



Ideology, Religion, and the Constitutional Protection of Private Property, 1760-1860

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IDEOLOGY, RELIGION, AND THE CONSTITUTIONAL PROTECTION OF PRIVATE PROPERTY: 1760-1860

*William W. Fisher III**

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* Assistant Professor of Law, Harvard Law School. A shorter version of this Article was presented at the Conference on Religious Dimensions of American Constitutionalism held at Emory University in April 1988. The editorial assistance of Margaret Gilmore and the comments of Scott Brewer, Richard Fallon, Paul Freund, Morton Horwitz, David Kennedy, Lance Liebman, Joann Lisberger, John Mansfield, Price Marshall, Charles McCurdy, Frank Michelman, Carol Rose, Stephen Siegel, Aviam Soifer, Arthur von Mehren, and G. Edward White were helpful in revising it.

INTRODUCTION

In several recent essays, legal scholars have examined the impact of popular ideologies on the substance and early interpretation of the original federal and state constitutions.¹ This Article seeks to refine that body of literature in three ways. First, drawing on work by social and intellectual historians, it argues that the political outlooks in general circulation in British North America during the Revolutionary and post-Revolutionary periods were more numerous — and the relationships among them more complex — than the bulk of the literature suggests. Second, it contends that the content and relative strength of those outlooks were affected by religious ideas and loyalties to a degree unappreciated by most of the legal scholars. Third, through an examination of three sets of doctrines limiting governmental interference with private property, the Article highlights the diversity of ways in which combinations of religious and political commitments impinged on constitutional law during this period.

I. POLITICAL DISCOURSE, 1760-1860

Partly because of the bicentennial celebrations, the past two decades have witnessed a spate of writing concerning American political discourse during the Revolutionary era and its aftermath.² In reassessing our constitutional heritage, legal scholars have recently drawn extensively but selectively on that work. The goal of this Part is to enable and urge them to be more precise. Section A briefly reviews the stages in which the historians'

¹ See, e.g., G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 5-13 (1986); M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* (1988); G. WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-35* 11-75, 597-602, 670-72 (1988); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987); Michelman, *Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988) [hereinafter Sunstein, *Beyond the Republican Revival*]; Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]; Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985) [hereinafter Note, *Origins of Just Compensation*]; Nedelsky, *Confining Democratic Politics: Antifederalists, Federalists, and the Constitution* (Book Review), 96 HARV. L. REV. 340 (1982).

² See, e.g., *ESSAYS ON THE AMERICAN REVOLUTION* (S. Kurtz & J. Hutson eds. 1973) (group of articles intended to be "a serious response to the bicentennial celebration" of the American Revolution); Bernstein, *Charting the Bicentennial*, 81 COLUM. L. REV. 1565 (1987) (critical bibliography of the scholarship inspired by the bicentennial celebration of the Constitution).

investigations proceeded. Sections B and C offer a synthesis of the newest work. Section D extracts from the literature four general insights that legal scholars should bear in mind when trying to set constitutional doctrine into historical context.

A. *Background*

Between the 1920s³ and the middle of the 1960s, the historiography of American political thought was dominated by two apparently unconnected interpretations. The central contention of the first approach was that, by the mid-eighteenth century, the large majority of Americans who cared about politics subscribed to a version of liberalism traceable to Locke's *Second Treatise*, the principal tenets of which were that government derives its authority from an original social contract and that the primary purpose of government is to protect liberty and property.⁴ Those convictions and their corollaries (for example, the principle that there should be "no taxation without representation") prompted the colonists to regard as illegitimate the manner in which the British imperial administration was tightened in the wake of the Seven Years War and ultimately induced the colonists to revolt.⁵ Essentially the same beliefs, it was argued, continued to dominate most Americans' outlooks through the nineteenth and twentieth centuries.⁶

The second of the two interpretations, commonly known as "Progressive" history, contended that the moving forces behind the major events in American political history were not abstract political theories but rather economic and social interests.⁷ For example, according to the Progressive

³ For descriptions of the interpretations of the Revolution and of American political thought that prevailed prior to 1920, see B. BAILYN, *THE ORDEAL OF THOMAS HUTCHINSON* viii-x (1974); B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 3-14 (1967).

⁴ This is a radically oversimplified version of Lockean liberalism, but a more nuanced account is unnecessary for present purposes. The content and sources of liberalism are considered in somewhat more detail *infra* at Parts I.B. and I.C.

⁵ See, e.g., C. BECKER, *THE DECLARATION OF INDEPENDENCE: A STUDY IN THE HISTORY OF POLITICAL IDEAS* (1922). For a critical account of this approach, see Bailyn, *The Central Themes of the American Revolution*, in *ESSAYS ON THE AMERICAN REVOLUTION*, *supra* note 2, at 3-5 [hereinafter Bailyn, *Central Themes*].

⁶ The seminal work arguing that American political thought continued to be dominated by a "Lockean orthodoxy" is L. HARTZ, *THE LIBERAL TRADITION IN AMERICA* (1955).

⁷ This is not to say that theorists of this ilk ignored altogether the role of ideas in political

scholars, crucial to the Revolutionary impulse was the selfish desire of American merchants to free themselves from the constraints on their activities imposed by the British;⁸ the principal reason for the adoption of the federal Constitution was the desire of certain classes of property owners to shield their holdings from the depredations of the state legislatures;⁹ and the clashes between the Jacksonians and their opponents in the second quarter of the nineteenth century and between the Democrats and the Republicans in the second quarter of the twentieth century should be understood primarily as struggles between groups interested in a more equal distribution of political and economic power and groups interested in maintaining the status quo.¹⁰

In the mid-1960s, the convergence of two lines of inquiry made possible a dramatic re-evaluation of our political heritage. The first consisted of work by a number of philosophers and cultural anthropologists that emphasized the role of ideologies in organizing the ways in which men and women apprehend, construct, and occasionally reconstruct their social and physical worlds.¹¹ The second consisted of the rediscovery of a body of

affairs. For the most part, however, they viewed political discourse merely as a form of propaganda — one of the weapons used by interest groups to achieve their ends. See Bailyn, *Central Themes*, *supra* note 5, at 5-6.

⁸ See, e.g., A. SCHLESINGER, *NEW VIEWPOINTS IN AMERICAN HISTORY* (1928). For a secondary account of the Progressive school, see Greene, *The Flight from Determinism: A Review of Recent Literature on the Coming of the American Revolution*, 61 S. ATL. Q. 236 (1962).

⁹ See, e.g., C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913); J. MAIN, *THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION, 1781-1788* (1961). Much of Beard's thesis has been severely criticized by subsequent scholars. See, e.g., F. McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958). However, Beard's central argument regarding the importance to those who drafted and ratified the Constitution of shielding property rights from what they considered manic and unreliable state legislatures is generally accepted. See, e.g., Appleby, *The American Heritage: The Heirs and the Disinherited*, 74 J. AM. HIST. 798, 799 (1987) [hereinafter Appleby, *The Heirs and the Disinherited*].

¹⁰ See, e.g., A. SCHLESINGER, JR., *THE AGE OF ROOSEVELT* (3 vols. 1957-1960); A. SCHLESINGER, JR., *THE AGE OF JACKSON* (1945) [hereinafter A. SCHLESINGER, *AGE OF JACKSON*].

¹¹ The most influential of these works are P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966); T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962); Geertz, *Ideology as a Cultural System*, in *IDEOLOGY AND DISCONTENT* 47 (D. Apter ed. 1964) [hereinafter Geertz, *Ideology as a Cultural System*]; Geertz, *The Impact of the Concept of Culture on the Concept of Man*, in *NEW VIEWS OF THE NATURE OF MAN* 93 (J. Platt ed. 1965); Geertz, *Religion as a Cultural System*, in *ANTHROPOLOGICAL APPROACHES TO THE STUDY OF RELIGION* 1 (M. Banton ed. 1966). The bearing of these essays on the study of political discourse is discussed in J.G.A. POCOCK, *POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* (1973) and Williams, *Critical Legal Studies: The*

eighteenth-century English political writing — in which ideas associated with classical republicanism figured prominently — that had helped organize an otherwise diffuse opposition to the manner in which the British government was then being administered.¹² Taking note of the currency of those ideas in the North American colonies, a group of historians led by Bernard Bailyn and Gordon Wood ventured an ingenious new interpretation of the sources of the American Revolution — an interpretation that drew heavily on the nascent understanding of the nature of ideology.¹³ To explain the break from England, they argued, we should attend neither to the logic of Lockean liberalism nor to the interests of the colonial elites, but rather to the ways in which the beliefs and anxieties the colonists inherited from the English Opposition conditioned their perceptions of and responses to the behavior of the imperial authorities.¹⁴

This new “republican synthesis” quickly swept the field. A host of historians found further evidence for it in the most likely and unlikely places.¹⁵ Other scholars traced the continuing influence of the ideological

Death of Transcendence and the Rise of the New Langdells, 62 N.Y.U. L. REV. 429 (1987).

¹² See C. ROBBINS, *THE EIGHTEENTH-CENTURY COMMONWEALTHMAN* (1959). Thorough discussions of this body of writing — and, in particular, of the nature and origins of “classical republicanism” — may be found in the several books and articles of J.G.A. Pocock: *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975) [hereinafter J. POCOCK, *THE MACHIAVELLIAN MOMENT*]; *The Machiavellian Moment Revisited: A Study in History and Ideology*, 53 J. MOD. HIST. 49 (1981); *Virtue and Commerce in the Eighteenth Century*, 3 J. INTERDISC. HIST. 119 (1972); *Machiavelli, Harrington, and English Political Ideologies in the Eighteenth Century*, 22 WM. & MARY Q. (3D SER.) 549 (1965); *1776: The Revolution Against Parliament*, in *THREE BRITISH REVOLUTIONS: 1641, 1688, 1776* (J.G.A. Pocock ed. 1980).

¹³ See Bailyn, *Central Themes*, *supra* note 5, at 11 (citing Geertz, *Ideology as a Cultural System*, *supra* note 11). A shrewd assessment of the influence of Geertz on Bailyn may be found in Appleby, *Republicanism in Old and New Contexts*, 43 WM. & MARY Q. (3D SER.) 20, 27 (1986) [hereinafter Appleby, *Republicanism in Old and New Contexts*]. Appleby has aptly characterized the shift in the analysis of political thought that accompanied the rise of this “republican synthesis” as a transition from intellectual history to the history of consciousness. See Appleby, *The Heirs and the Disinherited*, *supra* note 9, at 810-11. For a hostile analysis of this transition, see Lerner, *The Constitution of the Thinking Revolutionary*, in *BEYOND CONFEDERATION* 39, 39-47 (R. Beeman, S. Botwin & E. Carter II eds. 1987).

¹⁴ The most important of the works that developed this argument are B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) [hereinafter B. BAILYN, *IDEOLOGICAL ORIGINS*]; P. MAIER, *FROM RESISTANCE TO REVOLUTION: COLONIAL RADICALS AND THE DEVELOPMENT OF AMERICAN OPPOSITION TO GREAT BRITAIN, 1765-1776* (1972); *PAMPHLETS OF THE AMERICAN REVOLUTION, 1750-1776*, at 3-202 (B. Bailyn ed. 1965); G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1969).

¹⁵ The literature is summarized in Shalhope, *Republicanism and Early American Historiography*, 39 WM. & MARY Q. (3D SER.) 334 (1982); Shalhope, *Toward a Republican Synthesis: The*

framework identified by Bailyn and Wood into the Nationalist, Jeffersonian, and Jacksonian eras,¹⁶ and even into the late nineteenth century.¹⁷

By 1980, however, objections to this new interpretation could be heard. Some historians called for renewed appreciation of the importance of some version of liberalism to the nation's founding and subsequent history.¹⁸ Others decried the Anglo-centrism of both the liberal and the republican interpretations, insisting that greater attention be focused on the influence of the Scottish Enlightenment on the American revolutionaries.¹⁹ Still others urged us to look below the layer of "elite" political commentary in America and predicted that, if we did, we would discover a different, richer mix of ideas.²⁰

In sum, in recent years, historians' discussion of the character of American political thought in the revolutionary and post-revolutionary periods has become increasingly cacophonous.²¹ It is possible that from this debate

Emergence of an Understanding of Republicanism in American Historiography, 29 WM. & MARY Q. (3D SER.) 49 (1972).

¹⁶ See, e.g., L. BANNING, *THE JEFFERSONIAN PERSUASION: EVOLUTION OF A PARTY IDEOLOGY* (1978); T. BROWN, *POLITICS AND STATESMANSHIP* 3-12 (1985); D. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* (1980); J. POCOCK, *THE MACHIAVELLIAN MOMENT*, *supra* note 12; Banning, *Republican Ideology and the Triumph of the Constitution, 1789 to 1793*, 31 WM. & MARY Q. (3D SER.) 167 (1974); Murrin, *The Great Inversion, or Court versus Country: A Comparison of the Revolutionary Settlements in England (1688-1721) and America (1776-1816)*, in *THREE BRITISH REVOLUTIONS*, *supra* note 12, at 368.

¹⁷ See Ross, *The Liberal Tradition Revisited and the Republican Tradition Addressed*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 116, 121-25 (J. Higham & P. Conkin eds. 1979).

¹⁸ See J. APPLEBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984); J. DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1984); Kramnick, *Republican Revisionism Revisited*, 87 AM. HIST. REV. 629 (1982).

¹⁹ See, e.g., H. MAY, *THE ENLIGHTENMENT IN AMERICA* (1976); M. WHITE, *THE PHILOSOPHY OF THE AMERICAN REVOLUTION* (1978); G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* (1978).

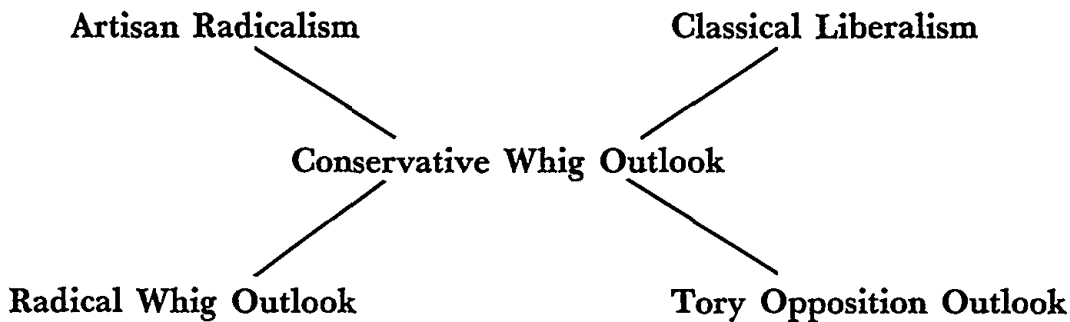
²⁰ See, e.g., *THE AMERICAN REVOLUTION: EXPLORATIONS IN THE HISTORY OF AMERICAN RADICALISM* (A. Young ed. 1976); E. COUNTRYMAN, *A PEOPLE IN REVOLUTION: THE AMERICAN REVOLUTION AND POLITICAL SOCIETY IN NEW YORK, 1760-1790* (1981); G. NASH, *THE URBAN CRUCIBLE: SOCIAL CHANGE, POLITICAL CONSCIOUSNESS, AND THE ORIGINS OF THE AMERICAN REVOLUTION* (1979); R. RYERSON, *THE REVOLUTION IS NOW BEGUN: THE RADICAL COMMITTEES OF PHILADELPHIA, 1765-1776* (1978); *AN UNCIVIL WAR: THE SOUTHERN BACKCOUNTRY DURING THE AMERICAN REVOLUTION* (R. Hoffman ed. 1985).

²¹ For an account of the current debate, see Kloppenber, *The Virtues of Liberalism: Christianity, Republicanism, and Ethics in Early American Political Discourse*, 74 J. AM. HIST. 9 (1987). Professor Stephen Siegel's provocative recent review of G. Edward White's history of the Marshall

there will emerge a new consensus interpretation — a revised account of the dominant or central ideas in American minds during the period. Probably more helpful, however, would be an acknowledgment of the diversity of outlooks to which Americans were being exposed and a corresponding reassessment of the impact of those outlooks on their political behavior. The next few pages sketch a provisional account of the latter sort. The intensity of monographic work in this field will undoubtedly require frequent revisions of the story. But enough good work is already available to make some generalizations practicable.

B. *A Catalogue of Outlooks*

If not taken too literally, the following diagram may be useful in making sense of the range of idioms that figured in political discourse during the revolutionary era:



Among the things the diagram is meant to suggest is that, circa 1776, the residents of the British North American colonies had ready access to at least five political persuasions or outlooks. In other words, in the welter of speeches, sermons, broadsides, pamphlets, and formal works of political theory to which they were regularly exposed,²² at least five constellations of beliefs clashed and competed for their allegiance. It should be emphasized at the outset that these were not formal creeds — schools of thought commanding the allegiance of independent constituencies. Although, for

Court (see *supra* note 1) provides an account of the development of the debate similar to the analysis offered in this section. See Siegel, *The Marshall Court and Republicanism* (Book Review), 67 TEX. L. REV. 903, 913-17 (1989).

²² On the outpouring of more and less formal political arguments during the revolutionary period, see B. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 14, at 1-21.

the purpose of brevity, they are presented below in schematic form, they are best understood as loose collections of convictions, attitudes, and moods. Each had its spokesmen and partisans, but most Americans were only tentatively committed to a particular outlook and were capable of drawing upon two or more in making sense of the events through which they were living.

The first of the five persuasions, the "Conservative Whig outlook,"²³ was associated with and substantially defined by the coalition of politicians, led by Robert Walpole, that dominated the British government during the mid-eighteenth century. The following related propositions formed the core of this view: Of the various imaginable systems of government, a "mixed" regime, in which the three social orders or "estates" (the people, the aristocracy, and the crown) are judiciously combined, is the most stable and the most likely to preserve liberty and property; governmental authority should be administered through a system of clear, public, reasonably stable laws that apply equally to all citizens; economic, social, and political leadership should be unitary — the same persons should have the most wealth, the most prestige, and the most political power; it is desirable, not objectionable, for the executive to "influence" other sectors of government through the distribution of patronage; and finally, commerce should be encouraged and managed by the state because it enhances the power of the nation and fosters material and moral progress that redounds to the benefit of everyone. More general and perhaps more important than these specific propositions was an overall attitude of confidence and pride, a feeling that the British Empire, society, and system of government were the best in the world and certainly were not in need of fundamental reform.²⁴

The other four outlooks departed in different directions from this cluster of beliefs. The two on the bottom of the chart correspond to the "left" and "right" branches of the shifting alliance of politicians in England op-

²³ This outlook could accurately have been labelled simply the "Whig" persuasion; the adjective "Conservative" has been used to distinguish it from the nineteenth-century American political party that went by the same name. See *infra* Part III.B.1.

²⁴ This composite portrait is derived from B. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 14, at 15-26, 45-46; I. KRAMNICK, *BOLINGBROKE AND HIS CIRCLE: THE POLITICS OF NOSTALGIA IN THE AGE OF WALPOLE* ch. 5 (1968); G. NASH, *supra* note 20, at 340-41; Howe, *European Sources of Political Ideas in Jeffersonian America*, 10 *REVS. AM. HIST.*, Dec. 1982, at 28, 35-36; Murrin, *supra* note 16.

posed to the Whig establishment. Sometimes referred to collectively as the "Country" view (in juxtaposition to the "Court" view), these persuasions differed from the Conservative Whig outlook not so much in the formal principles they embodied as in the tone or spirit in which those principles were applied.²⁵ Central to both views were a fearful, at times paranoid, attitude toward government and a concomitant hypersensitivity to "corruption." Their spokesmen contended that the desire to exercise power over others is a strong and addictive human impulse and that government, though necessary as a restraint on the lusts and passions that (all too often) drive men, is highly dangerous because it can so easily be used by some persons to dominate others. Under these conditions, they argued, the preservation of both order and liberty requires: (i) a strict separation of the "estates" that together comprise the sovereign power, and (ii) the willingness and ability of the people to recognize and halt encroachments by government on their liberties.²⁶

Though agreed on the foregoing propositions, the proponents of the two variants of the "Country" view elaborated them differently. The Tory Opposition was the more nostalgic and anti-commercial of the two. Writers in this tradition tended to trace the diseases that afflicted England to the mercantilist policies of the Whig administrations and the associated decline in the economic security and political power of the landed gentry. In their view, a healthy polity was a highly stratified polity; when they spoke of the need to preserve or restore "civic virtue," they usually meant the virtue of the top echelon. Their preferred cure for England's ills was the return of a "Patriot Prince, who [would] govern as well as reign, yet govern above parties and factions, in harmony with a loyal and independent commons."²⁷

²⁵ See B. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 14, at 46-47; Goldsmith, *The Principles of True Liberty: Political Ideology in Eighteenth-Century Britain*, 27 *POL. STUDS.* 141, 144-45 (1979).

²⁶ See J.A.W. GUNN, *BEYOND LIBERTY AND PROPERTY: THE PROCESS OF SELF-RECOGNITION IN EIGHTEENTH-CENTURY POLITICAL THOUGHT* 7-28 (1983); F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 77-83 (1985); C. ROBBINS, *supra* note 12; Siegel, *supra* note 21, at 917-21.

²⁷ B. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 14, at 51. See also J.A.W. GUNN, *supra* note 26, at 98-99; I. KRAMNICK, *supra* note 24, at ch. 6; Appleby, *The Social Origins of American Revolutionary Ideology*, 64 *J. AM. HIST.* 935, 939-40 (1978) [hereinafter Appleby, *Social Origins*]; Banning, *Jeffersonian Ideology Revisited: Liberal and Classical Ideas in the New American Republic*, 43 *WM. & MARY Q.* (3D SER.) 3, 7-10 (1986).

The Radical Whigs²⁸ were less fearful of commerce than of standing armies, patronage, and the spread of "luxury." In contrast to their Tory cousins, they believed that the economic independence essential to responsible citizenship could and should be achieved by a large percentage of the male population.²⁹ They were also more likely to subscribe to the collection of beliefs commonly known as civic humanism — the notions that a good life is a virtuous life; that virtue consists partly in a willingness to subordinate one's private ends to the commonweal; and that "man [is] a political being whose realization of self occurs only through participation in public life, through active citizenship in a republic."³⁰

The spokesmen for Artisan Radicalism subscribed to many of the tenets of the Radical Whig outlook but supplemented that persuasion with two related convictions. First, anticipating Marx, they made much of both the value and the virtue of productive labor and tended to associate the accumulation of wealth with parasitism or predation. Second, they believed in equality, not only of opportunity and political participation, but also of economic benefits and burdens — for instance, access to land, credit, and education; taxes; militia and road building duties; and fishing, grazing, and timbering rights. In short, this was the most seriously egalitarian of the persuasions.³¹

The fifth outlook, Classical Liberalism, actually represented an unsta-

²⁸ The American instantiation of this outlook is examined most thoroughly by Bailyn. See B. BAILY, *IDEOLOGICAL ORIGINS*, *supra* note 14, at 43-45, 51-93; see also Banning, *supra* note 27, at 10; Howe, *supra* note 24, at 34; Murrin, *supra* note 16.

²⁹ See F. McDONALD, *supra* note 26, at 75; Nash, *Also There at the Creation: Going Beyond Gordon S. Wood*, 44 WM. & MARY Q. (3D SER.) 602, 607-08 (1987).

³⁰ Kramnick, *supra* note 18, at 630. See also J. POCOCK, *THE MACHIAVELLIAN MOMENT*, *supra* note 12; Appleby, *Republicanism and Ideology*, 37 AM. Q. 461 (1985) [hereinafter Appleby, *Republicanism and Ideology*] (discussing the introduction and Anglicanization of Machiavelli's conception of civic virtue). For a representative American statement of this position, see 3 *THE WRITINGS OF SAMUEL ADAMS* 365-66 (H. Cushing ed. 1907). John Adams seems to have drifted in the course of his career from the Radical Whig outlook to the persuasion of the Tory Opposition. See G. WOOD, *supra* note 14, at ch. 14; Appleby, *Republicanism in Old and New Contexts*, *supra* note 13, at 20-21. *But cf.* Lerner, *supra* note 13, at 38, 50-61 (depicting Adams' outlook as more stable).

³¹ See E. FONER, *TOM PAINE AND REVOLUTIONARY AMERICA* 123-26 (1976); G. NASH, *supra* note 20, at 343; Kramnick, *Introduction to T. PAINE, COMMON SENSE* (I. Kramnick ed. 1976); Nash, *supra* note 29, at 607-11. For descriptions of the British analogues and antecedents of this outlook, see E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* ch. 8 (1963); G. WILLIAMS, *ARTISANS AND SANS-CULOTTES: POPULAR MOVEMENTS IN FRANCE AND BRITAIN DURING THE FRENCH REVOLUTION* (1968); Brewer, *English Radicalism in the Age of George III*, in *THREE BRITISH REVOLUTIONS*, *supra* note 12, at 323.

ble integration of two lines of political thought. The first was a tradition associated with John Locke that emphasized the natural rights of individuals to liberty and property and the conditional nature of political obligation.³² The second was a growing body of writing on economic affairs, the central assertions of which were: aggressive, acquisitive behavior by economic actors is not only inevitable but also desirable because its net effect is economic growth that improves the lot of all members of the society; and governmental interference with such behavior does harm, not good.³³

Each of these five persuasions found able and repeated expression in the luxuriant political literature of the 1760s and 1770s. And each provided the colonists a different perspective on — a different way of interpreting and responding to — the intensifying conflict with the British.

C. *Post-Revolutionary Political Argument*

That, in very brief compass, was the state of political discourse during the revolutionary era. What became of the five persuasions in the ensuing generations? A full answer to that question is beyond the scope of this Article, but two aspects of their fates are germane to the development of constitutional doctrine. First, to have any hope of success, the leaders of the contending camps in the major political battles of the late eighteenth century were obliged to appeal simultaneously to several different outlooks. An awareness of that imperative helps to account for the confusing variety in the positions taken by the parties. For example, as an increasing number of historians are acknowledging, there was no single, coherent Antifederalist position.³⁴ Instead, the literature produced by the opponents

³² For a summary of the roots of this tradition and its status in England circa 1770, see P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* 39-60 (1979). Of the various works that brought the tradition to the attention of the North American colonists, Blackstone's *Commentaries* were probably the most influential. See 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *38-92, *117-41.

³³ This body of writing is brilliantly examined by Joyce Appleby in a series of articles and books. See J. APPLEBY, *supra* note 18; Appleby, *Republicanism and Ideology*, *supra* note 30; Appleby, *Social Origins*, *supra* note 27, at 935, 943-49. For a complementary account, see P. ATIYAH, *supra* note 32, at 69-78. Sustaining and sustained by these theorists' commitment to free trade was a more general conviction that there exists "a natural social order embedded in human nature and worked out through the voluntary, but natural, interaction of individuals." Appleby, *Social Origins*, *supra* note 27, at 941.

³⁴ See, e.g., Beeman, *Introduction* to *BEYOND CONFEDERATION*, *supra* note 13, at 3, 17;

of the Constitution consisted of a jumble of unrelated, even inconsistent arguments: civic humanist pleas for the preservation of small, homogeneous republics staffed by virtuous independent citizens;³⁵ demands for more institutional checks on remote, corruptible rulers;³⁶ and liberal denunciations of anticipated federal regulations of commerce and the currency as illegitimate impediments to free trade and private initiative.³⁷

The Federalists' arguments were similarly eclectic. Their platform included such disparate planks as a liberal insistence upon the protection of persons' rights freely to use and dispose of their property;³⁸ a mercantilist vision, traceable to the Conservative Whig outlook, of state sponsorship and management of commerce;³⁹ and a theory of virtual representation, traceable to the Tory Opposition outlook, that envisioned a small group of public-spirited national legislators, drawn from a natural aristocracy, developing and pursuing a conception of the common good that transcended their respective constituents' material interests.⁴⁰

Much the same can be said of the Jeffersonian Party that took shape during the 1790s and dominated national politics in the early 1800s. In-

Kramnick, *The "Great National Discussion": The Discourse of Politics in 1787*, 45 WM. & MARY Q. (3D SER.) 3, 4 (1988).

³⁵ See, e.g., Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663, 1665-66 (1988); Kramnick, *supra* note 34, at 9-11. With a frequency distressing to contemporary defenders of classical republicanism, these pleas were tainted by racism, sexism, xenophobia, anti-Catholicism, or anti-Semitism. See, e.g., Letters of Agrippa, Dec. 3, 1787 and Dec. 28, 1787, in 4 THE COMPLETE ANTI-FEDERALIST 76, 85-86 (H. Storing ed. 1981); 4 THE DEBATES OF THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 192, 199 (J. Elliot ed. 63).

³⁶ See Kenyon, *Men of Little Faith: The Anti-Federalists on the Nature of Representative Government*, 12 WM. & MARY Q. (3D SER.) 3, 13-37 (1955).

³⁷ See Wood, *Interests and Disinterestedness in the Making of the Constitution*, in BEYOND CONFEDERATION, *supra* note 13, at 69, 93-103; Riesman, *Money, Credit, and Federalist Political Economy*, in BEYOND CONFEDERATION, *supra* note 13, at 128, 156-61 (arguing that most Antifederalists opposed the Federalists' various schemes for controlling the supply and value of paper money, believing that an absence of restrictions would "invigorate . . . commerce" and afford all persons opportunities to participate in it).

³⁸ See Kramnick, *supra* note 34, at 6-8; Nedelsky, *supra* note 1, at 340-50.

³⁹ See, e.g., THE FEDERALIST NO. 11, at 136-42 (A. Hamilton) (B. Wright ed. 1961); Kramnick, *supra* note 34, at 8, 27; Riesman, *supra* note 37, at 137-56 (describing the efforts of Hamilton, Robert Morris, and other Federalists to use the Bank of North America and later the Bank of the United States to stabilize the currency and thereby stimulate and stabilize trade and economic growth).

⁴⁰ See THE FEDERALIST NO. 35 (A. Hamilton); H. PITKIN, THE CONCEPT OF REPRESENTATION 190-208 (1967); Kerber, *supra* note 35, at 1666; Kramnick, *supra* note 34, at 13; Sunstein, *Interest Groups*, *supra* note 1, at 38-48.

termingled in the Jeffersonians' rhetoric were arguments lifted from the Radical Whig pamphlets (for example, laments that the Federalists' policies were eroding the social and economic conditions crucial to civic virtue, and demands that ordinary persons be afforded greater opportunities to participate in political affairs)⁴¹ and arguments that bore unmistakable marks of economic liberalism (for example, defenses of governmental land policies and subsidies for "internal improvements" designed to promote American commercial agriculture and open world markets to its products, and claims that free trade and economic growth would sustain a "natural harmony of interest" among persons of property).⁴²

The second pertinent feature of post-revolutionary discourse is that politicians and theorists frequently reworked the ideas they derived from different persuasions into novel ideological forms. The Federalist leaders were probably the most imaginative and successful practitioners of this technique. Among their innovations were: the transmogrification of the idea of "mixed government" into the modern conception of the separation of powers;⁴³ the grafting of a Protestant work ethic onto the republican ideal of public-spiritedness to produce a hybrid, substantially privatized conception of "virtue";⁴⁴ the adjustment of the Whig conception of sovereignty to make imaginable the notion of "the sovereignty of the people";⁴⁵ and the famous Madisonian multiply-and-neutralize solution to the perennial problem of factions.⁴⁶

⁴¹ See L. BANNING, *supra* note 16, at ch. 4; F. McDONALD, *THE PRESIDENCY OF THOMAS JEFFERSON* 19-22 (1976); Banning, *supra* note 27, at 6-10, 14-19. See also Murrin, *supra* note 16 (emphasizing the artisan radicalism in the party).

⁴² See J. APPLEBY, *supra* note 18; Appleby, *Commercial Farming and the 'Agrarian Myth' in the Early Republic*, 68 J. AM. HIST. 833 (1982); Appleby, *What is Still American in the Political Philosophy of Thomas Jefferson?*, 39 WM. & MARY Q. (3D SER.) 287, 294-301, 303-05 (1982); Banning, *supra* note 27, at 8-14. For a discussion of the role played by Thomas Paine and other English emigres in formulating and disseminating this novel combination, see Durey, *Thomas Paine's Apostles: Radical Emigres and the Triumph of Jeffersonian Republicanism*, 44 WM. & MARY Q. (3D SER.) 661 (1987).

⁴³ See D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* (1984).

⁴⁴ See Kramnick, *supra* note 34, at 15-23. For the subsequent history of some of these ideas, see D. RODGERS, *THE WORK ETHIC IN INDUSTRIAL AMERICA, 1850-1920* (1974).

⁴⁵ For discussion of the origins of this idea and the degree to which it departed from traditional conceptions of sovereignty, see G. WOOD, *supra* note 14, ch.10.

⁴⁶ See THE FEDERALIST NO. 10 (J. Madison). For discussion of the view of factionalism that Madison shared and capitalized on, see R. HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES, 1780-1840* chs. 1-2 (1969); R. KETCHAM, *PRESIDENTS ABOVE PARTY: THE FIRST AMERICAN PRESIDENCY, 1789-1829* (1984).

But their Jeffersonian successors were nearly as ingenious.⁴⁷ For example, to buttress their criticism of the "Quasi-War" with France in the late 1790s, Jeffersonian politicians and publicists supplemented the venerable Radical Whig condemnation of excessive executive power and standing armies with a new analysis of the dangers war posed to domestic harmony and socioeconomic equality⁴⁸ — an analysis restated many times in our subsequent history by groups opposed to involvement in foreign conflicts. In the following two decades, Jeffersonian leaders chipped away at the traditional belief that the existence of factions is a sign of disease in the body politic,⁴⁹ laying the groundwork for the modern theoretical defense of parties and party loyalty as essential to political stability and health.⁵⁰ Similarly, leaders of workingmen's parties in the early nineteenth century cleverly integrated arguments from Artisan Radicalism with liberal themes — thereby helping to delay, at least for a few decades, the collapse of a politically significant American labor movement.⁵¹

D. Implications

Several generalizations concerning the nature and role of political discourse in early American history are implicit in or derivable from the foregoing analysis. As will become apparent in Part III, each bears significantly on the questions of how and why constitutional law developed the way it did.

⁴⁷ For studies emphasizing the ideological innovativeness of the Jeffersonians, see L. CRESS, *CITIZENS IN ARMS: THE ARMY AND THE MILITIA IN AMERICAN SOCIETY TO THE WAR OF 1812* chs. 8-10 (1982); D. MCCOY, *supra* note 16; Appleby, *Republicanism in Old and New Contexts*, *supra* note 13; Kloppenberg, *supra* note 21, at 26-27.

⁴⁸ See L. BANNING, *supra* note 16, at 251-64, 292.

⁴⁹ See *supra* note 46 and accompanying text.

⁵⁰ See R. HOFSTADTER, *supra* note 46, at chs. 3-5. For an analysis of the completion of this transition by the founders of the Jacksonian Party, see *id.*, at ch. 6; Wallace, *Changing Conceptions of Party in the United States: New York, 1815-1828*, 74 *AM. HIST. REV.* 453 (1968).

⁵¹ See A. DAWLEY, *CLASS AND COMMUNITY: THE INDUSTRIAL REVOLUTION IN LYNN* (1976); E. FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* ch. 4 (1980) [hereinafter E. FONER, *POLITICS AND IDEOLOGY*]; S. ROSS, *WORKERS ON THE EDGE: WORK, LEISURE, AND POLITICS IN INDUSTRIALIZING CINCINNATI, 1788-1890* (1985); S. WILENTZ, *CHANTS DEMOCRATIC: NEW YORK CITY AND THE RISE OF THE AMERICAN WORKING CLASS, 1788-1850* (1984); Schultz, *The Ideology of the Post-Revolutionary Philadelphia Working Class* (unpublished essay, delivered at the Summer 1986 meeting of the Society for the History of the Early American Republic).

First, American political thought during the Revolutionary era was not consensual. Residents of the British North American colonies were exposed during the period to several alternative conceptions of how government ought to function and of what constitutes a respectable and rewarding individual life. Not surprisingly, they disagreed regarding the relative merits of those outlooks. Thus, the impression one derives from the work of Professors Bailyn, Wood, and Pocock — that, at the start of our national history, Americans were in substantial accord on important questions of politics⁵² — is inaccurate.⁵³

Second, for several reasons it is misleading to describe and explain Americans' disagreements in terms of a contest between stable liberal and republican worldviews.⁵⁴ The most obvious reason is that there were more than two outlooks in general circulation during the late eighteenth century. To be sure, political crises periodically precipitated division of the politically active population into two dominant opposed groups — Feder-

⁵² The three named scholars vary somewhat in the degree to which they perceive and describe American politics in the Revolutionary period as consensual. The most extreme is Pocock:

A neoclassical politics provided both the ethos of the elites and the rhetoric of the upwardly mobile, and accounts for the singular cultural and intellectual homogeneity of the Founding Fathers and their generation. Not all Americans were schooled in this tradition, but there was (it would almost appear) no alternative tradition in which to be schooled.

J. POCOCK, *THE MACHIAVELLIAN MOMENT*, *supra* note 12, at 507. Bailyn, whose account of American revolutionary politics stressed the dominance and coherence of the Opposition outlook, also acknowledged some disagreement among the originators and adherents of that perspective. *See* B. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 14, at chs. 2-3. Wood is the most willing to recognize variation within the outlook he labels "republican," but Wood's account also remains unduly "republican-centered." *See* G. WOOD, *supra* note 14, at 3-45. The last phrase is derived from Bloch, *The Constitution and Culture*, 44 WM. & MARY Q. (3D SER.) 550 (1987).

⁵³ Recent works emphasizing the diversity of outlooks in circulation in America in the Revolutionary period include: F. McDONALD, *supra* note 26, at 57-96; Bloch, *supra* note 52; Howe, *supra* note 24; Katz, *The American Constitution: A Revolutionary Interpretation*, in *BEYOND CONFEDERATION*, *supra* note 13, at 23; Kloppenberg, *supra* note 21, at 11-12; Nash, *supra* note 29.

⁵⁴ Most of the works cited *supra* at note 1 adopt variants of this stance. However, two of the central figures in the reinterpretation of American constitutional law in terms of republicanism, Frank Michelman and Cass Sunstein, seem to be moving away from this position. Michelman has never been altogether comfortable with the notion that liberalism and republicanism were the banners of opposing camps at any particular moment in American history — and has recently become even more insistent that the tension is valuable mainly for "heuristic" purposes. *See* Michelman, *Tutelary Jurisprudence and Constitutional Property*, in *ECONOMIC RIGHTS AND THE CONSTITUTION: YESTERDAY, TODAY, AND TOMORROW* (forthcoming 1989). Unlike Michelman, Sunstein continues to trace his preferred version of republicanism to the views of some members of the "framing generation," but recently he has depicted that version as a composite of liberalism and republicanism. *See* Sunstein, *Beyond the Republican Revival*, *supra* note 1, at 1561ff.

alists versus Antifederalists, Jeffersonians versus Federalists. But the platforms of those parties consisted not of coherent belief-systems, but rather of assemblages of sometimes dissonant arguments drawn from several popular persuasions. Moreover, the five persuasions did not remain unchanged in this process; as successive generations of party leaders combined and recombined the outlooks to address new issues, they tinkered with and sometimes transformed their components.⁵⁵ The result was that the set of concepts and associations available to each generation of political leaders was different from that available to their predecessors.⁵⁶

This is not to say that the range of the debate on questions of political theory was unlimited. Many matters were disputed, but many were not.⁵⁷ So, for example, there was nearly universal agreement on the following issues: (a) individual liberty is important, and the political system should be designed in large part to protect it;⁵⁸ (b) equally important is providing property owners protection against interference with their holdings by either other private parties or the government;⁵⁹ and (c) the will of the people is the ultimate source and justification of governmental authority.⁶⁰

⁵⁵ For examples of such innovation by the Federalists and Jeffersonians, see *supra* text accompanying notes 43-50. For discussion of the ways in which the followers and opponents of President Jackson broke apart the set of outlooks they inherited and built from the shards new outlooks, see *infra* Part III.B.1.

⁵⁶ Cf. C. LEVI-STRAUSS, *THE SAVAGE MIND* 16-18 (1962) (analogizing mythic thought — and implicitly political discourse — to “bricolage”).

⁵⁷ Cf. G. WHITE, *supra* note 1, at 52-53 (emphasizing the bounded character of political discourse in the Revolutionary era).

⁵⁸ See, e.g., Banning, *supra* note 27, at 12 n.30; Kloppenberg, *supra* note 21, at 23-24. The senses in which different Americans understood “liberty” varied substantially, but what we would now describe as “negative liberty” (crudely put, an individual’s right to be let alone) was either central to or a component of all of the various formulations. See generally I. BERLIN, *FOUR ESSAYS ON LIBERTY* 118-72 (1969).

⁵⁹ See, e.g., D. MCCOY, *supra* note 16, at 68-69; J. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 27-33 (1986); Appleby, *The Heirs and the Disinherited*, *supra* note 9, at 802. The reasons why this principle was common ground are considered *infra* in Part III.A.

⁶⁰ See E. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* chs. 10-11 (1988). For reasons suggested above (see *supra* text accompanying notes 24-29), Americans of different persuasions disagreed on the size and composition of the subset of the population whose “will” provided the foundation of governmental authority. But they were agreed that it was the will of some group, not “higher law” or a mandate from God, to which legitimate authority was traceable. For some of the views they were implicitly or explicitly rejecting, see J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* (1955) (on the fundamental law tradition); P. MILLER, *THE NEW ENGLAND MIND: THE SEVENTEENTH CENTURY* (1939) (on

Finally, historians' recognition of the existence of significant, albeit not unlimited, differences of opinion among late eighteenth century Americans both derives from and reinforces the destabilization in recent years of the theory of ideology. In the decade since the insights of Clifford Geertz swept the historical profession,⁶¹ further work by philosophers, political theorists, and anthropologists has cast doubt on the notion that ideologies (embedded in language and everyday life and reinforced by myriad symbols and rituals) operate as powerfully constraining conceptual frameworks that severely limit persons' capacities to reinterpret or re-imagine their social and political worlds. We are unlikely ever to return to the naive view that political creeds, like scientific hypotheses, are adopted because of their capacity to explain our surroundings and are discarded as soon as they are falsified.⁶² But the more extreme applications of Geertz' original vision — in which the adherents of a particular ideology were depicted as its prisoners, incapable (absent a collapse of the support system of rituals and habits) of transcending it⁶³ — now appear increasingly implausible.⁶⁴

What exactly will replace the Geertzian conception of ideology remains to be seen. American intellectual and social historians seem to be proceeding in two directions. Some are engaged in analyzing the outlooks of dis-

Puritan covenant theory); S. THORNE, *ESSAYS ON ENGLISH LEGAL HISTORY 171-85* (1985) (on medieval conceptions of law in England and on the Continent and their displacement during the sixteenth century by the notion that "law is the articulation of the will of a legal sovereign"). For analyses of the ways Americans had distanced themselves from those traditions, see Kloppenberg, *supra* note 21, at 24-25 and sources cited therein; Thompson, *The History of Fundamental Law in Political Thought from the French Wars of Religion to the American Revolution*, 91 *AM. HIST. REV.* 1103 (1986).

⁶¹ See Walters, *Signs of the Times: Clifford Geertz and Historians*, 47 *SOC. RES.* 537 (1980).

⁶² See Bailyn, *Central Themes*, *supra* note 5, at 6; Wood, *Rhetoric and Reality in the American Revolution*, 23 *WM. & MARY Q.* (3D SER.) 3 (1966). For a criticism of this conception of scientific hypotheses, see T. KUHN, *supra* note 11.

⁶³ Geertz himself provided a theory regarding the circumstances in which persons could and probably would break free of their inherited ideologies. See Geertz, *Ideology as a Cultural System*, *supra* note 11, at 49. Those qualifications were sometimes neglected by the historians who built on his work.

⁶⁴ For examples of historians consciously retreating from the Geertzian understanding of ideology, see Appleby, *The Heirs and the Disinherited*, *supra* note 9; Countryman, *Of Republicanism, Capitalism, and the "American Mind,"* 44 *WM. & MARY Q.* (3D SER.) 556 (1987); Lerner, *supra* note 13. Among the manifestations of this emerging sentiment among historians is the increasingly common usage of terms like "outlook" or "persuasion," rather than "ideology" or "worldview," to describe persons' political commitments — a usage this essay has deliberately adopted.

crete social or professional groups during particular periods of American history — groups on the scale of plantation mistresses in the antebellum South, physicians in the late nineteenth century, or Populists on the Great Plains during the 1890s.⁶⁵ Recognizing that such groups often overlap and that their members are usually aware of alternative outlooks, historians pursuing this line tend to deemphasize the tendency of the political persuasions they examine to “limit the zone of the thinkable” and concentrate instead on their power to integrate the communities in which they flourish.⁶⁶ Other historians remain committed to the study of the set of attitudes shared by all (or almost all) Americans during a particular era.⁶⁷ Conceding that this “public culture” is only one of several discourses to which any given citizen has access, these scholars nevertheless insist upon its importance — if only because it alone makes possible democratic decisionmaking on other than a broker-state model.⁶⁸

Whether and how these two lines of scholarship will intersect is uncertain, but one thing seems clear: the notion that Americans’ political behavior can be fully, or almost fully, explained in terms of the ways in which the belief-system that dominated the culture at a given time caused them to perceive and react to events⁶⁹ must be abandoned.

⁶⁵ For a favorable description of this school of contemporary American intellectual history, see Hollinger, *Historians and the Discourse of Intellectuals*, in *NEW DIRECTIONS IN AMERICAN INTELLECTUAL HISTORY* 42-63 (J. Higham & P. Conkin eds. 1979). For a less sympathetic discussion, see J. Williams, *Culture and Certainty: Four Variations on a Theme from the New Epistemology* (unpublished paper delivered to the Harvard Program on Legal History, Nov. 7, 1988). For examples of the approach, see B. BLEDSSTEIN, *THE CULTURE OF PROFESSIONALISM* (1976); E. FOX-GENOVESE, *WOMEN OF THE PLANTATION SOUTH* (1988); Hewitt, *Beyond the Search for Sisterhood: American Women's History in the 1980s*, 10 *SOC. HIST.* 299 (1985); W. Fisher, *The Origins and Ideology of Populism* (1976) (unpublished B.A. thesis).

⁶⁶ Cf. Chartier, *Intellectual History or Sociocultural History? The French Trajectories*, in *MODERN EUROPEAN INTELLECTUAL HISTORIES: REAPPRAISALS AND NEW PERSPECTIVES* (D. LaCapra & S. Kaplan eds. 1982) (describing a similar shift in focus by some European intellectual historians).

⁶⁷ See, e.g., Bender, *Wholes and Parts: The Need for Synthesis in American History*, 73 *J. AM. HIST.* 120 (1986); Haskell, *The Curious Persistence of Rights Talk in the "Age of Interpretation,"* 74 *J. AM. HIST.* 984 (1987).

⁶⁸ For a shrewd assessment of this emerging school, see Williams, *supra* note 65.

⁶⁹ For a forthright and extreme application of this view, see B. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 14, at 22-23:

It is the development of this [Opposition Whig world view] to the point of overwhelming persuasiveness to the majority of American leaders and the meaning this view gave to the events of the time, and not simply an accumulation of grievances, that explains the origins of the American Revolution. For this peculiar configuration of ideas constituted in effect an

II. THE ROLES OF RELIGION

The analysis outlined in the preceding Part might be extended profitably in any of several directions. For example, one might try to set the five outlooks described in Part I.B. into demographic context. Which groups of colonists in which areas found which of the persuasions most congenial? Answering that question would not be easy,⁷⁰ but at least a rough account would be essential before we could address such further issues as: In what ways did these outlooks grow out of — and help to define — the interests of particular occupational groups, classes, or communities? What were the relationships between changes in the socioeconomic positions of particular groups and changes in the content or relative strength of the five outlooks? Another promising avenue of investigation would involve reassessing the impact of these overlapping outlooks on the ways in which Americans behaved in various settings — for example, their military tactics,⁷¹ the ways they organized their families,⁷² or their engagement in local politics.⁷³ Perhaps most obviously, we might use the foregoing account to reconsider the role of ideology in the origins of the Revolution itself.

Combining the fruits of these various inquiries into a comprehensive account of the development of American culture in the Revolutionary era would be a formidable (if not impossible)⁷⁴ undertaking. The remainder

intellectual switchboard wired so that certain combinations of events would activate a distinct set of signals — danger signals, indicating hidden impulses and the likely trajectory of events impelled by them. Well before 1776 the signals registered on this switchboard led to a single, unmistakable conclusion — a conclusion that had long been feared and to which there could be only one rational response.

⁷⁰ For discussion of the impediments to answering the question — as well as some provisional efforts to do so — see Beeman, *supra* note 34, at 12-13; F. McDONALD, *supra* note 26, at 70-77; G. NASH, *supra* note 20, at 339.

⁷¹ Cf. L. CRESS, *supra* note 47; J. SHY, *A PEOPLE NUMEROUS AND ARMED: REFLECTIONS ON THE MILITARY STRUGGLE FOR AMERICAN INDEPENDENCE* (1976) (analyzing the impact of ideology on the Patriots' military strategies).

⁷² Cf. L. KERBER, *WOMEN OF THE REPUBLIC* (1980) (describing the various roles women played in the struggle for independence).

⁷³ Cf. R. GROSS, *THE MINUTEMEN AND THEIR WORLD* (1976) (describing political and social life in Concord, Massachusetts during the Revolutionary era).

⁷⁴ Cf. G. RUBIN & D. SUGARMAN, *LAW, ECONOMY, & SOCIETY: ESSAYS IN THE HISTORY OF ENGLISH LAW, 1750-1914* 121 (1984) ("No one analytical framework or viewpoint is likely to provide all the answers, let alone the perfect model. As Kenneth Burke remarked, '... a way of seeing is always a way of not seeing.'"); Beer, *Causal Explanation and Imaginative Re-Enactment*, 3 *HIST. & THEORY* 6 (1964) (cautioning historians against attempting comprehensive causal explanations of

of this Article ventures nothing so grand. Instead, this and the following Part concentrate on two strands in the historical fabric: the religious roots and dimensions of the five outlooks and the ways in which those outlooks affected constitutional protections of private property.

A. *Church and State*

Until recently, most accounts of Americans' political commitments in the Revolutionary and post-Revolutionary periods paid little attention to the ways those commitments were influenced by religious attitudes.⁷⁵ Contributing to this neglect was a general admiration for the Framers' supposed prescience in recognizing the benefits of separating the spheres of church and state. According to the standard story, the colonists' experience of religious oppression in the countries from which they had emigrated, reinforced by the lessons of destructive sectarian strife in their own communities during the seventeenth and early eighteenth centuries, gave rise to increasingly widespread support, not just for religious "toleration," but also, more fundamentally, for disentanglement of religion and politics.⁷⁶ Madison's and Jefferson's campaigns for "religious freedom" in Virginia and the inclusion of the free exercise and establishment clauses in the first amendment were seen as natural institutional expressions of those sentiments.

Taken together, three lines of recent scholarship require abandonment of this view of our past. First, several studies have clarified the extent to which governmental "establishment" of religion persisted during the late eighteenth and early nineteenth centuries.⁷⁷ To be sure, the British North American colonies were unusual in the limited support given religion by the state. Nevertheless, in every colony, statutory and common law lent

historical events, and urging instead the development of avowedly incomplete accounts).

⁷⁵ An important exception is the work of Alan Heimert. See A. HEIMERT, *RELIGION AND THE AMERICAN MIND FROM THE GREAT AWAKENING TO THE REVOLUTION* (1966).

⁷⁶ See, e.g., J. MURRAY, *WE HOLD THESE TRUTHS* (1960); Miller, *The Contribution of the Protestant Churches to Religious Liberty in Colonial America*, 4 *CHURCH HIST.* 65 (1935). An additional circumstance contributing to these attitudes, it was sometimes argued, was the overall diminution in piety itself during the colonial period. For an influential discussion of this "declension" in New England, see P. MILLER, *NATURE'S NATION* 14-49 (1967).

⁷⁷ See Botein, *Religious Dimensions of the Early American State*, in *BEYOND CONFEDERATION*, *supra* note 13, at 315, 318.

assistance to religious belief or observance.⁷⁸ Examples of such legal buttresses include the treatment of blasphemy as a crime, statutes forbidding work on Sundays, official thanksgiving and fast days, and the distribution of tax revenues to a limited set of Protestant denominations.⁷⁹ Most of these practices were unaffected by the Revolution.⁸⁰ All states officially "disestablished" religion during the course of the antebellum period, but, on the eve of the Civil War, Protestant churches in several jurisdictions continued to enjoy considerable governmental support.⁸¹

Second, the burst of empirical work during the 1960s and early 1970s by self-described "cultural historians" has made clear that, throughout the nineteenth century, there was a strong correlation between the positions Americans took on religious issues and the positions they took on political questions.⁸² Whatever the methodological limitations of those studies,⁸³

⁷⁸ Though there is disagreement concerning the number of colonies in which these supports were sufficiently extensive to amount to state "establishment" of a religion, compare J. REICHELLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 96ff (1985) (arguing that ten of the colonies had established churches at the time of the Revolution), with L. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT* 9-10 (1986) (arguing that there were five Anglican and four diversified establishments), there is no longer any dispute that such supports were ubiquitous and important.

⁷⁹ See Botein, *supra* note 77, at 320; see generally G. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* 19-68 (1987); T.J. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* chs. 4-7 (1986); L. LEVY, *supra* note 78, at 1-62.

⁸⁰ See McLoughlin, *The Role of Religion in the Revolution: Liberty of Conscience and Cultural Cohesion in the New Nation*, in *ESSAYS ON THE AMERICAN REVOLUTION*, *supra* note 2, at 197. It is telling that most of the early state constitutions officially recognized the governments they established as being, in some sense, "under or of God." Botein, *supra* note 77, at 319. The absence of such a recognition or of religious qualifications for officeholding in the federal constitution disturbed many Antifederalists. See, e.g., Letter by David, *Massachusetts Gazette*, Mar. 7, 1788, reprinted in 4 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 35, at 246-48 (arguing that "it is not more difficult to establish an elegant house without tools to work with, than it is to build a durable government without the publick protection of religion"). That the Antifederalists did not make more of the secularization of the document seems attributable, not to their acquiescence in disestablishment, but rather to their failure to foresee that "the new federal government [would become] a true nation-state, on the European model, for which some traditional religious identity might have been desirable." Botein, *supra* note 77, at 321-22. Cf. Kramnick, *supra* note 34, at 11 (noting that many Antifederalists wished to expand governmental supports for religion on the state level).

⁸¹ See W. MILLER, *THE FIRST LIBERTY: RELIGION AND THE AMERICAN REPUBLIC* (1986); J. REICHELLEY, *supra* note 78, at 101-04; Botein, *supra* note 77, at 324.

⁸² See, e.g., L. BENSON, *THE CONCEPT OF JACKSONIAN DEMOCRACY: NEW YORK AS A TEST CASE* 186-207 (1961); *ETHNIC VOTERS AND THE ELECTION OF LINCOLN* (F. Luebke ed. 1971); R. FORMISANO, *THE BIRTH OF MASS POLITICAL PARTIES, MICHIGAN, 1827-1861* (1971); R. JENSEN, *THE WINNING OF THE MIDWEST: SOCIAL AND POLITICAL CONFLICT 1888-1896* (1971); P. KLEPPNER, *THE CROSS OF CULTURE: A SOCIAL ANALYSIS OF MID-WESTERN POLITICS, 1850-1900*

they have at least disabused us of the notion that Americans' voting patterns were unrelated to their denominational loyalties.

Third, as at least one of the Framers intended,⁸⁴ many Americans' conceptions of, and reverence for, their constitutions (especially the federal Constitution) have had religious overtones. The official line has long been that a constitution is nothing more than the expression of the will of the sovereign people.⁸⁵ But a sense that its origins are at least partly divine, and that fidelity to it is mandated by something more than a social contract, has had considerable currency throughout our history.⁸⁶

In short, at the start of the Revolutionary era, religion and politics were intertwined in several important respects, and remained so at least until the Civil War. That generalization, however, does little more than establish a research agenda; we need a more detailed account of the ways in which these two zones of activity and belief overlapped. The following two sections do not purport to provide a definitive analysis, but identify a few of the points of contact that were to prove important to the development of constitutional law.

35-91 (1970). For a thorough review of the literature, see McCormick, *Ethnocultural Interpretations of Nineteenth-Century American Voting Behavior*, 89 POL. SCI. Q. 351 (1974), reprinted in R. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY* 29-63 (1986).

⁸³ For persuasive discussion of those limitations, see E. FONER, *POLITICS AND IDEOLOGY*, *supra* note 51, at 16-19; Kousser, *The "New Political History": A Methodological Critique*, 4 REVS. AM. HIST., Mar. 1976, at 1; Wilentz, *On Class and Politics in Jacksonian America*, 10 REVS. AM. HIST., Dec. 1982, at 45.

⁸⁴ See Letter from Madison to Jefferson, Oct. 17, 1788, in 5 THE WRITINGS OF JAMES MADISON 269, 273 (G. Hunt ed. 1904) (asserting as an argument in favor of a bill of rights that, "[t]he political truths declared in that solemn manner acquire by degrees the character of fundamental maxims of free Government, and as they become incorporated with the national sentiment, counteract the impulses of interest and passion"); Speech in the First Congress, First Session, June 8, 1789, in 5 THE WRITINGS OF JAMES MADISON, *supra*, at 370-89 (making a similar claim regarding the beneficial impact of a Bill of Rights on "public opinion").

⁸⁵ See, e.g., G. WOOD, *supra* note 14, at 353-89; Adams, *A Defense of the Constitutions of Government of the United States of America*, quoted in Pangle, *Religion in the Thought of Some of the Leading American Founders*, 4 NOTRE DAME J. L. ETHICS & PUB. POL'Y 37-40 (1989).

⁸⁶ See M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* 120, 225, 253 (1986); see generally Corwin, *The Constitution as Instrument and Symbol*, 30 AM. POL. SCI. REV. 1071 (1936); Corwin, *The Worship of the Constitution*, 4 CONST. REV. 3 (1920); Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937); Levinson, *"The Constitution" in American Civil Religion*, 1979 SUP. CT. REV. 123. For some hints as to the reasons why Americans have been prone to conflate their constitutions with their religions, see Appleby, *The Heirs and the Disinherited*, *supra* note 9, at 809-11.

B. *Religious Foundations of Political Persuasions*

Upon close examination, it becomes evident that most of the five political outlooks discussed in Part I grew out of and, to a significant degree, remained tied to particular religious traditions. Several otherwise puzzling aspects of the various outlooks make more sense once one recognizes those heritages.

As with most aspects of Revolutionary politics, the discussion must begin with affairs in England. If the intertwining of church and state was substantial in the American colonies, it was even more so in the "home country." In the mid-eighteenth century, Anglicanism was still the "established" religion in many important respects. Communicants of the Church of England enjoyed a legal, if not well-enforced, monopoly on all significant government positions. Even after the relaxations mandated by the Toleration Act, Protestant dissent remained subject to a variety of restrictions, and Catholicism was even more heavily penalized.⁸⁷ More generally, as Jonathan Clark has recently shown, the Church set the tone of much of intellectual and social life. Through their sermons and writings, Anglican leaders helped perpetuate an "aristocratic ethic," in which a stable, well-defined social and economic hierarchy was seen as legitimate and "[p]olitical loyalties were describable, and were frequently described, [not as contractarian and conditional, but] as hereditary, personal, emotional, uncalculating and even quasi-religious, bound up with faith as much as with feelings of nationalism."⁸⁸

To be sure, the Church did not lend unequivocal support to the *ancien regime*; throughout the period, Anglican publicists continued, albeit ineffectually, to denounce as immoral a few manifestations of the aristocratic "code of honor" — most notably, dueling and gambling.⁸⁹ But more im-

⁸⁷ See R.B. BARLOW, *CITIZENSHIP AND CONSCIENCE: A STUDY IN THE THEORY AND PRACTICE OF RELIGIOUS TOLERATION IN ENGLAND IN THE EIGHTEENTH CENTURY* ch. 1 (1962); A. GILBERT, *RELIGION AND SOCIETY IN INDUSTRIAL ENGLAND: CHURCH, CHAPEL, AND SOCIAL CHANGE, 1740-1914* ch. 1 (1976); D. KEIR, *THE CONSTITUTIONAL HISTORY OF MODERN BRITAIN SINCE 1485* 429-32 (1966). For a review (and endorsement) of the surviving restrictions on non-Anglican worship, see 4 W. BLACKSTONE, *COMMENTARIES* *41-65.

⁸⁸ J.C.D. CLARK, *ENGLISH SOCIETY, 1688-1832: IDEOLOGY, SOCIAL STRUCTURE, AND POLITICAL PRACTICE DURING THE ANCIENT REGIME* 196 (1985). Clark's somewhat polemical arguments are tempered in Innes, *Jonathan Clark, Social History and England's "Ancient Regime,"* 115 *PAST & PRESENT* 165 (1987). I am indebted to David Sugarman for directing me to these materials.

⁸⁹ See J.C.D. CLARK, *supra* note 88, at 93-115.

portant than these criticisms were the fundamental issues upon which the Church and the bulk of the landed gentry were in agreement: that social, political, and economic power should be unitary; that the King was entitled to the loyalty and submission of his subjects; and that, in general, social and political superiors deserved deference and obedience.⁹⁰ Each of these attitudes, it should be apparent, figured prominently in the more conservative of the outlooks reviewed above: the Conservative Whig and Tory Opposition persuasions.

But those two persuasions were not in accord on all questions, and one of the issues that divided them was religion. Whereas the Conservative Whig spokesmen were comfortable with the significant but circumscribed role played by the Church in political life, the Tories were dismayed by what they saw as its declining influence, and the erosion of the patriarchalism it commended and sustained.⁹¹ Indeed, one of the main dispositions that defined the latter group was fidelity to "orthodox Anglican political theology," which revolved around the notion that the authority of the extant government proceeded, in substantial part, from God.⁹²

⁹⁰ See *id.*, at chs. 2-4. The following passages from *THE NEW WHOLE DUTY OF MAN* (1744), a popular and influential Anglican devotional manual, convey something of the spirit of the Church's political stance:

[S]eeing that sovereigns are God's viceregents, and do reign by his authority, they also have a right to be honoured and revered by their subjects; because they bear God's character, and do shine with the rays of his majesty: and consequently, it is an affront to God's own majesty, for subjects to condemn and vilify their sovereigns, to expose their faults, and uncover their nakedness, and lampoon and libel their persons and actions: therefore never speak evil of the ruler of thy people . . . [Lesser officials] have a right to be honoured and revered, and obeyed by the people, according to the degree and extent of their authority and power: because wherever it is placed, authority is a sacred thing, as being a ray and image of the divine majesty, and such as may justly claim honour and reverence from all men; and whoever condemns the lowest degree of it, offers an affront to the highest; for he that resisteth the power resisteth the ordinance of God.

Quoted in J.C.D. CLARK, *supra* note 88, at 127.

⁹¹ See Walsh, *Religious Societies: Methodist and Evangelical, 1738-1800*, in *VOLUNTARY RELIGION* 279, 282, 285 (W.J. Shiels & D. Wood eds. 1986).

⁹² See J.C.D. CLARK, *supra* note 88, at 216-35. For roughly complementary accounts of the gradual transmutation, engineered by the eighteenth-century Tories, of the doctrine of the divine right of kingship into more moderate doctrines ascribing some kind of providential sanction to the Hanoverian regime, see *id.* at 119-98 and J.A.W. GUNN, *supra* note 26, at 120-93.

Incidentally, the connection between theology and politics held true for those who criticized the Whig regime from the opposite standpoint. The most "radical" participants in eighteenth-century English politics (i.e., those who agitated for Parliamentary reform, the moderation of the penal laws, the abolition of the slave trade, and other reforms) tended to be heterodox Dissenters, and their reli-

The religious dimensions of the Radical Whig view were more diffuse but no less important. As James Kloppenberg recently and convincingly argued, the conception of "civic virtue" so central to that persuasion, had deep roots in Protestant theology. "Between the discussion of the virtues in the *Summa theologica* of Thomas Aquinas and *The Nature of True Virtue* of Jonathan Edwards ran a string of less carefully constructed, but nonetheless powerfully influential, meditations on universal benevolence as the ideal of Christian ethical doctrine,"⁹³ and those meditations helped shape the English and American incarnations of civic humanism.⁹⁴ The increasing stridency with which the colonists in the 1760s and 1770s denounced the spread of "luxury," "vice," and "corruption," both in England and in their midst, is inexplicable unless one recognizes the religious connotations and implications for them of those terms.⁹⁵

The indebtedness of the Radical Whig vocabulary to the Protestant tradition also helps explain some apparent inconsistencies in the colonists' discourse. The use of the term "virtue" sometimes to mean altruism or benevolence and on other occasions to connote military valor or prowess⁹⁶ makes sense when one understands that the speakers were drawing simultaneously on two traditions: Protestant Christianity and classical republican political theory.⁹⁷ And the tension between the colonists' aspiration to contribute to mankind's spiritual and social progress, on one hand, and their assumption that all polities are doomed to oscillate between tyranny and anarchy, on the other, is less puzzling when one recognizes their indebtedness to both the millennialism of Protestantism and the cyclical theory of history central to classical republicanism.⁹⁸

gious sympathies explain much of the skepticism with which their proposals were received by the government leaders. See *id.*, at ch. 5; Bradley, *Religion and Reform at the Polls: Nonconformity in Cambridge Politics, 1774-1784*, 23 J. BRIT. STUD. 55 (1984); Innes, *supra* note 88, at 186-89.

⁹³ Kloppenberg, *supra* note 21, at 12.

⁹⁴ See *id.*, at 12-14. See also R. BLOCH, *VISIONARY REPUBLIC: MILLENNIAL THEMES IN AMERICAN THOUGHT, 1785-1800*, (1985); G. WOOD, *supra* note 14, at 3-45; Bloch, *supra* note 52, at 554-55.

⁹⁵ See N. HATCH, *THE SACRED CAUSE OF LIBERTY: REPUBLICAN THOUGHT AND THE MILLENNIUM IN REVOLUTIONARY NEW ENGLAND* 14 (1977).

⁹⁶ For an evocative sketch of the military associations of the idea of virtue for Virginians, see R. ISAAC, *THE TRANSFORMATION OF VIRGINIA, 1740-1790* 255-60 (1982).

⁹⁷ See Bloch, *supra* note 52, at 554-55; Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 SIGNS 37 (1987).

⁹⁸ See R. BLOCH, *supra* note 94, at 22-50.

Liberalism, the last of the five outlooks, is commonly thought to be one of the most stubbornly secular of belief-systems. To some extent, that characterization is accurate. But recent scholarship has demonstrated that the version of liberalism in vogue in the eighteenth century was significantly different from the sort of "possessive individualism" with which we associate the term today.⁹⁹ One of the reasons why, prior to 1800, the ideas of Locke found more favor than those of Hobbes is that Locke, fairly read, does not counsel unrestrained pursuit of self-interest, but instead urges obedience to natural law, which, through the exercise of "Reason," the individual is able to discern.¹⁰⁰ In short, Lockean liberalism, far from undermining Christian conceptions of virtue and duty, built upon and reinforced them.¹⁰¹

C. *Regional Variations*

These overall patterns of religious influence were modified by the political stances taken by different sects in the various colonies. In every region, religious loyalties were important — and, in particular, substantially affected the character and strength of the movement for independence from England — but the ways in which they intruded on politics defy generalization.¹⁰² Three illustrations follow.

In New England, religious developments contributed to the Revolutionary cause in two ways. First, the intense denominational strife sparked by the evangelical uprisings of the 1740s, in which the colonial governments

⁹⁹ See F. McDONALD, *supra* note 26, at 60-66; Kloppenberg, *supra* note 21, at 15-16. Contrast the characterization of Locke in C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 194-262 (1962) (emphasizing his contribution to contemporary "liberal-democratic theory").

¹⁰⁰ See J. LOCKE, *ESSAYS ON THE LAW OF NATURE* NOS. 6-8 (W. von Leyden ed. 1954); J. LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* § 42, at 188 (P. Laslett ed. 1970) (discussing the individual's obligation to assist persons in need).

¹⁰¹ For an illustration of this aspect of Lockean liberalism, see Essay by Republicus, Feb. 16, 1788, in 5 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 35, at 161 (arguing that, as long as an individual exercises his freedom in conformity with the "law of nature," i.e., practices "rectitude, or moral virtue," he has "a right to enjoy his person, life, and property free from all molestation whatsoever").

¹⁰² Cf. Bailyn, *Religion and Revolution: Three Biographical Studies*, 4 *PERSPECTIVES IN AM. HIST.* 85 (1970) (arguing for greater attention to the variety of connections between religion and politics in different colonies).

often sided with the "Old Light" clergy, helped both to undermine the habits of deference that had stabilized provincial politics during the early eighteenth century and to sensitize the colonists to the dangers of governmental suppression of dissent.¹⁰³ Second, in the succeeding decades, religious leaders of all persuasions closed ranks behind the revolutionary cause and helped to generate a justificatory platform best described as a blend of the hierarchical and nostalgic Tory outlook and the more anti-authoritarian and humanist Radical Whig view.¹⁰⁴

In Virginia, the contributions of religion to the revolutionary impulse were more equivocal. On one hand, the mid-century evangelical uprising against Anglican complacency contributed to the Patriot cause both by revitalizing the imagery of sin and virtue (thereby lending urgency to the revulsion against political "corruption") and by increasing the revolutionary fervor of the Anglican gentry, who saw resistance to the British as one way of deflecting the evangelicals' challenge to their hegemony.¹⁰⁵ On the other hand, Methodism, which on the eve of the Revolution was displacing Presbyterianism and Baptism as the principal beneficiary of the revival, tended to distract the attention of its converts from political affairs.¹⁰⁶

¹⁰³ See P. BONOMI, *UNDER THE COPE OF HEAVEN: RELIGION, SOCIETY, AND POLITICS IN COLONIAL AMERICA* 161-68 (1986) (describing these effects in the colonies in general and in Connecticut in particular). For an earlier, more general study, see A. HEIMERT, *supra* note 75 (emphasizing the hostility of the New England clergy who had been influenced by Jonathan Edwards to hierarchies of all sorts).

¹⁰⁴ See N. HATCH, *supra* note 95, at 1-20. Specifically, the clergy (led, for the time being, by the Congregationalists) contributed to the revolutionary cause a "reconstruction of typology depicting Israel as a republic, of the jeremiad portraying early New England as a bulwark against tyranny, and of the millennium envisioning a kingdom of civil and religious liberty." *Id.* at 12. See also P. BONOMI, *supra* note 103, at 187-89 (describing how a common "ideology of dissent" enabled both "evangelical Calvinism and religious rationalism" to contribute to the revolutionary program); G. NASH, *supra* note 20, at 361-62 (describing the "religious cast" of the resistance movement in Boston); H. STOUT, *THE NEW ENGLAND SOUL: PREACHING AND RELIGIOUS CULTURE IN COLONIAL NEW ENGLAND* 259-311 (1986); McLoughlin, *The American Revolution as a Religious Revival: "The Millennium in One Country,"* 40 *NEW ENG. Q.* 99 (1967) (agreeing with Heimert regarding the importance of the evangelicals' contributions to the Revolution, but arguing for greater appreciation of the variety of positions taken by the different evangelical groups). For John Adams' favorable view of the contributions of the clergy to the Revolutionary debates, see *Novanglus Essays* (1775), reprinted in *TRACTS OF THE AMERICAN REVOLUTION, 1763-1776* 328-30 (M. Jensen ed. 1967).

¹⁰⁵ See R. ISAAC, *supra* note 96, at 244-47, 264-69.

¹⁰⁶ On the political acumen of the Presbyterians and Baptists, see P. BONOMI, *supra* note 103, at 181-86. On the Methodists' withdrawal from politics and lukewarm support for the Patriot cause, see R. ISAAC, *supra* note 96, at 260-64. Cf. E. TROELTSCH, *THE SOCIAL TEACHINGS OF THE CHRISTIAN CHURCHES* 990ff (O. Wyon trans. 1981) (differentiating churches and sects partly on the basis

In Pennsylvania, religious factionalism helped in a curious way to create an environment conducive to the flourishing of Artisan Radicalism. Despite steady diminution in their relative numbers during the colonial period, the Quakers managed until the 1760s to retain control of the Provincial assembly.¹⁰⁷ In the end, it was not lack of political acumen, but rather their principled commitment to pacifism that proved the Quakers' undoing. In the French and Indian conflict, their reluctance to lend support to the war effort enraged the embattled farmers (most of them Scots-Irish Presbyterians) in the western counties, who promptly organized a party of their own hostile to the Society of Friends.¹⁰⁸ During the ensuing years, as opposition to British imperial policies intensified, the Quakers' distaste for armed resistance (combined with their conservative sympathies) caused them to withdraw more and more from political affairs.¹⁰⁹ The result was a power vacuum that was filled by the articulate leaders of the Philadelphia artisan community and the associated militia companies.¹¹⁰ Appealing to the workers' egalitarian sentiments, which had been fueled by the evangelical revivals, those leaders not only organized an unusually dedicated revolutionary movement, but also developed a program for domestic reform that included such planks as the elimination of property qualifications for officeholding and the equalization of tax burdens.¹¹¹

The importance of the political commitments of different denominations in different regions continued after the Revolution. In New England, for example, the political alliance of the theologically disputatious Protestant clergy temporarily held firm, but the stance they took changed. Led by the Congregationalists and later the Unitarians, they became increasingly crit-

of their tendency to engage in or withdraw from secular political affairs).

¹⁰⁷ See P. BONOMI, *supra* note 103, at 168-71.

¹⁰⁸ See *id.* at 171-76.

¹⁰⁹ See R. BAUMAN, FOR THE REPUTATION OF TRUTH: POLITICS, RELIGION, AND CONFLICT AMONG THE PENNSYLVANIA QUAKERS, 1750-1800 chs. 8-9 (1971); G. NASH, *supra* note 20, at 382. For a contrasting view of the contribution of Quakerism to popular politics in Pennsylvania, see S. LYND, THE INTELLECTUAL ORIGINS OF AMERICAN RADICALISM 101-11 (1968) (discussing the radical political implications of the Quaker concepts of conscience and "inner light").

¹¹⁰ See E. FONER, *supra* note 31, at 108-18; R. RYERSON, *supra* note 20, at 25-38, 103-15, 177-206.

¹¹¹ See E. FONER, *supra* note 31, at 111-15; G. NASH, *supra* note 20, at 374-82; C. OLTON, ARTISANS FOR INDEPENDENCE: PHILADELPHIA MECHANICS AND THE AMERICAN REVOLUTION (1975). The degree of social radicalism reflected by these planks is considered *infra* in Part III.A. For discussion of the impact of these views on the first Pennsylvania state constitution, see G. WOOD, *supra* note 14, at 226-37; E. FONER, *supra* note 31, at 131-34.

ical of the egalitarian aspects of the Revolutionary rhetoric, helping to develop the conservative outlook of New England Federalism.¹¹² And, in ways detailed in Part III,¹¹³ the resurgence of evangelicalism in the second quarter of the nineteenth century had an important impact on the genesis and platform of the Whig Party.

D. Implications

In sum, religious attitudes affected in intricate and crucial ways Americans' political attitudes and actions during the eighteenth and early nineteenth centuries. That insight bears in at least two respects on the issues addressed in this Article. First, it provides clues to a question implicitly posed by the recent scholarship reviewed in Part I: What explains the degree to which political debate during the Revolutionary era remained closed? In other words, why did no American theorist or politician stray outside the circle of outlooks sketched in Part I.B.? The historians responsible for the "republican synthesis" had an answer: the outlook refined by Walpole's English critics, because it made sense of the peculiar social and political conditions in the colonies in the mid-eighteenth century, enjoyed disproportionate popularity on this side of the Atlantic, and the resultant absence of any serious ideological competitors made it seem uniquely realistic to Americans who came of age in the 1760s and 1770s.¹¹⁴ Acknowledgment that there were not one but several significantly different political persuasions in circulation during the period — and that, consequently, no single belief system could have exercised the mentally imprisoning power posited by the Geertzian conception of ideology — deflates that explanation and presents the question anew. The material discussed in this Part points to a partial alternative answer: All five of the outlooks being bandied about had been shaped by and remained connected to some variant of

¹¹² See J.M. BANNER, JR., *TO THE HARTFORD CONVENTION: THE FEDERALISTS AND THE ORIGINS OF PARTY POLITICS IN MASSACHUSETTS, 1789-1815* (1970); N. HATCH, *supra* note 95, at 97-175; D. HOWE, *UNITARIAN CONSCIENCE: HARVARD MORAL PHILOSOPHY, 1805-1861* (1970); Beam, *Millennialism and American Nationalism, 1740-1800*, 54 *J. PRESBYTERIAN HIST.* 182 (1976); Miller, *Fashionable to Prophecy: Presbyterians, the Millenium and the Revolution*, 21 *AMERIKA STUDIEN* 239 (1976).

¹¹³ See *infra* Part III.B.1.

¹¹⁴ See, e.g., B. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 14, at ch.1; L. BANNING, *supra* note 16, at ch. 3.

Protestantism. The similarity of those variants (despite, of course, significant differences) helps account for the degree to which the five outlooks overlapped. And the continuing importance of those variants to the lives of most Americans helps account for the limitations on the Patriots' ideological innovativeness.

Second and more prosaically, the analysis of this Part suggests that, when looking for the sources of a particular constitutional principle or doctrine, we should be alert to the possibility that religious attitudes figured in its development. The three case studies presented below were inspired in part by that guideline and, as will be seen, reinforce it.

III. CONSTITUTIONAL LAW

The beliefs and loyalties described above affected in myriad ways the allocation of constitutional rights and duties during the first seventy years of our national history. Their impact can be observed, not only in such obvious contexts as the adoption and interpretation of the commerce, contracts, and religion clauses of the Constitution,¹¹⁵ but also in such obscure areas as the construction of the "republican form of government" clause¹¹⁶ and the interpretation of state constitutional provisions mandating the "separation of powers."¹¹⁷ Instead of trying to provide a full account of the influence of ideology and religion in these various fields, the remainder of this Article concentrates on three sets of doctrines, each involving an aspect of the relationship between government officials and the owners of private property. Though plainly limited in scope, these fields are sufficiently representative to support some generalizations regarding the ways in which political discourse and religious thought influenced American law before the Civil War.

¹¹⁵ U.S. CONST. art. I, § 8, cl. 3; art. I, § 10, cl. 1; amend. I. For recent scholarship stressing the ideological roots of these provisions, see W. MILLER, *supra* note 81; G. WHITE, *supra* note 1, at 595-675; Riesman, *supra* note 37.

¹¹⁶ U.S. CONST. art. IV, § 4, cl. 1. See Note, *Political Rights as Political Questions: The Paradox of Luther v. Borden*, 100 HARV. L. REV. 1125 (1987).

¹¹⁷ See, e.g., *Crane v. Meginnis*, 1 Gill & Johns. 463, 476 (Md. 1829); *Opinion of the Justices*, 4 N.H. 565 (1827); *Merrill v. Sherburne*, 1 N.H. 199, 213 (1818); *Hoke v. Henderson*, 15 N.C. 1, 12-13 (1833).

A. *The Just Compensation Principle*

Before the mid-1960s, when Lockean liberalism was thought to have been the principal ideological spur to the Revolution,¹¹⁸ historians tended to assume that Americans have been committed since time immemorial to the notion that a government should not take private property without at least compensating its owner. The re-evaluation of the ideological origins of the Revolution initiated by Professors Bailyn and Wood has forced us to reconsider that assumption.¹¹⁹ Some of the sponsors or beneficiaries of the "republican revival" have argued that, in the late eighteenth century there existed a substantial group of citizens who were committed weakly, if at all, to the "just compensation" principle. On this view, the adoption of the takings provision of the fifth amendment was not foreordained; rather, it reflected, and helped secure, the victory of the adherents of liberalism in their struggle with the adherents of republicanism.¹²⁰

Upon reconsideration, however, it turns out that a hostility to uncompensated takings was indeed shared by the large majority of Americans at least as early as the Revolutionary era.¹²¹ That consensus had a number of related causes and manifestations. Perhaps most importantly, none of the five political persuasions to which the colonists were regularly exposed in the late eighteenth century commended legislative power to expropriate or redistribute property. Central to the extant avatar of Liberalism were the notions that the right to own and use property is one of the natural

¹¹⁸ See *supra* text accompanying notes 5-6.

¹¹⁹ See *supra* text accompanying notes 13-17.

¹²⁰ The two most influential statements of this view are M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW* 63-66 (1977) and Note, *Origins of Just Compensation*, *supra* note 1. For elaborations of the argument, see Horwitz, *History and Theory*, 96 *YALE L.J.* 1825, 1833 (1987); Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 *S. CAL. L. REV.* 1, 8 & n.22 (1986). For signs of the growing popularity of this view among constitutional scholars, see Merrill, *Review Essay: Rent Seeking and the Compensation Principle*, 80 *NW. U.L. REV.* 1561, 1576 (1986); Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 *VA. L. REV.* 543, 561-62 & n.85 (1986).

¹²¹ For recent studies emphasizing Americans' agreement on this issue, see J. REID, *supra* note 59, at 27-33; Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 *WIS. L. REV.* 1135. That they shared a hostility to uncompensated takings by no means implies that Americans agreed on the set of entitlements encompassed by a "property right" or what governmental actions, short of outright expropriation, should be deemed "takings." Cf. C. Rose, *The Ancient Constitution* (Dec. 1988) (unpublished manuscript) (describing the different positions taken on those questions by the Antifederalists and Federalists). For discussion of the courts' handling of the takings issue during the early nineteenth century, see *infra* Part III.B.

rights government is founded to protect, and that the security of private holdings is crucial to the beneficial operation of the free market.¹²² Both the Conservative Whigs and their Tory opponents believed that a just society was highly stratified; government policies that smacked of “leveling” consequently were anathema to them.¹²³ The Radical Whig and Artisan Radical outlooks contained a potential conflict on this issue: on one hand, preservation of both liberty and the economic security and independence essential to responsible citizenship required that private holdings be protected from governmental action; on the other hand, both the avoidance of virtue-sapping “luxury” and the desirability of extending to as many people as possible the opportunity to become responsible citizens might seem to require a redistribution of wealth.¹²⁴ In practice, however, the colonists’

¹²² See *supra* text accompanying notes 31-33. The only theorist during the Revolutionary period whose work casts doubt on this generalization is Benjamin Franklin. In his celebration of self-reliance, his insistence upon each individual’s capacity and responsibility, through hard work and self-control, to improve himself, and his confidence in America’s economic and political future, Franklin embodied and helped to popularize crucial liberal values. See, e.g., Franklin, *Advice to a Young Tradesman* (1748), reprinted in *THE POLITICAL THOUGHT OF BENJAMIN FRANKLIN* 51-54 (1965); Franklin, *On the Labouring Poor* (1768), reprinted in *id.*, at 219-24. Yet, Franklin showed little interest in shielding private property rights from governmental interference. For example, in a letter drafted in 1783, he denounced Americans who objected to paying taxes, arguing in part:

All Property, indeed, except the Savage’s temporary Cabin, his Bow, his Matchcoat, and other little Acquisitions, absolutely necessary for his Subsistence, seems to me to be the Creature of public Convention All the Property that is necessary to a Man, for the Conservation of the Individual and the Propagation of the Species, is his natural Right, which none can justly deprive him of: But all Property superfluous to such purposes is the Property of the Publick, who, by their Laws, have created it, and who may therefore by other Laws dispose of it, whenever the Welfare of the Publick shall demand such Disposition.

Letter to Robert Morris, Dec. 25, 1783, reprinted in *id.*, at 357-58. The foregoing passage may overstate Franklin’s willingness to subordinate private holdings to the public good; his principal purpose seems to have been to justify property taxation and statutes regulating “Descents . . . Conveyances . . . and [Land] Uses” and not to legitimate expropriation. *Id.* at 358. In any event, on these issues Franklin was not representative. Insofar as his political thought was grounded in a utilitarian vision, rather than a theory of natural rights, Franklin was, for this era, an idiosyncratic liberal.

¹²³ See *supra* text accompanying notes 24-27. For discussion of the importance of the sanctity of private property to eighteenth-century British “public opinion” in general and to the Conservative Whig outlook in particular, see J. REID, *supra* note 59, at 28-32.

¹²⁴ For discussions of this tension, see F. McDONALD, *supra* note 26, at 87-90; Sunstein, *Beyond the Republican Revival*, *supra* note 1, at 1551; and *supra* text accompanying notes 29-30. The degree to which these outlooks incorporated a commitment to expanding the the set of persons capable of citizenship is not altogether clear. For the argument that they did, see J. CROWLEY, *THIS SHEBA, SELF: THE CONCEPTUALIZATION OF ECONOMIC LIFE IN EIGHTEENTH-CENTURY AMERICA* 108-10 (1974); D. MCCOY, *supra* note 16, at 67-68. For the argument that they did not, see B. BAILYN, *IDEOLOGICAL ORIGINS*, *supra* note 14, at 283-84. If Professor Bailyn is correct, of course, the absence

faith that land and income were distributed reasonably widely on this side of the Atlantic limited the force of the latter argument.¹²⁵

The clergy did little to threaten this consensus. To be sure, in a few of the many religious traditions with some influence in the colonies¹²⁶ arguments could be found supportive of public claims on private holdings. Puritan theology was particularly rich in this regard. Puritan attitudes toward private property were complex, incorporating a conviction that all private possessions must be used to promote the common good,¹²⁷ a benign attitude toward acquisitiveness supported by the notion (repeatedly renounced but nevertheless persistent) that individual prosperity was a sign of election,¹²⁸ and a labor theory of value.¹²⁹ During the early eighteenth century, at least one New England preacher derived from these dissonant beliefs a general critique of inequality of landownership and a related assertion of the state's authority and responsibility to confiscate unused holdings.¹³⁰ By the late 1760s, however, Puritan ministers' primary political concern had become the defense of New Englanders' "liberties" against the pretensions of the British, and suggestions that the state had some claim on private holdings dropped out of their writings and

from the revolutionary pamphlets of proposals for the redistribution of wealth is even more easily explainable.

¹²⁵ See Appleby, *The Heirs and the Disinherited*, *supra* note 9. For a description of Americans' realistic conviction that they enjoyed a remarkably broad distribution of wealth, and their fear lest British policies disturb it, see B. BAILYN, *THE ORIGINS OF AMERICAN POLITICS* ch. 2 (1967).

¹²⁶ See *supra* Part II.C.

¹²⁷ See *THE APOLOGIA OF ROBERT KEAYNE* viii-xi (B. Bailyn ed. 1964).

¹²⁸ This trait is, of course, the foundation of the famous "spirit of capitalism." See generally M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (1958 ed.). For discussions of New Englanders' tortured attitudes toward this "covenant of works," see P. MILLER, *ERRAND INTO THE WILDERNESS* 48-98 (1956); E. MORGAN, *THE PURITAN DILEMMA* chs. 9-10 (1958).

¹²⁹ See S. FOSTER, *THEIR SOLITARY WAY: THE PURITAN SOCIAL ETHIC IN THE FIRST CENTURY OF SETTLEMENT IN NEW ENGLAND* (1971).

¹³⁰ See J. MORGAN, *THE ORIGINAL RIGHTS OF MANKIND* (1722) (arguing that it was "unscriptural and contrary to our Reasonable Nature, that the Earth and the Creatures thereof should be Sold, or by Laws, Deeds, Grants, or any other colour or manner of device whatsoever, be made the Property of particular Persons; who exact all the Fruits of the Sweat of the poor Husband and his Family's labours and thereby make their Families, nay the Province to be their slaves" and therefore that the government could and should, through confiscatory taxation, ensure that all persons had an opportunity, "without price or purchase," to acquire farms of their own). For discussion of Morgan's position and of Solomon Stoddard's rebuttal, see W. SCOTT, *IN PURSUIT OF HAPPINESS: AMERICAN CONCEPTIONS OF PROPERTY FROM THE SEVENTEENTH TO THE TWENTIETH CENTURY* 17-18 (1977).

sermons.¹³¹

In other regions, the climate of opinion was similar. No group of religious leaders took a stand in favor of governmental power to expropriate property. And the representatives of at least one sect — the Catholics in Maryland — campaigned vigorously against such authority, fearing that it would work to their disadvantage.¹³²

Against this background, it is not surprising that one of the points of consensus in the Revolutionary debates was the importance of shielding private property from governmental interference. There were differences of emphasis to be sure. Some pamphleteers extended the principle to holdings of all sorts. Others differentiated property rights originating in honest labor from property rights originating in special privileges conferred by the corrupt and parasitic imperial administration, contending that only the former were sacrosanct.¹³³ Still other writers, especially those attached to the ideals of civic republicanism, stressed the obligation of every citizen to subordinate his individual interests — including his ability to make the most profitable use of his possessions — to the common weal.¹³⁴ But more

¹³¹ See H. STOUT, *supra* note 104, at 259-311 (describing New Englanders' self-conception during the Revolutionary era as "a people who, along with their liberty and property, 'owned' a special covenant with God").

¹³² See Fogarty, *Property and Religious Liberty in Colonial Maryland Catholic Thought*, 72 CATH. HIST. REV. 573, 593-600 (1986). Cf. 1 J. GOEBEL, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801* 81-83 (1971) (describing the efforts of the Anglican clergy in Virginia to prevent the colonial Assembly from reducing their salaries).

¹³³ For a particularly melodramatic version of this argument, see 1 *THE WRITINGS OF SAMUEL ADAMS* 190-91 (H.A. Cushing ed. 1968) (insisting that "a man should have the free use and sole disposal of the fruit of his honest industry, subject to no controul," but that this principle did not extend to the holdings of British bureaucrats; indeed, the bureaucrats' wealth derived from a set of policies condemnable on the foregoing principle, insofar as they took "the earnings and industry of the honest yeomen, merchants, and tradesmen of this continent" and used them to support "standing armies and ships of war; episcopates and their numerous ecclesiastical retinue; pensioners, placemen and other jobbers, [and] an abandoned and shameless ministry of hirelings, pimps, parasites, panderers, prostitutes and whores"), *quoted in* W. SCOTT, *supra* note 130, at 38.

¹³⁴ See G. WOOD, *supra* note 14, at 61 (recounting the belief of Samuel Adams and Benjamin Rush that, "A Citizen owes everything to the Commonwealth"). A good example of that sentiment is the following statement issued in 1779 by a Philadelphia Committee justifying its efforts to regulate the prices charged by city merchants for certain commodities:

The social compact or state of civil society, by which men are united and incorporated, requires that every right or power claimed or exercised by any man or set of men should be in subordination to the common good, and that whatever is incompatible therewith, must, by some rule or regulation, be brought into subjection thereto If the freedom of trade is to be [absolute] then must all and every species of forestalling, monopolizing and en-

striking than these differences was the virtually universal agreement on the main point: the state ought not be able to confiscate a man's property without his consent.¹³⁵

Even during those moments in the Revolutionary struggle and its immediate aftermath when social radicals seemed to be in the ascendance, proposals contemplating compulsory redistribution of property were remarkably rare. For example, in Philadelphia, commonly thought to have been the hotbed of colonial radicalism,¹³⁶ the spokesmen for the politically active artisans and militia companies contented themselves for the most part with denouncing regressive taxation schemes, property qualifications for voting, and restrictions on public access to meetings of the Assembly.¹³⁷ Some of their speeches and broadsides did contain proposals to empower government to limit in some way the accumulation of wealth, but few, if any, of those suggestions could be construed as demands for the redistribution of existing fortunes.¹³⁸ The situation was similar in New

grossing be sanctioned thereby, because [merchants'] idea of free trade is for every man to do as he pleases; a right, which . . . is repugnant to the very principles on which society and civil government are founded.

Pennsylvania Packet, Sept. 10, 1779, quoted in E. FONER, *supra* note 31, at 169-70. The merchants' response — that "price regulation threatened the very basis of society, 'which is established for the security of property,'" that "trade should be 'free as air[,] and that the private interest of the merchant and the good of the public went 'hand in hand,'" *id.* — provides an equally good illustration of the competing liberal position.

¹³⁵ See, e.g., Otis, *The Rights of the British Colonies Asserted and Proved* (1764), reprinted in PAMPHLETS OF THE AMERICAN REVOLUTION, *supra* note 14, at 446-47 ("[W]hat one civil right is worth a rush after a man's property is subject to be taken from him at pleasure without his consent?"); A. Lee, *An Appeal to the Justice and Interests of the People of Great Britain, in the Present Dispute with America* 14 (1775) ("The right of property is the guardian of every other right, and to deprive a people of this, is in fact to deprive them of their liberty.").

¹³⁶ See *supra* text accompanying notes 110-11.

¹³⁷ See E. FONER, *supra* note 31, at 123-26; G. NASH, *supra* note 20, at 376-79.

¹³⁸ See E. FONER, *supra* note 31, at 126. The most radical proposal to emerge in the revolutionary debate was the unsuccessful recommendation by a committee dominated by the militia leader James Cannon that the new state constitution include the following clause: "That an enormous Proportion of Property vested in a few Individuals is dangerous to the Rights, and destructive of the Common Happiness of Mankind; and therefore every free State hath a Right by its Laws to discourage the Possession of such Property." *An Essay on a Declaration of Rights* (1776), quoted in E. FONER, *supra* note 31, at 133. Gary Nash stretches a bit in characterizing this recommendation as a "clarion call for a ceiling on wealth." G. NASH, *supra* note 20, at 379. For the most part, the artisan leaders seem to have assumed that, if the predatory practices of the upper classes could be halted and their aristocratic ambitions frustrated, "all ranks and conditions would come in for their just share of the wealth." Article by a self-described "Tradesman" in the *Philadelphia Packet*, Apr. 30, 1776, quoted in G. NASH, *supra* note 20, at 379. See also E. FONER, *supra* note 31, at 125.

York, the only other city in which artisans and laborers assumed a substantial role in revolutionary politics. Although spokesmen for the workers roundly denounced the selfishness and greed of local merchants,¹³⁹ when, on the eve of the Revolution, they at last had a chance to advance a program for domestic reform, they confined their attention to such issues as secret balloting, the expansion of the suffrage, and the abolition of imprisonment for indebtedness, avoiding proposals for the redistribution of existing holdings.¹⁴⁰

A similar level of agreement characterized the debates surrounding the drafting and ratification of the federal Constitution. It has long been recognized that one of the Federalists' main objectives was to consolidate and protect property rights.¹⁴¹ The Antifederalists' position on this issue has been less clear. Recent scholarship, however, makes plain that, whatever may have been the differences among the various Antifederalists on other issues,¹⁴² they were in accord on this question. If anything, they were even more concerned with protecting property rights against governmental interference than their opponents.¹⁴³ To be sure, just before the Constitu-

¹³⁹ See, for example, the satiric *Proposals, for Erecting and Encouraging a new Manufactory* (1770), quoted in G. NASH, *supra* note 20, at 365. Compare the argument for price controls discussed *supra* in note 134.

¹⁴⁰ See B. MASON, *THE ROAD TO INDEPENDENCE: THE REVOLUTIONARY MOVEMENT IN NEW YORK, 1773-1777* 148-77 (1966); G. NASH, *supra* note 20, at 374; Boyer, *Lobster Backs, Liberty Boys, and Laborers in the Streets: New York's Golden Hill and Nassau Street Riots*, 57 N.Y. HIST. SOC. Q. 281 (1973); Champagne, *Liberty Boys and Mechanics of New York City, 1764-1774*, 8 LABOR HIST. 115 (1967); Countryman, *Consolidating Power in Revolutionary America: The Case of New York, 1775-1783*, 6 J. INTERDISCIPLINARY HIST. 645 (1976).

¹⁴¹ See, e.g., G. WOOD, *supra* note 14, at ch. 12; Kramnick, *supra* note 34, at 6-8; Nedelsky, *supra* note 1; Riesman, *supra* note 37, at 150-51.

¹⁴² See *supra* text accompanying notes 34-37.

¹⁴³ See, e.g., Letters of Cato to the Citizens of the State of New York, in 2 *THE COMPLETE ANTI-FEDERALIST*, *supra* note 35, at 111 (arguing that a central purpose of any government is guaranteeing "the security of the property of the community, in which expressive term Mr. Lock [sic] makes life, liberty, and estate to consist," and contending that a national government would either be unable to achieve that end or would be obliged to assume tyrannical powers to secure it); Letters from the Federal Farmer, in *id.* at 253 (insisting that the largest and most responsible portion of the American population consists of "men of middling property, men not in debt on the one hand, and men, on the other, content with republican governments, and not aiming at immense fortunes, offices, and power" and that such people are threatened by two smaller, equally irresponsible groups: "One party is composed of little insurgents, men in debt, who want no law, and who want a share of the property of others; these are called levellers, Shayites, etc. The other party is composed of a few, but more dangerous men, with their servile dependents; these avariciously grasp at all power and property" and have designed the proposed Constitution to secure their nefarious ends); Essays of Brutus,

tional Convention, a group of rebellious farmers in western Massachusetts expressed and, to some extent, acted upon skepticism regarding the sanctity of private property rights.¹⁴⁴ But virtually all observers, including the Antifederalists, reacted to that spectacle with horror.¹⁴⁵

Why then did it take so long for Americans to install in their constitutions express prohibitions on uncompensated seizures of property? Although a few of the first set of state constitutions provided protection against interference by the executive with private property, none forbade legislative takings.¹⁴⁶ Some of the state constitutions drafted later in the revolutionary struggle did include such bans, but the framers of the Constitution did not see fit to adopt one. Indeed, the inclusion of the takings clause in the fifth amendment was due largely to the initiative of James Madison who, far from responding to popular pressure, hoped that the primary function of the provision would be to stimulate popular apprecia-

in *id.* at 374-75 (contending that the power of the proposed federal government would extend “to every thing which concerns human happiness — Life, Liberty, and property” and that consequently it should at least contain a provision guaranteeing the right to trial by jury “in all controversies at law, respecting property”); Essays by Republicus, in 5 *id.* at 161 (arguing that, by the “law of nature,” every man has “a right to enjoy his person, life, and property, free from all molestation whatsoever; and were he able, even to repel the combined power of the world in any attempt to deprive him of either; and on this is founded a right of *equality*: for as one mans [sic] right is limited to the enjoyment, and defence of his own property; so every other mans right extends to the same limits, but no further, for it is inconceivable that an individual can of right, enjoy any possible possession, or happiness any part of which another person or even community of men can have a right to deprive him of”).

¹⁴⁴ See D. SZATMARY, SHAYS’ REBELLION: THE MAKING OF AN AGRARIAN INSURRECTION (1980).

¹⁴⁵ For a sampling of the Antifederalists’ reaction, see Letters of Centinel, in 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 35, at 204-05 (regretting the distortion of political sentiment in Massachusetts caused by the rebellion, but speaking of the rebellion itself in terms of “terror” and “mad riot and dissension”); Essays of Brutus, in *id.* at 416-17 (implicitly approving of the suppression of the insurrection by force); Essay by Vox Populi, in 4 *id.* at 50 (condemning the proposed federal Constitution as similar, in its disrespect for the constitution of Massachusetts, to Shay’s attempted revolution); Essay by Candidus, in *id.* at 135 (approving the “suppress[ion of the] late Rebellion” and eschewing any desire to “level all distinctions; emit paper money; encourage the Rebellion”); Warren, *History of the Rise, Progress and Termination of the American Revolution*, in 6 *id.* at 203-07 (describing the uprising as the misguided effort of an “incendiary and turbulent set of people” to redress grievances, some real, some imagined, by “violating the constitution of their own forming, and endeavouring to prostrate all legal institutions”).

¹⁴⁶ See Note, *Origins of Just Compensation*, *supra* note 1, at 700-01. The three states that limited the power of the executive — by providing that property could be taken only with the consent of the owner or the legislature — were Maryland, New York, and North Carolina. *Id.* at 698 n.15.

tion of the dangers of expropriation.¹⁴⁷

There are several probable explanations for this tardiness. First, early in the Revolutionary period, most Americans were convinced that their representatives were trustworthy. Indebted as they were to the Whig conception of "mixed government," the colonists believed that the primary function of the elected branch was to ensure that the executive did not encroach upon their private liberties; the notion that their delegates were themselves to be feared was not common currency.¹⁴⁸

The behavior of the state legislatures in the late 1770s and early 1780s undermined that conception, at least in the minds of persons with property to lose. Debtor relief legislation, paper money schemes that predictably resulted in rapid inflation and consequent devaluation of outstanding debts, statutes confiscating the estates of Loyalists, and statutes purporting to engross powers assigned by the constitutions to the other branches of government all seemed to reflect a distressing lack of concern for private rights.¹⁴⁹ It was in this altered climate that two states inserted "just compensation" requirements in their constitutions.¹⁵⁰

As yet, however, not everyone saw a constitutional ban on takings as the best way to curb legislative irresponsibility. This was partly because the danger that a state or federal government would engage in outright confiscation of private holdings was less salient at the time than the risk that it would either devalue property (through paper-money or debtor-

¹⁴⁷ See *id.* at 714-16. Madison's conception of the proper role of the takings provision is consistent with his notion of how the Bill of Rights as a whole was likely to operate as a beacon for public opinion. See *supra* note 84 and accompanying text.

¹⁴⁸ See G. WOOD, *supra* note 14, at 162-96; P. Marshall, Takings, Property Qualifications, and the Independent Citizen: Changing Conceptions of Property in a Constitution Making Era, 1776-1789, 16-21 (unpublished paper, on file with the *Emory Law Journal*).

¹⁴⁹ See F. McDONALD, *supra* note 26, at 90-93; G. WOOD, *supra* note 14, at ch. 10; Corwin, *The Progress of Constitutional Theory*, 30 AM. HIST. REV. 517-20 (1924).

¹⁵⁰ The states were Vermont and Massachusetts. For analyses of the somewhat idiosyncratic circumstances that gave rise to these provisions, see *Introduction* to O. HANDLIN & M. HANDLIN, *THE POPULAR SOURCES OF POLITICAL AUTHORITY* (1966); R. PETERS, *THE MASSACHUSETTS CONSTITUTION OF 1780* 143ff (1978); Note, *Origins of Just Compensation*, *supra* note 1, at 701-08; Marshall, *supra* note 148, at 21-32. The adoption of such provisions were by no means the only or the most important modifications made in the new constitutions in response to the perceived incidence of legislative irresponsibility. The powers of the governors, which had been sharply limited by the first generation of draftsmen, were enhanced; the judiciaries were accorded greater independence of the legislatures; and the legislatures were often divided into two houses partly in order to hobble them. See G. WOOD, *supra* note 14, at ch. 11.

relief laws) or impose excessive taxes on land (and subsequently seize it for nonpayment). The Federalists were especially fearful of the first of these threats and, to meet it, included in Article I, section 10, sharp limitations on the powers of states to interfere with contracts or regulate the currency.¹⁵¹ The Antifederalists were especially fearful of the second, and their anxiety prompted them to oppose fiercely the provisions of the draft Constitution empowering the federal government to impose taxes directly on the citizenry.¹⁵² The relative disinterest in takings provisions also derived in part from uncertainty regarding the efficacy of judicially enforced bills of rights in preventing governmental invasions of private liberties. It was for the latter reason that the draftsmen of the Constitution devoted the bulk of their time and thought, not to external restraints on the government they were constructing, but to aspects of its internal design (for example, the separation of powers and devices for filtering wise representatives from the body of the people) that they hoped would reduce the chances that officials would wield their power oppressively.¹⁵³

¹⁵¹ See U.S. CONST. art. I, § 10 (“No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; [or] pass any . . . Law impairing the Obligation of Contracts . . .”). For discussions of the origins of these provisions in the Federalists’ fear of devaluation of property, see Riesman, *supra* note 37; G. WHITE, *supra* note 1, at 600-01.

¹⁵² See, e.g., Essays of Philadelphiensis, in 3 THE COMPLETE ANTI-FEDERALIST, *supra* note 35, at 118:

Figure to yourselves, my brethren, a man with a plantation just sufficient to raise a competency for himself and his dear little children; but by reason of the immoderate revenue necessary to support the *emperor*, the illustrious *well born Congress*, the *standing army*, &c. &c. he necessarily fails in the payment of his *taxes*; then a hard-hearted federal officer seizes, and sells, his cows, his horses, and even the land itself must be disposed of to answer the demands of government: He pleads unfruitful seasons, his old age, and his numerous, and helpless family. But alas! these avail him nothing, his farm, his cattle, and his all are sold for less than half their value to his wealthy neighbour, already possessed of half the land in the county, to whom also himself and his children must become servants and slaves, or else perish with hunger and want. Do I exaggerate here? No truly.

(Emphasis in original). To similar effect, see The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, in *id.*, at 154 (“By virtue of their power of taxation, Congress may command the whole, or any part of the property of the People.”); Essay by a Farmer and Planter, in 5 *id.*, at 74. Cf. Riesman, *supra* note 37, at 157 n.46 (documenting Antifederalist hostility to Congressional imposts).

¹⁵³ See, e.g., D. EPSTEIN, THE POLITICAL THEORY OF THE FEDERALIST 93-99 (1984); G. WOOD, *supra* note 14, at ch. 13; Letter from Madison to Jefferson, *supra* note 84 (referring to bills of rights as “parchment barriers”); Letter from Madison to Jefferson, Oct. 24, 1787, in 5 THE WRITINGS OF JAMES MADISON, *supra* note 84, at 17 (arguing that, in view of the “infinite of legislative expedients” by which “injustice may be effected,” prohibitions on invasions of private rights are likely to be ineffectual).

But while the constitutional draftsmen hesitated to impose limits on legislative power to interfere with private property rights, the judges, for the most part, did not. During the late eighteenth and early nineteenth centuries, state and federal courts enforced with increasing vigor and confidence the principle that “[a] provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent.”¹⁵⁴ When pertinent constitutional provisions were available, the courts of course relied on them to support their rulings. But many, perhaps most, judges during this period felt that their authority to invalidate legislation was not limited to the enforcement of the terms of written constitutions.¹⁵⁵ For example, in the famous case of *Gardner v. Village of Newburgh*,¹⁵⁶ Chancellor Kent struck down a New York statute authorizing without compensation the diversion of a stream accustomed to flow through the plaintiff’s property — despite the fact that the New York Constitution did not yet contain a takings provision. Kent found it sufficient that the just-compensation principle “is admitted by the soundest authorities . . . [to be] a clear principle of natural equity,” “and is adopted by all temperate and civilized governments, from a deep and universal sense of its justice.”¹⁵⁷

¹⁵⁴ 2 J. KENT, COMMENTARIES ON AMERICAN LAW 275 (1827).

¹⁵⁵ See, e.g., *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 143 (1810) (Johnson, J., concurring) (“I do not hesitate to declare that a state does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”); *Ham v. M’Claws*, 1 Bay 93 (S.C. 1789) (refusing to enforce a statutory provision mandating the forfeiture of a group of slaves on the ground that “[i]t is clear, that statutes passed against the plain and obvious principles of common right, and common reason, are absolutely null and void, as far as they are calculated to operate against those principles”). One influential judge who did insist that courts had no business interfering with legislation except when it ran afoul of express constitutional provisions was Justice Gibson of Pennsylvania. See, e.g., *Harvey v. Thomas*, 10 Watts 63, 67 (Pa. 1840) (contending that, because the state’s newly adopted constitutional ban on takings referred only to takings for public purposes, the legislature’s grants of compensation to persons whose land was taken for private purposes proceeded “from a sense of justice, and not of constitutional obligation”). Indeed, Gibson at one point took the position that, even when legislative action did transgress an express provision, the courts ought not intervene. See Nelson, *Changing Conceptions of Judicial Review: The Evolution of Constitutional Theory in the States, 1790-1860*, 120 U. PA. L. REV. 1166, 1181 (1972). Those somewhat eccentric views, more than substantive disagreement with the just-compensation principle, accounts for Gibson’s notoriously permissive stance toward legislative interferences with private rights. Contrast the interpretation offered in M. HORWITZ, *supra* note 120, at 65-66.

¹⁵⁶ 2 Johns. Ch. 162 (N.Y. 1816).

¹⁵⁷ *Id.* at 166. For discussion of the large body of similar decisions during this period, see C. HAINES, *THE REVIVAL OF NATURAL LAW CONCEPTS: A STUDY OF THE ESTABLISHMENT AND OF*

There were exceptions to this trend, but most were more apparent than real. For example, until the early nineteenth century, the courts in Pennsylvania and New Jersey continued to deny compensation to owners of land seized by the state for highway construction, but the plausible rationale for this stance was that the proprietary land grants from which the claimants traced their titles expressly provided that the grantees were receiving more acreage than they had purchased to enable the government later to lay out roads across the premises.¹⁵⁸ The Supreme Court of South Carolina relied upon a similar — albeit less explicit — long-standing practice in denying compensation to owners of land taken for road building.¹⁵⁹ Thus, the hostility with which some state courts initially responded to pleas from adversely affected landowners derived, not from disagreement with the just-compensation principle itself, but from the conviction that the petitioners had not in truth been deprived of anything. And eventually, even those courts came around to the majority position that,

THE INTERPRETATION OF LIMITS ON LEGISLATURES WITH SPECIAL REFERENCE TO THE DEVELOPMENT OF CERTAIN PHASES OF AMERICAN CONSTITUTIONAL LAW (1930); Bruchey, *supra* note 121; Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221 (1931); Grant, *The "Higher Law" Background of the Law of Eminent Domain* 6 WIS. L. REV. 67 (1931).

¹⁵⁸ See M. HORWITZ, *supra* note 120, at 63-64, 289 n.4. In *M'Clenachan v. Curwin*, 3 Yeates 362 (Pa. 1802), the Pennsylvania Supreme Court explained the theory that underlay this practice:

In this plan there was evidently a chance, that the purchaser might be either a gainer or loser in the event, as it was then and would probably continue for a long time uncertain, how much of each man's land would be found necessary for such public roads. The quantity of 6 per cent. was however fixed as the permanent quantity to be added to every man's land for that purpose; and from that early period to the present time, no grant has been made either by the proprietaries or the commonwealth, without this addition of 6 per cent. expressly for the purpose of . . . establishing the roads and highways.

Id. at 372. The Court's holding in the case — that the recently adopted takings provision of the state constitution did not compel the state to pay for land to which it already, through this procedure, was entitled — may have been affected by the fact that the party that stood to gain from its ruling was a turnpike company, see M. HORWITZ, *supra* note 120, at 64, but does not seem to evince fundamental opposition to the "just compensation" principle itself.

¹⁵⁹ So, for example, in *State v. Dawson*, 3 Hill 100 (S.C. 1836), the Court reasoned that, because (i) "all the grants of land in this State are derived from the lords, proprietors, the crown or the State"; (ii) "[w]ithout the right of ingress and egress, real estate would be of little value"; and (iii) the legislature since 1682 had been routinely exercising the power to lay out roads over private land without compensating the owners, the power to do so must be deemed "a tacit condition of every grant made in this State" and constituted part of "the law of the land" pursuant to which persons' freeholds might be taken. *Id.* at 104. See also *Lindsay v. Commissioners*, 2 Bay 38 (S.C. 1796). For indications that the South Carolina judges did not look with favor on uncompensated takings in other circumstances, see *Ham v. M'Claws*, 1 Bay 93 (S.C. 1789), and *Bowman v. Middleton*, 1 Bay 252 (S.C. 1792).

whatever the origins of land titles in their jurisdictions, landowners were entitled to compensation whenever their holdings were dedicated to public purposes.¹⁶⁰

Initially, the courts' stance met with considerable popular resistance; in the late eighteenth century, decisions striking down statutes as unwarranted invasions of property rights often resulted in fierce public outcry. But most of the controversy concerned collateral issues — such as whether it was the business of the courts to enforce the just compensation principle or whether the owners in question had behaved badly enough to justify the expropriation — not the correctness or importance of the principle itself. So, for example, the famous decision of the Mayor's Court of New York City in *Rutgers v. Waddington*,¹⁶¹ construing the New York Trespass Act so as to read out of it a provision designed to facilitate suits against British collaborators, sparked angry newspaper articles, popular protests, and a resolution of the state Assembly condemning the decision.¹⁶² But the focus of the criticism was on the court's apparent assumption of the power to defy an act of the legislature — a power one author described as “inconsistent with the nature and genius of our government, and threatening to the liberties of the people”;¹⁶³ no one seems to have taken the position that it was legitimate for the legislature to confiscate the holdings of innocent persons.¹⁶⁴

¹⁶⁰ This is not to suggest that the compensation received by landowners always fully indemnified them for their losses. As Professors Horwitz and Scheiber have shown, antebellum legislatures employed a variety of devices to limit the awards actually received by persons deprived of property, and the courts often acquiesced in those procedures. See M. HORWITZ, *supra* note 120, at 63-67; Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, 5 PERSP. AM. HIST. 329 (1971) [hereinafter Scheiber, *The Road to Munn*]; Scheiber, *Property Law, Expropriation and Resource Allocation by Government: The United States 1789-1910*, 33 J. ECON. HIST. 232 (1973). But more important for present purposes is the courts' vigilance in ensuring that some compensation was paid.

¹⁶¹ The decision was originally reported in a pamphlet: *Arguments and Judgments of the Mayor's Court of the City of New York in a cause between Elizabeth Rutgers and Joshua Waddington* (New York 1784), reprinted in 1 J. GOEBEL, JR., *THE LAW PRACTICE OF ALEXANDER HAMILTON* 393-419 (1964).

¹⁶² See 2 W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 964 (1953); 1 J. GOEBEL, *supra* note 161, at 312-14.

¹⁶³ The quotation is from an open letter published on Nov. 4, 1784 in *The New York Packet and American Advertiser*, excerpted and quoted in 1 J. GOEBEL, *supra* note 161, at 313.

¹⁶⁴ For similar popular reactions to analogous decisions, see 2 W. CROSSKEY, *supra* note 162, at 966-68, 971-73. Cf. Siegel, *supra* note 120, at 8-29 (documenting the antebellum consensus on the proposition that “ordinary contracts were sacrosanct”).

In sum, the slow emergence of the doctrine that uncompensated takings of private property are impermissible is closely connected to developments in popular political thought, but not in the way one might first think. The delay in the adoption of constitutional provisions embodying that principle was caused, not by a shift in popular sentiment from a "republican" belief that individuals should be willing, when asked, to surrender their possessions to the public to a "liberal" belief that private rights were sacrosanct, but rather by uncertainty regarding how legislatures were most likely to abrogate private rights and how to prevent them from doing so. And the gradually diminishing hostility during the early nineteenth century to judicial invalidation of confiscatory statutes reflected, not a change in attitude regarding the legitimacy of uncompensated takings, but rather acceptance of the view that it was the job of the courts to prevent such takings.

B. *The Vested Rights Doctrine*

The question naturally arises: Which sorts of legislation did the courts consider confiscatory and thus deserving of invalidation? The set of antebellum decisions addressing that issue are commonly collected under the heading of the "vested rights" doctrine. The development of that field is wonderfully complex,¹⁶⁵ and this section does not purport to provide a

¹⁶⁵ A sense of its intricacy can be obtained by consulting H. HARTOG, *PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW, 1730-1870* (1983); Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origins of Laissez-Faire Constitutionalism*, 3 *LAW & HIST. REV.* 293 (1985); Corwin, *The Basic Doctrine of American Constitutional Law*, 12 *MICH. L. REV.* 247 (1914); Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 *HARV. L. REV.* 366, 460 (1911); Grant, *The Natural Law Background of Due Process*, 31 *COLUM. L. REV.* 56 (1931); Haines, *Judicial Review of Legislation in the United States and the Doctrines of Vested Rights and of Implied Limitations of Legislatures* (pts. 1-3), 2 *TEX. L. REV.* 257, 387 (1924) & 3 *TEX. L. REV.* 1 (1924); Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation From Vested to Substantive Rights Against the State*, 31 *BUFFALO L. REV.* 381 (1982); Reznick, *Empiricism and the Principle of Conditions in the Evolution of the Police Power: A Model for Definitional Scrutiny*, 1978 *WASH. U. L. REV.* 1; Scheiber, *Regulation, Property Rights, and Definition of "The Market": Law and the American Economy*, 41 *J. ECON. HIST.* 103 (1981); Scheiber, *Public Rights and the Rule of Law in American Legal History*, 72 *CALIF. L. REV.* 217 (1984) [hereinafter Scheiber, *Public Rights*]; Siegel, *Understanding the Nineteenth Century Contract Clause: The Role of the Property-Privilege Distinction and "Takings" Clause Jurisprudence*, 60 *S. CAL. L. REV.* 1 (1986); Note, *Land Use Regulation and the Concept of Takings in Nineteenth Century America*, 40 *U. CHI. L. REV.* 854 (1973) [hereinafter Note, *Land Use Regulation*].

comprehensive treatment of it. Instead, the following pages examine the aspect of the evolution of the doctrine in which the impact of a mixture of religious and political sentiments is most apparent.

The analysis turns upon an observation of parallelism between developments inside and outside what is conventionally considered the legal sphere during the second quarter of the nineteenth century. Subsections 1 and 2 below trace those developments. Subsection 3 considers how they might be related.

1. *Evangelicalism and the Emergence of the Whig Persuasion*

In the years immediately following the Revolution, religious observance in the new nation declined substantially. The intense interest in secular affairs associated with the Revolutionary struggle, the deterioration of traditional communities caused by the surge of the population westward, and the growing popularity and respectability of Deism combined to produce a marked decline in church membership.¹⁶⁶

Alarmed, the Protestant clergy sought to reinvigorate piety and religious commitment. For reasons that remain mysterious, they were remarkably successful, and it was the leaders of the more evangelical denominations that were the most successful. Especially in the newly settled regions, evangelical preachers attracted larger and larger groups of middle and lower class Americans to emotionally charged revivals. Distancing themselves from Calvinist doctrines of innate depravity and predestination, the new preachers told their eager audiences that virtue and salvation were within their control, that with sufficient effort and discipline, they could rid themselves and their society of sin. By the 1820s, Methodism and Baptism, the leading evangelical sects, were the largest religious groups in the country.¹⁶⁷

As Daniel Rodgers observes, what distinguished this so-called "Second

¹⁶⁶ See S. AHLSTROM, *A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE* 365-66 (1972); W. SWEET, *RELIGION IN THE DEVELOPMENT OF AMERICAN CULTURE, 1765-1840* 91-92 (1952). Influential Deist texts written during this period include Ethan Allen's *Reason the Only Oracle of Man* (1784) and Thomas Paine's *Age of Reason* (1794).

¹⁶⁷ See S. AHLSTROM, *supra* note 166, at 403-54; P. MILLER, *THE LIFE OF THE MIND IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR* 3-95 (1965).

Great Awakening” from its predecessors “was not merely its scale but its immense moral fervor.”¹⁶⁸

In the wake of the preachers erupted a vision of a morally purged land, cleansed of profanity and drunkenness, its children gathered into Sunday schools, its family life purified, its sabbaths undesecrated by railroads and the delivery of mails, its frontiers civilized, its cities reformed, its laws observed. Out of moral anarchy, the nation was to be brought into obedience: into conformity to the laws and government of God.¹⁶⁹

As the preachers and their converts eventually realized, effective management of secular laws and governments was crucial to the achievement of such a purified society. By coincidence, at the moment the revival was reaching its peak, throughout the country the opponents of President Jackson were casting about for a set of principles that would give shape and legitimacy to their cause.¹⁷⁰ Seizing the moment, the evangelicals helped mold — and thereafter lent their support to — the platform of the political party soon to assume the label “Whig.”¹⁷¹

Two tenets of the Whig creed were critical.¹⁷² First, Whigs argued that government (federal, state, and local) should intervene aggressively in social and economic life — most importantly, by vigorously promoting economic development. Among the measures of this kind they advocated were: the manipulation of tariff rates; the establishment of a national

¹⁶⁸ D. RODGERS, *CONTESTED TRUTHS* 117 (1987).

¹⁶⁹ *Id.* See also G. MARSDEN, *THE EVANGELICAL MIND AND THE NEW SCHOOL PRESBYTERIAN EXPERIENCE* 3 (1970).

¹⁷⁰ See McCormick, *Political Development and the Second Party System* in *THE AMERICAN PARTY SYSTEMS* 90-116 (W. Chambers ed. 1967).

¹⁷¹ See D. HOWE, *THE POLITICAL CULTURE OF THE AMERICAN WHIGS* 9, 18-20 (1979). That the leaders of the new party selected the label “Whig” is understandable, given their desire to establish a connection to the spirit of the Revolution, but unfortunate for our purposes.

¹⁷² The summary of the Whig outlook set forth in this paragraph is derived from: L. BENSON, *THE CONCEPT OF JACKSONIAN DEMOCRACY: NEW YORK AS A TEST CASE* (1961); T. BROWN, *POLITICS AND STATESMANSHIP: ESSAYS ON THE AMERICAN WHIG PARTY* (1985); R. FORMISANO, *supra* note 82; R. FORMISANO, *THE TRANSFORMATION OF POLITICAL CULTURE: MASSACHUSETTS PARTIES, 1790s-1840s* (1983); D. HOWE, *supra* note 171; G. VAN DEUSEN, *THE JACKSONIAN ERA, 1828-1848* (1959); G. VAN DEUSEN, *THE LIFE OF HENRY CLAY* (1937); G. VAN DEUSEN, *THURLOW WEED: WIZARD OF THE LOBBY* (1947); G. VAN DEUSEN, *WILLIAM HENRY SEWARD* (1967); Marshall, *The Strange Stillbirth of the Whig Party*, 72 *AM. HIST. REV.* 445 (1967); Van Deusen, *Some Aspects of Whig Thought and Theory in the Jacksonian Period*, 63 *AM. HIST. REV.* 305 (1958) [hereinafter Van Deusen, *Whig Thought*].

bank to manage the currency and the nation's financial system; subsidies for internal improvements, such as roads, canals, and the dredging of harbors; and the selective grant of corporate charters to enterprises that would advance the common good.¹⁷³ But (and this was crucial) what the Whigs wanted was regulated and ordered development, not uncontrolled growth.¹⁷⁴ Above all, they were committed to the proposition that government programs should be designed to benefit everyone; no one group should be penalized or exploited to serve the interests of others.¹⁷⁵

These attitudes are most apparent in the breadth of the policies to which the Whigs appealed when justifying their legislative proposals. For example, in a book appropriately entitled *The Harmony of Interests*, Henry Carey, one of the leading Whig publicists,¹⁷⁶ argued that a protective tariff would not only shield infant American industries from foreign competition, but would secure various ancillary economic and social benefits. By preventing the loss of specie through an unfavorable balance of trade, it would increase wages and lower the cost of living. By expanding the size of the industrial workforce, it would provide farmers reliable domestic markets for their products, which, in turn, would reduce the nation's need to establish "colonies whose people could be made 'customers.'" The resultant prosperity and international peace would improve the condition of women, by providing them employment prior to marriage and leisure afterwards to attend to their domestic responsibilities, and would raise the level of "morality" and intellectual achievement throughout the society.¹⁷⁷

¹⁷³ For an influential statement of these views, see Clay, Speech in Defense of the American System, Feb. 2, 3 & 6 1832, reprinted in *THE AMERICAN WHIGS: AN ANTHOLOGY* 32-43 (D. Howe ed. 1973).

¹⁷⁴ One of the reasons the Whigs generally opposed the Jacksonians' schemes for geographic expansion (popularly known as "Manifest Destiny") is that they believed those ventures would lead to disordered and frenetic development, rather than well-managed development. See D. HOWE, *supra* note 171, at 21.

¹⁷⁵ See, e.g., Webster, Reply to Jackson's Veto Message, July 11, 1832, reprinted in 6 *THE WRITINGS AND SPEECHES OF DANIEL WEBSTER* 149-80 (1903). Whigs were adamant that there existed no natural or inexorable conflict between the interests of different economic classes, and they opposed all policies (such as legal recognition of workers' rights to picket and strike) that they thought would lead to such conflict. See Van Deusen, *Whig Thought*, *supra* note 172.

¹⁷⁶ For a careful study of Carey's career, see D. HOWE, *supra* note 171, at 108-22.

¹⁷⁷ H. CAREY, *THE HARMONY OF INTERESTS* (1852), reprinted in *MISCELLANEOUS WORKS OF HENRY C. CAREY* 193-98, 200-13 (1872). Similar arguments can be found in much of the literature of the Whig party. For example, Henry's father Mathew Carey wrote countless pamphlets during the

The second tenet of the Whig persuasion is also evident in Carey's multifaceted argument. In contrast to the Jacksonians, who inclined toward libertarianism,¹⁷⁸ the Whigs were dedicated to the values of community and order. Their utopia was a society bound together by a common set of values, and they were more than willing to invoke the aid of the state to achieve that end.¹⁷⁹ The best expression of this impulse was the proliferation, under the auspices of the Whigs, of "reform" movements — and it is here that the influence of evangelicalism is most easily discernible. Examples of reforms advocated by such groups were: Sabbatarian legislation; laws against obscenity, sexual deviance, dueling, gambling, and drinking;¹⁸⁰ improvement of institutions housing criminals, the blind, and the insane;¹⁸¹ and the establishment of universal free public education.¹⁸²

In retrospect, we can see that the Whig outlook constituted a fusion of ideas that had figured in four of the five Revolutionary visions: the mercantilism of the Conservative Whigs; the celebration of virtue and the belief in the interdependence of private and public morality shared by the Tory Opposition and the Radical Whigs; and the Liberals' insistence that individual holdings and freedoms not be sacrificed to the public good. The formation of that compound was catalyzed by the evangelical revival.

1820s and 1830s defending Clay's "American System" (see *supra* note 173) on the ground that it would lead to a balanced economy, general prosperity, class harmony, and an overall increase in the nation's population and wealth. See G. VAN DEUSEN, *THE JACKSONIAN ERA*, *supra* note 172, at 18-19.

¹⁷⁸ See, e.g., R. FORMISANO, *THE TRANSFORMATION OF POLITICAL CULTURE*, *supra* note 172, at ch. 6; A. SCHLESINGER, *AGE OF JACKSON*, *supra* note 10, at 350-60; Johnson, *Sunday Observance and the Mail*, in *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY* 274-81 (J. Blau ed. 1954).

¹⁷⁹ See *THE AMERICAN WHIGS*, *supra* note 173, at 20.

¹⁸⁰ See R. FORMISANO, *supra* note 82, at ch. 6.

¹⁸¹ See Van Deusen, *Whig Thought*, *supra* note 172.

¹⁸² Both political parties supported expansion of public education, but whereas the Jacksonians saw schooling principally as a way of providing every child with the skills necessary to compete in a wide-open society, see, e.g., Wright, *On Existing Evils and their Remedy*, in *SOCIAL THEORIES OF JACKSONIAN DEMOCRACY*, *supra* note 178, at 282-88, the Whigs, led by Horace Mann, supported it as a mechanism that would enable an ethical elite to shape the values of the populace, thereby fostering consensus and harmony, see Mann, *The Necessity of Education in a Republican Government* (1838), reprinted in *THE AMERICAN WHIGS*, *supra* note 173, at 148-71; J. MESSERLI, *HORACE MANN: A BIOGRAPHY* 221-79 (1972). For a defense of the use of private philanthropy to the same ends, see Tuckerman, *Fourth Semi-Annual Report to the Executive Committee of the American Unitarian Association* (1829), reprinted in *THE AMERICAN WHIGS*, *supra* note 173, at 175-88.

2. *A Style of Legal Thought*

During the same period in which the Whig Party was coming into its own, state and federal judges were increasingly confronted with challenges to statutes regulating private property. In resolving such cases, they were torn between their desire to shield owners from undue legislative interference and their recognition of the need to afford governments some leeway in responding to proliferating social ills. Their solution was to develop various subsidiary doctrines or distinctions that enabled them to uphold some of the regulatory initiatives without unleashing the legislatures altogether.

These “mediating”¹⁸³ doctrines differed considerably in their details, but relied upon similar sorts of arguments and connected them in similar ways. The same analytical style characterized American courts’ handling during this era of many other common law and constitutional problems.¹⁸⁴ This subsection sketches that style — first by reviewing the two most important devices the courts employed to separate legitimate from illegitimate regulations, then by showing their resemblance to the courts’ responses to collateral fields. The following subsection considers the relationship between the style and the ideological and religious currents discussed above.

The first of the two mediating doctrines might be described as the “implied reservation” theory. Reduced to a precept, it would go like this: A statute that interferes with a person’s¹⁸⁵ enjoyment of a property or con-

¹⁸³ The adjective is derived from Kainen, *supra* note 165, who discusses a similar set of devices developed by the federal courts when interpreting the contract clause of the federal constitution and argues that those devices were designed to “mediate” contradictory principles or impulses.

¹⁸⁴ Use of the word “style” to refer to the mode of analyzing and deciding cases that predominates in a particular era can be traced to K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 36 (1960). For contemporary studies, building in one or another way on Llewellyn’s argument, see G. GILMORE, *THE AGES OF AMERICAN LAW* (1977); Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 *RESEARCH IN LAW & SOCIOLOGY* 3, 4-6, 23 (1980); Klare, *Contracts Jurisprudence and the First-Year Casebook*, 54 *N.Y.U. L. REV.* 876, 876 n.2 (1979). In the most ambitious of these studies, Duncan Kennedy takes a view somewhat different from that offered here of the style prevailing in the second quarter of the nineteenth century — arguing, *inter alia*, that courts were prone to regard “policy” and “equity” arguments as inconsistent or contradictory considerations. See D. Kennedy, *The Rise and Fall of Classical Legal Thought, 1850-1940* (1975) (unpublished manuscript).

¹⁸⁵ By the second quarter of the nineteenth century, it was established that a private corporation enjoyed constitutional protection against governmental interference with its property substantially sim-

tract right should be upheld if, and only if, it constitutes an exercise of a servitude or power expressly or impliedly reserved by the sovereign when it first granted the person (or his predecessor in interest) the right in question.¹⁸⁶ The character and implications of this way of analyzing legislation are best seen through example.

In 1833, the Supreme Court of North Carolina was called upon to decide whether a statute ousting a clerk of a superior court from a position he ostensibly enjoyed “on good behavior” could pass constitutional muster. The answer depended, in the Court’s view, on the implied terms of the original grant of the office to its current occupant. Because it was clear, from “the nature of things,” that the legislature must have the power periodically to reconsider how the government should be organized to promote “the general welfare,” an appointed official “takes the office with the tacit understanding, that the *existence* of the office depends on the public necessity for it; and that the Legislature is to judge of that.”¹⁸⁷ However, because “it is not possible that the public interest can be concerned in the question, *who* performs the services incident to it,” no such tacit term of the original appointment gives the legislature the right to take the position from the plaintiff and give it to someone else.¹⁸⁸

The same mode of analysis is evident in Chancellor Walworth’s justification and delimitation in the famous *Beekman* case¹⁸⁹ of the New York legislature’s authority to delegate its eminent domain power to a private corporation:

All separate interests of individuals in property are held of the government under this tacit agreement or implied reservation. Notwithstanding the grant to individuals, the *eminent domain*, the highest and most exact idea of property, remains in the government, or in

ilar — though not identical — to the protections enjoyed by a natural person. See, e.g., *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819); *University of North Carolina v. Foy*, 5 N.C. 57, 62 (1805). For the completion of the assimilation of private corporations into the category of “persons,” see Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173 (1985).

¹⁸⁶ In developing this doctrinal strategy, the courts may well have been drawing upon the line of Pennsylvania and South Carolina decisions discussed *supra* at text accompanying notes 158-59. For a structurally similar contemporary argument, see *Arnett v. Kennedy*, 416 U.S. 134, 151-55 (1974) (plurality opinion).

¹⁸⁷ *Hoke v. Henderson*, 15 N.C. 1, 20 (1833) (emphasis added).

¹⁸⁸ *Id.* at 21 (emphasis added).

¹⁸⁹ *Beekman v. Saratoga & Schenectady R.R. Co.*, 3 Paige 45 (N.Y. Ch. 1831).

the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property, in the manner directed by the constitution and laws of the state, whenever the public interest requires it The only restriction upon this power . . . is that the property shall not be taken for the public use without just compensation to the owner, and in the mode prescribed by law.¹⁹⁰

A clever variation on this analytical strategy underlies the equally famous decision of the Massachusetts Supreme Court in *Callender v. Marsh*.¹⁹¹ The case involved a constitutional challenge to a city surveyor's decision (authorized by a state statute) to lower the level of a public street. The plaintiff demonstrated that the regrading had exposed the foundation of his house and rendered his present doorway useless, forcing him to spend a substantial sum reinforcing the foundation and building a new entrance. Because the city had refused to reimburse him for those expenses, he argued that either the surveyor's decision or the empowering statute constituted a deprivation of property without just compensation. Chief Justice Parker, speaking for the court, dismissed the challenge, relying principally upon an ingenious interpretation of the transaction whereby the state had acquired from the plaintiff's predecessor in interest the authority to build the street. Parker argued that, when a city or state lays out a road on private property, it acquires not only the right, on behalf of the public, to travel freely over the present surface of the land, but also the right "to repair and amend the street, and, for this purpose, to dig down and remove the soil sufficiently to make the passage safe and convenient" — even if "title in the soil" remains in the private owner. The government, of course, must compensate the owner for all rights it compels him to relinquish. Accordingly, a person across whose land a road is laid "may claim damages, not only on account of the value of the land taken, but for the diminution of the value of the adjoining lots [i.e. the lot on which his house presently stands or is to be constructed], calculating upon the future probable reduction or elevation of [the] street" ¹⁹² Subsequent purchasers of the tract in question acquire no more rights than the original owner retained; they thus take the land subject to

¹⁹⁰ *Id.* at 72-73 (emphasis in original).

¹⁹¹ 1 Mass. (1 Pick.) 418 (1823).

¹⁹² *Id.* at 432.

the state's reserved right to elevate or lower the level of the road. "[A]s their purchase is always voluntary, they may indemnify themselves in the price of the lot which they buy, or take the chance of future improvements, as they shall see fit."¹⁹³ In sum, when a surveyor orders excavation of a road, no one is deprived of any property rights. The original owners of the plots across which the street was laid are presumed to have been fully compensated for their compelled relinquishment of the right to prevent such alterations.¹⁹⁴ Subsequent takers — like the plaintiff in the suit at bar — have simply lost a gamble they voluntarily made when they bought the land. The state has merely exercised a right it long ago "purchased" and paid for.¹⁹⁵ Cases decided on similar bases during this period are legion.¹⁹⁶

The second of the two doctrinal devices might be described as the "offsetting-gains" theory. The principle that undergirded it is that a statute altering or impairing a person's property rights is valid if and only if he suffers no net injury — i.e., the harm he sustains as a result of the statute is offset by a benefit to himself or his other possessions.¹⁹⁷ Again, the

¹⁹³ *Id.* at 431.

¹⁹⁴ In 1852, the same court (without citing *Marsh*) used an analogous argument to reject a claim by a landowner that an interpretation of the law of trespass exempting from liability a traveler who was compelled by "inevitable necessity or accident" to deviate from a public way and cross a privately owned field would constitute an "appropriat[ion of] private property to public use without providing any means of compensation to the owner." *Campbell v. Race*, 61 Mass. (7 Cush.) 408, 411-12 (1852) (Bigelow, J.).

¹⁹⁵ The theory just outlined is, in my view, more central to the court's decision than the "assumption of risk" argument for which the decision is generally known. See Scheiber, *The Road to Munn*, *supra* note 160, at 370; Note, *Land Use Regulation*, *supra* note 165, at 856-57.

¹⁹⁶ See, e.g., *Denny v. Mattoon*, 84 Mass. (2 Allen) 361, 365-66 (1861) (argument of Mr. Hoar, counsel for plaintiff); *Commonwealth v. Alger*, 61 Mass. (7 Cush.) 53, 85 (1851) (upholding a statute proscribing the construction of private wharves extending into Boston harbor beyond a prescribed line); *Commonwealth v. Tewksbury*, 52 Mass. (11 Met.) 55 (1846) (upholding a statute forbidding the removal of stones, gravel, or sand from privately-owned beaches); *Crittenden v. Wilson*, 5 Cow. 165, 166 (N.Y. Sup. Ct. 1825); *Coates v. Mayor of New York*, 7 Cow. 585, 605 (N.Y. Sup. Ct. 1827); *Vanderbilt v. Adams*, 7 Cow. 349, 350 (N.Y. Sup. Ct. 1827); *Baker v. Boston*, 29 Mass. (12 Pick.) 183, 193-94 (1831). Cf. *Commonwealth v. Chapin*, 22 Mass. (5 Pick.) 199, 201-02 (1827) (same principle applied to nonconstitutional case).

For other treatments of the famous *Alger* decision, *supra*, see Scheiber, *Public Rights*, *supra* note 165, at 223-24 (reading *Alger* as developing a positive theory of public rights that counterbalances the vested rights of individuals); Reznick, *supra* note 165, at 13-19 (emphasizing the contribution of the decision to the development of the concept of the police power).

¹⁹⁷ Most of these opinions contain an important ambiguity: in measuring the injury wrought by a regulation and the "offsetting gains" that might nevertheless legitimate the rule, does one look to the

shape and scope of the approach is best seen through example.

In *Vanderbilt v. Adams*,¹⁹⁸ the New York Supreme Court upheld a statute that authorized the New York City harbormaster to direct the movement of ships to and from private wharves. The principal rationale the court offered for its decision was that, though the measure did, "in some sense, limit and restrict the absolute right" that a wharf owner previously enjoyed, the net effect of the statute was to speed the process of unloading and loading ships in the harbor and thus, far from "lessening the value of the [owner's] right," in fact benefitted him as well as the public at large.¹⁹⁹

In 1834, the Massachusetts Supreme Court invoked the same conception of the limits of governmental power in striking down a city by-law forbidding the burial in Charlestown of corpses brought from Boston. The court denounced the provision as a "clear and direct infringement of the right of property, *without any compensating advantages*, and not a police regulation, made in good faith, for the preservation of health."²⁰⁰

Six years later, in *Green v. Borough of Reading*,²⁰¹ the Pennsylvania Supreme Court upheld a statute authorizing a borough to alter the level of public roads without compensating the owners of adjacent houses for damages they sustained thereby.²⁰² After a review of the relevant case law, Justice Hutson concluded with the observation:

I suspect, though there may be a temporary inconvenience, the plaintiff will find he has not been injured; no one thing which can be effected by man, tends more to increase the growth and prosperity of a town or city than good streets. The advantage to the whole town soon raises property in every part of it, and is to the advantage

probable net impact of the regulation on the well-being of the owner (the consequent protection from noxious uses of others' land, the lack of identifiable harm resulting from the fact that he never intended to use the land in the now forbidden fashion, etc.) or solely to the net effect on the property (its market value, any additional uses to which it might now be put, etc.)? In the late nineteenth century, judges would occasionally address this general question more forthrightly, but the issue continues to trouble and confuse the courts. *See, e.g., Agins v. Tiburon*, 447 U.S. 255, 262 (1980).

¹⁹⁸ 7 Cow. 349 (N.Y. Sup. Ct. 1827).

¹⁹⁹ *Id.* at 351-52.

²⁰⁰ *Austin v. Murray*, 33 Mass. (16 Pick.) 121, 126 (1834) (emphasis added).

²⁰¹ 9 Watts 382 (Pa. 1840).

²⁰² *Cf. Callendar v. Marsh*, 18 Mass. (1 Pick.) 418 (1823), discussed *supra* at text accompanying notes 191-196 (reaching the same result on the basis of the public-easement theory).

of every inhabitant.²⁰³

A similar approach was employed by the Supreme Court of Tennessee to sustain a city ordinance that required owners of lots in the central section of the town of Franklin either to construct brick sidewalks along the edge of their property or, if they were unable to do so, to pay a share, proportional to their frontage, of the cost of a sidewalk built by the city.²⁰⁴ The court conceded that the immediate increase in the market value of the properties in question caused by the construction of the sidewalk would not equal the costs borne by the owners of the lots. It insisted, nevertheless, that the owners would reap other gains: relief from the formerly "muddy and disagreeable" conditions of the adjoining street; "comfort" derived from the ability to walk on "the pavements made by other persons who owned lots in town" (a benefit to a property owner and his family that might be quite considerable depending on their "peculiar circumstances"); and a "proportional" part of the "general appreciation of property" in that town resulting from the improvement.²⁰⁵ During the years leading up to the Civil War, large numbers of constitutional challenges to land-use regulations were resolved by state appellate courts on similar bases.²⁰⁶

For present purposes, the significance of this line of decisions is that, like the "implied reservation" theory just reviewed, it embodies and en-

²⁰³ 9 Watts at 386.

²⁰⁴ Mayor and Aldermen v. Maberry, 25 Tenn. (6 Hum.) 275 (1845).

²⁰⁵ *Id.* at 279.

²⁰⁶ See, e.g., *Sohier v. Massachusetts Gen. Hosp.*, 57 Mass. (3 Cush.) 483, 493 (1849); *Cochran v. Van Surlay*, 20 Wend. 365, 373-74 (N.Y. 1838); *Baker v. Boston*, 29 Mass. (12 Pick.) 183, 194 (1831); *Rice v. Parkman*, 16 Mass. (15 Tyng) 326, 329-32 (1820) (exercise by legislature of *parens patriae* power legitimate as long as no person is injured thereby); *Holbrook v. Finney*, 4 Mass. (4 Tyng) 566, 568 (1808) (statute that substitutes one form of tenure for another is constitutional as long as the new form is more beneficial to all the tenants than the old form). The conception of the appropriate relation between a government and a private property owner embodied in this approach is consistent with (and may to some extent have been derived from) the practice, authorized by many antebellum eminent-domain statutes, of deducting from the compensation owed the owners of condemned land the value of the "benefit" they would reap from the public project in question. See L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 130-35 (1957); McCormick, *The Measure of Compensation in Eminent Domain*, 17 MINN. L. REV. 461 (1933); Scheiber, *The Road to Munn*, *supra* note 160, at 364-65; Comment, *Eminent Domain — Set-Off of Benefits Against Damages to Remaining Land Denied*, 43 IOWA L. REV. 303 (1958). Courts generally approved the use of this procedure. See, e.g., *Chesapeake & Ohio Canal Co. v. Key*, 5 Fed. Cas. 563, 564 (C.C.D.C. 1830) (No. 2,649).

forces a distinctive conception of the proper relationship between governmental power and individual rights. The notion that infuses both is that the state should act aggressively to promote economic development and to mold the morals of the populace but should limit itself to initiatives that do not cause any individual or group net injury. Those attitudes were by no means limited to constitutional adjudication during this period. In a wide variety of private-law fields, courts developed and deployed structurally similar arguments. A few illustrations should suffice.

In *Farwell v. Boston & Worcester Railroad*,²⁰⁷ Chief Justice Shaw announced²⁰⁸ what became known as the “fellow-servant rule” — the heart of which is that an employer is not liable when one of his employees is injured as a result of the negligence of another employee.²⁰⁹ The complex argument on which Shaw relied in reaching this result is distilled in a single sentence:

The general rule, resulting from considerations as well of justice as of policy, is, that he who engages in the employment of another for the performance of specified duties and services, for compensation, takes upon himself the natural and ordinary risks and perils incident to the performance of such services.²¹⁰

The reason that extension of this principle to a person injured through the negligence of his coworkers would promote “justice” is that the victim could be (and, “in legal contemplation,” was) compensated — in the form of higher wages — for running the risk of such injuries; thus, to allow the victim to recover in tort would be to give him a windfall. The reason the rule would promote “policy” is that it would induce workers to police each other’s conduct, thereby promoting the safety of all employees as well as of the passengers.²¹¹

²⁰⁷ 45 Mass. (4 Met.) 49 (1842).

²⁰⁸ In fact, another American court had already adopted the rule. See *Murray v. South Carolina R.R. Co.*, 26 S.C.L. (1 McMul.) 385 (1838). But, for a variety of reasons, Shaw’s opinion came to be considered the leading case.

²⁰⁹ For thorough discussions of the origins, development, erosion, and ultimate collapse of the doctrine, see Friedman & Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967); and Comment, *The Creation of a Common Law Rule: The Fellow Servant Rule, 1837-1860*, 132 U. PA. L. REV. 579 (1984).

²¹⁰ 45 Mass. (4 Met.) at 57.

²¹¹ *Id.* at 59.

A similar strategy underlies the opinion of the Supreme Court of New Hampshire in the 1834 case of *Britton v. Turner*,²¹² which held that a worker who quits before the expiration of his contract term can recover “off the contract” for the fair value of the services he has rendered. To deny the worker such a remedy, the court argued, would be both inequitable and bad policy — inequitable because it would treat builders and workers unequally²¹³ and would unjustly enrich employers; bad policy because it would give employers an incentive to make life miserable for their workers as their terms of employment drew to a close, a practice that would disrupt labor relations.²¹⁴

A final example: In *People v. Nickerson*,²¹⁵ Chief Justice Samuel Nelson of the New York Supreme Court justified on two grounds adherence to the traditional rule that a father is presumptively entitled to custody of his children after a divorce.²¹⁶ First, a man’s desire to provide for the “education and future advancement” of his offspring is one of the most powerful “incentives to industry and thrift”;²¹⁷ separate children from their fathers and “these motives to action” will “wither.”²¹⁸ Second, fidelity to the traditional rule would promote justice in the case at hand because the child probably would be better provided for if he stayed with his father and because the mother, having “greatly mistaken the obligations

²¹² 6 N.H. 481 (1834).

²¹³ When a builder failed either to finish a building or to comply with the design specified in his contract, he was permitted to recover “off the contract” the value of the work he had completed. *Id.* at 488-89. See M. HORWITZ, *supra* note 120, at 187-88.

²¹⁴ 6 N.H. at 486-96. Interestingly enough, the Massachusetts Supreme Judicial Court, when adopting the opposite rule, argued that to accord the worker a remedy would be both unjust and economically inadvisable — because it would give workers who quit a windfall (insofar as their wages were set on the understanding that they could not recover under such circumstances) and would weaken employees’ incentives to fulfill their promises. See *Stark v. Parker*, 19 Mass. (2 Pick.) 267 (1824).

The ways in which courts in other states dealt with this problem are insightfully reviewed in Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law*, 1986 WIS. L. REV. 677.

²¹⁵ 19 Wend. 16 (N.Y. Sup. Ct. 1837).

²¹⁶ As Professor Zainaldin has shown, the decision in *Nickerson* represented a temporary setback to the general reform of the law of child custody during the nineteenth century, which gradually came around to the position that the mother, not the father, is the parent presumptively entitled to the children. See Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption and the Courts, 1796-1851*, 73 Nw. U.L. REV. 1038 (1979).

²¹⁷ 19 Wend. at 19. “[F]or this he struggles and toils through life.” *Id.*

²¹⁸ *Id.*

and duties which devolved upon her by the marriage vow," had unjustifiably deserted her husband.²¹⁹

Common to the foregoing three cases, and to many others decided in this era,²²⁰ is the principle that courts can and should select common-law doctrines that simultaneously promote the common good and do justice in particular cases — virtually the same idea to which the courts recurred when shaping the vested rights doctrine during the same period.²²¹ In short, in a variety of fields, judges during the second quarter of the nineteenth century employed with unusual frequency²²² a distinctive analytical style whose components closely paralleled the cluster of beliefs advanced at the same time by the Whig party.

²¹⁹ *Id.* Remarkably enough, the decision of the Court for the Correction of Errors that repudiated *Nickerson* also relied upon a combination of "equity" and "policy" arguments. See *Mercein v. People*, 25 Wend. 65, 103 (N.Y. 1840).

²²⁰ A few additional illustrations: (a) In *Tyler v. Wilkinson*, 24 F. Cas. 472 (C.C.D.R.I. 1827) (No. 14,312), Justice Story defined and defended the "reasonable use" doctrine in relation to the consumption of water in nonnavigable streams in the following terms: "The true test of the principle and extent of the use is, whether it is to the injury of the other proprietors or not . . . The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and it is not betrayed into a narrow strictness, subversive of common sense, nor into an extravagant looseness, which would destroy private rights." *Id.* at 474. In other words, as much (and only as much) water may be consumed by a particular riparian owner as will make possible beneficial use of the resource without doing any other individual "sensibl[e]" injury. (b) Between 1815 and 1850, the courts in most states amended the common-law doctrines governing a landowner's right to lateral and subjacent support by (i) repudiating the doctrine of negative prescriptive easements and (ii) adopting a rule of no liability for injury to "artificial structures" in the absence of either "negligence" or "malice." Any other regime, they argued, would be both "highly unreasonable and unjust" and "inconsistent with principles of sound policy." *Richert v. Scott*, 7 Watts 460, 463 (Pa. 1838). (c) In the same period and for similar reasons, most states (following the lead of the New York courts) altered the law of adverse possession by (i) requiring possessors who claimed to have acquired title through long occupancy to have had a good-faith belief that they owned the land all along; (ii) adopting strict "tacking" requirements; and (iii) tightening the rules defining "actual" possession. See W. Fisher, *Changing Conceptions of Property as Revealed in the Law of Adverse Possession: 1800-1920* (1982) (unpublished manuscript).

²²¹ See *supra* text following note 206.

²²² This is not to suggest, of course, that all or even most opinions during this era conformed to the pattern; perusal of any given volume of case reports brings to light a variety of different analytical styles. See Scheiber, *Instrumentalism and Property Rights: A Reconsideration of American "Styles of Judicial Reasoning" in the 19th Century*, 1975 WIS. L. REV. 1; Scheiber, *Public Rights*, *supra* note 165, at 233-50. No more and no less is claimed here than that the style described in the text was employed substantially more often in the second quarter of the nineteenth century than in the preceding or succeeding eras.

3. *Connections*

What exactly does one make of the parallelism? The inference that springs most readily to mind is that most appellate judges in this era were Whigs and that their political commitments not surprisingly found expression in their opinions. Indeed, a check of the biographical literature reveals that several of the most influential judges during the period were active supporters of Whig candidates in local and national elections.²²³

For two reasons, however, that explanation does not seem adequate. First, many judges affiliated with the Jacksonian party employed in their opinions the same analytical style.²²⁴ Second, most judges who became Whigs in the second quarter of the nineteenth century had long held similar views, yet this style of reasoning did not become popular until the 1820s.

A more plausible, though necessarily speculative, explanation of the parallelism is that the Whig Party made publicly available a coherent package of related distinctions and attitudes — a package that, as it happened, readily lent itself to use in differentiating legitimate and illegitimate regulations of property. Partly because of its utility, partly because it enjoyed some popularity, partly simply because it lay at hand, judges of all political stripes were wont to draw upon it when fashioning doctrinal responses to novel problems.²²⁵

C. *The Constitutional Status of Slavery*

The most explosive of the constitutional questions confronted by American courts during the antebellum period was the degree to which slave-

²²³ See, e.g., L. BAKER, *JOHN MARSHALL: A LIFE IN LAW* 649-51 (1974); L. LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* 15ff (1957); R. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY: STATESMAN OF THE OLD REPUBLIC* 313, 378 (1985).

²²⁴ For example, Samuel Nelson, author of the opinion in *Nickerson* (discussed *supra* at text accompanying notes 215-19) and later a Justice of the United States Supreme Court, was a lifelong active Democrat. See C. SWISHER, *THE TANEY PERIOD, 1836-64* 220-21 (1974).

²²⁵ The analysis of judicial reasoning offered here parallels the analysis of political discourse during the Revolutionary period offered *supra* in Part I.D. In both contexts, it is suggested, actors were not compelled by a unitary ideology to respond in particular ways to particular events or problems. Rather, they had access to a number of differentiable idioms, and they were to a significant extent free to choose amongst those idioms in making sense of and reshaping their environments.

owners enjoyed protection against various forms of governmental or private interference with their property interests in their slaves.²²⁶ In the past two decades, several aspects of the courts' handling of that problem have received discerning scholarly attention. This section connects those various studies and derives from them some general insights.

A welter of federal and state constitutional provisions arguably bore upon the legal status of chattel slavery: the "slave trade" and "three fifths" clauses of Article I;²²⁷ the "full faith and credit" and "fugitive slave" clauses of Article IV;²²⁸ the "due process" and "takings" provisions of the fifth amendment;²²⁹ various state constitutional guarantees of equality and liberty;²³⁰ and state constitutional prohibitions on interferences with property.²³¹ During the period between the Revolution and the mid-1830s, judges and legislators on both the federal and the state levels and in all regions of the country cooperated in developing an elaborate compromise system for interpreting and implementing these various provisions. The net effect of that regime was to protect and preserve the institution of slavery in the states in which it was already established, but to limit its spread and to allow judges opposed to slavery to indulge with some frequency their "principled preference for liberty."²³²

²²⁶ For discussions of the complex processes by which American slaveowners originally came to be understood to have "property interests" in their slaves, see L. HIGGINBOTHAM, *IN THE MATTER OF COLOR* (1978); W. JORDAN, *WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO, 1550-1812* (1968); E. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM* (1975).

²²⁷ U.S. CONST. art. I, § 9, cl. 1 (preventing Congress prior to 1808 from prohibiting "The Migration or Importation of such Persons as any of the States now existing shall think proper to admit"); U.S. CONST. art. I, § 2, cl. 3 (apportioning Representatives and direct taxes among the states "according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons").

²²⁸ U.S. CONST. art. IV, § 1 (requiring each state to give "Full Faith and Credit . . . to the public Acts, Records, and judicial Proceedings of every other State"); U.S. CONST. art. IV, § 2, cl. 3 (providing that "No Person held to Service or Labour in one State, under the Laws thereof, escaping into another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due").

²²⁹ U.S. CONST. amend. V (providing that "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation"). The origins of the latter provision are discussed *supra* in Part III.A.

²³⁰ See, e.g., Va. Declaration of Rights, art. I, § 1 (providing that "all men are by nature equally free").

²³¹ See, e.g., MASS. CONST. of 1780 Part I, art. 10.

²³² The quoted phrase is from the pathbreaking book by the late Robert Cover. See R. COVER,

More specifically, under the terms of this tacit deal,²³³ slavery was shielded in three ways. First and most importantly, it was agreed that neither the federal Constitution nor the relevant state constitutions impaired the power of southern states, by positive law, to treat slaves as property and thereby to deprive them of most of the entitlements enjoyed by other persons.²³⁴ Second, Congress would provide a federal procedure for identifying and returning slaves who had escaped into the North,²³⁵ and the northern states would comply with their constitutional obligation not to interfere with the recapture and removal of such persons.²³⁶ Third, slaveowners could travel with their slaves in the North without running the risk that they would be emancipated.²³⁷ (In several states, this last-mentioned privilege was secured by statute;²³⁸ in others, though cases on point were rare, it was generally assumed that the courts would apply the principles of comity in a fashion that would recognize and enforce the property rights created by the laws of the slaveowners' states.)²³⁹

JUSTICE ACCUSED 35 (1975). For a review of the terms of the pre-1840 compromise, see G. WHITE, *supra* note 1, at 674-703.

²³³ The most influential exponent and defender of this arrangement — and the commentator most willing to acknowledge its status as a “compromise” — was Joseph Story, who, despite his personal opposition to slavery, continued to his death to defend the arrangement against both the abolitionists and the pro-slavery forces. See R. NEWMYER, *supra* note 223, at 344-58, 365-78.

²³⁴ See, e.g., *Emerson v. Howland*, 8 F. Cas. 634, 636 (C.C.D. Mass. 1820) (No. 4,441) (Story, J.) (accepting the binding force of Virginia law, pursuant to which “[t]he owner of the slave has the most complete and perfect property in him. The slave may be sold, devised, or may pass by descent, in the same manner as other inheritable estate. He has no civil rights or privileges. He is incapable of making or discharging a contract; and the perpetual right to his services belongs exclusively to his owner.”); *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 133, 141 (1806) (Tucker, J.) (holding that the provision of the Virginia Declaration of Rights, quoted *supra* at note 230, “was meant to embrace the case of free citizens, or aliens only; and not by a side wind to overturn the rights of property”); Letter from Justice Joseph Story to Justice Bushrod Washington, Dec. 21, 1821, quoted in G. WHITE, *supra* note 1, at 696 (eschewing any intention to “meddle” with “the question of the right of slavery in general”).

²³⁵ See Fugitive Slave Act, Act of February 12, 1793, ch. 7, 1 Stat. 302. As Justice Story acknowledged, “these provisions for the arrest and removal of fugitives . . . contemplate summary ministerial proceedings and not the ordinary course of judicial investigation.” 2 J. STORY, COMMENTARIES ON THE CONSTITUTION 588-89 (1833).

²³⁶ See R. COVER, *supra* note 232, at 163.

²³⁷ See *id.* at 83-99; P. FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981).

²³⁸ For example, the 1780 Pennsylvania statute that initiated gradual emancipation in the state exempted slaves owned by persons who remained in the state less than six months. An analogous 1817 New York statute permitted slaveowners to remain in the state for nine months without running the risk that their slaves would be freed. See P. FINKELMAN, *supra* note 237, at 46-69.

²³⁹ See, e.g., S. LIVERMORE, DISSERTATION ON THE QUESTIONS WHICH ARISE FROM THE

At the same time, slavery was limited or undermined in four ways. Most significantly, no constitutional provision was deemed to impair either the power of Congress to exclude slavery from the territories or the power of the northern state legislatures to emancipate the slaves within their borders.²⁴⁰ Second, after 1808, Congress forbade the importation of slaves into the United States and provided severe (albeit erratically enforced) penalties for violation of the ban.²⁴¹ Third, when slaves remained in northern states long enough to secure their freedom pursuant to the terms of those states' laws, the courts in southern states abided by those emancipations.²⁴² Fourth, in a wide variety of cases implicating the institution of slavery in marginal ways, federal and state judges construed or altered doctrines of domestic or international law so as to increase the chances that the affected slaves would be freed.²⁴³

Crucial to this complex compromise was general acceptance of the notion that it was legitimate for courts to invoke natural law when deciding cases involving slavery — but only when the relevant positive law was in some way ambiguous or incomplete.²⁴⁴ So, in several of the marginal cases

CONTRARIETY OF THE POSITIVE LAWS OF DIFFERENT STATES AND NATIONS 31-32 (1828), *quoted in* Ely, Book Review, 69 CALIF. L. REV. 1755, 1756 (1981).

²⁴⁰ Accordingly, during this period, most northern states moved to eliminate slavery and Congress, in the Missouri Compromise, excluded slavery from federal territories north of 36° 30'. See D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 107-13 (1978); P. FINKELMAN, *supra* note 237, at 70-100.

²⁴¹ See G. WHITE, *supra* note 1, at 691ff.

²⁴² See P. FINKELMAN, *supra* note 237, at 181-235.

²⁴³ The most famous such case is *United States v. La Jeune Eugenie*, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), in which Justice Story, riding circuit, construed the law of nations so as to uphold an American warship's seizure off the coast of Africa of a slave trader flying a French flag. (See G. WHITE, *supra* note 1, at 692-93 and R. NEWMYER, *supra* note 223, at 347-50 for thorough discussions of the case.) Story's aggressive interpretation of the law of nations was subsequently overturned by the Supreme Court in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825), but even in the latter case, Chief Justice Marshall liberally construed a variety of evidentiary rules so as to free (for subsequent colonization in Africa) the majority of a group of captured slaves. See J. NOONAN, *THE ANTELOPE* 115ff (1977). For other cases evidencing similar "tilts" toward emancipation, see *United States v. Gooding*, 25 U.S. (12 Wheat.) 460 (1827); *The Plattsburgh*, 23 U.S. (10 Wheat.) 350 (1825); *United States v. Smith*, 27 F. Cas. 1167 (C.C.D. Mass. 1823) (16,338); *United States v. La Coste*, 26 F. Cas. 826 (C.C.D. Mass. 1820) (No. 15,548); *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 133 (1806) (generously applying the common-law presumption that persons not exhibiting "negroid features" were not slaves).

²⁴⁴ This interstitial use of natural-law principles may be seen as a (temporary) compromise between the positions taken by Justices Iredell and Chase in their famous debate in *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798). For analyses of the courts' attitudes toward natural law in general during

just mentioned, the judges relied overtly or covertly on the body of natural law writings hostile to slavery in tilting the scales against slaveowning litigants.²⁴⁵ But in cases in which the pertinent statutory or constitutional provisions were, in the judges' opinions, clear, they declined to give weight to competing natural law norms.²⁴⁶ Supported in part by the foregoing jurisprudential principle, American constitutional (and nonconstitutional) doctrine pertaining to slavery remained reasonably stable until the 1830s.²⁴⁷

A number of developments conspired to destabilize this doctrinal structure. Contributing factors included: the expansion of the zone of slavery effected by the Mexican War; Southerners' growing unease, intensified by a few notorious slave revolts, regarding the viability of the system of slavery; and Northerners' corresponding uneasiness regarding Southerners' determination to defend the institution, reinforced by the adoption of the "gag" rules in Congress and the closure of the Southern mails to antislavery literature.²⁴⁸ But foremost of the causes of the collapse of the system was the radicalization of abolitionism in the North during the 1830s.

Antislavery sentiment had been smoldering in the Northern states since the Revolution, sustaining not only the virtual elimination of slavery in the region, but also various proposals for emancipation in the South.²⁴⁹

this period and of how those attitudes affected their responses to cases implicating slavery, see R. COVER, *supra* note 232, at 132-40; G. WHITE, *supra* note 1, at 674-82.

²⁴⁵ For sensitive discussions of Story's use of natural law in *La Jeune Eugenie*, for example, see R. COVER, *supra* note 232, at 101-04; R. NEWMYER, *supra* note 223, at 348-50; G. WHITE, *supra* note 1, at 693.

²⁴⁶ See, for example, the cases cited *supra* at note 234.

²⁴⁷ There were disagreements and regional variations, to be sure. For example, as already mentioned, Justice Story and Chief Justice Marshall parted ways over the status of the slave trade under the law of nations. See *supra* note 243. In *Mima Queen & Child v. Hepburn*, 11 U.S. (7 Cranch) 290 (1813), Marshall and Justice Duvall disagreed regarding whether slaves seeking their freedom should be allowed a special exception to the hearsay rule. Compare *id.* at 295 (no) with *id.* at 299 (yes). And the firmness with which the slave trade statutes were enforced varied substantially by jurisdiction. See R. Newmyer, *supra* note 223, at 349. But, compared with the amount of doctrinal conflict and change in the last 20 years of the antebellum period, these disagreements were minor.

²⁴⁸ See R. NEWMYER, *supra* note 223, at 366; Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

²⁴⁹ See THE ABOLITIONISTS: MEANS, ENDS, AND MOTIVATIONS vii-viii (H. Hawkins ed. 1972); B. BAILYN, IDEOLOGICAL ORIGINS, *supra* note 14, at 232-46; Freehling, *The Founding Fathers and Slavery*, 77 AM. HIST. REV. 81 (1972). The most important national abolitionist organization during this period was the American Colonization Society, which advocated resettling freed slaves in western Africa.

Until 1830, however, the organized abolitionist movement had only a small following and little respectability. One of the most important political effects of the Second Great Awakening²⁵⁰ was the sudden increase in the intensity and popularity of the movement. As many historians have observed, the evangelical uprising, with its vision of a morally purified society and its emphasis on each individual's capacity and responsibility to act as God's instrument in establishing that society, precipitated a shift in the objectives and spirit of abolitionism — from a moderate and "gradualist" approach to a demand for immediate emancipation at any cost.²⁵¹

This change and increase in antislavery sentiment altered the environment in which the courts operated in two ways. First, a new cadre of abolitionist lawyers, often supported by local abolitionist societies, initiated or used private lawsuits to challenge the entire system of slavery. Hitherto, lawyers defending slaves had usually confined themselves to the narrowest arguments likely to free their clients.²⁵² Now slaves' counsel began, whenever possible, to mount frontal assaults on "the peculiar institution."²⁵³ Their arguments varied, but two general claims — both inconsistent with the prevailing doctrinal regime — were advanced with increasing frequency. One group of lawyers insisted that the Constitution did not (as previously had been assumed) protect slavery even in the Southern states against federal legislative or judicial interference. A second, even more radical group contended that various provisions of the Constitution (for example, the due process clause of the fifth amendment) were inconsistent with slavery — and therefore that federal and state statutes supportive of the institution (for example, the Fugitive Slave Act of 1793 and the even more draconian Fugitive Slave Act of 1850) were unconstitutional.²⁵⁴ Common to both arguments was the assertion that judges

²⁵⁰ See *supra* text accompanying notes 168-71.

²⁵¹ See G. BARNES, *THE ANTI-SLAVERY IMPULSE* (1933); D. DUMOND, *ANTISLAVERY* (1961); E. FONER, *POLITICS AND IDEOLOGY*, *supra* note 51, at 65; L. PERRY, *RADICAL ABOLITIONISM: ANARCHY AND THE GOVERNMENT OF GOD IN ANTISLAVERY THOUGHT* (1973); Loveland, *Evangelicalism and Immediate Emancipation in American Anti-Slavery Thought*, 32 J. SOUTHERN HIST. 172 (1966).

²⁵² See R. COVER, *supra* note 232, at 159-60.

²⁵³ For example, the *Aves* cases (discussed *infra* at note 260) was initiated by the Boston Female Antislavery Society, and Ellis Gray Loring, a member of the Garrisonian New England Anti-Slavery Society, organized his argument on behalf of the "the slave Med" around a broad attack on the system of chattel slavery. See P. FINKELMAN, *supra* note 237, at 101-11.

²⁵⁴ The seminal work charting the emergence and arguments of these two groups is W. WIECEK,

who lent even qualified support to slavery were less bound by the Constitution than they pretended and thus were morally responsible for the manner in which they exercised their discretion.²⁵⁵

The second way in which intensified abolitionism altered the legal climate was by sharply increasing public interest in suits implicating slavery. The abolitionist press publicized upcoming cases, analyzed the arguments of counsel, commended emancipatory decisions, and excoriated decisions they deemed pro-slavery.²⁵⁶ Partly as a result, the proceedings of federal and state courts in the northern states were disrupted by mobs with greater frequency. On a number of occasions, abolitionist crowds responded to adverse rulings by rescuing fugitive slaves or persons accused of aiding them.²⁵⁷ Even in cases in which it did not materialize, judges were cognizant of the risk of such reaction.

In sum, after 1830, federal and state courts were presented increasingly often with cases implicating crucial legal buttresses for the system of slavery,²⁵⁸ with briefs and oral arguments containing broad-gauged attacks on that system, and with a public intensely interested both in their pronouncements and in their reasoning. The large majority of judges responded by abandoning the compromise system they had constructed during the previous 40 years,²⁵⁹ but the directions in which they moved varied widely. In two dimensions — in the analytical styles judges employed to resolve cases involving slavery, and in the doctrines they deployed to manage the institution — one can detect major divergences in approach.

THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977), in particular chapter 11. For complementary treatments, see R. NEWMYER, *supra* note 223, at 355; Nelson, *supra* note 248. For a discussion of the arguments of black antislavery constitutionalists, see Kennedy, *Comment on Rowan, Equality as a Constitutional Concept*, 47 MD. L. REV. 46, 48-49 (1987).

²⁵⁵ See R. NEWMYER, *supra* note 223, at 355.

²⁵⁶ See, e.g., D. FEHRENBACHER, *supra* note 240, at 417-48; P. FINKELMAN, *supra* note 237, at 126-27; R. NEWMYER, *supra* note 223, at 376.

²⁵⁷ See, e.g., L. LEVY, *supra* note 223, at chs. 5-6; C. SWISHER, *supra* note 224, at 653-75.

²⁵⁸ Thus for example, prior to 1835, northern state courts rarely were presented with cases involving slaves in transit, see P. FINKELMAN, *supra* note 237, at 70ff, and the United States Supreme Court did not have to confront directly the question of the constitutional status of slavery or the southern slave trade, see R. NEWMYER, *supra* note 223, at 367. After that date, suits of both sorts arose with increasing frequency.

²⁵⁹ The death in 1845 of Justice Story, the most stalwart defender of the old system, accelerated its collapse.

On the doctrinal level, the nature and range of the courts' responses are well-known. Perhaps the most obvious of the developments was the collapse of reciprocity in state judges' handling of slave-transit cases: Northern judges became less and less willing to allow visiting Southerners to retain ownership of their slaves,²⁶⁰ while Southern judges became less and less willing to recognize the emancipatory effect of travel in the North.²⁶¹ At least one Northern court declared unconstitutional the federal Fugitive Slave Law,²⁶² while the majority of federal and state courts upheld the act.²⁶³ Finally and most controversially, while most judges continued to believe that Congress enjoyed the authority to exclude slavery from the territories, a growing group on the United States Supreme Court disagreed,²⁶⁴ eventually announcing their position in the disastrous *Dred Scott* case.²⁶⁵

²⁶⁰ The leading cases are Chief Justice Shaw's decision in *Commonwealth v. Aves*, 18 Pick. 193 (1836), and the ruling by the New York Court of Appeals in *Lemmon v. People*, 26 Barb. 270 (1857). As Paul Finkelman has recently made clear, several other northern state courts followed Shaw's lead, see P. FINKELMAN, *supra* note 237, at 126-80, although, as Finkelman's critics have indicated, a few courts, particularly in the mid- and far-west, hewed to the old line, see, e.g., Ely, *supra* note 239, at 1757-58.

As Aviam Soifer has pointed out, the majority of northern judges who after 1830 increasingly were willing to free slaves in transit did not thereby "reject" or "alter" the law of comity. On the contrary, they continued to insist that the governing principle was that the courts of one state will give effect to entitlements established pursuant to the laws of another only when doing so does not violate the public policy of their own jurisdiction. The change in approach resulted from a shift in their conceptions of the "public policy" of their jurisdictions. See Soifer, *Compromise at the Boundaries of Bondage*, 10 REVS. AM. HIST. 185, 190 (1982). In making this adjustment, some courts were likely affected by the views of their local legislatures, many of which in the years after 1840 repealed the statutes guaranteeing slaveowners safe passage. See T. MORRIS, *FREE MEN ALL: THE PERSONAL LIBERTY OF THE NORTH, 1760-1861* ch. 7 (1974).

²⁶¹ See P. FINKELMAN, *supra* note 237, at 181-235.

²⁶² See *In re Booth and Rycraft*, 3 Wis. 157 (1855); *In re Booth*, 3 Wis. 13 (1854).

²⁶³ See, e.g., *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1852); *Prigg v. Pennsylvania*, 40 U.S. (16 Pet.) 539 (1842); *Sims' Case*, 7 Cush. 285 (Mass. 1851). For a modern criticism of the position taken by these courts, see Dworkin, *The Law of the Slave-Catchers*, TIMES LITERARY SUPPLEMENT, Dec. 5, 1975, at 1437. For a modern defense of their assertion that they were obliged to uphold the statute, see Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1284 (1987).

²⁶⁴ For an early statement of this position, see *Groves v. Slaughter*, 15 Pet. 449, 515 (1841) (Baldwin, J.).

²⁶⁵ *Dred Scott v. Sanford*, 19 How. 393 (1857). For analyses of the various theories advanced by different members of the majority to support this result, see D. FEHRENBACHER, *supra* note 240, at 305-414; Corwin, *The Dred Scott Decision, in the Light of Contemporary Legal Doctrines*, 17 AM. HIST. REV. 52, 59-67 (1911). For a recent essay arguing that the Justices' divergence in opinion was less than is commonly supposed, see Vishneski, *What the Court Decided in Dred Scott v. Sanford*,

The variety of the judges' reactions on the stylistic level is less well-known but equally important. As Robert Cover and, more recently, James Boyd White have argued, many judges "retreated" to a rigid formalist positivism.²⁶⁶ Purging their opinions of references to natural law,²⁶⁷ they looked for guidance to the language of the pertinent constitutional or statutory provisions or (anticipating modern "contractarian" styles of statutory interpretation)²⁶⁸ tried to interpret the applicable provisions in the light of the "deals" struck by competing interest groups at the time of their adoption.²⁶⁹ Cover overstated his case, however, in suggesting that all judges moved in the direction of formalism. William Nelson may have exaggerated equally in contending that "instrumentalism" was the dominant style in slavery cases decided in the two decades prior to the Civil War,²⁷⁰ but he was right that some courts attempted frankly to decide cases so as to advance "public policy" — in particular, the preservation of the Union and the maintenance of a labor system they deemed essential to the profitable cultivation of cotton.²⁷¹ Finally, some judges in the North

32 AM. J. LEG. HIST. 373 (1988).

²⁶⁶ See R. COVER, *supra* note 232, at 159-91; White, *Constructing a Constitution: "Original Intention" in the Slave Cases*, 47 MD. L. REV. 239 (1987).

²⁶⁷ G. Edward White argues plausibly that the strain of the slavery cases prompted the Supreme Court to begin to distance itself from natural law theory as early as its 1825 decision in *The Antelope* (discussed *supra* at note 243). See G. WHITE, *supra* note 1, at 701-03. After 1830, however, the retreat became more general.

²⁶⁸ See, e.g., Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); R. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution* (Oct. 1986) (unpublished manuscript).

²⁶⁹ For example, in *United States v. Amistad*, 40 U.S. (15 Pet.) 156 (1841), Justice Story, whose opinion nineteen years earlier in *La Jeune Eugenie* was one of the leading examples of effective interstitial use of natural law (see *supra* note 243), confined himself for the most part to a literal reading of the Treaty of 1795 with Spain (concluding that slave mutineers did not come within the meaning of the terms "pirates or robbers") in setting free the 40 slaves before the Court. See R. NEWMYER, *supra* note 223, at 368-69. Similarly, in *Dred Scott*, Chief Justice Taney adopted a radically positivist interpretation of the pertinent constitutional provisions, seeking to derive determinate interpretations of the clauses from the common understanding of the members of the polity at the time of their ratification. See White, *supra* note 266, at 256-60. This style of argument was certainly not unknown prior to 1830, see, e.g., *Hudgins v. Wrights*, 11 Va. (1 Hen. & M.) 133, 139-41 (1806) (construing the Virginia Declaration of rights in light of popular customs and understanding at the time of its adoption). But it became much more common after that date.

²⁷⁰ See Nelson, *supra* note 248, at 538-47.

²⁷¹ See, e.g., *The Latimer Case*, 5 Law Rep. 481 (Mass. 1851); *Sim's Case*, 61 Mass. (7 Cush.) 285 (1843); *Ross v. Vertner*, 4 Miss. 120, 142, 5 Howard 305, 360 (1852); *Scott v. Emerson*, 15 Mo. 576, 586 (1840).

took neither route; instead of muting the moralistic aspect of the pre-1830 analytical style, they amplified it, concentrating on the immorality of slavery and their duty to do what they could to confine or suppress it.²⁷²

The net long-term impact of these diverse innovations is difficult to estimate.²⁷³ The complexity of the ramifications is suggested by the venerable debate concerning the effects of a single decision, the 1842 ruling of the Supreme Court in *Prigg v. Pennsylvania*.²⁷⁴ The opinion of the Court, written by Justice Story, held in pertinent part that a state kidnapping statute violated the Constitution to the extent the statute interfered with the efforts of a slavecatcher to capture and return a fugitive slave. Although the decision was roundly denounced by abolitionists,²⁷⁵ Story seems to have thought that, by imposing on the federal government the entire job of orchestrating the return of fugitives, his ruling would impede the activities of slavecatchers and thus represented a "triumph of freedom."²⁷⁶ Some modern scholars disagree, pointing out that when, eight years later, Congress shouldered the burden of designing a comprehensive and exclusively federal system for returning fugitives, the procedures it adopted were more summary and prone to error than anything a northern

²⁷² See, e.g., *In re Booth*, 3 Wis. 13, 18-48 (1854) (declaring the Fugitive Slave Act of 1850 unconstitutional, in the face of a contrary decision by the United States Supreme Court, on the ground that it violated "the first principles of natural law . . . a paramount law — the fundamental law, to which each and all are equally bound"). See also Osgood, Book Review, 1 L. & HIST. REV. 155, 157 (1983) (reviewing P. FINKELMAN, AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY (1981)). For an argument that Justice Story, in his opinion in *Prigg v. Pennsylvania*, 40 U.S. (16 Pet.) 539 (1842) (discussed *infra* at text accompanying notes 274-76), continued to draw upon a tempered, contextual theory of natural law, see Note, *Justice Story, Slavery, and the Natural Law Foundations of American Constitutionalism*, 55 U. CHI. L. REV. 273 (1988).

²⁷³ One effect of the divergence in the analytical styles exemplified in the slavery cases may have been to undermine and discredit the distinctive blend of "policy" and "equity" arguments currently being used by the courts to reshape other common-law and constitutional doctrines, see *supra* Part III.B.2., thus opening the way for the emergence of the post-bellum "Classical Style" of judicial reasoning. Cf. Nelson, *supra* note 248 (offering a somewhat different account of the relationship between abolitionism and classicism). An assessment of that interpretation must await another paper.

²⁷⁴ 40 U.S. (16 Pet.) 539 (1842).

²⁷⁵ See R. NEWMYER, *supra* note 223, at 372.

²⁷⁶ The principal source of information regarding Story's views on this score is the (not altogether reliable) biography published in 1851 by his son, William Wetmore Story. See 2 LIFE AND LETTERS OF JOSEPH STORY 391-93 (W. Story ed. 1851). For an explication of Story's position, see T. MORRIS, *supra* note 260, at 103-06. Some support for it may be found in Finkelman, *Prigg v. Pennsylvania and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5 (1979).

state would have been likely to institute.²⁷⁷ To which it might be responded: the passage of the Fugitive Slave Act of 1850 lent considerable credibility to the forces in the North whose subsequent combination into the Republican Party would spark the Civil War,²⁷⁸ which, for all its horror, was the only way slavery in the United States could have been abolished reasonably expeditiously. The ultimate impact of the corpus of post-1830 decisions is comparably uncertain.²⁷⁹

CONCLUSION

The three case studies just completed illustrate three general ways in which ideological and religious currents have influenced the development of constitutional doctrine in the United States. The judicial adoption of the "just compensation" principle is an instance in which popular consensus on a particular issue substantially affected both the content of the provisions incorporated in the federal and state constitutions and the interpretations thereof adopted by the courts. Despite large differences between the political outlooks and religious denominations available to Americans in the late eighteenth century, there existed widespread agreement on the illegitimacy of uncompensated outright expropriation of private property. As a result, although the particular institutional arrangement that would be devised to curtail uncompensated "takings" was indeterminate, the development of some system for shielding individual holdings from legislative interference was highly likely.

The evolution of the legal principles that, in the second quarter of the nineteenth century, gave shape to the "vested rights" doctrine is an instance in which a combination of religious and political themes, rather than guiding or constraining the courts' decisionmaking, provided judges a rhetorical resource when confronting a novel problem. The distinctive configuration of attitudes toward economic development, special privileges,

²⁷⁷ For development of this and other objections to Story's view, see R. NEWMYER, *supra* note 223, at 372-78; White, *supra* note 266, at 252.

²⁷⁸ See E. FONER, *FREE SOIL, FREE LABOR, FREE MEN* 124-33 (1970).

²⁷⁹ For some contrasting views, see P. FINKELMAN, *supra* note 237, at 313-18 (arguing that the Republicans were correct in seeing in the decisions of the federal courts in the 1850s a trend toward the "nationalization of slavery" and implying that they responded appropriately to the threat); Ely, *supra* note 239 (arguing that the trajectory outlined by Finkelman was extremely unlikely).

public morality, and individual rights popularized by the Second Great Awakening and the emergent Whig Party provided state and federal judges an analytical template — a collection of related distinctions and justifications — they could and did employ when devising ways to distinguish legitimate from illegitimate governmental regulations of private property.

The development of the set of constitutional doctrines pertaining to chattel slavery is an instance in which a religiously-inspired popular movement forced the abandonment of an elaborate doctrinal edifice but had only limited control over the content of the rules and arguments that replaced it.²⁸⁰ The delicate compromise engineered by state and federal judges between 1790 and the 1830s could not withstand the assaults of the radicalized abolitionist movement, but its collapse precipitated enormous variety in both the modes of reasoning and the substantive positions adopted by the courts.

One comes away from these three case studies, not with the impression that broad ideological currents were the principal determinants of doctrinal development during this period,²⁸¹ nor with a sense that belief-systems were of marginal importance,²⁸² but with an appreciation of the diversity of ways in which a complex array of religious and political sentiments impinged on the law.

In addition, each of the case studies, when set against the backdrop of Parts I and II of this Article, suggests a general question that merits greater attention by both historians and constitutional scholars. The first of the studies asks us to reconsider an age-old puzzle: In view of the fact that the “just compensation” principle presented a formidable obstacle to the redistribution of wealth, from which many Americans in the late eighteenth century would have benefited, how can one account for the ab-

²⁸⁰ For an analogous development, see Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980) (ideology of liberalism forced abandonment of a doctrinal system that recognized the legitimacy of semi-public, semi-private institutions but did not determine what doctrinal system would take its place).

²⁸¹ For an example of an essay implicitly adopting this perspective, see Katz, *Republicanism and the Law of Inheritance in the American Revolutionary Era*, 76 MICH. L. REV. 1 (1977).

²⁸² For examples of essays adopting this perspective, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 12 (2d ed. 1985); Fede, *Legitimized Violent Slave Abuse in the American South, 1619-1865: A Case Study of Law and Social Change in Six Southern States*, 29 AM. J. LEG. HIST. 93 (1985).

sence of any significant challenge to that principle? The answers supplied by Marx and Gramsci,²⁸³ though helpful, are too general to be adequate. We need to know more about which groups of colonists subscribed to which of the five outlooks “in the air” at the time, and how they came to find those views compelling.²⁸⁴

The second prompts the question: What cultural mechanisms during the early nineteenth century facilitated or impeded the transmission of ideas and modes of reasoning from nonlawyers to lawyers — and vice versa? To answer it we need to know more about how particular groups of lawyers were educated, whom they associated with, and what they were reading²⁸⁵ — as well as who was listening to them.²⁸⁶

The third case study adds a comparative dimension to a question being asked with increasing frequency by contemporary scholars: Is constitutional adjudication an effective way of achieving broad social reforms in the United States?²⁸⁷ The lesson of radical antislavery constitutionalism is

²⁸³ See Marx, *On the Jewish Question* (1843), reprinted in *THE MARX-ENGELS READER* 24-51 (R. Tucker ed. 1972) (relegation of religion and property ownership to the private sphere in the United States has resulted neither in the withering away of superstition nor in the redistribution of wealth because Americans have ceased to see such matters as subject to collective determination, failing to recognize that human liberation might involve more than religious freedom and freedom to hold and alienate property); A GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Q. Hoare & G. Smith eds. 1971) (class rule is ordinarily sustained not by force but by cultural hegemony, the (qualified) acceptance by “the great masses of the population” of a belief system that justifies the existing distribution of wealth and power); Lears, *The Concept of Cultural Hegemony: Problems and Possibilities*, 90 AM. HIST. REV. 567 (1985) (applying Gramsci’s insights to the United States).

²⁸⁴ See *supra* text accompanying notes 70-71 (discussing the need for more information regarding the demographics of the constituencies of the five outlooks).

²⁸⁵ In other words, we need more studies like Jonathan Messerli’s neglected book on the intertwined legal and political careers of Horace Mann, see J. MESSERLI, *HORACE MANN: A BIOGRAPHY* (1972), R. Kent Newmyer’s biography of Justice Story, see R. NEWMYER, *supra* note 223, and Alfred Konefsky’s recent discussion of the overlapping cultures of lawyers and merchants in Boston between the Revolution and the Civil War, see Konefsky, *Law and Culture in Antebellum Boston*, 40 STAN. L. REV. 1119 (1988).

²⁸⁶ See, e.g., R. FERGUSON, *LAW AND LETTERS IN AMERICAN CULTURE* (1984) (documenting the rise and fall during the antebellum period of the prestige and influence of law in literary culture); R. NEWMYER, *supra* note 223, at 83-92, 237-62 (describing Story’s efforts in his opinions, grand jury charges, and law school lectures to (re)educate New Englanders in a particular brand of republicanism).

²⁸⁷ As regards the expansion of civil rights, see, e.g., Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Kennedy, *Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott*, 98 YALE L.J. 999 (1989). As regards women’s control over their bodies, see, e.g., M. GLENDON,

ambiguous. Efficacy may not be the only criterion by which to assess efforts to use the Constitution to secure fundamental social change, but it is surely one relevant measure.

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