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SALMON P. CHASE, LEGAL COUNSEL FOR FUGITIVE SLAVES: ANTISLAVERY IDEOLOGY AS A LAWYER'S CREATION

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SALMON P. CHASE, LEGAL COUNSEL FOR FUGITIVE SLAVES:
ANTISLAVERY IDEOLOGY AS A LAWYER'S CREATION

by

Charles August Banker

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE

MASTER OF ARTS

APPROVED, THESIS COMMITTEE:

[Signatures]

Harold M. Hyman, Professor of History, Chairman
Ira D. Gruber, Professor of History
John B. Boles, Professor of History

Houston, Texas
May, 1986
ABSTRACT

"SALMON P. CHASE, LEGAL COUNSEL FOR FUGITIVE SLAVES:
ANTISLAVERY IDEOLOGY AS A LAWYER'S CREATION"

Charles August Banker

Salmon P. Chase's doctrine of "Freedom National" expressed in In re Matilda formed the theoretical basis of "moderate" antislavery thinking. Chase's 'legal mind' provides an important historical context for understanding his antislavery doctrine, which sought the separation of the national government from all connection with slavery and hoped for its 'eventual demise' throughout the nation. Paralleling the legal profession's encouragement of the public/private distinction in law by developing the notion of the private law being a 'science' based upon the 'first principle' of the right of property Chase's doctrine of "Freedom National" may be termed a 'science of public law' based upon the 'first principle' of 'liberty'. Much like the legal profession's encouragement of judicial authority based upon equity which could embrace the commercial evolution of property, Chase's doctrine proposed a kind of 'Congressional equity' to guarantee the gradual perfection of liberty and the eventual demise of slavery.
ACKNOWLEDGMENTS

Much appreciation to Professor Hyman for encouraging me to pursue this rewarding study and for his careful insights along the way. Also much thanks to my colleagues and friends, Jim Peterson and Ken DeVille for their attentive ear and helpful insights in the midst of my often vague wranglings about 'context,' 'hermeneutics,' and other such "irrepressible conundrums." Special thanks also goes to Mandy Hughes and Steve Kinney for their encouragement of my work on this paper. And finally, much gratitude to Salmon P. Chase, and his example as a lawyer representing the property-less in our society.
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PREFACE

This essay was written in partial satisfaction of the requirements for a joint degree in law and in history at the University of Houston Law Center and Rice University, respectively. As a future lawyer, my exposure to legal and constitutional history raised the difficult question which is explicit in the very creation of the 'joint program': the lawyer's need, understanding and/or use of history in the practice of law. Law school taught me that the measure of history was its effectiveness as legal argumentation in a courtroom. My graduate studies at Rice, however, taught me that history should be measured by the devotion of an historian to uncovering its contextual 'truth.' Of course, these two views are polar opposites, and, therefore, obviously present an extremely difficult tension for someone like myself who has been imbued with the 'higher ideals' of liberal studies, and, at the same time, will need, for the sake of psychological and monetary survival, to adhere, in certain degree, to the pragmatic, and often valueless dictates of the contemporary legal scene. The 'new' legal history expounded by law school professors from Hurst to Horwitz to Kennedy meant to provide some solace for 'types' like myself, but alas it seems only to have encouraged my pursuit to find 'where the twain shall meet, if at all, between law and history. This essay demonstrates such a 'grappling' with the deeper issues, which expressed itself in a concern with
the question of methodology, and, in turn, made it possible, I think, to write any history at all.
INTRODUCTION

Abraham Lincoln stated in his first debate with Stephen Douglas in August of 1858: "I believe if we could arrest the spread [of slavery] and place it where Washington, and Jefferson, and Madison placed it, it would be in the course of ultimate extinction, and the public mind would, as for eighty years past, believe that it was in the course of ultimate extinction. The crisis would be past."¹ This statement gives voice to the central tenet in the development of Republican political ideology as it was formulated in response to the problem of slavery. Termed a policy of "containment," it was not simply an inspiration of Lincoln in the heat of debate, but was founded in the decades preceding, in the antislavery struggle, particularly after 1830, to politicize and Constitutionalize the problem of slavery.² Antislavery lawyer Salmon P. Chase conceived of the basic idea as early as 1836, articulating it for the first time in his brief to an Ohio court in the case of In Re Matilda.³ "Freedom National, Slavery Sectional" became the rallying cry of Chase's Liberty Party in the 1840s, and later of the Republican party, which endorsed the idea in their political platform of 1856 and 1860.⁴ This was the Constitutional way of getting rid of slavery, and simply stated, demanded what the Framers of the Constitution demanded. Chase himself summed up the proposition when he stated: "The Constitution
found slavery and left it a state institution - the creature and dependent of state law - wholly local in its existence and character. It did not make it a national institution."⁵ Just the opposite. The Framers were committed to restricting it from any territories where it had not gone and even legis-lating in hope of its eventual demise elsewhere.⁶

To most ardent abolitionists this seemed a compromise of principle.⁷ If slavery was morally wrong, then it was wrong everywhere and the government of the United States, being one based on freedom and human dignity, was obliged to cut away immediately the canker of human bondage.⁸ Within these moral confines, there was no place for ambivalent words like "its eventual demise."⁹ This led to a split in the cause against slavery, resulting in what Salmon Chase saw as a differentiation between the advocates of moral platitudes (Abolitionists) and those of pragmatic constitutional politics (Antislavery).¹⁰ Abolitionists' aims, wrote Chase, "cannot be affected by political power," they "may go farther than discretion may warrant," they "may set up standards to which the masses cannot be brought."¹¹ In contrast, antislavery's aims were political. They sought the separation of the federal government from slavery, and its deliverance from the Slave Power. Therefore, wrote Chase, "abolition is not properly speaking a political object, antislavery is."¹² President Lincoln, for one, obviously adhered to Chase's viewpoints. Again, in his debate with
Douglas he claimed that the doctrine of "Freedom National" was the only policy the Constitution appeared to leave open, and more important, to retreat from it would be to accept as inevitable what he called "the perpetuity and nationalization of slavery."13

Historians have acknowledged the influence of Chase's "moderate"14 antislavery thinking upon later political developments, seeing it as an important thread running through pre and post war Republican politics and constitutionalism; and furthermore, they have seen it as influencing not only Republican ideas and actions in regards to the Reconstruction Amendments, but conservative developments in the post war judicial arena as well -- particularly expressed in a reluctance to alter fundamentally the federal system.15 The early classic works on antislavery law and politics by historians Jacobus ten Broeck and Howard Jay Graham16 provide a helpful general analysis of the constitutional theory and rhetoric of lawyers and politicians during the antislavery period. Although their work capably demonstrates the genesis of ideas that were later relied upon by the framers of the Reconstruction amendments, it does not offer any explicit analysis of 'how' and 'why' these antislavery ideas and doctrines developed as they did.

More contemporary historical scholarship, however, building upon these early works has been more specific in addressing the issue. Their explanations of the development of
"Moderate antislavery doctrine has taken several avenues: 1) the antislavery and later Republican commitment to Constitutionalism, particularly traditional views of the federal balance between nation and state;¹⁷ 2) the fear of the Slave Power and the general impulse to promote capitalist expansion through free labor;¹⁸ 3) the instrumentally conservative nature of the American judiciary, particularly when it came to political and constitutional reform;¹⁹ and finally, 4) the practical fluidity of constitutional theory in being shaped by the popular interests of the era.²⁰ Besides contributing sound scholarship, it is essential to recognize that all these views, including those of ten Broeck and Graham, attribute singular importance to the role of lawyers in effecting the development of antislavery doctrine.

Lawyers, however, in each instance, are treated as instruments of either higher political ideals, on the one hand, or pragmatic political interests on the other. They are not viewed as individuals influenced by the corporate concerns of legal professionalism, and, therefore, able to shape in their own unique way antislavery politics and constitutional law. An important reason for this historical oversight is the apparent ambiguity in historical scholarship over questions of methodology, and the proper boundaries for the respective disciplines of traditional 'narrativist' history and the 'new' legal history. To understand more fully the role of 'historical context' in doing history can help to define
these 'boundaries' and, at the same time, encourage needed dialogue between two differing views of the historical enterprise. More importantly, for immediate interests in an understanding of the use the following essay, of 'historical context' as it pertains to the development of antislavery ideology reveals the centrality of the antebellum legal profession in determining 'how' and 'why' that ideology developed as it did. Indeed, an answer to the contextual question, "What are characteristics of antislavery ideology that help to determine a context for its study?" demonstrates that antislavery ideology was comprised of legal elements and characteristics, particularly those of the lawyer's mind in the 1830s and 40s which were encouraged and legitimated by legal professionalism.

In 1836, Salmon P. Chase was legal counsel for a fugitive slave girl named Matilda. There, in an Ohio court, before the antislavery cause and politics and constitutional rhetoric were in vogue, and just shortly after Chase himself became involved in the movement, he submitted a brief on Matilda's behalf. Acting as a lawyer and not as a politician, Chase fathered the doctrine of "Freedom National". It was a lawyer's doctrine and it expressed the professional legal mind in the 1830s with its various interests, propensities, and intrinsic limitations. The 'lawyer's mind,' then, which might be termed the lowest common denominator in the American federal system, provides an
important, if not necessary, 'historical context' for an understanding of the development of a particular strain of antislavery ideology, and its Republican prodigy.

The following essay elaborates this idea. First, Chapter I discusses the antebellum 'legal' mind as a context for examining fugitive slave case law, and explaining more fully particular aspects of the "moderate" brand of antislavery ideology. Chapter II examines the 'legal' and political mind of one antislavery lawyer, in particular, Salmon P. Chase. Chapter III discusses the application of that mind in an analysis of Chase's influential doctrine of 'Freedom National' as developed in the case of In re Matilda. And finally, as a "Methodological Postscript," the importance and dynamics of developing an historical context for legal history is examined in light of contemporary legal historical scholarships.
NOTES


3. Speech of Salmon P. Chase in the Case of the Colored Woman Matilda (Cincinnati, 1837).


11. Salmon P. Chase to Charles D. Cleveland, October 22, 1841, Chase Papers, Library of Congress. "In a country like ours, " Chase explained, "there must always be a close relationship between "moral revolutions and political revolutions." Moral awakenings necessarily came first, sparked by the outrage of "the most ardent, the most jealous and the most determined." Only in the sphere of moral reform, quite free from mundane considerations of profit or politics, could abolitionists "set up standards to which it

12. Chase to Thaddeus Stevens, April 8, 1842, Stevens Papers, L.C. As cited in Foner, p. 80.


14. For an elaborate explanation of the different strands of antislavery jurisprudence, see William J. Wiecek, The Sources of Antislavery Constitutionalism 1760-1848 (Ithaca, 1977).


22. Chase biographers suggest that Chase became committed to antislavery in 1835 shortly after an antiabolitionist mob burned the publishing office of James Birney's Philanthropist. See e.g., Albert Bushnell Hart, Salmon Portland Chase (Boston, 1899).
CHAPTER I
ANTEBELLUM LAWYERS AND THEIR 'JEALOUS MISTRESS':
LEGAL REPRESENTATION AS HISTORICAL CONTEXT

Any story about lawyers, or the American legal system in or around the 1830s inevitably begins where most historians do, with a quote from Alexis de Tocqueville.¹ He wrote in 1832: "The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, the lawyers take possession of it, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice."² Since he was more an early sociologist than political philosopher, Tocqueville could describe but not fully comprehend this phenomenon of the lawyer's "aristocratic" role in American society.³ To explain it fully he would have had to talk about Locke and Hobbes, and the Glorious Revolution, and would have needed to be more precise about the distinctiveness of American political realities such as federalism, democracy, and Republic. Tocqueville, nonetheless, observed a central characteristic of the American legal system: with no princes or Crown, the locus of authority in American democracy became the law and its lawyers. It is important, however, to go beyond Tocqueville - to discuss briefly the nature and significance of this kind of authority - to ask where it came from and why -
to indulge in a bit in Locke and Hobbes.

Although political theory is often at odds with political reality, the theoretical can help to dissect and explain, particularly in retrospect, political realities as they existed in history. Affected with the seeds of Lockian natural rights humanism, the English Parliamentary system, however, after the Glorious Revolution, was essentially Hobbesian in placing the locus of authority or sovereignty fully in the legislature – as a "final, unqualified, indivisible power." The English rejected the important liberal notion of "social contract," relegating volition or consent to at most a secondary role in determining the obligations of men or citizens. To be sure, there was no need for social contract since the Revolution was essentially a "propertied" revolution, and the nature of representation afterward assured that the interests of the aristocratic vanguard would remain protected. This kind of representation, however, did not allow for the phenomena of colonial self government. Independence was inevitable as the propertied classes in America grew in political strength and sophistication. So went the cry "no taxation without representation," and, not surprisingly, along with it, the rhetoric of Lockian natural rights and social contract.

But, in the newly formed United States, were Tocquevillian lawyers ready and willing to fill the void in a government not designed for an aristocracy? Although Jeffersonian
agrarianism had won over Hamilton's elitism, social contract rhetoric, was replaced with pragmatic constitutional negotiation. America had a government made up of internal checks and balances, and most importantly, a government composed of a federal structure, all designed to support the notion of democratic representation. At first, the need for lawyers wasn't as obvious since, in the early Republic years, America was more homogeneous, and its own 'propertied' interest essentially comprised the seat of government in both state and nation. But with the territorial expansionism, population growth, state-making and greater social mobility of the Jacksonian era, Hamilton's darkest fears of the excesses of democracy -- the tyranny of majority rule by the masses -- were beginning to come to light. Lawyers by the early 1830's were readily filling the void left in a government not designed for an aristocracy, but in which a propertied aristocracy nonetheless existed. In the end, the institutions of American democracy not only created, but particularly in the case of federalism, came to sustain Tocqueville's lawyer class.

In America, then, property-holders were assured to have their interests protected not by a representative system stacked in their favor as in England, but by a different kind of representation: the attorney-client relationship. To perfect this relationship -- America's own tainted form of representative democracy -- lawyers during this period sought
to consolidate their power by becoming self-consciously professional. This effort took various forms, but begins with a simple exhortation to priority. Timothy Walker in 1844 wrote in the *Western Law Journal* about the key to "professional success:"

*I will further add...that to be successful lawyers, you must be nothing but lawyers. By this I mean, that the law must be your exclusive pursuit. You cannot be men of all work, and lawyers beside, any more than you can be in two places at the same time. - The Law is said to be a jealous mistress, and in this respect you will find her so. She must and will have your exclusive devotion, or else she will discard you altogether...*

This "exclusive devotion" of the lawyer to his "jealous mistress," Walker revealed further on, is necessary to fully protect the interests of his client. The Law, he wrote, "requires all the time and talents you can command; and just in proportion as you divert them to other absorbing pursuits, you discourage clients from employing you, because you disable yourselves from attending to their interests." This identification of a lawyer's commitment to law with that of his commitment to his client is not surprising in a period which inaugurated and encouraged the progressive "privatization of American Law." This is also not surprising that Walker would identify the primary temptress of a lawyer's all-absorbing devotion to his presumably virtuous as well as "jealous mistress" as the lure of politics. By 1844, when Walker wrote, Jacksonianism had taken advantage of the representative altruism of
America's political democracy. Majoritarian rule by the "common man" was the order of the day, and, therefore, the lawyer's client could never be assured that his interests were secure via the public law. However, as Walker persuasively tried to put it, the public realm was not only harmful to the best interests of legal clientele, but similarly harmful to the personal ambitions of lawyers. As faithful representative of private interest, his warning to lawyers reveals his as well as his clientele's loathing for the vicissitudes of the Jacksonian persuasion.

What can be more ephemeral than the reputation thus acquired? The popular favorite to-day is the object of reproach tomorrow. The idol of one party is libelled by the other. The greatest lover of the people must admit that they are exceedingly capricious in their likes and dislikes. They smile and frown, applaud and hiss, almost in the same breath. Walker would not be taken in by such a "strange infatuation."

His priorities were in place. "And had I the most burning thirst for fame," he wrote, "and the power to choose what kind it should be, I would be a Mansfield rather than a Pitt, a Marshall rather than a Jefferson." Without these priorities, the lawyer would not just be subject to the political whims of the masses, but more importantly, and underlying the whole of Walker's pastoral, he would be "discarded altogether" by his private clientele, that "jealous mistress." In the end, the lawyer must "be assured...that professional and political success rarely go together. To obtain one, you must renounce all hope of the
other."

Were lawyers reading this article convinced of their private as against a public calling? Had they forgotten that the American Revolution and Constitution were actually the work of earlier generations of lawyers? Would they, in the end, like Walker, really prefer Marshall over Jefferson or Madison, even if his client so advised? His answer would probably be "no" to all of these, but as Walker acknowledged, this was indeed a different generation of lawyers, as well as of Americans. On the one hand, Jacksonianism ran rampant, taking full advantage of the American system of representative democracy, and on the other, America was becoming an increasingly prosperous nation - more people with more wealth and private holdings. These individuals sought an alternative kind of representation by way of the American bar. The outcome of this dynamic was a well-defined distinction between the public and private realms of law. Although there were earlier anticipations of this distinction in American as well as European political history, it was during this period that a fundamental conceptual and architectural division in the way law was understood on the American scene took place. The "public law" came to embrace constitutional, criminal, and regulatory law, while everything else was relegated to the law of private transactions - torts, contracts, property, and commercial law. With lawyers working overtime to protect their client's interests
and perfect their representative duties, the area of private law developed in profound and creative ways with far-reaching legal and social impact.20 Besides the well-documented emergence of the "will theory of contracts" and the law of negligence in tort, significant and creative developments occurred in areas once particularly reserved for the public domain but now increasingly becoming "privatized."21

The novel separation between public and private corporations, decided as early as 1819 in Dartmouth College v. Woodward,22 illustrates the tension between the public and private domains as well as the innovative application of the lawyers' mind in representing the private interest. Although, generally, a corporation consisted of private shareholders, its legal character had traditionally been that of a public institution created by legislative authority for public purposes and subject to governmental regulation and control.23 However, in the early part of the nineteenth century, the old public corporation model emerged as a vehicle of private business interests for the purpose of accumulating capital.24 Tension between the public and private interest became greater. Any political leaders thought the people should be able to maintain some legislative control over the corporation; private investors insisted that it should be free from any form of state regulation to insure the protection of their investment.25

An attempt in resolving their tension occurred in 1814
in the United States Supreme Court. Daniel Webster represented before the Court the investors in Dartmouth College who were attempting to prevent the New Hampshire legislature from altering the original charter of the college. Webster argued that Dartmouth College was a private and not public entity, and thus beyond legislative interference. However, he won the Court's attention when he adroitly argued that the college charter composed "all the essential constituent parts of a contract." Expounding a will theory of contract, Webster stated, "There is something to be contracted about, there are parties, and there are plain terms in which the agreement of the parties on the subject of the contract is expressed. There are mutual considerations and inducements." He then concluded by asking the Court, "And is there any difference, in legal contemplation, between grant of corporate franchises and a grant of tangible property?" Although the Court in a vote of 5 to 1 answered him with a resounding "Nay!," they left in the decision a caveat that allowed state legislatures via incorporation acts to continue in specified ways to restrain corporate power.

The case contributed to the nineteenth-century distinction between the public and private domains in American law. It also revealed the "modus operandi" of that distinction - who fostered it and why, and who benefited. In his brief to the Court, Webster left nothing to the historical imagination: Jacksonianism was the devilish culprit with
which the private property interest had to contend. Only behind the fortress of private law could this interest be assured protection and allowed to fully prosper. Webster eloquently stated:

The case before the court is not of ordinary importance, nor of everyday occurrence. It affects not this college only, but every college, and all the literary institutions of the country. They have flourished hitherto, and have become in a high degree respectable to the community. They have all a common principle of existence, the inviolability of their charters. It will be dangerous, a most dangerous experiment, to hold these institutions subject to the rise and fall of popular parties, and the fluctuations of political opinions. If the franchise may be at any time taken away, or impaired, the property also may be taken away, or its use perverted. Benefactors will have no certainty of effecting the object of their bounty; and learned men will be deterred from devoting themselves to the service of such institutions, from the precarious title of their offices. Colleges and halls will be deserted by all better spirits, and become the theatre for the contentions of politics. Party and faction will be cherished in the places consecrated to piety and learning. These consequences are neither remote nor possible only. They are certain and immediate.31

The Court granted Webster his wishes. This kind of rhetoric worked particularly well with a Court deeply imbued with a judicial nationalism, which, without Webster's help, propagated the notion of private protection for both private and subsequently public benefit; and it also worked well with a Court that wholeheartedly concurred with him that Jacksonianism was the Devil to this kind of prosperity.32 The Court was fully aware that if it held otherwise, private "benefactors" would "have no certainty of effecting the object of their bounty," and the "learned men" from which the
nation benefited would be "deterred from...service to such institutions." Indeed, the words of Daniel Webster counted for much. This case reveals he had rightly earned his reputation as a lawyer "who had wrestled with the Devil himself (Jacksonianism), and won."33

Jacksonian democracy, however, persisted through the decades of the antebellum period, significantly influencing political developments on both the state and national level.34 At the same time, lawyers continued in their arduous devotion to represent the best interest of their private clientele by shaping the substantive content of private law.35 The public/private distinction came to be deeply ingrained upon the American legal psyche.36 In order to assure a strict representative devotion to their property-holding clients and to consolidate their power so that their voice could rival that of the majority, lawyers during the period became increasingly and more self-consciously professional.37

Although the formal bar organization with rigid licensing practices declined during the period, a more informal organization did occur that influenced the professional caste and the nation in dramatic ways.38 Particularly in light of Jacksonian hostility against professionalism, historian Perry Miller has documented this "amazing rise within three or four decades, of the legal profession from its chaotic condition of around 1790 to a position of political and intellectual
domination."39 This political prowess came as a result of informal professional organization that worked not only as a means of consolidating power, but, more importantly, as a "policing" of lawyers so that the best interests of the property-holding elite in America would be effectively and efficiently attained. This elite, unlike the British, didn't have the representation of Parliament in the public sector as a guarantee. Instead, they had American lawyers as their private representatives subtly working their own political and professional magic within the more subtle workings of America's democratic institutions.

Magic aside, the lawyer elite in America worked diligently to police a profession whose ranks were being filled exponentially with young, ambitious, and sometimes un-cultivated and politically unsound men. One social historian has estimated that from 1783 to 1820 the number of lawyers grew four times faster than the general population, which itself was expanding at an enormous rate because of natural increase and immigration.40 The result was a fear among the leaders of the profession that the corrupting influence of Jacksonian liberalism was seeping within the profession itself. It follows, then, that along with the desperate dirges against majoritarian despotism, Thomas Clerke could write in his exposition of Blackstone in 1840. "If the legal profession should become so incompetent, so corrupt," as to impair the absolute right of the possessor of property, "it
would invite all the evils of despotism." Therefore, legal professionalism arose as its leaders sought through informal organization to guarantee a unified voice by educating their legal progeny as to what interest must be represented at all times and at all costs; and, in addition to this, professionalism arose as these same men sought to sell a mode of representation -- the attorney-client relationship -- to a "jealous mistress" that demanded nothing less than absolute devotion.

This twofold dynamic of legal professionalism to educate and legitimate was expressed in various ways. For one, formal legal education arose during the period as a viable alternative to apprenticeship with the founding of new law schools and old ones increasing in attendance. For example, the Harvard Law School and the law lectureship at the University of Maryland was established in 1817, the Yale Law School in 1843, and in the interim various private law schools in the manner of early Litchfield in Connecticut. Their role was obvious. "We confidently expect," said a reviewer in 1827, that these institutions will result in "a bar more generally erudite and profound than heretofore, and a gradual retirement of ignorant and impudent pretenders, to their merited obscurity and insignificance." Besides this growth in the formalities of legal education, the substance of a lawyers education came to be vastly improved as law writers such as Joseph Story and Chancellor Kent composed their ex-
haustive commentaries on America's version of the Common Law.\textsuperscript{44} Kent's \textit{Commentaries}, in particular, published between 1826 and 1830, were America's Blackstone and unlike the dabblings of earlier jurisprudential writers, his was a thorough treatment of all aspects of American law, incorporating court decisions and treatises, both American and English.\textsuperscript{45} Of these \textit{Commentaries}, Perry Miller captured their magnitude when he wrote: "Their demonstrations of how the Common Law had become the law of America, made the jibes of Sampson seem childish."\textsuperscript{46} Finally, in addition to law schools and legal treatise writing, the proliferation of legal periodical literature also expressed the growing American urge toward professionalism.\textsuperscript{47} These specialized publications overtly embodied the dual professional purpose of legitimation and education as they attempted both to "sell" the profession to the public and to more fully educate the growing bar.\textsuperscript{48} For example, such journals as the \textit{Monthly Law Reporter} (1838-1866), the \textit{New York Legal Observer} (1842-1854), the \textit{Pennsylvania Law Journal} (1842-1848), and the \textit{Western Law Journal} (1843-1853) offered their readers a "medium of communication concerning legal matters of fact useful and interesting to gentlemen of the bar."\textsuperscript{49} At the same time these journals were filled with memoirs of practitioners, living and dead, which invariably praised the American lawyer as a man of great honor, indomitable industry and unyielding perserverance.\textsuperscript{50}
Depending upon the journal, articles would often provide a forum for the expression of larger theoretical and political concerns, or an opportunity for a member of the professional elite to lecture the bar and the nation.\textsuperscript{51} In January 1832, \textit{American Jurist and Law Magazine} printed an article by Massachusetts Chief Justice Lemuel Shaw in which he expressed 'the' central theme of antebellum legal professional logic: \textit{THE LAW IS A SCIENCE}.\textsuperscript{52} This idea provides a backdrop for understanding the whole of the professions' informal organization and solidarity, its incalculatable growth and its emergent power. And the idea, more concretely, explains the necessary movement in legal education from apprenticeship to formal institution, as well as the content of the latter's curriculum; and finally, it explains the purpose as well as form and content of the legal treatise writing of the period in explaining and depicting American Common Law. Furthermore, viewing the law as a science explicitly demonstrates the twofold professional dynamic of education and legitimation. On the one hand, it provided lawyers with a mode of systematic study into the intricacies of legal logic as well as, just as important, an authoritative explication of the priorities of professional representation. And on the other hand, it provided the lawyers' clientele with the much-revered sense of certainty, authority, and professional confidence that their commercial interests demanded.
As Shaw's article reveals, legal thinkers during the period conceived of the law's "scientific" nature as different from late nineteenth and twentieth century American thinkers. The latter instinctively equate science with objectivity, and contrast it with subjective locus of thought. When they call law scientific they mean to contrast it with legislation, which is supposedly merely "political." In contrast, Shaw, following Blackstone's lead, viewed science as a body of knowledge which was neither strictly deductive nor strictly inductive, but rather one in which particulars were rationally related to first principles. Thus Shaw could write: "The positive and practical rules of jurisprudence bear the same relation to the principles of natural law, that a well contrived constitution of government bears to the natural principles of society...In both cases, natural justice furnishes the general principle, positive or conventional law the exact rule."

With explanations like this and especially those from the most read law book in America, Blackstone's Commentaries, it is not surprising that American legal education began to move away from apprenticeship and toward formal institutions. A lawyer, according to Blackstone in his Commentaries, without a university education, trained under the apprenticeship system, must be "uninstructed in the elements and first principles upon which the rule of practice
is founded." He must never aspire to form, and seldom expect to comprehend, any arguments drawn, a priori, from the spirit of the laws and the natural foundations of justice." Thus, he stated in another section, "It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reason for making them. But, when law is to be considered not only as a matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of those positive constitutions of society." Where Blackstone, however, viewed such a conception of law as not being "improper or useless," American legal scholar and educator David Hoffman saw legal science as a necessity of the highest degree. "Would it be possible," he wrote, "to interpret justly a law, or explain a contract, without knowledge of the general principles on which they are promulgated or entered into?...And what are the rules of evidence, but metaphysical and ethical modes of investigating truth on the one hand, and limiting our deductions by a regard to human rights and feelings, and to our moral constitution, on the other?" Hoffman's elaborate Course of Legal Study, published in 1817, gave voice to these questions as he set forth a definition of the elements of legal training based upon the notion that law need be, of necessity, studied as a science. His ideas particularly influenced curriculum development at the newly founded Harvard Law School, and at the University of Virginia
Law School founded in 1826.\textsuperscript{62}

In a lecture as professor of law at the University of Maryland in 1823, Hoffman told his students of the need for "a comprehensive view of the subject," yet because of "the vast extent of most branches of legal science" such knowledge is impossible without the help of "methodized treatises."\textsuperscript{63} Thus he stated in reference to the diligent student of the law: "But should he pursue this course to the greatest extent, the methodized treatises, especially of our own time, are of infinite use: they give the natural order of inquiry, they show what is to be sought, and where it is to be found."\textsuperscript{64} Of course, Chancellor Kent, Justice Story, James Gould, and others went beyond contemporary expectations and provided the legal profession -- students, teachers, and practitioners -- with that "comprehensive view" in their treatises and commentaries. Accordingly, they "improved" Blackstone by adopting the common law to the particular exigencies and circumstances of the American experience.\textsuperscript{65} Besides Kent's \textit{Commentaries}, other classics of the period include: Reeve's \textit{Baron and Feme} (1816), Gould's \textit{Pleading} (1832), Greenleaf's \textit{Evidence} (1842-1843), Parson's \textit{Contracts} (1853-1855), Washburn's \textit{Real Property} (1860-1862), and Story's exhaustive collection of commentaries compiled between 1832 and 1845.\textsuperscript{66} By reference, in particular, to Kent's monumental efforts, which were exemplary of the general trend, George Bancroft was led to remark, "Now we
know what American Law is; we know it is a science."\(^{67}\)

Unlike their English forebears, these writers seem obsessed with the notion of law being a science. References to the scientific nature of the law abound in their introductory chapters, lectures, and addresses.\(^{68}\) In short, they simply elaborated upon the basic idea expressed by Lemuel Shaw, that law as a science meant that the particulars of the common law were rationally related to first principles, presumably from nature or basic concepts of justice and right. What exactly these "first principles" were or where they actually came from is vague; but this time, much like, instead of unlike, their English forebears, particularly Blackstone, the treatise writer's primary concern was respect for the rights of others, especially property rights.\(^{69}\) For Blackstone and these American writers the right of property was an "absolute right" founded in the immutable laws of nature." And accordingly, "the primary end of humans laws is to maintain and regulate these absolute rights of individuals."\(^{70}\) Thus, what the treatise writers intended to demonstrate by advancing the notion of law as a science was that the common law undeniably stood for the protection of property. They accomplished this by expressing the law's scientific nature in terms of both content and form. The 'content' aspect is seen in their attempt to logically ground the law in the authority of first principles, while the 'form' aspect is revealed in their systematic organization of
the material so as to give the common law the appearance of exactness, consistency and predictability. All of this to the inestimable joy of American property-holders.

The best of the treatise writers, Story and Kent, demonstrate an analytical sophistication unequalled in their time and unsurpassed in America for generations. They were motivated, however, by more than simply an aesthetic concern for intellectual excellence. Indeed, they were on a mission of 'higher calling' in America's representative democracy. They were seeking in all their capacity the most effective way to represent professionally their propertied clientele before the courtroom bar and the nation. In the process they had to sell the common law to America's property-holders and at the same time educate their own to the priorities of their profession. In this they succeeded, and, therefore, they were the primary cause of the ascendancy of Tocqueville's American "aristocracy."

The peculiarities of power within America's political democracy explain both the necessary focus and obvious genius of Kent and Story in developing an especially "scientific" strategy for success. First, American federalism allowed for a dispersal of authority which reserved for those not in control of government the possibility of political power through local governmental institutions. Local power, however, was never a guarantee since majoritarianism operated on the national as well as state level. A residual, however, within
the American democratic system since the days of the Revolution and the Declaration of Independence has been the Jeffersonian notion that dispersal of authority within government meant the possibility of private power based upon 'higher' principle. It is not surprising, then, that natural law or 'first principle' arguments were especially appealing to an American psyche only a few decades away from the "spirit of '76." The common law tied to first principles was easier to 'sell' to the American propertied elite than the situation Blackstone faced in Britain in trying to reconcile the same first principles, or specifically, the natural law, with the positive law dictates of Parliament. In a way, the selling of the common law in America can be described as the following: what Thoreau advocated in the 1830s and 1840s, the American Bar accomplished.

The Bar's success in contrast to Thoreau's lonely journeys back and forth to Walden can only be understood by noting the second peculiarity of power within America's political democracy. Historians note that the judiciary ever since Marshall's ascendancy to the 'high' Court has occupied a powerful, yet precarious place in American history. The growing supremacy of the federal judiciary meant that legal representation before a local courtroom bar was ultimately representation before the nation. But more important for the antebellum period is the recognition that representation in a local courtroom in which the common law was being applied and
justified meant that principles of absolute right such as "property" were being pragmatically and 'scientifically' enforced. Furthermore, it is through those same courts that laws had to be certain and predictable so that the commercial and proprietyd interests could trust in their outcome. Effectively legal representation meant the certainty of winning. Therefore, the success of the Bar in their selling of the common law or to put it as Thoreau might, in their advocacy of private power based on 'first principles,' was contingent upon the courtroom success of their client, which of course, in turn, depended on a decision from the Bench.

Since everything rested upon the decision of a judge, the common law had to be made to appear as an authority beyond the arbitrary dictates of judicial conscience. The proprietyd and commercial elite needed more than an unspoken allegiance by the judiciary that their interests would remain indefinitely secure. To sell the law as a science with all its fringe benefits of first principles, precedent, and systematic exactness became the obvious remedy. However, a problem remained. The beauty of the common law had been its adaptability, its intrinsic propensity to embrace change, especially changes in the nature of property in commercially developing societies. The character of such change was accepted as being "evolutionary," from the base simplicity of feudalism to the urbane sophistication of commercialism. No legal thinker was more instructive on this point than
Blackstone. The evolutionary movement of the status of property from feudal to commercial was a central image conveyed in his Commentaries. He wrote:

When therefore, by gradual influence of foreign trade and domestic tranquillity,...the judges quickly perceived that the forms and delays of the old feudal actions...were illsuited to that more simple and commercial mode of property which succeeded the former, and required a more speedy decision of right, to facilitate exchange and alienation.  

The flowering of commercial society aside, a problem did indeed remain, for, as Blackstone revealed in this passage, it was the "judges" who perceived that property "best answers the purposes of civil life,...when its transfer and circulation are totally free and unrestrained." How could judges in being faithful to their scientific calling, and answering only to the higher principled dictates of the common law, be able to freely listen to the voices of social and economic development? And furthermore, how could they listen to these voices without sacrificing their much-revered scientific certainty and appear to the property and commercial interest as simply arbitrary?

The answers were not immediately forthcoming. American jurisprudence was also concerned with the notion of property's evolutionary development. Following the Blackstonian scheme, Chancellor Kent wrote: "The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from feeble force in a savage state, to its full vigour and maturity among
polished nations, forms a very instructive portion of the history of civil society. In the "polished" intellectualty of America, however, this judicial conundrum of the common law's characteristic for evolution and change, yet need for certainty was at least partially answered, this time not by Kent, but by the omniscient Story.

Story's answer probably came by a careful reading of Blackstone. In his Commentaries, Blackstone recognized that the movement from feudal to a "commercial mode of property" in England was the result not of common law judges generally, but of a special kind of judge - those who sat in courts of equity. In fact, Blackstone saw regular common law judges as stifling progress. "Through the dread of innovation," he wrote, "they hesitated at going so far as perhaps their good sense would have prompted them." Thus, they "left an opening," he continued, "for the more liberal and enterprising judges, who have sat in our courts of equity, to show them their error by supplying the omissions of the courts of law." The Chancery judges, then, were responsible for the English common law's evolution toward the needs of commercial society. "Everyone who is conversant in our ancient books, Blackstone pointedly wrote, "knows that many valuable improvements in the state of our tenures...and that of administering justice, have arisen from this single reason, that the same thing was constantly effected by means of a subpoena in the Chancery."
The crucial lesson, of Blackstone for Story and expressed in his *Commentaries on Equity Jurisprudence* (1836) and *Commentaries on Equity Pleadings* (1838) was that the courts of equity and the courts of law were "founded on the same principles of justice and positive law," and were "inwardly bottomed upon the same substantial foundations." Story's contribution to the aforementioned problem in the common law proved to be the ultimate compromise between judicial certainty and social change -- he made equity, too, a "science." He insisted that equity like the common law, generally, was "completely fenced in by principles," and was, furthermore, the heart of the common law because it "addressed to the consciences of men the beneficent and wholesome principles of justice." Story wrote:

> The principles of equity jurisprudence are of a very enlarged and elevated nature. They are essentially rational, and moulded into a degree of moral perfection which the law has merely aspired to...the great branches of jurisprudence mutually illustrate and support each other. The principles of one may often be employed with the most captivating felicity in the aid of another; and in proportion as the common law becomes familiar with the lights of equity, its own code will become more useful and more enlightened.

Although Story's lofty words suggest that his formulation of equity as a science contributes significantly to the authority of the common law, they, in reality, were words of a more base intent. While his science of equity successfully acted to legitimate and "sell" the common law to the legal professions' propertied clientele, especially as against the
running competition of Codification, it functioned prag-
matically to take from equity its very heart. Equity was in
its essence judicial discretion and to insist that it was a
science, in the end, made it merely another technical branch
of the common law.

More importantly, to speak of equity in Story's terms
alerted both America's propertied elite and lawyers that the
common law was not only meant to protect property, but was
meant to multiply it economically. The common law was now
guaranteed to embrace the commercial spirit which especially
couraged the continued development of property from a
"feeble force in a savage state, to its full vigour...among
polished nations." By advocating law as a science both
Story and Kent and other treatise writers essentially jus-
tified a judiciary, leaving with them the responsibility to
perceive the delicate balance between vested rights and
public policy. What was originally meant, however, primarily
for state court adjudication, in certain cases, bridged the
gap between public and private law reaching the national
level with the judicial activism of the Taney Court, specifi-
cally exemplified as early as 1837 in the Charles River
Bridge case. Through the American judiciary the Revolution-
ary notion of individual liberty against government was fully
realized within the particular confines of America's poli-
tical democracy. But it took more than a justifiably active
judiciary. It took lawyers adequately educated in the
priorities of their professional commitment. This education acting within the realities of the law's public/private dichotomy shaped the 'legal mind' in antebellum culture. The beginning as well as the 'end' of the lawyer's education can be summarized in that simple exhortation to absolute devotion to their "jealous mistress," the law, which meant at the same time, their dedicated representation of the interests of their legal clientele before the courtroom bar and the nation.
NOTES


3. Tocqueville also stated that lawyers were "America's aristocracy" since they "form the highest political class and most cultivated portion of society." Tocqueville, p. 258.


8. See generally, Marvin Meyers, The Jacksonian Persuasion (Stanford, 1957); Edward Pessen, Jacksonian America (Georgetown, 1978).


11. Ibid.


15. Ibid.

16. Ibid.


19. Ibid.


22. 4 Wheaton 518 (1819); see generally, Henry Friendly, *The Dartmouth College Case and the Public-Private Penumbra* (Austin, 1971).


25. Ibid.


27. Ibid.

28. Ibid.


41. Quoted in Miller, *Life of the Mind in America*, p. 228.


44. Stevens, "Two Cheers," p. 423.


47. Bloomfield, p. 142.

48. Bloomfield emphasises in his work that the thrust of professional propaganda was for approval by the "common folk" of Jacksonian America. Bloomfield's examples, however, can easily be read as demonstrating that the bar instead primarily geared their propaganda to their own clientele.

49. Bloomfield, p. 143.

50. Ibid, p. 144.

52. American Jurist and Law Magazine (Boston), 7 (1832), 56-70. The work was originally delivered as an address to the Suffolk County Bar in 1827 with the title "The Science of Law."


54. See Miller, Life of the Mind, pp. 156-164.


57. Blackstone, I-32.

58. Ibid.


60. David Hoffman, A Lecture, Introductory to a Course of Lectures, 1823. Quoted from Perry Miller, The Legal Mind, p. 90.

61. David Hoffman, A Course of Legal Study, 2nd ed. (Baltimore, 1836).


63. Hoffman, Lecture; quoted from Miller The Legal Mind, p. 88.

64. Ibid.


66. Story's treatises include: Commentaries on Bailments (1832); Commentaries on the Constitution of the United States, in three volumes (1833); Commentaries on the Conflict of Laws (1834); Commentaries on Equity Jurisprudence, in two volumes (1836); Commentaries on Equity Pleading (1838); Commentaries on Agency (1839); Commentaries on Partnership (1841); Commentaries on Bill of Exchange (1843); and Commentaries on Promissory Notes (1845).

68. See Timothy Walker, *Introduction to American Law* (Boston, 1855) p. 4; see generally Miller, *The Legal Mind*.


70. Blackstone, I-124.


72. This idea was expressed in Jefferson's adoption of Locke's social contract theory of the relation of the government to the governed. See Baily, pp. 282-305; see also Isaiah Berlin, "Two Concepts of Liberty" in *Four Essays on Liberty* (1969).


77. Blackstone, III, 267-68.

78. Ibid, II-288.


80. Blackstone, III, 267-68.

81. Ibid.

82. Ibid, III-441. The idea of "evolution" also played a role here. Duncan Kennedy writes: "The different courts had
once formed a rational whole, with each allotted a particular function. But by a gradual process, each had acquired a jurisdiction essentially concurrent with each of the others. The judges accomplished this through fictions, as when the King's Bench, supposedly limited to trying civil suits in trespass, expanded its jurisdiction to cover all civil actions by the 'surmise' that all defendants brought before it in civil actions, had committed an imaginary trespass. "Kennedy, "Blackstone's Commentaries," p. 249.

83. Ibid, III-434.

84. Ibid, III-437.


86. Ibid, 73.

87. The codification movement began in the early 1820s aiming to reduce the uncertainty of the common law by replacing it with clear and objective codes that would not need judicial discretion to interpret. Its success in American legal history was first seen in the adoption of New York's "Field Code" in 1848, and later in the Rules of Civil Procedure established in 1938. One historian suggests that it was this movement that promoted Story to undertake his treatise writing. McDowell, p. 72.

88. See, Horwitz, Transformation, p. 266. Although Horwitz sees the primary culprit as the Codification Movement and not Story, he recognizes that the merger of law and equity "represents another instance of the subjection of an already eroded tradition of substantive justice to an increasingly formal set of legal rules, which were themselves now stringently justified as having nothing to do with morality." Ibid.

89. See Footnote Number 97.
CHAPTER II

SALMON P. CHASE: LAWYER AND POLITICIAN FOR ANTISLAVERY

On December 14, 1829 Salmon Portland Chase stood before the "venerable and excellent" Justice Cranch of Maryland to receive examination for the bar. As Chase stood there nervously on that December day, the new president of the United States, Andrew Jackson, most likely sat comfortably in his White House office considering his upcoming message before an apprehensive Congress, and Joseph Story probably sat preparing lectures in his new Chair as Dane Professor of Law at Harvard, and no doubt a black man working in a field somewhere in Virginia or Georgia sat for a momentary break from his arduous labor. Although apprehensive, Chase passed his exam and set out on a soon-to-be successful law career in the booming western city of Cincinnati. More important, however, for the historian of this period, Chase's success as a political ideologue for the growing antislavery movement of the 1830s and 1840s spread his name far beyond the boundaries of a western boomtown and into national prominence as a spokesman for the Liberty party. Chase's contribution came in converting the antislavery movement from a quasi-religious crusade to a successful political force. In his study of the roots and ideology of the Republican party, Eric Foner concluded, "No antislavery leader was more responsible for the success of this transformation, and did more to formulate
an antislavery program in political terms" than Chase. The combination of Chase as lawyer and antislavery advocate was indispensable in formulating his antislavery ideology, expressed primarily in the doctrine called "Freedom National." Indeed he was no stranger to a courtroom in which a black man depended upon him for a defense; this kind of courtroom defense, which was most likely far from Chase's mind as he stood before Judge Cranch in 1829, soon became an antislavery plea to Americans in the arena of Constitutional politics.

In pursuing politics as against exclusive devotion to that "jealous mistress," the law, Chase challenged Timothy Walker's truism "that professional and political success rarely go together." His formal political involvement began with the antislavery movement in the late 1830s and can be said to have culminated in his appointment as Secretary of Treasury by Abraham Lincoln in 1860, serving until 1868. His time in politics included his years as Chief Justice of the United States Supreme Court from 1864 to 1873 if that delicate balance between law and politics may be so skewed to favor the latter. Whatever the case may be, in the interim between his early involvement in the antislavery movement and his tenure as Lincoln appointee, he fully embraced political life by serving as a Liberty party spokesman, United States senator, Ohio governor and presidential candidate. As an exception to Walker's above stated rule, however, in the
years before his election to the Senate in 1848, Chase maintained a successful legal practice in and around Cincinnati, Ohio. Although he was not a leader in the Ohio bar, he was deemed by his peers as "a very able and effective attorney." By the mid-1840s he had acquired extensive property holdings as a result of his legal practice, and his law firm, Chase and Bull, in 1845 is reported to have had an annual income of nearly ten thousand dollars. Thus, Chase's political involvement seems not to have threatened his success as a Cincinnati lawyer. However, this success, it should be noted, was not immediate. Like most beginning lawyers, he struggled financially during his first years of practice, and interestingly enough, he did so with the uncertain help of one Timothy Walker.

In April 1832 Chase became a partner in the Cincinnati firm of King and Walker. Their relationship lasted seven months, and although the circumstances of his departure are not known, perhaps Walker saw in young Chase a man destined to be seduced away from the legal profession and into the politics of antislavery. Perhaps, on the other hand, Chase was not asked to leave the firm, but instead left on his own volition. Perhaps he perceived Walker's inconsistency. Law and politics always went hand in hand. To be devoted to the law in actuality meant to be devoted to a propertied clientele with their own self-interested political agenda. The professionalization of the bar as well as the privatization
of the substantive content of the law during the period were simply guarantees that these "political" interests would be devotedly represented. Indeed, the legacy of Chase was not an exceptional ability to combine legal practice with political involvement, but his ability to perceive that devotion to antislavery politics and the professional commitment to technical expertise as a lawyer were not contradictory efforts. The combination of the two simply meant devoted representation for a 'different' political cause, and thus a 'different' legal clientele than Timothy Walker's. It meant an attorney-client relationship not with America's propertied class, but with the class of the underprivileged and discriminated against. In antebellum America, it meant legal representation before the courtroom bar and the nation of the enslaved black man or black woman.

To understand more fully Chase's innovative advocacy of an underclass clientele, which eventually earned him the title: "Attorney General of Runaway Negroes," is to understand more fully the 'spirit of the age' in which Chase as a young lawyer lived. Described by historians as a period of 'Romantic Idealism,' it was a time, more concretely, when the idea of a better society lay in the future through the concerted effort of individual piety, self-discipline, and hard work in reform. Historians attribute much of the reform impulse to the religious revivalism of the period, which inculcated in the American popular psyche the possibility of
salvation through private choice and action, and furthermore, provided the hopeful potentialities of a more perfect individual as well as corporate millenial future.\textsuperscript{15} Chase himself was deeply religious, his faith described by a biographer as an evangelical Episcopalianism.\textsuperscript{16} Indeed, his letters to family and friends are filled with exhortations to faith, especially those to his brother Philander, himself an Episcopalian minister. Although lawyers of the period occasionally dabbled in the various reform movements,\textsuperscript{17} the lawyer Chase was hardpressed to find exemplary American precedent for dedicated representation of 'runaway negroes.' Chase sought an example elsewhere, across the sea in England, and found a hero in one Lord Henry Brougham.

Literary lyceums as well as the pages of American periodicals were often graced with romantic ruminations of the life and exemplary character of great men of both bygone days and of the present time. Although such reminiscences might be historically disregarded by some as simply rhetorical sentimentalism, they were, rather significantly, much more. They were an expression of an age in which 'Romantic Idealism' was an important causal element in human conduct. The combination of this idealism with Chase's religious and reformist sentiments is probably best expressed in a lecture at a newly founded literary Lyceum, given only months after arriving in Cincinnati, and which was later published in the \textit{North American Review} in July, 1831 under the title: "The
Life and Character of Henry Brougham. Here Chase, not surprisingly, extolls the life of a well-known British lawyer and politician.

Brougham was a contemporary of Chase in England who as a member of parliament and as a lawyer championed the cause of the common man and the underprivileged as against the hierarchical hegemony of the British social and political elite. Chase called him an "advocate of human liberty," and among his efforts were reform in education, reform in the British judiciary and the common law generally, and especially, important to Chase, the abolition of slavery in England and the slave trade in its colonies. Brougham's admirably resolute commitment to humanistic and 'Christian' causes was rooted in his view of the role of the advocate in the attorney-client relationship. Resembling the exhortations of Walker, Brougham seems to have viewed the advocate as "bound to carry his zeal for his client so far as to forget that there was any other person in the world beside him, and to lose sight of every other consideration than the one of his success." Brougham's 'client' and cause, however, as idealized by Chase, was not the pragmatic politics of a propertied elite, but the higher goal of freedom and equity for those in society who were devalued and underprivileged. This latter class, as Chase intimated throughout his essay, Brougham particularly linked with his efforts against slavery. Brougham, Chase wrote, "belongs to a great party,
which has arisen in modern times, - we mean the party of the
friends of freedom; who confine their regards within the
limits of no geographical boundaries and to no peculiar tex-
ture or color of skin."23 In Brougham, Chase found, early in
his career, a man, even if idealized, who embodied his own
sentiments - an exemplary lawyer and dedicated antislavery
politician, which meant for Chase in the late 1830s, con-
certed and effective legal representation for America's black
underclass.

Beyond Chase's romantic idealizing of Brougham and the
'higher calling' of antislavery, the realities of legal
professionalism demanded that in order for him to make money
and build a reputable law practice, his service to the needs
of those he and Brougham ostensibly were at odds -- the
propertied class -- was a necessity. With Chase it seemed a
bearable necessity, for throughout his legal career, even at
the height of his antislavery politicizing in the 1840s, he
acted as legal counsel for 'men of property and standing' in
the Cincinnati community and beyond. Early on he built his
reputation by handling deeds, mortgages, estate management,
and contractual agreements. Later, at its height, his prac-
tice involved almost exclusively commercial concerns and
litigation, retaining, in particular, the account for the
Cincinnati agency of the Bank of the United States.24 Thus,
Chase as a lawyer learned the basics that every lawyer
learned in America at the time. He learned that private law
was separate from public, and the former was the primary
domain of the lawyer. He learned, in detail, the intricacies
of the law of property and the importance of its commercial
'evolution.' And finally, he learned that law was based on
principle and precedent, being 'scientifically' deduced for
the sake of predictability, consistency, and reasonableness.

By 1837 when Chase represented his first 'runaway
negro' before the courtroom bar, he was well versed in the
particularities of antebellum lawyering, and was himself now
a member of Tocqueville's "aristocratic" lawyer class.
However, with the example of Brougham before him, along with
his own reformist and antislavery convictions, Chase offered
his legal skills in March, 1837 for the representation of a
slave-girl named Matilda. To act as effective legal counsel
in the case, Chase had to learn more about law than his com-
mercial practice had allowed. He had to learn about the
public law and the intricacies of American Constitutionalism
and federalism. He had to learn about the Fugitive Slave Law
of 1793 with its subtle nuances and unresolved intentions.
And finally, he had to learn about the law of comity as it
pertained to slavery, discerning the differences between
slaves sojourning, in transitu, and fugitive.

Chase's education into federalism, the fugitive slave
law, and the law of comity in combination with what he
learned about the priorities of the 'legal mind' of the 1830s
and 1840s -- legal science, the right of property, the evolu-
tion of commerce, etc. -- made up the elements of his doctrine called "Freedom National," which was fundamentally expressed in the case of *In re Matilda*. In short, what Chase accomplished was an innovative integration of the public law as it pertained to slavery and the private law in its manifestations and rationalizations of professional priority.

An understanding of the public law during the period begins with an understanding of the workings of the American federal system. At that time, state autonomy and local interest prevailed over that of the nation. The distribution of economic resources was the major policy issue during the period, and it was the states that primarily controlled its allocation and development. As one historian has asserted, state economic policymaking was expressed in state chartering of corporations including banks, building or funding internal improvements, allocating land and other natural resources, and distributing legal privileges and immunities in order to allow entrepreneurial activity to flourish. In addition, states frequently expropriated property under the law of eminent domain in the interest of economic development. Besides this control over economic areas including property rights, states enjoyed virtually exclusive control over elections and apportionment, civil rights, education, family and criminal law, business organizations and local government. And finally, they controlled the conditions of labor, especially race relations, which, of course, included slavery.
The localist nature of political parties during the period also worked to reinforce what historians have come to term "dual federalism." Since the work of government was done primarily on a local level, political parties had adopted themselves to state-centered convictions about the proper spheres of government activity. In this regard, one historian has stated: "Multiple political organization with parties organized on a state basis primarily, and with significant variation in party constituencies and ideological preferences from one state to another, helped to institutionalize the 'dualism' of loyalty to both state and nation."

These political demographics together with the American people's basic belief in Constitutionalism, and the prominence of articulate politicians to exploit those beliefs rhetorically, encouraged the bias in favor of local autonomy and eventually, in practical effect, made Chief Justice Roger B. Taney's dual federalism into a doctrine of state power that was in actuality "duelling" -- one that encouraged the disunionists tendencies of the Slave Power. In the interim, however, southern constitutionalists like John C. Calhoun formulated theories of federalism designed first and foremost with the pragmatic intention of protecting local authority over their peculiar institution and resulting in theories of state sovereignty that placed sophisticated restraints on almost all national governmental functions.
should be noted, allowed exceptions only when a domestic na-
tional function served to further the protection of slave
property, as in the recaption clauses of the fugitive slave
laws. Such views both encouraged and compounded, especially
in the south, the already localist tendencies and realities
of antebellum government and society. In this regard, Harold
Hyman has written:

The general effect of such state-centered thinking
helped to hold at minimum levels the vitality as
well as the functions and size of the national
government. Federal bureaucracy had become 'a cave
dwelling affair,' whose national officials con-
tented themselves with the 'modest performance of
minor duties.'

Therefore, it is obvious from Supreme Court case law spoken
from Taney's 'high chair' to the states rights con-
stitutionalist rhetoric of John C. Calhoun spoken from a
stump in South Carolina, that an overarching theme was con-
sistent throughout the period -- America was indeed made up
of a dynamic national union of states. And further, this was
a union in which the social and political exigencies of the
period made explicit its essentially "dual" character, and at
the same time demanded and made into law certain expressions
of responsibility and cooperation between the dignitaries of
that system: the nation and the states.

Of course, cooperation and sharing lasted until the
spring of 1861 when secession and war immobilized the once
dynamic national union of states. But the deadly bacteria of
disunion had much earlier in American history found its way
into the "innerds" of the federal system of government; and the hotly contested political debates of the 1830s, 1840s, and 1850s were simply symptomatic expressions of a disease gradually spreading throughout the system. The conflict over the fugitive slave laws was just one of those controversies, but as one historian has noted, the most dangerous of them all. Its danger lay primarily in the actual possibilities of physical violence that could be generated from the circumstances surrounding a fugitive slave escaping from his southern home to a northern free state. Lawful slaveholders wanted their slaves back; abolitionists wanted these oppressed people to taste freedom; hired slave catchers wanted their bounty; and free Negroes in the North simply wanted to live in peace. The potential for conflict was there, yet at the same time these laws provided an opportunity for litigation by antislavery lawyers like Chase who saw in them a potential for social change via the court system, and a forum for the expression of antislavery constitutional rhetoric and ideas. Therefore, a thorough understanding of the Fugitive Slave Law along with federalism provided the antislavery lawyer with a channel into the dynamics of the 'public law.'

The fugitive slave laws passed by Congress in 1793 and 1850 was based upon the fugitive slave clause in the Constitution. The paragraph in the second section of the fourth article of the Constitution was adopted unanimously
and with little discussion by the Federal Convention. It reads:

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.  

Although it is clear from this wording that the free states did not possess absolute discretion on the matter of runaway slaves, it is not clear on another vital question: who possessed the power and obligation to carry this guarantee into effect? Because the clause was phrased in the passive voice, considerable uncertainty resulted. Was the clause addressed to the federal government, or to the states, or both; or was it meant to be self-operative, merely securing the right of a master to go into the free states and recover his property by his own efforts? Since the framers were unclear on the subject and the fugitive clause itself was silent, Congress took hold of the problem in the 1790s, and in 1793 they responded with the first federal fugitive slave law.

Attempting to address the above questions, Congress, after considerable debate, decided under the act of February 12, 1793 that a slaveowner or his agent was "empowered to seize or arrest such fugitive from labour" and take him before a federal judge within the state, or before "any magistrate of a county, city or town corporate" where the seizure was made. Upon "proof to the satisfaction" of such
official "either by oral testimony or affidavit taken before and certified by a magistrate of any state or territory" to the effect that the person seized did owe service, the official had the duty "to give a certificate thereof to such claimant...which shall be sufficient warrant for removing the said fugitive from labour, to the state or territory from which he or she fled." Anyone who obstructed a claimant "knowingly and willingly" or concealed a runaway would be subject to a $500.00 penalty, to go to the claimant on an action of debt. What was provided, in other words, was a summary ministerial hearing, similar to an extradition hearing in which state officials could be used to hear claims after a seizure had been made by a slaveowner or his agent. However, the act was still quite vague and left unclear the extent of state power to supplement the basic processes outlined by the act with its own procedural or substantive safeguards. Thomas Morris in his work on northern personal liberty laws writes that "the real conflict left unresolved by the passage of the 1793 act was between a recognized right of recaption and a passively phrased right of an owner to have his property delivered up, on one hand, and the power of northern states to protect their citizens and others within their jurisdictions from kidnapping and abuse, on the other." With the spread of antislavery sentiment, several northern states adopted personal liberty laws that were
designed to provide legal safeguards to alleged fugitive slaves and protect free Negroes from kidnaping. During the late 1830s and early 1840s these free state laws protecting the personal freedom of blacks had come under heavy attack from pro-slavery people and antiabolitionists as being destructive of the rights of slave owners and dangerous to the harmony of the Union. When abolitionists countered with the demand that all persons claimed as runaways be granted a jury trial, these southerners shifted the dispute to another forum -- the United States Supreme Court. There they hoped to obtain a final judgment that would eliminate the insecurity created by the laws. In 1842 the most important decision regarding slavery of the decade came before the high Court: **Prigg v. Pennsylvania.**

Edward Prigg, a slave-catcher who claimed to be the agent of a Maryland slavemistress, violated a 1826 Pennsylvania personal liberty law when he carried off an alleged slave woman and her children to Maryland without securing a certificate of removal required by the state law. To make up a test case, Prigg voluntarily returned to Pennsylvania and submitted to prosecution for violation of the act. After conviction on the state level, he obtained a writ of error from the United States Supreme Court, alleging the unconstitutionality of the state law.

The Supreme Court reversed the conviction and held the Pennsylvania act unconstitutional. Since seven of the jus-
tices wrote separate opinions, it is difficult to speak of the Court's reasoning. Justice Story's opinion is considered that of the Court, even though no five justices concurred in all of its reasoning. As for the first question before the Court, should state courts be entrusted with administering the issue of fugitive slaves?, Story decided that Congress alone was responsible for carrying out the fugitive slave provision of the Constitution and that Congress had covered the whole ground of authority through the Fugitive Slave Act. Congress' power was not only exclusive, but was so exclusive that the states, because they had no authority in this area, were under no compulsion to enforce the law in their courts. Furthermore, declared Story, uniformity of legislation and enforcement were requisites which only the national government could provide. He wrote: "the nature of the provision and the objects to be attained by it require that it should be controlled by one and the same will, and act uniformly by the same system of regulations throughout the Union. If, then, the States have a right in the absence of legislation by Congress, to act upon the subject, each State is at liberty to prescribe just such regulations as suit its own policy, local convenience, and local feelings." Story emphasized that the Court's invalidation of the Pennsylvania statute should not be interpreted as an abridgment of state police power, as the states "possess full jurisdiction to arrest and restrain runaway slaves, and
remove them from their borders.⁴⁹ So long as the states did not "interfere with or obstruct the just rights of the owner to reclaim his slave,⁵⁰ they were free to prescribe regulations for the protection of the population against fugitive slaves.

Story's finding that exclusive jurisdiction over fugitive slaves lay with the federal government was not surprising, given his strong nationalist sentiments expressed in earlier decisions.⁵¹ Yet one biographer qualifies Story's viewpoint, writing:

Story's opinions, particularly in the Prigg, Tyson, and Miln cases, seem to discount the possibility of cooperation between the national and state governments and rigidly divide jurisdictions into compartments, nearly always at the expense of state power. It is no exaggeration to say they do not embody the spirit of federalism and imply a continual aggrandizement of the political state. Extreme though Story's nationalism was, however, it had its limits. Story's main concern was the independence and supremacy of the judiciary. His nationalism was primarily judicial nationalism.⁵²

Whether intentional or not the ultimate logic of Story's strong nationalist position allowed for use of Story's opinion by later antislavery advocates. By entrusting the enforcement of the fugitive slave clause solely to Congress, Story was forced to conclude that the states could not be held responsible for its enforcement. This led him to further conclude that although Congress could authorize state judges and officials to enforce the law, Congress could not require them to do so.⁵³ This appeared to some anti-slavery people as an open suggestion to free state legislatures that
they bar their courts and officials from enforcing the federal act.\textsuperscript{54} Justice Taney attacked Story's opinion on this very basis. Story's emphasis on federal exclusivity, feared Taney, would encourage state noncooperation. The states, he claimed, had a duty in assisting the national government in the enforcing of the fugitive slave law.\textsuperscript{55}

Taney's fears proved wellfounded as antislavery lawyers, judges, and legislators subsequently put Story's dictum to antislavery use. They cited it as authority for denying jurisdiction over fugitive cases, and thus felt justified in allowing alleged runaways to go free. Moreover, they used it to justify legislation prohibiting state officials from enforcing the 1793 law and also legislation not allowing the use of state facilities for that purpose.\textsuperscript{56} In consequence of these efforts, determined southerners sought to adopt a more stringent fugitive slave law based exclusively on federal power.\textsuperscript{57} As part of the Compromise of 1850, Congress adopted the Fugitive Slave Act of 1850, which provided for the appointment, by federal circuit courts, of federal commissioners who were given concurrent jurisdiction with federal district courts over fugitive slave questions.\textsuperscript{58} To the outrage of those in the antislavery movement, the act provided no jury trial and did not permit the alleged fugitive slave to testify. In addition, the act declared a federal commissioner's decision conclusive as against the issuance of a state writ of habeas corpus.\textsuperscript{59} The advantage to
the proslavery interest is obvious. With the earlier 1793 law, the national government spoke forth so as to at least guarantee that the law of slavery "ought to" prevail over the law of freedom in the event of a conflict over runaway slaves; however, with this 1850 rendition, the national government seemed to say much more: that the law of slavery "would" indeed prevail over the law of freedom in such conflicts.

According to historian Mark DeWolfe Howe, Congress's decisions to address the issue of fugitive slaves as early as 1793 and the Supreme Court's harmonious affirmation in *Prigg v. Pennsylvania* in 1842, broke what had been, beginning with the Framers, the nation's constitutional commitment to silence on the issue of slavery. This "old commitment," said Howe, was not primarily the reflection of a general philosophy with respect to federalism, but the consequence of America's heritage of British pluralism with respect to slavery. In short, British pluralism was the ability to condemn slavery through the common law of England and the law of nature, and concurrently to sustain it through positive law and the law of nations. America followed suit in allowing slavery in the South and permitting abolition in the North. The way Americans did it, however, "was at once a distinctive and a startling contribution to the art of government." First, said Howe, it must be remembered that the United States has no common law, only the positive law of
the nation comprised of the Constitution and statutes enacted by the Congress. Thus, unlike the English, the American federal judiciary was "denied the consoling jurisdiction of the common law - the capacity occasionally to circumvent a positive law of servitude by enforcing a common law of freedom." For those framing the American Constitution and who longed for slavery's early end, it was important that nothing should be said to give it "positive" endorsement. Furthermore, the framers realized early that if the nation should seek to deal either sympathetically or antagonistically with the institution of slavery, "the frail bonds of union would burst apart." Thus, American federalism came in handy and expressed in its own unique way the inheritance of British pluralism: the nation was committed to silence while the destiny of slavery was in the hands of the States.

Howe's analysis is both profound and convincing, and he adds yet another important historical insight when he points out that American federalism was of a very different character when related to the institution of slavery. He perceptively wrote:

Starting with the dominant presupposition that the nation had no power of any sort to touch the institution of domestic slavery, the American courts soon discovered that problems of federalism as they bore on slavery did not concern the relationships of states to nation but the relationships of states to one another....There being no federal common law of freedom and no congressional positivism establishing slavery, there was simply a conflict of laws to be resolved in the courts of the several states, and a conflict of principles to be resolved by the churches throughout the land.
To be sure, the slavery issue was left as a conflict of laws question between and among the several states, and it seems clear that the fugitive slave clause of the Constitution intended to do just that. According to Howe, the provision seems to reflect one supposition: "The assumption that issues with respect to the rendition of fugitive slaves must be resolved by interstate arrangements."\(^{68}\) Congressional power to take such responsibility must be deemed unconstitutional.

American conflicts of law theory appeared more often than not respectfully obtuse, and as secession and war approached, unjustifiably ad hoc. Perhaps this was because conflicts of law theory, generally, was and is an unsettled and ill-defined area of law with no standard body of doctrine available, or perhaps controversial case law and treatise writing in conjunction with precedent-hungry lawyers proved to be a combination that resulted, in the least, in complicated and often convoluted arguments and legal propositions. Whatever the case might be, American conflicts of law theories in relation to slavery did exist during the period, and an understanding of these is another essential element in the education of the antislavery lawyer into the public law as it pertained to the slavery issue. While the study will consider conflicts of law theory as expressed in American case law and treatise-writing, it must begin where Mark DeWolfe Howe began, with a look at the British inheritance;
and not surprisingly like Howe's study of British pluralism, American conflicts of law theory is very much indebted to the utterings of Lord Mansfield from the Kings Bench in 1772 in the case of *Somerset v. Stewart*. 69

James Somerset was a slave brought to England from America by Charles Stewart in 1769. Somerset escaped in 1771 and was recaptured by Stewart, who consigned him to be sold in Jamaica. Abolitionists intervened and secured a writ of habeas corpus on Somerset's behalf from Mansfield in 1772. 70 Mansfield held for Somerset, ruling that whatever else a master might do about or with his claimed slave, he could not forcibly send him out of the realm, and that habeas corpus was available to the black to forestall the threatened deportation. 71 Although admittedly not intending to abolish slavery in toto in England, Mansfield's statements justifying the result were interpreted and relied upon as doing just that. Indeed, the very fact that habeas corpus would allow a black to test the legitimacy of his putative master's claim to him was a great extension of the Great Writ and a threat to the security of slavery in England, 72 but for the purposes of the present study, two propositions in Mansfield's statements proved especially influential upon American conflicts of law theory.

First: "The state of slavery...is so odious, that nothing can be suffered to support it, but positive law." 73 This not only provided fuel for antislavery concepts of
natural law, but more important for conflicts of law purposes, made it clear that only the states, the residuum of positive law in America's federal system, could establish slavery. And second, there was the statement that "so high an act of dominion [seizing a slave for sale abroad] must be recognized by the law of the country where it is used. The power of a master over his slave has been extremely different, in different countries." This statement laid down the general principle of a comity of "territorial exclusivity," which as applied by Mansfield meant that the "lex domicilii," the law of an individual's domicile, by which a person is held in slavery does not of its own force determine the slave's status in England, even though the lex fori, the law of jurisdiction where litigated, and the lex domicilii are based on the same general corpus of statutory and common law, as was true of the metropolis and the colonies in the British empire.

English judges and lawyers immediately began to wrestle with the ambiguities and potentialities of Mansfield's decision. In America, however, the decision came to have its most profound impact sixty years later as jurisdictions in the midst of the increasingly heated antislavery activity after 1830 applied in their own way Somerset ideas of comity and positive law. Before this, from about 1790 to around 1830 free and slave state courts had accommodated each other on questions concerning the extraterritorial effect of their
laws. The fundamental question that these courts faced was whether the law of slavery of a southern state was valid and effective in northern free state jurisdictions. In other words: Did a slave who entered a free state acquire personal liberty, or did his or her status continue in the free state? There was general agreement during this period that a non-fugitive slave could spend a limited period of time in a free state without the master losing his property rights in the slave. These cases involved slaveholders with sojourning and "in transitu" slaves not seeking permanent residence in a free state. This accommodation by northern courts was reciprocated in the South as their courts willingly recognized that indefinite or permanent residence in a free state resulted in the emancipation of former slaves.

Several factors seemed to have contributed to this early pattern of accommodationism. The first and most important factor was the antipolitical, antiradical nature of the antislavery movement prior to 1830, which meant, in sum, no effective opposition to slavery being generated in the courts, no well-formulated counterattacks being proposed by southerners. Another factor was the shared legacy between slave and nonslave states in certain vestiges of Roman-European traditions of international law which propagated such concepts as the right of transit and the recognition of status. Indeed, the right of an individual to travel abroad without being molested, at least within states having
amicable relations with the state of the traveler's domicile, was widely recognized. And similarly, there was the recognition of "status," a legacy from Roman law, in which the status of a person was impressed on him by the law of his domicile and continued to attach to him wherever he went.

Finally, accommodationist tendencies were also influenced by the contemporary uncertain state of conflict of laws doctrine in the United States. For example, in United States v. LaJeune Eugenie, a case involving a ship of uncertain nationality engaged in the slave trade off the coast of Africa, Justice Story sitting as a federal circuit judge in 1822, declared that natural law principles should be embodied in the law of nations, which is supposed to govern international conflicts of law questions. Thus, on that basis Story held that the international slave trade was "repugnant to the great principles of Christian duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice." Three years later, however, Chief Justice Marshall in The Antelope declared just the opposite. He rejected Story's identification of natural law with the law of nations and held that since "the world has agreed" that slavery is "a legitimate result of force," or positive law, it "cannot be pronounced unlawful."

The accommodationist impulse began to disintegrate in the 1830s after the Nat Turner rebellion and with the emer-
gence of abolitionism in northern states and proslavery apologetics in the South. In technical terms, American judges were no longer shaping the "lex fori" to integrate as smoothly as possible with the "lex domicilii" or foreign jurisdiction, but instead, exalted public policy considerations of the "lex fori" over those jurisdictions. *Somerset* principles were ripe for application, and there is no better place to begin than with their codification in 1834 by the preeminent Justice Story in his *Commentaries on the Conflicts of Laws*. There, Story discarded the notion of a "moral obligation" or natural law in relation to the law of nations as held in *LaJeune Eugenie* and replaced it with the principle of "comitas gentium" or "comity" declaring that the laws of other nations should take precedence since "each nation must be the final judge for itself..." and the grant of recognition to foreign laws must express the will of the sovereign state, not the mandate of law. In addition to rejecting natural law, Story rejected the European doctrine that laws fixing status should have universal recognition using as an analogy, interestingly enough, the impossibility of admitting that a free state must recognize the status of a slave domiciled in a slave state. The above statements including that quoted below unequivocally affirm Story's adherence to the *Somerset* principle of a comity of "territorial exclusivity," yet Story seems to be going beyond anything said in *Somerset* by suggesting in the opening lines below
that, at present, the law of nations was indeed against the institution of slavery. He wrote:

There is uniformity of opinion among foreign jurists, and foreign tribunals, in giving no effect to the state of slavery of a party, whatever it might have been in the country of his birth, or of that, in which he had been previously domiciled, unless it is also recognized by the laws of the country of his actual domicile, and where he is found, and it is sought to be enforced.92

It remains unclear, however, what effect such a consensus of nations would have upon states adhering to territorial exclusivity. Is Story trying to formulate a kind of "higher law" out of the consensus of nations?

Whatever the case may be, Somerset, Story's Commentaries, and "comitas gentium" were applied and further elaborated in 1836 when a six year old slave girl named Med was brought to Boston by a slaveholder from New Orleans. While the slaveholder was in Boston, intending to remain there for four or five months before returning with Med to New Orleans, the Boston Female Anti-Slavery Society required lawyers to secure a writ of habeas corpus on behalf of Med.93 In Commonwealth v. Ames, Chief Justice Shaw ruled "sojourning" as no longer legal in Massachusetts, thus pronounced Med a free Negro from that day on.94 In so ruling, Shaw followed Somerset in stating that slavery "being contrary to natural right and effected by local law, is dependent upon such local law for its existence and efficacy, and being contrary to the fundamental laws of this state, such general right of property cannot be exercised or recog-
nized here." Thus, Shaw affirmed Massachusetts as essentially being territorially exclusive when it comes to questions of comity and slavery. Shaw, however, added an important caveat which seemed to apply *Somerset* in its more strict sense than recognized by earlier interpretations. It must be remembered that although Mansfield was later at pains to suggest that *Somerset* had abolished slavery in England, his granting a writ of habeas corpus to a black slave had indeed given that "person" a procedural right of due process of law, and thus a right that could challenge the very basis of his enslavement. The difficulty in applying this aspect of Mansfield's decision in American courts probably resulted from its threat to American jurisprudence's cherished distinction between procedural and substantive due process. Shaw, however, seemed to have little difficulty, and using a *Somerset* view of comity, deals effectively with the question of "status" raised earlier by Story. Shaw wrote:

> That, as a general rule, all persons coming within the limits of a state, become subject to all its municipal laws, and entitled to the privileges which those laws confer; ...applies as well to blacks as whites, except fugitives, ...that if such persons have been slaves, they become free, not so much because any alteration is made in their status, as because there is no law which will warrant, but there are laws, if they choose to avail themselves to them, which prohibit their forcible detention or forcible removal.\(^{96}\)

This caveat by Shaw that black "persons" could avail themselves of laws which prohibit "forcible detention or forcible removal" had the potential, that only the sharper minds
of the time could grasp, of providing procedural guarantees of due process of law that could act to challenge the very basis of slavery in the United States.

Salmon Chase understood the subtleties of Shaw's and Mansfield's legal reasoning. He understood the intent of Story's comity and understood the kind of federalism that worked for or against fugitive slaves. By 1837 when Chase wrote a brief to the Ohio court in the case of In re Matilda, it was obvious that he knew a great deal about the public law of slavery. Also, by 1837, he knew a lot about being an establishment lawyer. He had been in private practice in Cincinnati for seven years representing "men of property and standing," and thus was steeped in the private law of contract, property and commerce. He was wellversed in the priorities of his profession and in the legal ways and means of private property's protection and propagation. Chase, however, in 1837 went beyond the boundaries of antebellum professional logic. Instead of representing the interest of private property he chose to represent with the same vigor yet perhaps with increased resolve what he deemed the interest of individual liberty. Only eight months before trying his first fugitive slave case, he witnessed a series of events that Chase biographers note was a political turning point for the young lawyer.97

On a warm July evening a large group of Cincinnati citizens carrying torches assembled on a side street in the
city. This was no political rally or community social. Before the evening was over the office of James Birney's abolitionist newspaper, The Philanthropist, would be sacked, along with several Negro homes. Although Chase had certainly expressed antislavery leanings before this time, particularly in his encomium of Henry Brougham years earlier, he had not fostered the resolve to become associated with political abolition. However, after witnessing the destructive actions of an anti-abolitionist mob on that July evening, Chase became convinced of his calling. Of those events he later wrote: "I was opposed at this time to the views of the abolitionists, but I now recognized the slave power as the great enemy of freedom of speech, freedom of the press, and freedom of the person." Though Chase would never fully adhere to the views of abolitionism, his decision marked a significant turning point for both himself and the nation. For one, it inaugurated the doctrine called "Freedom National," which fully expressed the application of the privatized antebellum legal mind to the emerging public law of slavery. And furthermore, Chase's decision to represent an underclass in American political society on the basis of personal liberty and individual freedom set an important precedent for the priorities of legal professionalism only realized a century later. Chase's decision while most likely startling the Cincinnati Bar, transformed the cause of political antislavery. The moral platitudes of abolitionism
were translated into pragmatic political action via legal representation of negroes before the courtroom bar. Chase would no longer devote himself primarily to the "jealous mistress" his once-mentor Timothy Walker referred. Instead, he chose to devote himself to the higher ideals of freedom and equality which also demanded a similar devotion, but one much less compelled by monetary gain than by simple compassion.
NOTES


2. Andrew Jackson was inaugurated into office on March 4, 1829, and in December gave his first annual message to Congress. Southern leaders in particular were eager to hear the 'President's policy on tariff reform; see Norman Graebner, Gilbert Fite, and Philip White, A History of the American People, 2nd ed., I (New York, 1975), pp. 237-239.

3. Nathan Dave gave $10,000 to support a professorship at Harvard Law School. Upon the encouragement of Dane, Story accepted the post in 1829 while he was a justice of the United States Supreme Court. Lawrence Friedman, A History of American Law (New York, 1973), pp. 281, 289.

4. At first Justice Cranch suggested Chase study another year and then try again for examination. To this Chase responded: "Please your honors, I have made all my arrangements to go to the Western country and practice law." Cranch changed his mind and swore Chase in. Quoted in Schuckers, The Life and Public Services, p. 30.

5. Ibid., pp. 33-37.


10. See generally, Albert Bushnel Hart, Salmon Portland Chase (Boston, 1899); J. W. Schuckers, The Life and Public Services of Salmon Portland Chase (New York, 1874).


13. Soon after beginning his practice, Chase wrote to his brother: "When speaking of my professional situation, I omitted to mention that I have yet had two visitors in the shape of clients; from one of whom I never expect to get anything. From the other I received four dollars." J. W. Schuckers, *The Life and Public Services of Salmon Portland Chase* (New York, 1874), p. 33.


19. In regards to the system of justice in the British Empire, Chase quoted Brougham as saying: "The administration of law is more wretchedly defective than law itself. Justice is sold at an enormous price. The witty saying of Horne Tooke is too true. To one who said, the Courts are open, he replied, 'Aye, like the London Tavern, - to all who can pay the bill.' So high are these bills, so great is the expense of legal proceedings, that it is frequently better to pocket an injury quietly and say nothing about it, than to attempt to obtain redress at law." Chase, "Henry Brougham," p. 242.


22. According to Chase, Brougham stated: "There is a law above all the enactments of human codes; the same throughout the world, the same in all times; such as it was before the daring genius of Columbus pierced the night of ages, and opened to one world the sources of power, wealth, and knowledge, to another, all unutterable woes; such it is at this day; it is the law written by the finger of God on the heart of man; and by that law, unchargeable and eternal, while men despise fraud, and loathe repine, and abhor blood, they shall reject, with indignation, the wild and guilty fantasy that man can hold property in man!" Chase, "Henry
Brougham," p. 255.


25. Harold Hyman has written: "As unparalleled in the mid-nineteenth century as its political democracy, American federalism was distinguished from all others by the extent of the country, by the mass of territorial expansion and amount of state-making after 1800, and by the basic policy determination and performance, responsibilities that state governments and then local divisions retained jealously and tenaciously." Hyman, *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York, 1973), p. 7.

Historians have described the nature of the American federal system before the Civil War as a "dual federalism" in which the federal and state governments had different spheres of authority and pursued independent courses of action. See Harry N. Scheiber, "American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives," *Toledo Law Review* 9 (1977) 619.

26. Federal-state relations during the period should be viewed less as definitive of American federalism in a particular period and more as an accurate rendering of the nature of federal relations generally within the American system, occurring at a time when the quest for definition was particularly crucial. There are scholars, however, who see the dual nature of American federalism as a product of a bygone era, a more pure time in our history, before the corrupting influence of national centralization. See Forrest McDonald, *A Constitutional History of the United States* (New York, 1982); Raoul Berger, *Government by the Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, 1977). They view the history of American federalism as a process of movement from the decentralized intentions of the framers to the centralization of national government by both ignorant politicians and greedy bureaucrats. The result of their myopia is that they see the "dual" nature of federalism as essentially expressing sharp divisions of power, functions, and responsibilities between the central government and the states. In contradistinction to this view, other scholars see the duality of American federal-state relations as intrinsic to that relation, transcending any particular historical epoch. See Harold Hyman, *A More Perfect Union*; William R. Brock, *Parties and Political Conscience: American Dilemmas, 1840-1850* (New York, 1979); Morton Keller, *Affairs of State* (Cambridge, 1977). To these scholars, America's "federal framework" was and is a dynamic national union of states. In this union, complex interactions exist at all levels of government with both the federal and state govern-
ments exercising certain exclusive functional responsibilities and sharing others. See, Hyman, "Is Federalism Still a Fundamental Value? Scholars' Views in Transition" in The Growth of Federal Power, eds. Rhodri Jeffrey-Jones and Bruce Collins (DeKalb, 1983). This view of federalism is cooperative, intermixing, and dynamic, or as Hyman has aptly stated: "dual rather than duelling." Accordingly, the history of American federalism is not simply the chronic movement from state independence to centralization, but instead an oscillation between greater local autonomy and stronger central authority. This oscillation, Hyman again has stated, occurred as new issues required not only new policies but as in fugitive slave recaptures or enforcement of blacks' rights, actual implementations of policies. Hyman, "Is federalism Still a Fundamental Value?" p. 152.


36. See generally, William Wrecik, The Sources of Antis-

37. U.S. Constitution, Article IV, Section 2.


41. Morris, Free Men All, p. 22.

42. Ibid., p. 102.

43. "Abolitionists before 1840 annually but unsystematically attacked the constitutionality of the 1793 act, principally on the grounds that it denied the right of jury trial guaranteed in the Sixth and Seventh Amendments..." Quoted from William Wiecek, "Slavery and Abolition Before the United States Supreme Court, 1820-1860," Journal of American History, 65 (1978), pp. 43-44.

44. Morris, Free Men All, p. 94.


46. Ibid, p. 539.

47. Ibid, p. 541.


49. Ibid, p. 543.


51. See generally, James McClellan, Joseph Story and the American Constitution (Norman, 1971).

52. McClellan, Joseph Story, p. 263.

53. Prigg, p. 625.


61. See Howe, pp. 32-37.


63. Ibid, p. 37.

64. Ibid, p. 37.

65. "It was no less unlikely that the foes of slavery would accept a document that provided explicit sanctions for safeguarding and preserving the institution than South Carolina and Georgia would ratify a Constitution that contemplated its outlawry by national authority." Ibid, p. 35.


68. Ibid, p. 40, 41.


70. Ibid.

71. Ibid.


73. *Somerset*, 20 Howell St.Tr. 2 at 82 (1772).

74. Ibid, p. 83.


77. See generally, Pinkleman, *Imperfect Union*.


79. Sojourning slaves were slaves brought with their masters into a free state for a limited period of time, while "intransitum" slaves were slaves being taken from one slave jurisdiction to another. Belz, *The American Constitution*, p. 253.


82. Ibid, p. 90.

83. *United States v. La Jeune Eugenie*, 26 F.Cas 832 (Mo. 15, 551) (C.C.D. Mass, 1822).

84. *La Jeune Eugenie*, 26 F.Cas 832 at 846.


86. Ibid, p. 121.


89. Ibid, p. 43.


94. Ibid, p. 265.

96. Ibid, p. 212.


98. For an excellent discussion on the nature and impact of antiabolitionist mobs during this period, see, Leonard L. Richards, "Gentlemen of Property and Standing" Anti-Abolition Mobs in Jacksonian America, (New York, 1970).

CHAPTER III
THE "MATILDA" CASE AND "FREEDOM NATIONAL": A SCIENCE OF PUBLIC LAW

In May, 1836, a slave girl named Matilda and her owner Larkin Lawrence, landed by steamboat in the river harbor at Cincinnati. They were on their way back to their home state of Missouri after a brief stay in Virginia. While in Cincinnati, Lawrence checked himself and his slave into a nearby hotel to wait for the next steamboat to St. Louis. When that steamboat finally arrived, slaveowner Lawrence was without a slave. Matilda had fled. She had left her hotel room and made her way to the city’s black neighborhood. There she stayed for several days in hiding. While Lawrence continued on to Missouri, Matilda left her temporary refuge and was employed as a maid in the home of Cincinnatti politician and newspaper editor James Birney. In March, 1837, nearly a year after she had been brought to Cincinnati, she was taken from Birney's home and arrested as a fugitive from labor. As Matilda and those close to her soon discovered, Lawrence had hired James Riley, a reputed slavecatcher living in Cincinnati, to recover her. When Riley and his cohorts found Matilda at Birney's house, they obtained warrants from a state judge to have her arrested under the Fugitive Slave Law of 1793. Although Matilda was potentially once again harshly bounded to master Lawrence, she was at least temporarily within the professional bond of
Salmon R. Chase, her lawyer. He secured for her a writ of habeas corpus to prevent her seizure under the 1793 Act.

In his brief written on Matilda's behalf to the Hamilton County Court of Common Pleas, Chase argued for Matilda's freedom. The substance of his argument was an attack upon the constitutionality of the Fugitive Slave Act of 1793. In so doing Chase formulated a constitutional program for slavery's abolition, which later came to be known as the doctrine of "Freedom National." Based upon the 'first principle' of a right to personal liberty, this doctrine proclaimed a divorce of the national government from all connection with the institution of slavery, leaving that institution wholly dependent for its existence upon state law.

Chase opened his argument with a premise that informs the whole of his political and legal perspective. Chase even as early as 1837 considered himself not an abolitionist but an antislavery man. He was opposed to the moral platitudes of abolitionism which he saw as disavowing the importance of working within the confines of America's legal and governmental institutions to effect their aims, and thus were, in actuality, politically impotent. In short, Chase the lawyer saw abolitionist rhetoric as ineffective for courtroom advocacy. Early in his brief, Chase wrote:

A poetical imagination may indulge the contemplation of the golden scales of immortal, passionless justice, hold forth, evenly poised, on high: but the poet will be sadly disappointed if he expects that his cause will be weighed, in those balances, by a human tribunal. I shall confine myself, therefore, to the legal and constitutional aspects
of the case before the Court. At first glance, it seems that Chase, in criticizing the effectiveness of the "poetical imagination" of abolitionism, is, in traditional terms, rejecting natural law in favor of positive law. In the same paragraph, he wrote:

This Court will administer the law; not that law, sublimely described as receiving the homage of all creatures, both in heaven and in earth,...but that other and far less perfect law, which is written in the books and statutes of fallible men.

By the end of his brief, however, it becomes obvious that Chase is doing something more than simply choosing between natural and positive law. Chase, in advocating his doctrine of antislavery jurisprudence called "Freedom National," was trying to make natural law work within a positive law system just as Blackstone and the American bar had done with the common law, and just as Jefferson and Madison and others had tried with the American Constitution.

To accomplish his task, Chase applied what he learned as a member of the bar and as a reader of Blackstone. In particular, he applied his understanding of the need for a system of certainty and reliability based upon the rhetoric of "first principles." The legal profession had done the same in order to 'sell' their profession to a propertied elite. The profession created a 'science' of law for the purposes of educating lawyers as to the priorities of professionalism and legitimating these priorities to themselves, to the nation, and, most importantly, to their property-rich
cliente. Like his professional mentors, Chase had to sell to the American people and their representatives a Constitutional program of freedom for black people. In order to be effective, however, Chase, again like the legal professional elite during the period, looked to an aspect of American law where the interests of his clientele would be most effectively represented. For the American bar, it was in the domain of the 'private' law. For Chase and other antislavery lawyers, it was in the 'public' law. He saw that it alone could effectively represent the interests of black clients, but to do so it needed to be developed into a precise science.

Chase's doctrine of "Freedom National" is an attempt to make scientific the public law of slavery. Where the American bar aimed their particular brand of law's science at a propertied elite and its representatives, the profession itself, Chase sought to win to his cause the American populous generally and their representatives, members of national and state legislatures. Therefore, unlike the legal profession which sought to guarantee a representative voice for an economic elite threatened by the political whims of democratic government, Chase's program for political hegenomy relied explicitly upon the democratic nature of American political society. Chase, however, stayed the whims of democracy by invoking a higher authority to which the populous and their representatives were historically bound to
submit -- the American Constitution. Although such Constitutional rhetoric might suggest that "Freedom National" was simply a program for judicial superiority through constitutional interpretation and review, it allows for much more. Chase saw that in making Constitutional law into a "science," he was providing a mode of legislative implementation, as against judicial interpretation.

This call to a "science of public law" which operated to effect the legislation of Constitutional doctrine was presaged in 1832 by none other than Massachusetts Chief Justice Lemuel Shaw. In his article in the American Jurist and Law Magazine entitled "The Science of Law," Shaw suggested the necessity for developing a science of public law governing legislative enactment in a time of "restless impatience of things as they are," and "wanton love of innovation." 5

Thus, in accordance, he wrote:

The popular and representative character of our legislative bodies render it of the utmost importance that this restless spirit of inquiry should be duly estimated, and properly guarded and directed,...It is not enough to say that the law is so established, that so it was enacted by the statute of Edward I....the rule may be a good rule, because it is an essential component part of a complicated and well devised system, and completes the symmetry of a noble body of laws. But some better reason must be given for it, than that it was so enacted....The question will still be put, 'upon what principle is it founded?'

In advocating a science composed of higher principles, both Chase and Shaw, in theory, placed ultimate authority not in the Constitution per se, or any particular interpretation
of it, but in its application by legal theorists to the 'higher' processes of science. The process itself was to act as a kind of higher authority. In practice, however, given the nature of legal advocacy, Chase, in particular, came to promote his interpretation of the Constitution as applied to slavery -- "Freedom National" -- as the only one science would allow.

In other words, Chase's 'first principles' and their scientific application to American Constitutionalism meant freedom for blacks and not their slavery. By applying this approach to the general tenants of law and argument learned from his experiences as a member of the bar, Chase made natural law work, at least theoretically, within a positive law system. His strategy, however, in accomplishing this task by developing a science of the public law and attempting to win American legislators was not predicated simply on the fact that the legal profession and their clientele held a monopoly on the private law. Instead, Chase based his strategy on something much more fundamental, his view of the very nature of the relationship between positive and natural law. According to Chase, natural law was associated only with morality while positive law was the law actually implemented, and upon which society was based. Natural law affected political society only as those who made positive law -- legislators -- decided to adhere to natural law dictates. This view challenged other versions of natural law which saw
it as a viable standard for the courts to measure the positive law enacted by legislation. In short, Chase's version took natural law away from the judiciary where it acted to justify the interest of property, and used it for his own efforts toward constitutional reform. Natural law became for Chase what "first principles" had become for the American bar: a tool of persuasion, tailored this time by Chase to the concerns and interests of legislators whose ranks, not surprisingly, were composed of a significant amount of lawyers.

The issue of slavery was particularly applicable to Chase's understanding of positive and natural law, and in turn would effect his views dramatically. In the Somerset case of 1772 in England, Lord Mansfield declared slavery a creation solely of positive law, and abhorant to the law of nature. Since that dictum, slavery's presence, particularly within the British empire depended upon legislation. Therefore, the possibility of slavery's creation or demise depended upon positive law enactments of legislative bodies. When Chase applied this precedent to America's version of the law of comity, particularly expressed in Story's Commentaries and Shaw's opinion in Commonwealth v. Aves, he laid the theoretical foundation for slavery's eventual demise, and in so doing, established a viable American precedent upon which to legitimate "Freedom National."

Chase's version, however, in practical effect, took
Somerset a step further. He proposed that when the positive law of slavery encountered the positive law of freedom which was based upon the law of nature, the latter prevailed. Again, in the first pages of his brief, Chase wrote:

Slavery is admitted, on all hands, to be contrary to natural right. Wherever it exists at all, it exists only in virtue of positive law. The right which, in its own nature, can have no existence beyond the territorial limits of the state which sanctions and supports it. It vanishes when the master and the slave meet together in a state where positive law interdicts slavery. The moment the slave comes within such a state, he acquires a legal right to freedom.  

To make the positive law of freedom more right or more just than the positive law of slavery was to add another step in guaranteeing slavery's eventual demise. In particular, it created for antislavery jurisprudence the much coveted "presumption of freedom." This kind of rationale was especially appealing to American legislators who were also American lawyers. The Somerset precedent, along with Chase's adaptation, provided a lens to focus the Constitution and make legitimate its contemporary interpretation in relation to slavery. Thus, Chase's "Freedom National" was particularly persuasive because it embodied all the elements of effective legal argumentation: first, it was a 'science' composed of first principles, and second, it was based upon sound legal precedent.

With the preliminary questions of positive and natural law aside, Chase in the next several pages of his brief explicated the technical illegalities and improprieties of
Matilda's arrest and detention according to habeas corpus. He argued that the claimant's affidavit for process was extrajudicial and the arrest warrant unauthorized, thus making the court's warrant of commitment insufficient. Accordingly, the habeas corpus act, wrote Chase, "which prescribes the form of commitment to be used by justices of the peace, requires the magistrate to describe the crime or offense in the warrant." Finally, Chase concluded this portion of his argument by writing:

What offense known to the laws of this state, or of any state, has she committed? For what cause is she imprisoned? This Court cannot regard the allegations of counsel or the rumors of the day. It must look to the commitment and the commitment alone. And what cause of detention is there plainly and sufficiently expressed, or expressed at all? None. Absolutely none unless color be a sufficient cause of detention; and if so - if color be sufficient cause of imprisonment, let us know the exact shade.

Chase devoted the second half of his brief to an attack upon the constitutionality of the Fugitive Slave Law of 1793. It is here that "Freedom National" had its genesis. In the opening paragraph, Chase responded first to accusations by opposing counsel claiming the irrelevancy of arguing the Act's constitutionality. "If the act of congress" wrote Chase in allusion to his earlier argument, "be unconstitutional, then this commitment is no better than waste paper; the whole proceedings of the magistrate have been illegal, and the petitioner must be discharged." From here Chase's writing inaugurated "Freedom National," his
science of the public law of slavery, which began where the antebellum Bar had begun, with the enumeration of 'first principles.'

Story and Kent had proposed that America's private law was fundamentally based upon the absolute right of property. Chase made a similar absolute declaration, except his was in relation to the public law. He declared that the basis of American governmental policy was the absolute right of personal liberty. In addressing the public law, Chase was in essence addressing slavery. As stated above, the Somerset decision had made slavery a product of legislation, and therefore within the domain of the public law. To declare liberty as the foundation of government and the basis of public law was to declare freedom and not slavery as the status of black people; and furthermore, to advocate this 'first principal' of liberty in no way contradicted or threatened Story's and Kent's proposals in relation to the private law and it's 'first principle' of property. In practical effect, the lawyer, according to Chase's program, was not destroying a property in advocating a slave's freedom, but upholding a sacred right of democratic government. This right, however, which meant the free status of blacks was reserved only for the public law, having, as Chase himself stated, no direct application in "suits between man and man."\(^{15}\)

An inquiry into the historical and theoretical origins
of American government and law comprise the bulk of Chase's argument in the succeeding pages of his brief. This was done in order to justify his advocacy of liberty as a 'first principle.' His inquiry examines certain provisions within several foundational documents which support his argument for liberty and demonstrate the unconstitutionality of the 1793 Fugitive Slave Act. Before 1837 the antislavery movement had been involved in little constitutional argumentation, relegated primarily to William Lloyd Garrison and his coterie. For almost the next four decades after 1837 constitutional arguments against slavery came to the forefront of American political consciousness. Chase's 1837, argument in the "Matilda" case was considered by his peers as a spectacular constitutional effort. Among other contributions, it set an important precedent for a mode of argumentation which sought constitutional as well as extra-constitutional historical and theoretical proof of slavery's illegitimacy. Chase examined both the substance and origin of these foundational American documents: The Declaration of Independence, the Constitution, and the Ordinance 1787.

Chase's invocation of the Declaration of Independence as a reason to oppose slavery was not a new phenomenon within antislavery constitutionalism. During and immediately after the American Revolution, antislavery rhetoric surrounding the Declaration abounded in statements made by antislavery groups and antislavery proposals made within northern state legisla-
tive assemblies. What was new, however, was the preeminence given to the principles of the Revolution embodied in the Declaration. Their status was now considered on equal footing with that of the American Constitution.

In this regard, Chase, referring to the 1793 Act, wrote:

And can it be that the framers of the constitution intended to confer on Congress power to enact such a law as this? To suppose it, would be to rob their names of that reverence with which they have ever been pronounced. Can it be that the states adopted this constitution, knowing and understanding that it authorized the enactment of this or any similar law? If they did, the great principles which had hallowed their recent struggle, were strangely forgotten.

Moreover, Chase seemed to treat the Declaration as even more basic than the Constitution, much like the radical antislavery constitutionalist William Goodell treated it in 1844 when he stated that the Constitution was but "The mere outward form, the minutely detailed provisions...the instrument, of which those principles [of the Declaration] are the living spirit and substance." Chase, however, directed his analysis to the question of state ratification of a Constitution that intended in the fugitive slave clause what the Act of 1793 had accomplished. "Let is be remembered," wrote Chase, "that the states existed before the federal constitution, and that the fundamental law of each asserted and guaranteed the absolute, inherent, and inalienable rights of every citizen. Among these were reckoned "life, liberty, and the pursuit of happiness." He concluded by writing that no state "would have assented to a
constitution which would withdraw from either of those rights." 24 Finally, Chase made clear that liberty was the important 'first principle' which was embodied in the Declaration and had informed the spirit of the Constitution. "The universal law of human liberty," he wrote, was a right "proclaimed by our fathers, in the Declaration of Independence, to be self-evident and reiterated in one state constitution as its fundamental axiom, that all men are born 'equally free.'" 25

When it came to examining the Constitution, Chase looked to specific provisions which demonstrated through its 'letter,' the 'spirit' of liberty. The fourth and fifth amendments were of particular interest to him. Specifically, in relation to the fourth amendment, he wrote, "how could the people be more completely exposed to 'unreasonable seizures,' than by this act of Congress? Under its sanction, any man who claims another as his servant, may seize and confine him." 26 Indeed, the Act in no way restrained the claimant in the selection of the object of seizure - be it negro or slave. If it turned out to be invalid, then "personal rights have been grossly violated." 27 And finally, Chase asked the frightening and democratically repugnant question: "Can we wonder, 'upon pretence of seizing fugitives from labor, under the provisions of this act, unprincipled persons have kid- napped free persons, transported them out of the state, and sold them into slavery?'" 28
In Chase's treatment of the fifth amendment, liberty came to be better defined as it acquired the all-encompassing quality of "due process of law." Prior to this time only southerners appealed to the amendment, specifically the third clause which states: "No man shall be deprived of life, liberty, or property, without due process of law." While southerners emphasized the word "property," writes historian Don E. Fehrenbacher, "northern radicals like Salmon P. Chase placed emphasis on the word 'liberty.'"29 The result was an explicit and convincing argument against the constitutionality of the 1793 Act. "The act of Congress," wrote Chase:

Provides that persons may be deprived of their liberty without any process of law. It provides no process for the apprehension; none for the detention; none for the final delivery of the escaping servant. Everything is to be done by the claimant. He is to arrest the fugitive, or the person whom he may take to be the fugitive; he is to bring him before the magistrate; he is to keep him in custody while the magistrate examines the evidence of his claims; he is to remove him when the certificate is granted. From beginning to end of the proceeding, there is nothing like legal process.30

Thus, Chase, in predictable fashion, concluded that the act "exposing as it does, every member of the community to arrest, confinement and forceable transportation without process of law, is repugnant to the first principles of civil liberty and subversive of the very ends of society."31

The third document Chase examined was discussed in his brief at length and seemingly given the most weight of all.32
"As citizens of Ohio," wrote Chase, "we are accustomed to hear eulogies upon the Ordinance of 1787...that ordinance merits all the encomiums which have been passed upon it. It lies at the foundation of all our institutions."\textsuperscript{33} Indeed, the Northwest Ordinance of 1787 was important to Chase for several reasons. First, it was another embodiment of the 'great principle' of personal liberty fought for in the Revolution.\textsuperscript{34} Second, it expressed concrete applications of that principle. "It established the...inviolability of private contracts, it recognized and enforced the duty of government to foster schools, and diffuse knowledge; it enjoined the observance of good faith towards the Indians...and finally, most important to Chase, it declared that there should be 'neither slavery nor involuntary servitude within the territory, otherwise than in the punishment of crimes.'"\textsuperscript{35}

Third, the 1787 Ordinance bound the settlers of the Northwest Territory, of which Ohio became a state, to its antislavery dictates. It was an "article of compact between the original states and the people and the states in the territory....Every settler within the territory, by the very act of settlement, became a party to this compact, and bound by its perpetual covenants, and forever entitled to the benefit of its provisions,..."\textsuperscript{36} The people of Ohio claimed "the obligation and benefit of those provisions" by incorporating them into their state constitution.\textsuperscript{37} They went
further, however, noted Chase, by "declaring that no alteration of the constitution shall ever take place, so as to introduce slavery or involuntary servitude."38

Finally, the 1787 Ordinance was important to Chase because it "stipulates that the inhabitants of the territory shall always be entitled to the benefit of the writ of habeas corpus and of trial by jury."39 The Fugitive Slave Act of 1793 specifically violated those guarantees by providing that "any man who claims another as a fugitive servant, may subject him, and that, as I have already said, without process, to trial before a single magistrate, without a jury."40 Chase concluded by stating: "The rich, the intelligent and the well known may be safe and secure, for their personal rights could hardly be violated with impunity; but there is no safety, - there is no security for the poor, the ignorant and the unfriended."41

On the basis of the Declaration of Independence, the Fourth and Fifth Amendments, and the Ordinance of 1787, Chase declared the unconstitutionality of the Fugitive Slave Act of 1793 by establishing liberty as a 'first principle' of government and public law. Next, Chase sought a 'guarantee' for the realization of that principle within the peculiarities of the American system, which meant the abolition of slavery. The American Bar had guaranteed the realization of their 'first principle' of property through an active, well-informed judiciary. Chase's guarantee was much
more complicated. His involved an elaborate constitutional argument which sought to divorce the national government from all connection with slavery, leaving it wholly dependent for its existence upon state law. This was the essence of the doctrine of "Freedom National."

"The constitution," claimed Chase, "contains no recognition whatever, of any right of property in man. It neither affirms, nor disaffirms the existence, possible or actual, of such property." This silence was never broken even by the fugitive slave clause, or the 1793 Act which sought to implement it. Neither, wrote Chase, "say anything about escaping property in negroes and mulattoes," but are concerned only "with the broad and general relation of master and servant," which includes not only escaping negroes and mulattoes, but white apprentices as well. Here, Chase saw an essential distinction between the relation of master and servant, rightly governed by the public law, and the relation of owner and property, reserved for the private domain. The national government, said Chase, "has nothing whatever to do" with the latter relation, but left "this whole matter of property in human beings, precisely where the articles of confederation left it, with the states."

To make Chase's argument work, however, the Fugitive Slave Clause still needed explaining, since it ostensibly gave Congress power to legislate in relation to 'escaping servants,' which, of course, included fugitive slaves. Like
the "full faith and credit clause" of the Constitution, argued Chase, the fugitive slave clause was nothing more than an article of compact or an agreement between the states. Accordingly, the clause conferred no power on the government or any of its offices or departments.45 Instead, it declared "that the citizens of no state in the union, legally entitled to the service of any person, shall be deprived of that right to service, by the operation of the laws of any state into which the servant may escape; and it requires such state to deliver him up, on the claim of the lawful master.46 The clause, then, does not confer legislative power on congress to make laws such as the 1793 Act, but it acts to restrain operation of states' laws in a particular class of cases, obliging states to the performance of certain duties toward the citizens of other states.47 By way of conclusion, Chase summarized his argument by writing:

The constitution restrains operation of the state constitutions and the state laws, which would enfranchise the fugitive. It also binds the states to deliver him up on the claim of the master, and by necessary inference, it obliges them to provide a tribunal before which such claim may be asserted and tried, and by which such claims may be decided upon, and if valid, enforced: but it confers no jot of legislative power on congress.48

Chase's program preserved that delicate federal balance between nation and state embodied in pre-Civil War federalism. In so doing, he accomplished what historian Mark De Wollf Howe later analysed as the founding Father's intent, to "commit the nation to silence" when it came to slavery, so
that "the frail bonds of union" would not "burst apart." Accordingly, Chase's 'federalism' was characteristically unique. By leaving the destiny of slavery in the hands of the states, problems of federalism as they bore on slavery became, again as Howe stated, not a concern of "The relationships of states to nation, but the relationships of states to one another, and therefore, "a conflict of laws to be resolved in the courts of the several states." This is where, according to both Chase and Howe, the framers of the fugitive slave clause intended the issue of slavery to be resolved. Chase's interpretation of the clause as an article of compact between the states when combined with the prevailing thinking of the day on comity, as being 'territorially exclusive,' had the effect of making sure that slavery would be contained in the southern states, and that a "presumption of liberty" for arrested blacks would have legal effect in the north.

Although "Freedom National" did not abolish slavery throughout the whole of the nation as other more radical proposals had sought, it 'guaranteed' that freedom would be proclaimed by the national government, thus hedging the very real threat of national domination by Chase's nemises, the Slave Power. Chase hoped that through the 'moral influence' of the national government's example, the states would follow in proclaiming the freedom of blacks. In his brief to the U.S. Supreme Court in the 1847 case, Jones v. Van Zandt,
Chase made explicit this idea. He wrote:

...it was never intended that the American Nation should be, in any sense, or in any degree, implicated in the support of slavery: but on the contrary, that it was the original policy of the government of the United States, to prohibit slavery, in all territory subject to its exclusive jurisdiction, and to discountenance it by the moral influence of its example and declarations in the states and districts over which it had no legislative control.51

Here Chase added a new element to his traditional view of the nature of American federalism. The national government took on a kind of supervisory role over the states by advocating what might be termed a 'Congressional Equity.'

Congress, according to Chase, must take the responsibility, in their implementation of "Freedom National," to see that the moral dictates of 'liberty' become an instrumental part of the 'public' law, just as the judiciary had done with 'property' in the private domain. These moral dictates were not meant to be fully realized or even understood in any particular generation, but were meant to be developed along with the inevitable progress of society. 'Equity,' historically, was the principle of authoritative application, be it executive, judge, or legislator, of fairness and justice to the particular circumstances of a case in which the legalistic application of the 'law' provided no remedy. The use of equity by Congress, however, like the judicial equity of Story and Kent went beyond the demands of a particular case to apply the concept as both a justification and an explanation of the law's
progressive development in relation to society. Congressional equity, then, like judicial equity was necessary this time for the 'public' law's development, in the words of Kent, from a "feeble force in a savage state, to its full vigour...among polished nations." Of course, this progress of the public law toward 'freedom' occurred simultaneously with the progressive development of property, so crucial to the American Bar's property-rich clientele. It was the hopeful process of history's evolution, particularly embodied in Chase's religious hope of a more perfect millenial future that seems to have linked the 'public' and 'private' domains of law: perfection of liberty and the commercialization of property. Like older more traditional forms of property, slavery too would be swept aside "as a relic of a barbarous age." Therefore, by guaranteeing the realization of liberty at least on the national level through 'congressional equity,' Chase's doctrine of "Freedom National" guaranteed the 'eventual demise' of slavery throughout the whole nation. Moreover, his 'science of public law' based on liberty and implemented by Congress, again like the American bar under Story and Kent, made natural law work within a positive law system.

Although Chase's argument on Matilda's behalf was a noble effort, inaugurating a particular brand of antislavery jurisprudence which later formed the basis of mainline Republican politics, he lost his case before the Ohio Court
of Common Pleas. Without appeal, Matilda in the dramatic words of one historian, "was hustled off by her captors, sent down to New Orleans on a riverboat, and sold into historical obscurity." Indeed, Matilda had not been accrued the benefits of the 'first principles' of America's political democracy by those in power to dispense them. Chase's proclamation of the common law maxim rang all too true in the ears of a nation soon faced with the crisis of war. "Execrandus, qui non faut libertati!" (He who will not favor liberty, shall be accursed).
NOTES


2. See infra., pp.


4. Ibid.


6. Ibid.


8. See infra., pp.

9. In Chase's brief to the U.S. Supreme Court in the 1847 case of *Jones v. Van Zandt*, he took this idea another step further when he wrote "The very moment a slave passes beyond the jurisdiction of the state in which he is held as such, he ceases to be a slave; not because any law or regulation of the state which he enters confers freedom upon him, but because he continues to be a man and leaves behind him the law of force, which made him a slave." Chase, *Reclamation of Fugitives from Service* (Cincinnati, 1847), p. 84.

10. See *supra*, Chapter II, pp. 67-68.

11. Chase provided an analogy of habeas corpus violation when he wrote: "If then a man charged with murder, were committed upon a warrant showing no cause of commitment – showing nothing but an arrest, a partial trial and the color of the party – must he not be discharged from custody upon habeas corpus? Might not the officer having him in custody, suffer him to escape without liability for the escape? Would not the very act of detention under such a warrant render the officer liable in trespass?" Chase, *Speech*, p. 10.

12. Ibid, pp. 9-16.


15. Ibid, p. 35.


17. Ibid.


20. Ibid., pp. 264-265.


24. Ibid.


27. Ibid.

28. Ibid.


30. Chase, Speech, p. 27.

31. Ibid, p. 29.

32. In his brief before the U.S. Supreme Court in the case of Jones v. Van Zandt (1847), Chase gave the Northwest Ordinance of 1787 such a privity as to place it first in order of discussion and treating it with the most length. See Chase, Reclamation of Fugitives from Service, pp. 60-70.

33. Chase, Speech, p. 27.

34. In regards to the intent of the framers of the Ordinance, Chase wrote: "The country had then just emerged from the war of independence. The soil which had been drenched with patriot blood, was hardly dry: and the echoes of that devout Thanksgiving, which burst from every lip and from every heart, at the glorious termination of our great
struggle, still lingered throughout the land. The great principles of personal right, and of free government, were then familiar to all minds and dear to all hearts. The struggle which had just terminated, had been a struggle for great principles." Chase, *Speech*, p. 26.

35. Ibid, p. 28.

36. Ibid, p. 28, 29. The federal Constitution did not effect this act. "The Constitution of the United States," wrote Chase, "neither did, nor could repeal, impair, abridge, or alter the terms of this compact. It left them as it found them, in the full force of their original obligation." Ibid, p. 29.

37. Ibid.

38. Ibid.


40. Ibid.

41. Ibid, p. 31-32.

42. Ibid, p. 35.

43. Ibid.

44. Ibid.


46. Ibid, p. 20.

47. Ibid.


52. See supra, Chapter I, pp. 30-32.


CONCLUSION

By asking the contextual question, "What are characteristics of antislavery ideology that help to determine a context for its study?", the legal historian is allowing the subject matter of history to inform him as to 'how' it should be studied. The answer to this question reveals that antislavery ideology is comprised of legal characteristics, particularly those characteristics of the lawyer's mind in the 1830s and 40s, which were encouraged and legitimized by a legal professional vanguard concerned with serving the interests of a propertied clientele. This 'lawyer's mentality' saw a distinct separation between the public and private domains of the law with the latter being the lawyer's area of expertise and function. Second, it viewed the law as a precise 'science' based upon the 'first principle' of the right of property. And finally, it recognized the necessity of allowing, and also encouraging the development of the law of property so as to embrace its commercial evolution.

When this historical context, the antebellum legal mind, is, in turn, used to guide the study of antislavery ideology, it reveals the extent to which that ideology was a lawyer's creation. Grappling with the issue of slavery, lawyers shaped the 'public' law into their own image, forming in certain cases the theoretical framework for antislavery politics and constitutionalism. Salmon Chase was a premier lawyer in this process. His doctrine of "Freedom National"
was the beginning of "moderate" antislavery ideology that later formed the basis of Republican political platforms. Courtroom legal argument created Chase's doctrine. In the "Matilda" case of 1837, before antislavery politics and constitutional rhetoric were in vogue, Chase, the lawyer, and not the politician, applied his professional legal mind to the problem of fugitive slaves. The result was a 'science of public law' that advocated 'liberty' as its first principle, was based upon sound legal and constitutional precedent, and proposed a 'Congressional equity' to assure the eventual demise of slavery, and the gradual perfection of freedom.

Although Chase did invoke 'higher principle' in his argument, he considered himself not an abolitionist advocating 'moral platitudes' against slavery, but an antislavery man with definite political goals in mind. His 'higher principles' were meant to work for concrete change, and were, accordingly, advocated in the context and in the language of American law and constitutionalism. This belief in political antislavery grew out of his courtroom battles over fugitive slaves, and was significant to him for its pragmatic legal and political consequences. Chase's ideas embodied in the doctrine "Freedom National," if realized, were examples of such pragmatism in their advocacy of the Fugitive Slave Law's unconstitutionality along with the more general proposal of the complete separation of the rational government from slavery. A humanistic and 'Christian' idealism, however,
tempered Chase's political pragmatism. A belief in history's hopeful evolution toward a better, more perfect future, acted as a foundational element in Chase's antislavery doctrine. It was this belief that appears to have united the 'public' and 'private' domains of law, intermingling in a profound way the idea of the perfection of 'liberty' and the commercialization of 'property.'

Historians have made much of this simultaneous development of both liberty and property, particularly as that development might have influenced conservative economic and legal concerns during Reconstruction and onward. Yes, much uncertainty as to the relation of economics to American law and constitutionalism still persists. Perhaps historians, in evaluating this period, should be less willing to view the period from what came afterward. In post-Civil War America, the distinctions between the private and public domains of the law became increasingly blurred as the economic connection between the progress of liberty and the progress of property became an outspoken reality, at least according to the United States Supreme Court. To view the period, however, from its own context, and not that of the latter nineteenth century, is to view from the 'eyes of its beholders.' From the perspective of Salmon Chase and his contemporaries, a controlling and profound distinction existed between the concepts of public and private law. Therefore, to simplify 'liberty' into a purely economic
proposition along with 'property,' is to remove it from the complexity of its context, which involved a range of commitments, uses, and interpretations, and to make constitutional law, as some historians have tried, into a passive instrument of economic capitalism. The concept of 'liberty' in the 1830s and 40s was much more. At least to one member of that generation, Salmon Chase, it was a sacred ideal of democratic government, which also worked as a legal proposition before the courtroom bar in arguing for the freedom of fugitive slaves.
POSTSCRIPT ON METHODOLOGY

HISTORY AND 'HERMENEUTICS': A SEARCH FOR
LEGAL HISTORY CONTEXT

In recent years the social sciences, the humanities, and law in particular, have been introspectively asking questions about the authority of their respective interpretations and views of the human predicament. "Hermeneutics" is the buzz word floating around the hallowed halls of American academic institutions to identify the true seekers after genuine understanding. The result has been the development of a complex and intimidating body of knowledge -- hermeneutical theory -- that in itself has been deemed by some as a separate discipline.¹ Moreover, when applied to specific fields such as history and law it has created considerable debate along with much misunderstanding and confusion.² Its positive effects, however, are seen in fields such as law and history that, in the past, have been averse to challenging traditional viewpoints and grappling with deeper questions of interpretation. In particular, traditional 'narrative' historians, who emphasize craft over method, have expressed an interest in these issues when talking about the development of 'context.'³ Although some of these historians argue that hermeneutics only makes explicit what they have been doing implicitly all along, others have recognized the importance of making their context an explicit
element in doing their history. These historians have much to contribute, in general, to the practical workings of hermeneutical theory as well as, in particular, much to teach the "methodological" historians found in the social sciences and the law.

"In the study of history, the context is all important," historian Arthur Bestor has written. In his study of the events leading up to the Civil War and their relation to American Constitutionalism, Bestor demonstrated that the subject matter being studied (the Civil War) should determine how it is studied (as a constitutional crisis), or stated in another way, the subject matter being studied should guide the historian in identifying the historical context. According to Bestor, by identifying this context, the historian is provided with an interpretive framework necessary to explain the interactions of historical events. At the same time, however, the historian must allow the events or data of historical experience to inform the context by revealing additional, divergent, or tangential "patterns of interaction." In other words, the historian's task is both purposive and revelational, on the one hand, speaking to the data of historical experiences with certain tacitly held conceptions while, on the other, allowing the data to speak for itself, thus potentially altering those original conceptions. In the words of another writer on the subject: "...an individual concept derives its meaning from a context
or horizon within which it stands; yet the horizon is made up of the very elements to which it gives meaning.\textsuperscript{9} This interaction of interpreter and subject matter has been appropriately termed the "hermeneutical circle."\textsuperscript{10}

Although Bestor's methodology is not recognizably employed in much of contemporary historical scholarship, it is rooted in a long tradition of literary and historical interpretation. Indeed, the theory of interpretation, "hermeneutics," is almost as old as literature itself, going as far back as the beginning of philosophy.\textsuperscript{11} From the middle ages through the Renaissance and into the nineteenth and twentieth centuries hermeneutics became extended, refined, and developed to include a wide range of cultural, literary, and historical experience.\textsuperscript{12} As it developed, the philosophical and theological varieties of hermeneutics have in large measure come to overshadow what has been termed the "philological," which played an important part in the development of historical method.\textsuperscript{13} In recent years, however, hermeneutics has enjoyed a considerable revival of interest in both legal and constitutional interpretation and in traditional historical analysis.\textsuperscript{14} In both fields, hermeneutics promises to incorporate both reader and text. On the one hand, it challenges the static reliance upon precedent by traditional constitutionalists, and on the other, it challenges the misguided quest for objectivity by "scientific" historical researchers. In this regard, an historian of
interpretation, D. R. Kelley, has written:

Intellectual fashion aside, the main attraction of hermeneutics seems to be its promise of alternatives to intimidating behaviorist, quantitative, or abstract-structuralist approaches to the human sciences. In the pandemonium of 'scientific' methods for the study of society and culture the one common feature has been the attempt in one way or another to do away with the thinking subject. In the name of scientific objectivity, psychoanalysts and Marxists have likewise looked for impersonal forces below, or beyond, the level of consciousness; functionalists and structuralists have sought patterns, or codes, which likewise transcend, or subsume, human behavior; 'deconstructionist' literary critics have subordinated authorial intention and consciousness to the medium of discourse, whether language or 'writing;' and 'new' economic and social historians have cast their explanations in statistical and serial terms which make personality, quality, and perhaps values irrelevant.15

What hermeneutics proposes, Kelley concludes, is to accommodate both the historian and the subject matter studied, "to find a place in the routine of question-and-answer for the questioner-and-answer, no matter what his perspective or scientific equipment."16

Another way to put Kelley's observations is to say that an essentially narrativist17 historian like Arthur Bestor employs hermeneutics first to achieve a certain degree of objectivity resulting from using a methodology, which is lacking in the more aesthetic emphasis of narrativism. Second, he uses it to affirm his self-admitted subjectivity as an obvious and necessary ingredient in the writing of history. A historian like Bestor, then, is neither fully a narrativist in the sense of rejecting the use of a methodology nor a
scientist who aims self-consciously at methodological rigor. The latter social scientist orientation stresses methodology in order to derive generalizations that will fit into the larger corpus of social and behavioral science. Bestor and hermeneutical theory, however, are somewhere in between, and seems naturally predisposed to live in the tension between the theoretical and the practical, or as Oscar Handlin calls it, the "dreams" and "waking hours." In this regard, Handlin writes: "Vast panoramic dreams beguile the historian..., and aspirations to be that transcendental eyeball, mastering the whole by taking all in and giving all order. But in the waking hours he must return to the note cards and the tyranny of intractable facts." ¹⁸

Traditional legal history, which some historians have described as "lawyers' history," does not take cognizance of this tension. Instead, it views law as a 'science,' and history as simply a tool to trace its linear development. Although a rich tradition within the legal profession supports this notion, the tradition, like any other legal creation, should not be viewed without skepticism, especially as it may function to legitimate the notion of law as a science. Such a notion, first emerged in the writings of the great English jurisprudents, Hale and especially Blackstone,¹⁹ and later was most forcefully expressed in America through the jurisprudential thought and legal rhetoric of Justice Story and Chancellor Kent.²⁰ As legal pedagogy developed after the
era of Story and Kent, the notion of law as a science went beyond oration and professional rhetoric to become embodied by the 1870s in a fully developed methodology for teaching law: Dean Langdell's casebook analysis. During this period the first so-called legal historians were recognized in the law schools. Their arrival at this time is not surprising since the legal scholar saw his role as not simply to train students in the law as it was, but to ascertain the principles truly underlying the law through scientific research into historical precedent. This was done with the supposed end of reforming existing law by bringing it into conformity with those principles.21 It follows, then, that this kind of history is not concerned with understanding law in relation to wider culture and society, but instead with only describing the internal or "evolutionary" development of legal principles and doctrines.

Accordingly, again to refer to Handlin's earlier quote, the facts of historical experience discovered during the "waking hours" are not "real" facts since their existence as a part of the whole of society and culture is not allowed to be fully scrutinized. To partake in the luxury of "dreaming" about a larger framework of understanding or even to dream about a historical context is a waste of time because the motive for doing history is not to understand the past, but simply to justify an existing legal concept or doctrine or to argue pragmatically for a change or resumption in the legal
status quo. Morton Horwitz agrees and exposes an important element when he perceptively writes: "The main thrust of lawyers' legal history, ...is to prevent the real function of history by reducing it to the pathetic role of justifying the world as it is. In order to make this possible, history must be ransacked in order to sing hosannas to all of the existing pieties of professionalization."22 In the end, legal history is simply a part of that "mysterious science" of law revealed by Blackstone and propagated by his legal offspring in America to provide lawyers with a semblance of professionalism, while at the same time giving them an instrument to accomplish and legitimate their particular professional and socio-economic goals.

If a theory of interpretation could be claimed for this kind of history, it might be termed a "bramble bush" hermeneutic. In Karl Llewellyn's classic monograph The Bramble Bush, he likened the law school experience to an experience described in a poem of the same name.23 In that story, a "wondrous wise man" jumped into a bramble bush and by it has his eyes plucked out. When he realized that he was blind he jumped into another bramble bush and scratched his eyes back in again. The bramble bush is the data of the law. The wise man is the law student and his eyes are his preconceptions, assumptions, personal ambitions, etc. Confronted with the law, the wise man's conceptions of reality are challenged and permanently altered as he now can see
nothing because of his blindness. Only after a combination of courage and humility, willfully jumping back into the legal materials and accepting their conditions, is the wise man truly wise and mysteriously able to perceive his world as it should be perceived. Llewellyn described the agony and ecstasy of this "conversion" when he wrote in his own poetic tone, "High sun, no path, no light, thirst and the thorns. - I fear there is no cure. No cure for law but more law. No vision save at the cost of plunging deeper. But men do say that if you stand these thousand vicious guffs, if you fight through to the next bush, the gushing there brings sight."24

The wise man, law student, or legal historian must experience a kind of mystical conversion to the faith of legal professionalism before he can have the ability to act competently in his evaluation of the past, perception of the present, and prediction for the future course of legal development. According to this schema, the "bramble bush" hermeneutic is no real hermeneutic since the circular interaction of interpreter and subject-matter studied is completely nonexistent. Instead, both are so dominated by a methodological framework constructed by a tradition of professional self-interest that neither are allowed speak, act, or be valued on its own terms. The fantasy that preoccupies this kind of legal historian is professional elitism supported and legitimated by another fantasy - or more appropriately called a 'myth' - that law is a science.
Embarrassed and disenchanted with legal professional's and legal academic's insistence upon the law's logical evolutionary development and intrinsic autonomy, the school of legal academics called the "Legal Realists" proposed around the turn of the century that law was not what the "formalists" believed it to be. To the contrary, law was man-made and thus culturally and even psychologically contingent. Karl Llewellyn, a major contributor to the movement, was not inadvertently mentioned earlier in relation to lawyer's or formalist history. Although critical of the scientific approach to law, legal realism like Llewellyn were unaware or unwilling to offer any larger methodological alternative. The result is that they have been largely forgotten, some dismissed as "dreamers;" yet they were part of a larger movement in American Legal Theory called "pragmatic instrumentalism" combined several strands of aberrant legal thought including sociological jurisprudence and Dewey pragmatism. American pragmatic instrumentalism, according to one historian, was of distinctive significance in American history not only because it was American's only indigenous theory of law, but because its influence exceeded that of any other general body of thought about law. From this intellectual milieu came legal historian James Willard Hurst, who, according to some legal academics, revolutionized the discipline, combining like no other legal historian before him a "dreamy" concern with the theoretical and
strenuous commitment to the practicalities of the "waking
hours." 28

Unlike the makers of lawyers legal history, Hurst saw
history as having a much broader purpose than simply to jus-
tify the legal status quo. He saw it as a means to uncover-
ing 'how' law works in society and 'how' legal and social
change takes place so that policymakers in the present can be
better guided in their decisionmaking. Obviously indebted to
Dewey pragmatism, Hurst viewed law as essentially a func-
tional instrument in society, or stated more theoretically,
"another form of social intelligence created to increase
man's ability to achieve rational control over social
change." 29 Along with Dewey, Hurst believed that men achieve
rational control through experimental method, which expands
their empirical appreciation of the consequences of their
conduct. This expanded awareness of the consequences en-
larges their ideas of what is desirable as well as of the
most efficient means of attaining it; and this leads to
growth in the range and quality of life experience, espe-
cially emotional experience, for, as Hurst has stated,
"reason probably finds justification ultimately as an instru-
ment by which men achieve more subtle, more varied and more
shared emotion." 30

Therefore, legal history becomes an essential tool to
help realize Hurst's pragmatic goals since it strives to un-
cover man's past attempts at rational control over his world
and the consequences of those attempts. In his monumental work on the Wisconsin lumber industry, *Law and Economic Growth*, Hurst made it his primary concern to show how it came about that the legal system so failed in its job of providing rational processes to increase awareness of long-run consequences that it permitted Wisconsin lumbermen to cut thirty million acres of forest to exhaustion.\(^{31}\) In brief, Hurst demonstrated that private economic interests had come so to overwhelm social and political life during this period that men's consciousness of the desirable and how to reach it came to take account only of immediate economic costs and benefits. In addition, men no longer used their rationality to control and manipulate the political process, in particular, through legal agencies of the state, in order to promote ideas of the general good of their communities less parochial than purely economic interest.\(^{32}\)

In general, then, Hurstian legal history unlike lawyer's legal history is concerned with law as it relates to the wider culture in society. Hurst wrote: a "full-dimensional legal history must tell of the sleeping force exercised upon the law from outside it, by what people wanted, by the functional needs of other institutions, and by the mindless weight of circumstances."\(^{33}\) Thus, Hurst can dream of developing a framework of interpretations, a contextual understanding of historical data. Of course, the development of such a context must accord with the particular emphasis
and concerns of the period being studied. But Hurst doesn't doubt that behind every legal determination in a particular period "lay some dynamic, confidently accepted, validating principle." Essential to Hurst's analysis of the nineteenth century in general was the notion that law and government at a time when Americans were purposively settling a continent and fulfilling the basic economic conditions for community existence, functioned instrumentally as a "release of the creative energies" of entrepreneurial individualism. For Hurst, such an underlying principle arising from the general historical circumstances of 19th century America, methodologically functioned as an interpretive framework or context for Hurst's further detailed analysis of a particular historical event or series of events occurring during the period.

Hurst's legal history not only differed dramatically from lawyers' legal history in terms of both content and methodology, but also in purpose. While the lawyer historians were "singing hosannas" to professionalization as Horwitz stated, Hurst was composing "fight songs" for governmental policymakers in their efforts to promote the social concerns of the twentieth century welfare state. As noted earlier Hurst was a committed pragmatist who saw the past as a laboratory of governmental interaction with society in which policymakers in the present can be both inspired and forewarned in their quest to know how social change works in
America. Robert Gordon stated: "Hurst's rebellion against the dominant tradition in legal scholarship was not made in the name of disinterested reconstruction of the past; he is an intensely committed moralist, for whom the past is full of dreadful warnings." Hurst's views were in keeping not only with Dewey's insistence on the unity of thought and action but with the "Wisconsin idea," that social science research in the university should lead to social reform through legislation. In the end, Hurst's "moralism" cannot only be said to have contributed to the instrumental intelligence of contemporary legislators and other policymakers, but also can be said to have exposed lawyer's legal history and the legal profession in general for its irreverent, yet seemingly inevitable abuse of history. Morton Horowitz wrote:

Once legal history attempts to penetrate the distinction between law and politics by seeing legal and jurisprudential changes as a product of changing social forces, it begins to undermine the indispensable ideological premise of the legal profession - indeed of any profession - that its characteristic modes of reasoning and its underlying substantive doctrines may not be universal or necessary, but rather particular and contingent.

Although Hurstian legal history brought to the discipline and left as a legacy a great breadth of constructive and theoretical understanding along with a commitment to exhaustive and detailed research, it suffers from important limitations. Hurst's primary limitation is the limitation of any historian who approaches the data of history as a social scientist. The social scientist, as mentioned earlier, aims
self-consciously at methodological rigor in order to derive generalizations that will fit into the larger corpus of social and behavioral science. Hurst as a social scientist is seen in his commitment to and use of pragmatic instrumentalist theory. As a pragmatist, Hurst possesses a well-defined understanding of the nature and purpose of law, government, and human rationality, generally, as they relate to the larger context of society. With these conceptions in mind Hurst searches the data of legal history and describes what he finds there not surprisingly in terms of the categories of his pragmatic assumptions.

This connection is most profoundly seen in what Hurst perceives as the underlying principle or "Volgtiest" of the nineteenth century. Hurst presupposes in pragmatist fashion that the basic function of law is to increase men's ability to achieve rational control over social change in order, particularly, to liberate their natural capacity for growth. As summarized earlier, Hurst found that law in the early nineteenth century functioned to "release the creative energies" of entrepreneurial individualism, or to state it more technically, and thus obviously pragmatic, to liberate American society's natural capacity for growth. Hurst thus makes the substance of his legal history a pragmatic explanation of legal activity in terms of the legal actors' "use" of law and government as a form of man's attempt at rational control over social change.
This is not to say that Hurst's descriptions and explanations of the role of law in nineteenth century America are inaccurate. Because Hurst's borrowed philosophy of pragmatism is based upon an empirical evaluation of the legal, social, economic, etc. elements of the American experience, his history does accurately portray important truths about the role law in nineteenth century America.

Is his explanation, however, the whole truth? Several legal historians, including Hurst disciple Harry Scheiber, believe not. Scheiber, less methodologically rigorous than Hurst, questions Hurst's obsession with the economic motive, resulting in Hurst's denial of 19th century decisionmaking in non-economic areas. For example, Scheiber notes that the state constitutional conventions of the 1820s were not simply part of the larger quest for release of individual energies, but reflected class antagonisms, basic sectional divisions, and conflicting ideologies. Furthermore, Scheiber views Hurst's model as describing one, but only one, type of historic American legal process. Another important legal process, according to Scheiber, was evidence in the states that undertook major internal improvements in the early canal era. Unlike Hurst's Wisconsin case in which the state government embraced a policy of resource allocation and the devolution of government largesse, Scheiber's examples of state government embraced more direct policies of governmental involvement by actually mobilizing capital for the con-
struction and operation of bulk transport. In those states involved according to Scheiber this resulted in numerous and dramatic variations from Hurst's historical model of the legal process. 41

Schieber's criticism reveals a major weakness in Hurst's pragmatic instrumentalist mode of doing legal history. As legal historians uncover more historical data pertaining to nineteenth century law and economics, they discover that the instrumental links between the law and Hurst's conception of the larger social/economic processes are not as strong, or at least, consistent throughout the system as Hurst contends. Scheiber, however, a committed Hurstian and instrumentalist, does not question Hurst's conception of nineteenth century social/economic processes; he simply shows that similar social and economic conditions can produce different and varied legal responses. In other words, Scheiber offers a more refined hypothesis that tries to account for most of the variations. In the end, although Hurst's scheme of social/economic processes and legal responses are not always as consistent or causally related in every part of the system, his basic pragmatic analysis remains intact, only with weakened instrumental links.

Lawrence Friedman, also a Hurst disciple, deals in another way with this problem of increased complexity of legal forms and obvious indeterminacy of causal relations in Hurst's model. 42 According to Friedman, the legal system
does not directly respond to Hurst's larger social/economic processes, but instead is a response to competing "interests" which are produced by the larger processes. Since Friedman's explanations are concerned primarily with the aspirations and strategies of individuals and groups, his legal history can account for the complexity of legal forms while at the same time appear as more causally precise rendering of the relationship between law and economy than Hurst's more vague model. Friedman, however, as an instrumentalist within the Hurstian tradition, is committed to understanding society's "interests" in terms of the larger systems and structures, and it is at this level that Friedman is similarly unable to offer anything but vague causal connections. In critique of this approach, Robert Gordon has written:

This method, subtly employed, yields narratives that are both subtle and exciting, but sooner or later, as every legal change is attributed in turn to a different set of bargains among interests, as a form of explanation it is going to seem discouragingly ad hoc.43

What Friedman and Scheiber demonstrate is an attempt to fit historically controverted data into the larger model created by Hurst's social scientific perspective. Problems with Hurst's history were inevitable, for as Gordon again has pointed out, Hurst in dealing with the peculiar context of nineteenth century American state promotion and regulation of economic enterprise, chose an easy case for demonstrating his pragmatist model of the relation between law and society. When the legal historian diverges, even minimally, from
Hurst's particular historical context, the instrumental links between law and the larger socio-economic processes become less obvious and thus a more refined hypothesis must be created to account for the variations.44 Such an attempt at hypothesis, however, is not the only response of legal historians to the instrumentalist approach best represented by Hurst. The response of legal historians of the nineteenth century as they go beyond the justifications of Hurstian disciples occurs primarily on three levels, each increasing in critical content. First, legal historians question the accuracy of the instrumentalist conception of larger nineteenth century socio-economic processes; second, they doubt Hurst and other's views on the nature and function of American law and economy; and third, they question the efficacy of the whole of the social scientist methodology of pragmatic-instrumentalism in being able to explain legal, social, and economic events in nineteenth century America.

The first level of response demonstrates that social and economic conditions apparently similar in relevant respects to those described by Hurst and other instrumentalists have actually produced radically different legal responses.45 While this level of response involves a complex analysis, the second and third levels are more far-reaching in their critical effect and thus demand thorough consideration. The second level also debunks this positivist conception of the larger socio-economic processes, but does
so by offering an alternative view of the nature and function of American law and economy in the nineteenth century. Morton Horwitz in his groundbreaking work entitled *The Transformation of American Law, 1780-1860* proposes that basic rules in important segments of "private law" were consciously altered or repudiated by common law judges during the period between the Revolution and the Civil War in order to aid, legitimize, and mystify the transformation of the American economy into an entrepreneurial-capitalist one.46 The major change in law can be described as the advent of a "contractarian" or will theory. Grant Gilmore summarized Horowitz's argument:

Property interests lost their sacrosanct status as the ideas of economic growth and competition came to have a more compelling charm for the 19th century mind than the older ideas of stability and monopoly. For strict liability and the wide protection afforded existing interests in property, there was substituted the much narrower concept of liability based on carelessness, fault, or negligence....Emerging 'contractarian' theories...purported to base liability on will, consent, or 'meeting of the minds,' rather than on status or vested property rights.47

Thus law was transformed to focus on the individual, or on individual units in society, and emphasized their independence, their ability to act more or less as they chose, and their ability to use economic power to solve the problems of daily life, rather than any need to rely upon group, communal, or civil aid. As noted by Marx, the individualistic ethos of contractarian legalism plays a necessarily central role in the growth and stability of a society
based upon commodities, exchange, profit, and the supposedly bargained-for appropriation of the power of workers by employers. Horwitz capably demonstrates the truth of Marx's insight.

Although Horwitz employs a considerable amount of Marxist thought in his analysis of nineteenth century American law, he is not, on the methodological level, a modern Marxist legal historian. Instead Horowitz, like Hurst, is essentially a social scientist employing an instrumentalist methodology, which as stated earlier, analyses law as purely a function or instrument of society. The difference between the two is that Hurst sees law as an instrument in the hands of a political elite who consensually acted in the best interest of the populous. Horwitz, on the other hand, sees nineteenth century law as dominated by a self-interested class of economic elites who instrumentally used the law to impose a disproportionate share of the cost of economic development "on the weakest and least organized groups in American society." To explain in another way, Horwitz essentially affirms the instrumental aspect of Hurst's methodological assumptions, yet he employs a contrary and threatening "story line." Hurst believes in the optimistic liberal vision which sees American history as a gradual recession of error before the advance of commerce, liberty, and science, and more particularly sees the regulatory welfare state as a continuation of the true American tradition
of positive state interventions in the interest of the commonwealth. Horwitz, on the other hand, tells the story of the dark side of capitalist development: "The destruction of communal bonds and meaningful faiths, the wrenching apart of families, the abolition of honorable crafts, the routinization of work," ...and from a political perspective, "the betrayal of the revolutionary promise of democracy by plutocrats who have...managed to wrest the machinery of law and government away from the people and press it into the service of the wealthy and powerful." The celebrated impact of Horwitz's thesis upon legal historical scholarship comes as a result of the deviant story line that threatens the liberal vision by relativizing the old story-lines, and making them look like some among many possible interpretive frameworks in which to stick historical evidence.

Although Horwitz's writing threatens Hurst's espousal of the liberal vision, he along with Hurst falls under the criticism of the third level of response by legal historians mentioned above - the so-called modern Marxist or critical legal scholars. These legal historians question the efficacy of the whole of Hurst's as well as Horwitz's social scientific methodology of instrumentalism in explaining the events of nineteenth century American law and society. They point out that the instrumentalist approach seems to dismiss the relative autonomy of law, and thus fails to fully consider the impact of law itself upon the social and economic
structures of American society. To illustrate, both Hurst's and Horwitz's instrumentalism comes close to explaining the relationship between American law and industrial capitalism in what one Marxist scholar, in a criticism of instrumentalism, termed "anthropomorphic conspiracy theory."

He argued that:

The perspective offers no understanding of law as a complex and variegated rule-system whose origins are frequently as mysterious to elites as to governed. It offers no vision of a legal system as a series of constraints upon law-given and ruled alike. It does not refer to legitimacy and authority other than in the context of manipulation and mystification. It does not provide for the elaborate patterns of accommodation that characterize many situations of social control. The law-giver is an Olympian figure endowed with a rationality, an innocence of unintended consequences and a clear self-interestenedness.

This kind of criticism of instrumentalism, by critical legal scholarship, is rooted in the attempt to understand more fully the American legal system's seeming autonomous nature and the effect of legal autonomy upon socio-economic development. The theoretical ground for this kind of understanding of the nature and function of law is in its earliest form, found in the writings of both Marx and the German sociologist Max Weber. In addition to emphasizing the coercive nature of law, Marx and Weber also pointed to the role of legal institutions in legitimating the power structures of capitalist society. Weber noted that it was no only in the sphere of production that domination took place. The "rational-legal" domination associated with formal justice,
legalism, bureaucracy, professionalism, impersonal relations and so on had impregnated all spheres of society, economic and cultural. In terms, however, of understanding the role of these phenomena as mechanisms for institutionalizing popular consent, critical legal scholarship is indebted more recently and most profoundly to the work of Antonio Gramsci, particularly his development of the notion of "hegemony." 

Hegemony, for Gramsci and his critical-legal advocates is essentially, although somewhat ambiguously, a term for the process in which the dominant ideology in a society is facilitated, preserved, and legitimated. In contrast to orthodox Marxism which sees the sheer force of economic relations as the sole determinant of the political, social, and cultural structures, in society, these modern Marxists hold that all social phenomena cannot be reduced or derived from the economic. Instead, noneconomic elements such as basic values, beliefs, and/or customs in society must be taken into account. These noneconomic forces, as the argument goes, are adopted and promoted both consciously and unconsciously, by the dominant class, and in their own particular way act to facilitate and legitimize the dominant class's ideological vision of society. But the important consideration for Gramsci was "how" these beliefs and values were promoted by the dominant class. As Gramsci recognized,

...Hegemony..., refers more to a mode of organizing beliefs and values, than to any particular set of beliefs and values; and the concept directs attention to the institutions and practices that carry and reproduce ideology within a particular social
Accordingly, law is an important, if not primary hegemonic mechanism or "mode of organizing beliefs" which reproduces the dominant class ideology in society. This is, however, a complex process, occurring at several levels. Since law is seen as "omnipresent in the very marrow of society," it becomes the task of the Marxist thinker to locate and uncover the subtleties of this hegemonic influence or, in other words, to discover law's function as an autonomous element in society. Perhaps British legal historian E. P. Thompson put it best, when he wrote:

I found that law did not keep politely to a 'level,' but was at every bloody level; it was interwoven within the mode of production... it was simultaneously in the philosophy of Locke; it intruded brusquely within alien categories, reappearing bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralizing over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigor of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.57

To account for this complexity, the legal historian faces no small task. American legal historian Mark V. Tushnet, however, has tried to give concrete definition to legal autonomy as it applies to the American system.58 For one, he sees the American legal order's intrinsic commitment to tradition and doctrine as providing a basic framework which limits and guides contemporary legal decisionmaking.
Legal doctrine, then, is not simply the result of material interest, but, as Tushnet contends, the result of choices between concepts, choices made by lawyers whose primary interest lay in coherence, not in currency. Relying upon some of the groundwork laid by Perry Miller in his development of the notion of a "lawyers ideology of autonomy," Tushnet further contends that the American lawyer's obsession with consistency — that present actions be shown to be consistent with prior actions — arises from the need to justify and explain their contradictory position in society. He wrote:

American lawyers have regarded consistency as important because, as a component of an ideology of autonomy, it insulates them from disquiet arising from contradictions in their roles as servants of the elite, engaged in enhancing a domination at odds with important Western ethical and religious traditions, and as guardians of the law that is thought to embody those traditions.

Thus Tushnet, this time borrowing from the work of Jurgen Habermas, sees the illusion of consistency provided by legal tradition as a means of legitimating the status quo.

This kind of internal dynamic of the legal process is exemplary of how Tushnet sees the autonomous element in law as influencing the social and economic order, acting to encourage or inhibit change. Tushnet's views may be further summarized as follows: 1) Legal decisions provide resources for political movements by providing a needed rallying point to gather strength. 2) Old legal rules and institutions that persist because of the difficulty in changing them may delay the emergence of new rules long enough for social forces to
change substantially. 3) Changes in the law, sought by political movements, are often only symbolic victories with no substantive results, and act to narrow the movements' aspirations for substantive change. Finally, 4) Although the American legal order provides an important means for mobilizing political action, it, most importantly, acts to inhibit mobilization that cannot refer to conceptions of social order already inherent in the legal order.62

Although Tushnet's analysis of legal autonomy is compelling, he does not fully express the aspirations and concerns of critical legal scholar. In their attempt to discover Gramsci's "hegemonic" influences, critical legal analysis has led them to search for the most basic forms of "structural consciousness" underlying legal doctrine.63 Legal history, then, becomes the history of legal consciousness, and anyone not similarly involved in the quest for the most basic forms of this consciousness, which history they hope can reveal, are viewed as somehow ideologically impure, and thus, intellectually imprecise. Where Tushnet's thinking might contain salvageable elements of impurity, Hurstian thought has far too long been polluted by pragmatic-instrumentalism to warrant a dispensation of grace. Indeed, for the critical legal school, Hurst's social scientific methodology cannot satisfactorily explain any aspect of the legal, social, or economic phenomena in American history.

What critical legal history does, however, is simply
impose a different methodological framework than Hurst upon historical data. Their method, like Hurst's, is social-scientific at its base, but unlike Hurst's, is derived from a sophisticated Marxist analysis of man, law, and society. They begin by recognizing that human beings are constantly torn between the need for others and the fear of them, and law is one of the cultural devices invented in order to establish terms upon which they can fuse with others without having their identities or freedom crushed. Legal systems, then, become attempts to build structures that will facilitate good and prevent bad fusion. These structures will always be ideological since they are built by dominant elites, and they are doomed to collapse since the fundamental contradiction between fusion, or community, and individuality has never been overcome.

As with any scientific hypothesis, this analysis must be judged according to whether it comports with actual human experience, as new data is acquired. To do such an evaluation here is beyond the scope of this essay; however, it is important to note that unlike Hurst's or Tushnet's historical analysis, critical legal history seems far too abstract and removed from the world of concrete social experience. As critical legal scholar Robert Gordon has admitted, their "method makes it look as if the history of these legal/intellectual structures were somehow self-determining - as if the structures rose and fell because of some objective
inner dynamic unrelated to the world of social struggle or, for the matter, to real people of any kind.\textsuperscript{66}

Generally, as a social scientific methodology, however, critical legal history can be critiqued as to whether it provides a proper way of doing legal history. Like the Hurstian model, this kind of history is also ignorant of the hermeneutical need to fully incorporate both the interpreter and the subject-matter being studied. Similarly, it tries to force a larger framework of analysis upon the subject-matter without fully allowing that subject to speak for itself and thus determine its own context of study. Tushnet, although not as obviously as his critical legal colleagues is also guilty of this. He falls somewhere between Hurst and the critical legal school in his development of what might be termed a 'sophisticated instrumentalism' which provides insightful analysis of law in relation to larger social and political structures, but also tries to force a determined model of causality (class domination) upon the data of history.

As mentioned earlier, Arthur Bestor's approach to developing context, in contrast to the differing 'schools' within legal history, begins with the subject-matter itself allowing its own characteristics to determine its context or 'how' it is to be studied. In this way Bestor is applying hermeneutical theory. In brief, to repeat his analysis, Bestor first sought to understand the nature of the Civil War
crisis, which he found to be intimately related to America's constitutional mode of political society. Once understood in this way, Bestor sought not to explain the causes of the Civil War, but with American Constitutionalism as a context for understanding and interpretation, simply sought to explain the elements he found on the American historical scene in the 1830s, 1840s, and 1850s leading up to the Civil War as they relate to the larger "pattern of their interaction."

Bestor explained:

Each individual factor derives its significance from the position it occupies in a complex structure of interrelationships. The fundamental historical problem, in short, is not to measure the relative weight of various causal elements, but instead to discover the pattern of their interaction with one another. 67

Thus, Bestor is not caught in the 'causal trap' of the legal historians who have devoted their attention to explaining only the causal relation of law to society or vice versa. Their use of words like "instrumentalism" and "autonomy" act to reveal their predicament. Autonomy, as Tushnet and the critical legal scholars use it, is simply a sophisticated instrumentalism, which as its title suggests, is primarily concerned with explaining causality in terms of society's impact upon the law.

For legal historians to learn from Bestor and other narrative historians concerned with context means that they may have to give up a considerable degree of their past. As demonstrated in this essay, legal history has been dominated
by a social-scientific approach to history which begins with a preconceived notion of what law means in society and forces that notion upon their legal subject matter. This results both in a false objectivity based on someone else's theoretical inklings, and a strictly causal instrumentalism that attempts to explain their limited subject-matter, law, as principally an "effect" upon society. To learn from narrativism would mean not only that legal historians would have to become better writers, but, more significantly, that they might have to redefine the boundaries of their discipline.

As Bestor himself demonstrated, an ostensibly nonlegal subject matter, the Civil War, when studied in terms of context, is revealed to possess legal and constitutional characteristics. The historical context, then, is not only important in doing the task of history in general, but is essential in defining the discipline. In other words, the context and not the subject matter itself is what determines the discipline and conceptual boundaries of legal history. If the nature of the subject matter being studied is discovered to have legal elements and those elements provide a context for understanding and interpretation, then the historian is doing good legal history. The historian, however, is not doing good legal history when historical context, on the one hand, is a preordained tradition of priorities and beliefs as in lawyers' legal history, or on the other, a preordained set of presuppositions about the role of law in American society
as demonstrated by Hurst, Tushnet, and critical legal scholarship.
NOTES

1. There are basically two schools of hermeneutical theory. The first, which is essentially employed in this essay, sees hermeneutics as a general body of methodological principles that underlies valid interpretations. Among its proponents are Dilthey, Schleiermacher, Betti, and Hirsch. The second school sees hermeneutical theory as a philosophical enterprise in itself. For them, hermeneutics is an exploration of the character of and requisite conditions of all understanding. Called 'phenomenological hermeneutics,' it asks questions like: What is interpretation? What is the nature of understanding itself?, etc. Its proponents include Gadamer, Habermas, and Heidigger.


4. For a discussion of traditional narrativist style, see Oscar Handlin, Truth in History, (Cambridge, Mass., 1974); Isaiah Berlin, Historical Inevitability (London, 1954); Berlin, Hedgehog and the Fox: An Essay on Tolstoy's View of History (London, 1953). Although these historians don't specifically address the contemporary hermeneutical debate, their writings suggest there is method in simply being a good historian without having to make method explicit.

6. In this regard, Bestor wrote: "...the very form that conflict finally took was determined by the preexisting form of the constitutional system. The way the opposing forces were arrayed against each other is war was a consequence of the way the Constitution had operated to array them in peace." Bestor, p. 220.

7. Ibid., P. 221.

8. Ibid.


13. Ibid., p. 645.


17. Narrativism has traditionally been the interest in history as the construction of a 'story' without the use of scientific method or social context. The emphasis is upon
the literary and analytical skills of the historian as against any sort of intertextual criticism and context.

18. Oscar Handlin, Truth in History (Cambridge: Harvard University Press, 1979), p. 110. In the 'waking hours,' Handlin continued, "...he finds mastery of another sort, not of a whole universe or even of a whole mountain, but of the fragment he examines in its totality. Within its limited ambit he finds exposed all life's amplitude; and therein, too, the operations of numerous forces the intersection of which are open to his eyes. He will know his own valley the better for being conscious of its place in the range; and theotactical images may call his attention to the particular features within his regard. He may even long to fit his own piece into some larger whole. No harm to it, unless the dizzying image or the giddiness of the longing betray him into bending the pieces and falsifying the evidence, thereby destroying the ultimate worth of his efforts." Ibid.


24. Llewellyn, p. 120.


27. Ibid, p. 35.

29. Gordon, p. 46.


34. Hurst, Law and Economic Growth, pp. 171-172.


36. Ibid, p. 49.


38. Gordon, p. 46.


40. Ibid.

41. See Scheiber, p. 754.


44. Ibid., p. 75.


51. Ibid., p. 97.


60. Tushnet, "Perspectives...", p. 88.

61. See generally, Jurgen Habermas, Legitimation Crisis (Boston, 1975).


63. See generally, Duncan Kennedy, "The Structure of Blackstone's Commentaries."


66. Ibid.

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The growth of professionalism is elaborated in an im-

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The inspiration to pursue the question of historical context was a result of a reading of Arthur Bestor's fascinating article "The Civil War as a Constitutional Crisis." In the essay, Bestor outlines a 'hermeneutical' approach to history from the viewpoint of a traditional narrativist historian. Other important efforts by 'narrativist historians include Hyman, A More Perfect Union; Philipp Paludan, A Covenant With Death; Paludan "The American Civil War Considered as a Crisis in Law and Order" American Historical Review 77 (1972) 1013 and Morton Keller, Affairs of State (1977). The history of hermeneutical theory as applied to law is very adequately elaborated in D. R. Kelley, History, Law and the Human Sciences (1984). Other important works
