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# Legal Language: Expansion, Consolidation, Resistance

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# *Legal Language in Nineteenth-Century America,*

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# LEGAL LANGUAGE IN NINETEENTH-CENTURY AMERICA

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Legal language in America, a species of the political discourse of popular sovereignty, underwent significant changes during the nineteenth century. Overall, the rhetorical development of the law was characterized by several overlapping patterns: popularization and fragmentation on the one hand, and increasing specialization and sophistication on the other as elites sought to tame the revolutionary features of America's early democratic culture. The colonists, a fairly homogenous and literate population, inherited a revolutionary tradition with British and continental antecedents. That rhetorical tradition emphasized limits on bureaucratic authority, fair process, a distinction between higher law and ordinary law, and the people as sovereign. Beyond certain cultural proclivities, several other factors contributed to the rapid spread of legal language in the United States and made it difficult for elites to dictate the law's development.

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One indispensable force involved technological innovation, which spurred the dissemination of law, rendering it less hierarchical, more accessible, and often eclectic in substance. The rise of print capitalism ushered in the age of nationalism, as populations recreated themselves into "imagined communities" bound by a common literary heritage.[1] For Americans, that was a nation constituted by written law and the popular language of political liberty.[2] A cultural emphasis on writing improved the durability of legal language, linked disparate communities, and made it possible to make elaborate plans for family and nation.[3]

Technological improvements from the typewriter to the rotary printing press facilitated the emergence of the book trade in America, the spread of private and institutional law book collections, and the establishment of legal training as a science.[4] At the same time, technological change also hastened the emergence of partisan newspapers

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[1] Benedict Anderson, *Imagined Communities: Reflections on the Origins and Spread of Nationalism* (London: Verso, 1991); *see also* Eric Hobsbawm, *Nations and Nationalism since 1780: Programme, Myth, Reality* (Cambridge, UK: Cambridge University Press, 1990).

[2] Robert L. Tsai, *America's Forgotten Constitutions: Defiant Visions of Power and Community* (Cambridge, MA: Harvard University Press, 2014); Pauline Maier, *Ratification: The People Debate the Constitution, 1787-1788* (New York: Simon & Schuster, 2010); Christian Fritz, *American Sovereigns: The People and America's Constitutional Tradition Before the Civil War* (New York: Cambridge University Press, 2009); Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); Gordon S. Wood, *The Creation of the American Republic, 1776-1789* (Chapel Hill: University of North Carolina, 1969); Edward S. Corwin, *The "Higher" Law Background of American Constitutional Law* (Ithaca: Cornell University Press, 1967).

[3] Peter M. Tiersma, *Parchment, Paper, Pixels: Law and the Technologies of Communication* (Chicago: University of Chicago Press, 2010), 13-32.

[4] M.H. Hoeflich, *Legal Publishing in Antebellum America* (New York: Cambridge University Press, 2010), 10-29.




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and editorial writing, the spread of pamphlets, and periodicals catering to ethnic and partisan interests. Dissent, too, would have its literary voice. With these technological advancements, legal language thus developed along dual tracks: an official version recorded in bound volumes, cited in court documents, and spoken by trained specialists in formal settings; as well as a popular dialect bursting through the rough-and-tumble debate of popular media and sustained in the literature and everyday interactions of ordinary people. As a result, the evolution of legal language overall trended toward democratization and diversification—regardless of the actual justifications and dominant ideology associated with any particular issue.

Beyond dramatic changes in the technologies of language, two major socio-legal dynamics of political development drove linguistic innovation during the nineteenth century: expansion and consolidation. For a significant period of time, an unruly vernacular in property rights, self-governance, and individual liberty fostered the destabilization of borders and the breaking of treaties, the rapid acquisition of land, and the forging of newfound civic identities. At the same time, official renderings of law facilitated a rush for political integration, institution building, and the displacement of older folkways with a common national heritage and set of Anglo-American laws. This more sophisticated view took most visible hold in property, torts, and contract law, helping industrialists and corporations take increasing risks in the economy by altering social expectations of responsibility and blame.[5]

[5] Nan Goodman, *Shifting the Blame: Literature, Law, and the Theory of Accidents in Nineteenth-Century America* (Princeton: Princeton University Press, 1998); Morton J.

The push and pull of these objectives produced a profound sense of anxiety in the American polity, and those conflicted feelings and shifting values were often worked out in courtroom discourse and through popular literature. As Tocqueville observed, the rise of the legal profession in America served as a bulwark "against the excesses of democracy."[6] The "love of order and of formalities" instilled in lawyers "naturally render them very hostile to the revolutionary spirit."[7] A scientific logic and rhetorical preference for efficient, detached analysis conducted by experts typified legal conversation.[8] Yet a space for oral argumentation was preserved in the trial court, often before a jury of one's peers, allowing for an emotional appeal to communal experiences.[9] This performative relationshiop between lawyer and jury intensified through reforms restricting a judge's ability to comment on testimony and oral advocacy.[10]

Arguments over the meaning and application of higher law became prevalent within the legal system, but through contest and resolution, the language of liberty and equality also became routinized and domesticated. Revolutionary arguments and methods were consistently frustrated through legal rules and discredited in the courtrooms; the

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Horwitz, *The Transformation of American Law: 1780-1860* (Cambridge, MA: Harvard University Press, 1977).

[6] Alexis de Tocqueville, *Democracy in America*, trans. Henry Reeve (New York: Gryphon, 1992), Book I, ch. 16, 254-255.

[7] *Ibid*. Tocqueville astutely notes that "[a] portion of the tastes and of the habits of the aristocracy may consequently be discovered in the characters of men in the profession of the law." *Ibid*. at 255.

[8] Peter M. Tiersma, *Legal Language* (Chicago: University of Chicago Press, 1999), 51-151, 203-210.

[9] Larua Hanft Korobkin, *Criminal Conversations: Sentimentality and Nineteenth-Century Legal Stories* (New York: Columbia University Press, 1998).

[10] Renee Lettow Lerner, "The Transformation of the American Civil Trial: The Silent Judge," 42 *William & Mary Law Review* 195, 233-239 (2000).

most radical constitutional theories were rejected as so much rubbish. As opportunities within legal proceedings for wide-open discourse diminished, the major sources for the innovation of legal language had to be discovered and nurtured elsewhere: in secondary legal writings and treatises, political writings and orations, newspapers, and novels.

Nationally, legal efforts to manage the growth of the American nation produced both linguistic fragmentation and consolidation. The discourse of settler sovereignty, seen as a natural outgrowth of colonial self-rule, was the first to have its way in the nineteenth century. In the age of nation building, the pioneer served as a romantic ideal of citizenship: hardy, curious, self-sufficient, and virtuous. Whether it was in the mastery of nature, as some depicted it, or in the battlefield conquest of indigenous peoples, as others saw it, there can be little doubt that settler-made law became an engine of America's fledgling democracy.[11]

Walt Whitman's poetry paid tribute to this ideal citizen and mythologized the migratory experience. In "Pioneers! O Pioneers," he casts Americans as a "restless race" and describes people living on the frontier in energetic, masculine terms: "impatient, full of action, full of manly pride and friendship."[12] They are "[c]onquering, holding, daring, venturing as we go the unknown ways." In the process of felling "primeval forests," settlers build a civilization for the "followers" who "in embryo wait behind." To be first is to face untold danger, but also to be heroic, for "all the rest on us depend." Whitman

[11] Christopher Tomlins, *Freedom Bound: Law, Labor and Civic Identity in Colonizing English America, 1580-1865* (New York: Cambridge University Press, 2010); Frederick Jackson Turner, *The Frontier in American History* (New York: Holt, 1921); Tsai, *America's Forgotten Constitutions*, 18-33.
[12] Walt Whitman, "Pioneers! O Pioneers," *Leaves of Grass* (Brooklyn: Eakins Press, 1855).

portrays a society united in the frenetic task of political development: "all the workmen at their work/ All the seamen and the landsmen, all the masters with their slaves."

But America's budding legal rhetoric could also be used to subvert the social order. Determinist movements employed legalistic language associated with the pioneer ideal to challenge basic social tenets and to reorganize existing communities. From the breakaway Republic of Indian Stream and Dorr's Rebellion in the Northeast to the secession of the Republic of Texas from Mexico in the Southwest, citizens forged legal rights by controlling land and asserting a natural right to rule.[13] The 1836 Texas Declaration of Independence illustrated this trend.[14] Its signatories claimed that Mexico invited migration and created expectations of political liberty, promises upon which settlers had relied: "The Mexican government, by its colonization laws, invited and induced the Anglo-American population of Texas to colonize its wilderness under the pledged faith of a written constitution, that they should continue to enjoy that constitutional liberty and republican government to which they had been habituated in the land of their birth, the United States of America." Moreover, Mexican officials could not be counted on to protect settlers' rights, for they have "acquiesced in the destruction of their liberty" and the instigation of martial rule. Mexico could hardly complain now that Americans have "taken up arms in defence of the national constitution" and severed their "political connection with the Mexican nation."

[13] Fritz, *American Sovereigns*, 246-276; Tsai, *America's Forgotten Constitutions*, 18-82.
[14] *The Unanimous Declaration of Independence Made by the Delegates of the People of Texas*, Mar. 2, 1836.

Yet the vernacular of liberty, property, and destiny used by settlers and pro-development policymakers had a double-edged quality. In an age of territorial expansion, pioneer sovereignty proved to be a potent language of power, uniting a youthful citizenry around dreams of discovery, systematic rationality, and the irrepressible right to rule. Nevertheless, the rhetoric of pioneer sovereignty could not be allowed to go unchecked, for its very logic disrupted legal boundaries and made it difficult to institutionalize a society's hard-won gains. As unorganized and indigenously-populated lands became territories, and as territories turned into states, a more systematic rule of law displaced the more unruly discourse of popular sovereignty, driving more adventurous ideas ever into alternative texts and underground communities.

Religious revivals and political reform movements, including a number of utopian projects, spread the language of liberty and popular consent as groups migrated West. Such dissenting communities depended on the language of liberty in creating their own legal texts and belief systems. For example, the Icarian immigrants from France created law-like institutions, even as they organized themselves according to socialist principles. Some alternative communities played with more democratic procedures; others tried more autocratic ones. In doing so, these groups instrumentally used American legal language in the service of their own narrow goals, but their actions also often revealed, at a profound level, a kinship with America's democratic culture.[15] Religious groups and

[15] Tsai, *America's Forgotten Constitutions*, 49-82; Diana M. Garno, *Citoyennes and Icaria* (Lanham, MD: University Press of America, 2005); Carol Weisbrod, *The Boundaries of Utopia* (New York: Pantheon, 1980): Albert Shaw, *Icaria: A Chapter in the History of Communism* (New York: G.P. Putnam's Sons, 1884); Emile Péron, *Brief History of Icaria. Constitution, Laws and Regulations of the Icarian Community*

reform movements played a significant role in keeping the higher-law tradition alive, preserving space for a robust vernacular for criticism and legal change. In this manner, legal language became broader, thinner, and more available to a wide array of persons and compatible with a shocking range of ideologies and policy objectives. Law, as a "vulgar tongue," gained the power to resist existing hierarchies and impart new forms of social order.[16] At times, states blessed these radical projects; at other times, these religious experiments were merely facilitated by available constitutional idioms and the law of contract. Social groups not only challenged existing property rights regimes by recycling existing legal modalities, but also tried different rules promoting the equality of women and racial minorities, and expressive and religious freedoms. When these experiments ended, state law often intervened to liquidate communal holdings and reintegrate their members into American society.

Perhaps the most dramatic shifts in legal discourse took place around slavery. Opponents of slavery appropriated the language of liberty against traditionalists, racial nationalists, and even the very authors of America's legal texts. Through forceful counter-use and agitation, they enlarged a young nation's vocabulary of power. Sermons, books, and newspaper editorials forcefully stated the case for abolition, argued that slavery entailed illegal kidnapping and battery, and defended resistance to slavery as an

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(Corning, IA: Office of Publication, 1880); Etienne Cabet, *The History of the Colony or Republic of Icaria in the United States of America* (Nauvoo, IL: Icarian Print, 1852).

[16] In calling law a "vulgar tongue," Tocqueville remarked that the "whole people contracts the habits and the tastes of the magistrate" and that law is fashioned to suit the purposes of the legal profession. Tocqueville, *Democracy in America*, 261. In fact, legal language proved to be far more dynamic than the Frenchman believed, not merely domesticating revolutionaries, but also inspiring average citizens to take up radical projects.

exercise of the natural right of self-defense.[17] Americans fought over conceptions of equality and liberty, veering between communal understandings of these fundamental ideas and more individualistic formulations.

*Uncle Tom's Cabin*, published in 1852, was a runaway bestseller, described by reviewers as "a necessity of the age ... [that] had to be written," with readers expressing "doubt if abler arguments have ever been presented, in favor of the 'Higher Law' theory, than may be found here."[18] At one point in the tale, Tom watches as a slave trader hands over a slave woman's sleeping boy to a buyer without her knowledge or consent. The casual nature of the transaction, juxtaposed with the mother's horrified reaction upon learning of the sale and departure of her son, leads Tom to describe a mix of feelings about the law:

> Tom had watched the whole transaction from first to last, and had a perfect understanding of its results. To him, it looked like something unutterably horrible and cruel, because, poor, ignorant black soul! He had not learned to generalize, and to take enlarged views. If he had only been instructed by certain ministers of Christianity, he might have thought better of it, and seen in it an every-day incident of a lawful trade; a trade which is the vital support of an institution which

[17] See, e.g., Lysander Spooner, *A Plan for the Abolition of Slavery and to the Non-Slaveholders of the South* (New York: Lysander Spooner,1858); Lysander Spooner, *The Unconstitutionality of Slavery* (Boston: Bela Marsh, 1845). During this period, William Lloyd Garrison's newspaper *The Liberator* and *Uncle Tom's Cabin* (London: John Cassell, 1852) by Harriett Beecher Stowe became literary influences on the slavery debate.

[18] Review of Uncle Tom's Cabin, *London Times*, Sept. 1852; Review of Uncle Tom's Cabin, *The National Era*, Apr. 15, 1852; Review, *Frederick Douglass' Paper*, Apr. 1, 1852.

> an American divine tells us has "no evils but such as are inseparable from any other relations in social and domestic life." But Tom, as we see, being a poor, ignorant fellow, whose reading had been confined entirely to the New Testament, could not comfort and solace himself with views like these. His very soul bled within him for what seemed to him the wrongs of the poor suffering thing that lay like a crushed reed on the boxes; the feeling, living, bleeding, yet immortal thing, which American state law coolly classes with the bundles, and bales, and boxes, among which she is lying.

In this passage, Tom openly struggles with competing visuals and legal principles, weeping over what he has witnessed. Tom's Bible-based learning matches his feelings of disgust and sympathy, along with his powerful sense of injustice arising from the lived experience of slavery. Stowe contrasts the potency of higher law joined by human experience from ordinary "state law," which (though reflecting community judgment) denied the reality of human suffering by classifying slaves with other non-sentient commodities that are bought and sold. The next day, the trader learns that the mother had drowned herself in sorrow while others slept. His response is merely to shrug and write off his business loss as a "little incident[] of lawful trade."

The sensational 1829 pamphlet known as *Walker's Appeal* turned America's language of political liberty against the slave trade.[19] David Walker, a former slave, directed his words primarily to the colored people of the United States, urging them to "assert their rights as men" by revolting against their slave masters. Toward the end of his

[19] David Walker, *Walker's Appeal* (Boston: David Walker, 1829).

pamphlet, Walker recited the Declaration of Independence, using its ringing words to raise a charge of hypocrisy on the part of republicans nevertheless devoted to a brutal and unequal practice, and to show that legal slavery's manifold cruelties gave rise to a "right . . . [and] duty, to throw off such government."

In a similar vein, the radical abolitionist John Brown wrote an editorial justifying his armed rescue of slaves as an enforcement of individual "liberty"; he later authored a Declaration of Liberty on behalf of the enslaved people of America.[20] In that declaration, likely written in 1859, Brown called for defenders of the "Slave Code," whose "laws are no laws," to be dethroned and for "universal freedom" and the "natural equality of rights" to be restored. To Brown, elites had warped the meaning of the Constitution for selfish and dehumanizing ends. In order to both publicize an alternative rhetoric of liberty and imbue it with the force of popular sovereignty, Brown held a convention of "friends of freedom," namely, abolitionists and formers slaves. In Chatham, Canada, Brown and his followers elaborated upon the principles announced in the Declaration by approving a Provisional Constitution. The rotting remnants of the 1787 Constitution now had a direct competitor in a text sanctified by freedmen and their allies.

Slaveholders, too, claimed America's legal language as their own, employing it to entrench their economic interests and value system. On the other side of the contentious

[20] John Brown, "Old Brown's Parallels," *New York Tribune*, Jan. 28, 1859; A Declaration of Liberty by the Representatives of the Slave Population of the United States of America, July 4, 1859; Provisional Constitution and Ordinances for the People of the United States (1858); Robert L. Tsai, "John Brown's Constitution," *Boston College Law Review* 51 (2010): 151-207. *See also* Brian McGinty, *John Brown's Trial* (Cambridge, MA: Harvard University Press, 2009); F.B. Sanborn, ed., *The Life and Letters of John Brown: Liberator of Kansas and Martyr of Virginia* (Boston: Roberts Bros., 1885).

question, pamphlets and newspapers played a prominent role in rationalizing slavery in terms of man's social nature, property rights, and the prerogative of white citizens as sovereigns.[21] Though stressing the equality of citizens, the rhetoric of civic republicanism presumed that not all individuals are fit for self-rule. Moreover, slavery preserved federalism, or the structure of constitutional governance, and its proponents used the rhetoric of equality to advance the political equality of states rather than what they called the equality of the enslaved. Slaveholders contended that the people of each state enjoyed the basic rights of nullification and disunion when they became despondent about their political future.[22] By contrast, the North's war justifications, issued in presidential speeches, proclamations and other public documents, offered a theory of constitutional self-government that rejected the right of states to leave the "perpetual" Union and called secession an act of rebellion.[23]

An increase in the use of proclamations and public orations offered American presidents fresh means by which to present a striking vision of the law and themselves as

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[21] Eric Walther, *The Fire-Eaters* (Baton Rouge: Louisiana State University Press,1992); William W. Freehling, *The Road to Disunion, vol 2: Secessionists Triumphant, 1854-1861* (New York: Oxford University Press, 2007); John C. Calhoun, Speech, Jan. 10, 1838, in Eric L. McKitrick, ed., *Slavery Defended: The Views of the Old South* (Englewood Cliffs, NJ: Prentice-Hall, 1963); George Fitzhugh, *Cannibals All! Or, Slaves Without Masters* (Richmond, VA: A. Morris, 1857); George Fitzhugh, *Slavery Justified* (Fredericksburg, VA: Recorder Print Office, 1850).

[22] Michael T. Bernath, *Confederate Minds: The Struggle for Intellectual Independence in the Civil War South* (Chapel Hill: University of North Carolina Press, 2010); Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York: Oxford University Press, 1970); Laura A. White, *Robert Barnwell Rhett: Father of Secession* (Gloucester, MA: P. Smith, 1965).

[23] President Jackson's Proclamation Regarding Nullification, Dec. 10, 1832. On the different uses of a citizenry's war experiences to justify constitutional change, see Robert L. Tsai, "Three Arguments About War," 30 *Constitutional Commentary* __ (2014).

a guarantor of liberty.[24] In this reprisal of older models of charismatic leadership, a president is called from among the people and claims to be uniquely capable of protecting the rights of the community. In fulfilling this literary-historical role, the oral and the written interacted in dynamic fashion: speeches were given with an eye toward memorialization; the most important legal texts might also be announced live for dramatic effect. Presidential discourse therefore straddled the official and the popular, at times reinforcing the law as given by judges and at other times capitalizing on broader idioms to resist juridic formulations of the law in the name of the people.

Perhaps the most famous presidential writing of all—the Emancipation Proclamation—had its formal function as a legal document justifying the liberation of slaves in the seceding states overtaken by its function as a vehicle popularizing the language of resistance to slavery.[25] After President Abraham Lincoln affixed his signature, the five-page document was sent by telegraph to concerned parties and published widely in newspapers. The U.S. Supreme Court's *Dred Scott v. Sanford* decision in 1857 had read the Constitution's protection of slavery in absolutist terms, excluding slaves and former slaves from the America political community as "beings from an inferior order" forever incapable of the duties of citizenship. Chief Justice Roger Taney's ruling privileged the individual slaveholder's right of property in the slave,

[24] Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton: Princeton University Press, 1987).
[25] Eric Foner, *The Fiery Trial: Abraham Lincoln and American Slavery* (New York: W.W. Norton & Co., 2010); Paul Finkelman, "Lincoln, Emancipation, and the Limits of Constitutional Change," *Supreme Court Review* 9 (2008): 349-387; Sanford Levinson, "Was the Emancipation Proclamation Constitution? Do We/Should We Care?," *University of Illinois Law Review* (2001): 1135-1158.

reading the Due Process Clause of the Fifth Amendment in such a way as to short-circuit local and state movements toward emancipation and citizenship, and to disrupt congressional efforts to manage the slavery dispute.[26]

Lincoln's January 1, 1863, wartime proclamation pushed back against this juridic formulation of political equality as an idea reserved for white men alone. That winter in Gettysburg, Lincoln rewrote the nation's founding so as to emphasize the birth of "a new nation . . . dedicated to the proposition that all men are created equal."[27] Lincoln freed the slaves as a "fit and necessary war measure," but also called it an "act of justice, warranted by the Constitution." Some abolitionists were not satisfied by the technical and limited scope of the statement, but others hailed it as a strong moral signal from the presidency—one that would ultimately make the Emancipation Proclamation and Gettysburg Address more famous than the Thirteenth Amendment later abolishing slavery.[28]

In one sense, defenders of the Union utilized the popular language of justice, liberty, and equality to demoralize the South and win the war. In another sense, Lincoln deployed war-dependent arguments about freedom to rhetorically create a new political community during a time of great upheaval: a polity no longer based on condition of servitude (past or present), but rather on mutual sacrifice and acceptance of ideas of equality and freedom. Legal language was thus deployed by the administration to knit

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[26] Dred Scott v. Sanford, 60 U.S. 393 (1857). *See generally* Mark Graber, Dred Scott *and the Problem of Constitutional Evil* (New York: Cambridge University Press, 2006); Don E. Fehrenbacher, *The* Dred Scott *Case: its Significance in American Law and Politics* (New York: Oxford University Press, 1978).
[27] Abraham Lincoln, Address, Gettysburg, Pa., Nov. 19, 1863.
[28] John Hope Franklin, "The Emancipation Proclamation: An Act of Justice," National Archives, Jan. 4, 1993, reprinted in *Prologue Magazine* (1993): 25(2).

together soldiers, abolitionists, slaveholders in states that had not seceded, escaped slaves, and anyone willing to resist the Confederate theory of law and politics. Though Lincoln would not live long enough to see the realization of this legal vision, his speeches and writings helped Americans imagine a future in which the rule of law once again constituted a pluralistic citizenry concerned with happiness and good order.

Though sanitized of the strongest forms of racial sovereignty, Lincoln's powerful vision of American law recapitulated the view that a strong, undivided nation-state was the best vehicle for political community. Valuing unity of purpose and belief above all, his prose failed to acknowledge that differences, too, could be an enormous source of strength and respect for law. Additionally, Lincoln's short-term reliance on war to move citizens to embrace racial equality, while instrumentally brilliant, left equality arguments vulnerable in the long run to counterarguments that the problems of racial discrimination were historically contingent ones that had mostly been solved at war's end.

The Confederate theory of law, in particular, had to rely on alternative media as the political fortunes of slaveholders changed for the worse.[29] On this front, popular legal language fostered a regional lifestyle based on the plantation, and later helped forge a national identity based on shared economic and cultural ties. Having abandoned the institutions associated with the Union, secessionists tried to recreate their own legal culture, by transforming what had previously been a dissident belief system into a governing framework and new laws. The founders of the Confederacy sought popular

[29] Jon L. Wakelyn, ed., *Southern Pamphlets on Secession, November 1860-April 1861* (Chapel Hill, University of North Carolina, 1996); William C. Davis, *"A Government of Our Own": The Making of the Confederacy* (New York: Free Press, 1994).

authorization for their linguistic enterprise by following the precedent established by the Framers of the 1787 U.S. Constitution: calling for conventions in the slaveholding states where grievances could be aired, publishing statements justifying Southern independence, and then drafting and ratifying a constitution to govern a slave-owning republic.[30] Pro-slavery newspapers and pamphlets waged an ideological battle against abolitionist writings, giving as good as they got and encouraging other states to flee what they believed to be a despotic legal order.[31]

After the Civil War, the Reconstruction Amendments codified an anti-slavery legacy, one that imposed new obligations on states while strengthening and clarifying the terms of national citizenship.[32] As written, the Amendments promised the franchise, due process, and equal protection of the laws to every member of the polis. Still, it did not take long for linguistic conflict over the meaning of equality to resume. In the *Slaughterhouse Cases*,[33] the Supreme Court read these provisions narrowly to forbid Congress from enacting a civil rights public accommodation law. This highly technical interpretation of the Fourteenth Amendment's Privileges and Immunities Clause was met

[30] *See, e.g.*, Declaration of the Immediate Causes Which Induce and Justify the Secession of South Carolina from the Federal Union, Apr. 26, 1852; Confederate States of America-Constitution for the Provisional Government, Feb. 8, 1861.
[31] Tsai, *America's Forgotten Constitutions*, 120-134; Stephanie McCurry, *Confederate Reckoning: Power and Politics in the Civil War South* (Cambridge, MA: Harvard University Press, 2010).
[32] Garrett Epps, *Democracy Reborn: The Fourteenth Amendment and the Fight for Equal Rights in Post-Civil War America* (New York: H. Holt, 2006); Bruce Ackerman, *We the People 2: Transformations* (Cambridge, MA: Belknap Press, 1998); John Hope Franklin, *Reconstruction: After the Civil War* (Chicago: University of Chicago Press, 1961); Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* (New York: Harper & Row, 1988).
[33] 83 U.S. 36 (1873).

with public outrage and warred with a broader understanding of the nation's commitment to ensuring racial equality. It also represented an effort by elites—judges in particular—to assert control of linguistic development over the rights of citizenship (and deny Congress that power except as to a narrow range of rights).

As Reconstruction ended, other tropes reemerged to frustrate broad application of the Constitution's promise of equality. The ordinary language of "civil" and "political" life—nowhere mentioned in the Bill of Rights but an active element of republican ideology—became a potent way of limiting the Constitution's reach as legal strategies of exclusion become increasingly discredited. Thus, through the ordinary operation of the justice system, the juridic grammar of equality became routinized and particularized. Phenomena defined as involving only the "social" sphere, even though governmental regulation might be involved, could thus be defined beyond the scope of the Fourteenth Amendment. Such terms, coupled with formulations extoling the traditional "police power" of each state to ensure public order and regulate the moral welfare of the people, thus became the legal discourse for creating new racial hierarchies. Local ways of life reasserted and retrenched themselves, despite the imperatives of national citizenship. It is in this light that the *Plessy v. Ferguson* decision upholding racially segregated railroad cars is best understood.[34] The U.S. Supreme Court's majority opinion stressed the ineradicable quality of social differences—differences that by themselves gave rise to no right of action: "A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races and which

[34] 163 U.S. 537 (1896).

must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races."[35] Draining race-based laws of the presumption of ill motive or effect, Justice Henry Billings Brown wrote that "[l]aws permitting, and even requiring, [racial] separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power."[36] Using the "social" as a category that delimited legal remedies, the Court ironically then turned a blind eye to the sociological reality of a community stratified by race-based regulations and norms. The "social" became an anti-category, a widening lawless zone (at least by higher law standards).

*Plessy* was not merely a product of a rhetorical clash involving individual rights on the one hand and state prerogatives on the other. Through its manipulation of social and legal categories, the decision also licensed an atomistic and antagonistic set of rhetorical practices that both justified and obscured practices that systematically dehumanized racial minorities.

Life within the system of legal slavery and racial segregation was highly fraught, filled with contradictions and having many unintended consequences. Justice Harlan's famous *Plessy* dissent pointed out that, under Louisiana's racial code, Chinese passengers who in many formal respects enjoyed a lesser legal status were treated better than blacks. But a more wide-ranging critique of the law can be found in literature. Mark Twain's *The*

[35] *Id*. at 543.
[36] *Id*. at 544.

*Tragedy of Pudd'nhead Wilson* not only dramatized the absurdities inherent in America's system of racial apartheid but also toyed with the legal spaces for defiance.[37] A major plot line involves a slave girl, Roxy, who is charged with taking care of a slavemaster's son. To protect her own son from being sold, she decides to switch the two boys, raising her own fair-skinned son as the heir to the plantation and the inattentive slavemaster's boy as a slave. This shocking subversion of the racialized legal order reveals not only a mother's desperation living under slavery but also the depravity of a legal system that could so callously separate family members. Yet the mother's micro-resistance to slavery is ultimately unsuccessful, for her son grows up passing for white, but also becomes spoiled, cruel, reckless, and violent. This turn of events reveals the apparent superiority of cultural forces over inborn traits, though the legal system theoretically turns on the innate characteristics that differentiate human beings. Worse, the young man ends up robbing and killing his "uncle," a local judge. When two innocent people are tried for murder, fingerprint evidence leads to the discovery of Tom, the real killer, as well as his true identity as Roxy's son. His fate is not only to be convicted of murder, but also to be pardoned by the Governor (at the request of his "father's" creditors) and sold down the river to satisfy the slavemaster's debts—a poignant reminder of the inescapable quality of legal slavery. Meanwhile, the real Tom, raised culturally as a slave, is restored to his

[37] Mark Twain, *The Tragedy of Pudd'nhead Wilson* (New York: Bantam Books, 1894). Spangler finds in the story a compelling critique of the importance of property rights in the Gilded Age. George M. Spangler, "Pudd'nhead Wilson: A Parable of Property," *American Literature* 42 (1970): 28-37; *see also* Lee Clark Mitchell, "'De Nigger in You': Race or Training in *Pudd'nhead Wilson*?," *Nineteenth-Century Literature* 42 (1987): 295-312; Earl F. Briden, "Idiots First, Then Juries: Legal Metaphors in Mark Twain's *Pudd'nhead Wilson*," *Texas Studies in Literature and Language* 20 (1978): 169-180.

place as a free man and the heir to a fortune but his manners remain "vulgar and uncouth," and he simply "could not endure the terrors of the white man's parlor." When Twain hands down these moral-legal judgments, Roxy finds her own "heart was broken" and "the voice of her laughter ceased in the land."[38]

Beyond recurring issues over race, arguments about security, war making, and the needs of a national economy spurred the growth of a language of power that consolidated ideas of belonging and authority. The rule of law—extended in a series of judicial rulings to every subject matter in which the federal government might be said to have an enumerated or implied interest—enhanced the influence of political actors and judges alike over land, institutions, and identity.[39] After the Civil War, the needs of political development continued to shape the terms of civic membership, and how the state dealt with non-citizens and populations perceived to comprise imperfect citizens. On the one hand, a young nation-state's impetus to expand allowed advocates to use the language of equality to push for more inclusive terms of participation. On the other hand, while formal rules for immigration and voting were relaxed for most of the nineteenth century, a host of procedures and informal practices arose by which to regulate the lives of minority communities.[40] Rather than simply exclude or banish all undesirables, the law turned toward strategies of partial integration and management.[41]

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[38] *Ibid*., Conclusion.
[39] Marbury v. Madison, 5 U.S. 137 (1803); *see also* Cohens v. Virginia, 19 U.S. 264 (1821); McCulloch v. Maryland, 17 U.S. 316 (1819); Martin v. Hunter's Lessee, 14 U.S. 304 (1816).
[40] For most of the nineteenth century, the states regulated immigration as waves of migrants arrived from European countries. In 1882, Congress enacted the Chinese

As the nineteenth century came hurtling to a close, new disintegrating forces worked against national efforts at linguistic consolidation. The law appeared to many Americans as too confining, overly partisan, and highly susceptible to corruption. Once again, the law seemed to serve the interests of the few over the many, and the rhetoric of liberty and equality would have to be refitted for a new age. The excesses of capitalism and big government continued to generate adaptations of the rhetoric of equality and sovereignty. Those who did not organize their own alternative communities tried to reform economic and social policies. Some tax resistors, who could be found among the business class and working class alike, tried to dismantle the system of taxation that had emerged to fund major war efforts and internal improvements of the nineteenth century; others labored to frustrate tax reforms such as progressive taxation. Tax resistors not only recycled revolutionary-era idioms involving taxation without adequate representation, they also claimed that broad tax powers had to be tied to specific exigencies and that certain taxation programs violated individual rights to equality and property.[42] During the Civil War, onerous taxes by the Confederacy in its final, desperate months had helped erode support for the Southern cause. Far from ending such defiance, the conclusion of the war merely merged older forms of tax skepticism with newer concerns about the size

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Exclusion Act during a serious economic downturn in which legislators acceded to concerns about racial purity.

[41] On the Puritan roots of the American rhetoric of banishment, see Nan Goodman, *Banished: Common Law and the Rhetoric of Social Exclusion in Early New England* (Philadelphia: University of Pennsylvania Press, 2012).

[42] Romain D. Huret, *American Tax Resisters* (Cambridge, MA: Harvard University Press, 2014), 13-77. Recall that American colonists had castigated the Crown "For imposing Taxes on us without our Consent," listing tax policies among the "injuries and usurpations" justifying a complete political break. Declaration of Independence, July 4, 1776.

of government and how it was financed. As the justifications for expanded governmental power grew, so too did popular legal arguments seeking to check or reverse these developments.

Urbanization, industrialization, and economic dislocation in the waning decades of the nineteenth century produced fiery rhetoric levied against Gilded Age excesses. Populists unleashed the republican language of virtue and equality against electoral fraud, the monopolization of natural resources ("a heritage of the people"), exploitation of labor by management, and unchecked immigration. Outraged farmers and their allies turned property rights rhetoric against rich owners and speculators, insisting that "wealth belongs to him who creates it," rather than to those who amass it. The most strident and conspiratorial Populists complained that corporations had "enslaved" the American people.[43]

Tapping into fears about the demise of the agrarian economy, the ascendance of an impersonal industrial order, and a latent strain of nativism, the platform of the People's Party in 1892 called for the realization of "equal rights and equal privileges," the unionization of workers, and the return of government to "the hands of the 'plain people.'"[44] Believing sovereignty and territorial control to be inextricably linked, leaders of this farmers' revolt demanded that any land held by corporations "in excess of their

[43] Mrs. Sarah E.V. Emery, *Seven Financial Conspiracies Which Have Enslaved the American People* (Lansing, MI: R. Smith & Co., 1887), reprinted in Jeffrey Ostler, "The Rhetoric of Conspiracy and the Formation of Kansas Populism," *Agricultural History* 69 (1995): 1-27.

[44] Populist Party Platform, July 4, 1892; *see generally* C. Vann Woodward, *The Origins of the New South: 1877-1913* (Baton Rouge: Louisiana State University Press, 1951); Robert H. Wiebe, *The Search for Order, 1877-1920* (New York: Hill & Wang, 1967); Richard Hofstadter, *The Age of Reform: From Bryan to FDR* (New York: Knopf, 1955).

actual needs" and all lands owned by aliens be reclaimed by the government and given to "actual settlers only." Four years later, at the height of its influence, the Populist Party embarked on efforts to regain "our financial and industrial independence," by wresting power from "European moneychangers" and corrupt politicians.[45] The platform advocated the referendum as a vehicle for direct lawmaking, the direct election of senators, and the establishment of term limits for public officials. Expressing explicit disapproval of recent Supreme Court decisions on taxation, Populists reiterated their support for a graduated income tax.

Popular sentiment also led to the redrawing of the design of the judiciary throughout the country. In a burst of legislative activity during the mid-nineteenth century, citizens demanded that judges be directly accountable to the people to guard against cronyism and subservience to other branches of government—a phenomenon that tugged against the Federalist legacy of indirect governance.[46] Populists extended this older critique against a new political aristocracy, seeking to dismantle what William Jennings Bryan called an "office-holding class [that] excludes from participation in the benefits the humbler members of our society."[47]

Bryan's electrifying "Cross of Gold" speech at the Democratic National Convention bore all the hallmarks of a popular assault on elite formulations of law. He

[45] People's Party Platform, July 24, 1896.
[46] Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America* (Cambridge, MA: Harvard University Press, 2012).
[47] William Jennings Bryan, Speech, Democratic National Convention, Chicago, Ill., July 9, 1896. See generally Rhys H. Williams & Susan M. Alexander, "Religious Rhetoric in American Populism: Civil Religion as Movement Ideology," *Journal for the Scientific Study of Religion* 33 (1994): 1-15.

cast the problems facing the yeoman farmer as a matter of collective "liberty," for "[t]he individual is but an atom; he is born, he acts, he dies; but principles are eternal; and this has been a contest of principle." Bryan then deployed the rhetoric of equality to lift up the agrarian laborers represented by the populist movement: "But we stand here representing people who are the equals before the law of the largest cities of Massachusetts…. The farmer who goes forth in the morning and toils all day, begins in the spring and toils all summer, and by the application of brain and muscle to the natural resources of this country creates wealth, is as much a businessman as the man who goes upon the Board of Trade and bets upon the price of grain." He assailed the Supreme Court for striking down tax reform legislation, thundering, "the principles upon which rest Democracy are as everlasting as the hills; but … they must be applied to new conditions as they arise." From there, Bryan described the Populist surge as an effort to stand "against the encroachments of accumulated wealth."

While potent regionally, the angry class-driven rhetoric of pitchfork liberty eventually stumbled against the harsh demographic realities of urban existence at the national level. This is not to say that dissatisfaction dissipated with Bryan's loss in the 1896 presidential election, but rather that such appeals had to be broadened before lasting policy changes could be made. To the ears of many citizens, Populist exhortations seemed overly radical, narrow, and insufficiently attentive to modern American life in the cities. Though Bryan disclaimed any desire for ideological "conquest," his strident attack on the gold standard and major features of the national economy sounded positively revolutionary to voters who desired more modest corrections.

Because Populism was primarily an agrarian and sectional experience, sex equality did not figure as a prominent concern; women had to clamor for recognition and autonomy separately. The women's rights movement enjoyed a galvanizing moment in Seneca Falls, where attendees of a convention prepared the *Declaration of Sentiments* in 1848.[48] With Elizabeth Cady Stanton as its primary author, the document cited Blackstone for the proposition that natural law is superior to human law and that the "true and substantial happiness of woman" is the ultimate purpose of government. Then, playing on the words of the 1776 Declaration of Independence, the Seneca Falls document listed a series of "injuries and usurpations on the part of man toward woman." Unlike separatist movements, however, women's rights leaders used the ancient language of liberty and self-determination to promote reform within the existing legal order. They demanded the franchise, equal opportunity in the workplace, and fair treatment in the areas of property rights, marriage, religion, and education. Legal language served several functions for reformers: identifying subjects for reevaluation, marking the importance and urgency of these issues vis-à-vis other matters, and inspiring collective political action. Tactically, the women's rights movement looked to the precedent established by abolitionists. Substantively, however, the connections were more strained. Sex equality

[48] Seneca Falls Declaration of Sentiments and Resolutions, July 19-20, 1848. See Sally G. McMillen, *Seneca Falls and the Origins of the Women's Rights Movement* (New York: Oxford University Press, 2008); Judith Wellman, *The Road to Seneca Falls: Elizabeth Cady Stanton and the First Woman's Rights Convention* (Urbana: University of Illinois Press, 2004); Kristin A. Olbertson, "Religion and Rights in Nineteenth-Century American Law: Reflections on the Work of Elizabeth B. Clark," *American Journal of Legal History* 53 (2013): 121-130. On the influence of the Declaration of Independence more generally, see Alexander Tsesis, *For Liberty and Equality: The Life and Times of the Declaration of Independence* (New York: Oxford University Press, 2012).

arguments were highly fraught, with considerations of sex entangled with those of race and nationality. For many, women's rights emerged seamlessly from more established forms of antislavery rhetoric. But for others, racial equality was little more than a convenient foil, reminding white men that their wives and daughters should not be treated worse than black citizens and recent immigrants.[49]

In this same vein, it may be instructive to consider briefly the nineteenth-century experience of the indigenous population, whose own interactions with Anglo-American law began in serious antagonism and moved into a more complicated phase of linguistic adaptation and political assimilation. Early on, American law treated indigenous populations as foreign nations. Defeat of Indians on the battlefield led to banishment on a massive scale to the outer edges of the polity. Even so, native tribes, forcibly relocated west of the Mississippi in the 1830s, pushed for greater autonomy during the latter part of the nineteenth century.[50] They did so in the face of efforts to organize the land and extend the rule of law over Indian affairs. At first, the federal government directed inhabitants of

[49] For instance, the Declaration of Sentiments itself decried, "[Man] has withheld from her rights which are given to the most ignorant and degraded men—both natives and foreigners." See Kathryn Kish Sklar, *Women's Rights Emerges Within the Anti-Slavery Movement, 1830-1870: A Brief History with Documents* (Boston: Bedford/St. Martin's, 2000); Linda K. Kerber, "From the Declaration of Independence to the Declaration of Sentiments: The Legal Status of Women in the Early Republic 1776-1848," *Human Rights* 6 (1977): 115-124.

[50] Frank Pommersheim, *Broken Landscape: Indians, Indian Tribes, and the Constitution* (New York: Oxford University Press, 2009); Stuart Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (Cambridge, MA: Harvard University Press, 2005); Rennard Strickland, *Fire and the Spirits: Cherokee Law from Clan to Court* (Norman: University of Oklahoma Press, 1975); Angie Debo, *And Still the Waters Run: The Betrayal of the Five Civilized Tribes* (Princeton: Princeton University Press, 1972); Grant Foreman, *The Five Civilized Tribes* (Norman: University of Oklahoma Press, 1934).

the region to establish a single government with an eye toward territorial status and eventual statehood. Soon thereafter, Congress enacted a series of laws apportioning Indian lands and requiring individuals to register for a share of real property. These laws attacked tribal sovereignty by destroying its territorial basis and, along with other measures, subsuming much of Indian governance within a federal framework.

In response, tribal leaders not only demanded that treaties with the federal government be honored, they also increasingly resorted to the language of American law in making their appeals.[51] Indian leaders tried to turn the rhetoric of political liberty against elites who they believed wanted nothing more than to steal ancient lands, destroy indigenous culture, and abrogate valid agreements. From the perspective of liberal nationalists, the Civil War had proven the importance of creating a strong national legal order and civic identity, coupled with a commitment to individual rights and liberties. For such theorists, the connection between the citizen and the nation-state had to be profound and as direct as possible, uncomplicated by the claims of competing sovereigns.

To resist this dominant vision of the law, legal writing again served as a tool for the oppressed. The so-called Five Civilized Tribes (Cherokee, Choctaw, Seminole, Creek & Chickasaw) met in 1870 and drafted the Okmulgee Constitution, in response to a federal directive that "all the nations and tribes in Indian territory be formed into one consolidated government." Drawing on previous native constitutions and laws, as well as white man's legal instruments (including the Tennessee Constitution), representatives of these Indian nations proposed a republican form of government for Indian Territory. The

[51] Tsai, *America's Forgotten Constitutions*, 152-160.

Okmulgee Constitution envisioned a confederacy ruled by a government with three branches, including a Governor, General Assembly, and judicial department. A Declaration of Rights secured to each inhabitant of Indian Territory Anglo-American trial rights, as well as familiar expressive rights of assembly, speech, and religion.[52] Although this instrument was never ratified according to its own terms, the document framed future conversations over Indian independence, the synthesis of competing legal systems and cultures, and the scope of minority political rights into the next century.

Much had changed during the nineteenth century. Territory had been acquired, annexed, and mapped. Early forms of American politics had matured into an intricate system of bureaucracies across the land, administered by trained professionals. Through it all, legal language played a major role in shaping debates, inspiring risk-taking and lawbreaking, and justifying changes in communal boundaries and civic identities. The most visible development involved the displacement of customary legal discourse by institutions and statutes over time. Nevertheless, legal vernacular retained a vitality in politics and literature, simultaneously nurturing widespread belief in the rule of law while preserving an oppositional democratic culture.

[52] Okmulgee Constitution (1870); Arrell M. Gibson, "Constitutional Experiences of the Five Civilized Tribes," *American Indian Law Review* 2 (1974): 17-45.