

Criticisms of the Common Law and the Development of the American Codification Movement

Our American legal system reflects England's in that we adopted that state's common law. This adoption happened out of necessity, but was met with ardent opposition by the American Codification Movement, a significant force in the legal environment from about 1820 to 1850. This was a powerful effort, one led by some of the foremost legal minds of the era, figures that remain notable to this day. It was motivated by a desire to make codified law an essential element in American legal development. As historian Charles Cook, in his study of the era's legal reforms, *The American Codification Movement*, explains, the movement "is best understood as an attempt to deal with the problems of antebellum legal development that occurred within an already well-established legal tradition" (1)¹. In this essay, I am not as concerned with what transpired over the course of the movement, as I am with what gave rise to it. I will attempt to show, through a study of the legal and political climate surrounding Americans both in the early years of this country's independence, leading up to 1820, and in those years in the seventeenth and early eighteenth centuries when colonists were founding a society and body of laws for themselves here, while abroad Blackstone was concurrently writing his famous treatise on the English common law, that it was the nature of Americans' existence in an ever-expanding frontier state, joined with both their core desire for the law to protect their private property and their growing self-identity as an exceptional and mobile people, that created a set of conditions particular to the American experience and lent credence to criticisms of the common law, criticisms which found their ultimate form in the American Codification Movement.

¹ Charles Cook, *The American Codification Movement: A Study of Antebellum Legal Reform*

The Frontier At The Start: The Early American Mindset

Frederick Jackson Turner, an influential American historian, in his essay, “The Significance of the Frontier in American History,” examines the meaning of the frontier through a discussion of the American practice of liberty². By putting Turner’s essay in conversation with French political theorist and historian Alexis de Tocqueville’s seminal *Democracy In America*³, with particular emphasis placed on Tocqueville’s discussion of restlessness, we can gain not only a clearer formulation of the term “frontier” and the changing interpretations Americans have had of it over time, but also a better understanding of how the frontier and the law have been inextricably linked together in America. Tocqueville and Turner both look at the frontier as physical land. But, the notion one gets in looking at their writings and the state of the American legal system at the turn of the nineteenth century is that for the American people, and for the sake of law and democracy in America, more important than the fact of the frontier is the idea of the frontier, especially when looking at the rise of America as a mobile culture.

Literally, and on an elemental level, the significance of the frontier to early Americans was that it provided them the idea of mobility, of an open space to which they could move, thus helping this nation’s citizens understand themselves to be a mobile people. John Locke described us best as being the people who first enacted that right to go, to leave the place that you were born and grew up in, and Thomas Jefferson echoed this sentiment, viewing those first Americans who ventured from England into the newly discovered Americas as the first to exercise the right to leave². Initially then, Americans only became Americans because they left the place of their origins. But as generations of new Americans were born and raised here, what came to define

² FJ Turner, “The Significance of the Frontier in American History”

³ Alexis de Tocqueville, *Democracy in America*

and distinguish America was its distinctive democracy, which was fostered by its common law system that was itself a reflection of Americans' mores and customs.

For Tocqueville, the frontier, as unexplored land, allowed for the creation of our democracy, and it was our views about this frontier that influenced how our democracy would grow. Ours is a nation founded by Puritans, the first of whom "...sought a land so barbarous and neglected by the world that there at last they might be able to live in their own way and pray to God in freedom" (Tocqueville, 36)³. This whole nation was literally a physical frontier, but, as Tocqueville explains, Puritans were afraid of its unsettled places, for they believed that when one goes outside of civilization, he or she will fall to bad temptations. To them, the wilderness, the physical frontier, was a place of great freedom and, hence, danger. This view of the frontier led Puritans to establishing laws, in the form of social contracts, in every colony they founded. As the New England colony's population grew, it "came more and more to present the novel phenomenon of a society homogeneous in all its parts. Democracy more perfect than any" (39) before it. Yet from those social contracts arose in these Puritans an attitude that would later permanently mark the American mindset. In his famous sermon, "A Model of Christian Charity," Puritan John Winthrop ingrained in his fellow colonists the notion that, in their consenting to the colonies' social contracts, they were really making a covenant with God, consenting "...to obey the ordinances of God, be subject to God's will, and do God's work. They are covenanting to be God's chosen people" (32). This belief is an early example of American exceptionalism, the Puritans thinking, as so many Americans would and still do, that they were special simply because they were here, that "their safe passage to the shores of New England signifies God's ratification of their covenant" (32). They believed they were working for God, and could now do so without facing persecution, as they had in England. They viewed the frontier, the unexplored

land, as a “...new promised land. It can be a land of freedom, justice, and charity under God” (32). This vision the Puritans had, that this land could provide an equality of conditions and justice for all, are staples of our democracy and legal system today. Tocqueville argues that this notion could only have been cultivated because the frontier was so massive, that “...God himself gave [the Puritans] the means of remaining equal and free, by placing them upon a boundless continent...open to their exertions” (282). Thus, the boundlessness of the American frontier, a seemingly unending sprawl of new land, allowed Puritans a freedom from physical limits that created in them, and the future Americans who would establish our particular democracy and legal system, ideals of egalitarianism and justice that, whether successfully or not, the development of our laws has always been aimed at preserving.

Property Matters: The Necessity for the English Common Law

The American Revolution did not lead to any immediate reforms to the existing law of the time, marking a conservation of the legal status quo atypical of the effects of other nations’ revolutionary experiences. In fact, “all but two of the thirteen new states specifically provided that pre-existing law would remain in force” (Cook, 3)¹. Instead, the English common law, both as a set of rules and as a means of organizing a legal system, was adapted to the American circumstance, with only those provisions that dealt with colonial status and allegiance to the English Crown being eliminated. This lack of legal reform was directly the product of American revolutionaries feeling that their purpose in achieving independence was to guarantee that everybody had those rights, liberties, and immunities which already existed in the law, but which the English had threatened. To this point, the First Continental Congress had declared, in 1774,

that as subjects of the Crown, Americans had all the same rights those born in England were privileged to, including, specifically, the “Common Law of England” (4).

The practical reason, though, behind not deviating from the laws already in place was that there existed a glaring absence of reported decisions. As James Kent, while sitting on the New York Supreme Court in 1789, noted, he had ““never dreamed of volumes of reports and written opinions. Such things were never heard of. We had no law of our own and nobody knew what it was”” (9). Until we started preserving decisional law and making it readily accessible through regular publication, we could have no American common law of our own. Likewise, this lack of easy access to authoritative sources of law, such as past statutes and decisions, rendered text writing in those early years of our independence a difficult task. And as scant few American legal texts and treatises came into existence prior to 1800, and fewer than thirty were even made between 1800 and 1815 (9), this lack of native law books on American jurisprudence and substantive law left American lawyers, dealing then with ever-increasing legal disputes and demands, almost no resort but to depend upon those English legal works and precedents already available and in effect.

While the dearth of native legal materials might have helped lead the newly confederated states in the direction of maintaining the English common law, giving too much weight to this practical reason belies a much more influential, pragmatic reason: the protection of property. The years immediately following the Revolution were already a period of extraordinary change, and any breaking with legal continuity would likely only have brought greater uncertainty and instability to the law, something that could not be afforded because it would jeopardize existing property rights. Thomas Jefferson, in rejecting the creation of a new legal system, surmised, as others leaders of state commissions working to revise the laws of their new states did, that ““the

imperfections of human language, and its incompetence to express distinctly every shade of idea,' would render each word of any new text 'a subject of question and chicanery...and thus would involve us in ages of litigation and render property uncertain'" (5). When declaring it necessary that existing laws be kept in effect, the Vermont legislature, though newly independent from English control, explained that established English law should remain binding because "the inhabitants of the State have been habituated to conform their manners to English laws, and hold their real Estates by English tenures'" (4). This expressed concern for the safety and protection of individuals' property has been a central tenet of our legal system, of our democracy, indeed of the principles we as a people hold dear since the time those early Puritans first began taming the wilderness of the frontier and laying the foundation for the nation we live in today.

While, in the present, property might best be considered a social institution that structures people's relationships with each other and with the state regarding how to control, use and transfer scarce resources, it was in the eighteenth century viewed mainly as an object of the utmost importance, its ownership the source of one's influence and power, and its protection the intended aim of the law, an aim reflected in, if not derived by, William Blackstone. Blackstone's *Commentaries on the Laws of England* (1765-1769) was at this time considered the leading work on the development of English law. Blackstone's highly influential work was a methodical treatise on the English common law, and it served as the definitive source of US common law both before, and immediately after, the Revolution. Blackstone defines private property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (Blackstone, 1:2)⁴.

⁴ William Blackstone, *Commentaries on the Laws of England*

He writes that one of the absolute rights inherent in every Englishman, in addition to the rights of personal security and personal liberty, is that of private property, “which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land” (1:138), and he stresses the importance of protecting this right by writing that, “so great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community” (1:139). Given the immense value Blackstone places in private property, it is not surprising that he takes the possession of private property to be the basis of an individual’s legal will and ability to contract, and he defines liberty primarily as the individual’s right to an undisturbed possession of property (Michals, 196)⁵. He actually takes this further even, delineating liberty amongst different classes of people, finding that the varying abilities, rights, and duties of individuals are derived primarily from their different relations to real property, and he argues that, without property, power cannot be maintained (199). More specifically, “a stable social order, one built on the stable identities of generations of landowning gentlemen, cannot be maintained without real property. According to Blackstone, an independent will is itself an effect of real property, not an attribute of natural persons” (199-200). Blackstone therefore assumes that, under the common law, those in society who own no property inherently exist “under the dominion of others” (Blackstone, 1:171)⁴, and that the English common law is, and by design must be, “extremely watchful in ascertaining and protecting this right...that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law” (1:139).

Now, given that, to the Puritans, the unending amount of wilderness that was the frontier before them presented the danger that one could go outside of civilization and lose themselves to

⁵ Teresa Michals, “‘The Sole and Despotic Dominion’: Slaves, Wives, and Game in Blackstone’s Commentaries,” *Eighteenth-Century Studies*, Vol. 27, No. 2 (Winter, 1993-1994), pp. 195-216

the wrong temptations, and the fact that at America's independence there was still myriad frontier wilderness untouched by American civilization, equating that frontier to the state of nature as John Locke viewed it will provide a better understanding of why the right to property was seen as so fundamental to Americans and the common law as expounded by Blackstone. This is especially true since Blackstone's *Commentaries* can in some ways be seen as a synthesis of English common law with Lockean political philosophy, which, at the time of Blackstone's writing had gained prominence in Britain and the colonies (Lubert, 278)⁶. While Blackstone did not go as far as Locke would in binding civil law to natural law, Blackstone did give high regard to the Lockean view on natural law, finding that, "being co-eval with mankind and dedicated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this" (Blackstone, 1:41)⁴. Blackstone would not agree with Locke in many respects, and he thought Locke was "a populist who would have destroyed English law and 'levelled all distinctions of honour, rank, offices, and property' — all of which were explicitly under attack when Blackstone wrote" (Srevens, 423)⁷. Still, Blackstone appears to have been very influenced by Locke's views on property, and this influence proved very important to early American lawyers, who relied a great deal on Blackstone in informing them of the law and in building cases (Tuckness, 555)⁸.

Reflecting on the Glorious Revolution of 1688, which saw the overthrow of King James II and the British monarchy, Locke, in his *Second Treatise of Government*, argued that the state

⁶ Howard L. Lubert, "Sovereignty and Liberty in William Blackstone's 'Commentaries on the Laws of England,'" *The Review of Politics*, Vol. 72, No. 2, (Spring 2010), pp. 271-297

⁷ Jacqueline Stevens, "The Reasonableness of John Locke's Majority: Property Rights, Consent, and Resistance in the Second Treatise," *Political Theory*, Vol. 23, No. 3 (Aug., 1996), pp. 423-463

⁸ Alex Tuckness, "Discourses of Resistance in the American Revolution," *Journal of the History of Ideas*, Vol. 64, No. 4 (Oct., 2003), pp. 547-563

of nature was not entirely bad, and that the government and the law's primary purpose is the protection of property. Locke conceives that "Men living together according to reason, without a common superior on earth, with authority to judge between them, is *properly the state of nature*" (Locke, 15)⁹. Thomas Hobbes, also writing in response to the Glorious Revolution, had contemplated the state of nature to be a state of war. In *Leviathan*, Hobbes wrote, "...men have no pleasure...in keeping company, where there is no power able to over-awe them all" (Hobbes, 70)¹⁰. To Hobbes, men, by their natures, are competitive, diffident, and glory-seeking, qualities that cause them to be prone to fighting with one another. And without a common power to restrain the pugnacious natures of men, those living in this state of nature "...are in that condition which is called Warre; and such a warre, as is of every man, against every man" (70). Hobbes believed the law exists, then, because so long as every man has a right to everything, "...there can be no security to any man..." (72). Locke, however, disagreed, and specifically differentiated the state of nature from the state of war. Locke defines the state of war as "...force, or a declared design of force, upon the person of another, where there is no common superior on earth to appeal to for relief..." (Locke, 15)⁹. Locke is not doing as Hobbes did, defining the state of war as one where every man is against every other man. Rather, Locke is defining the state of war as it affects the individual. Locke finds that in society, when an individual is the target of an act of aggression, the use of the law helps the actual state of war cease to be (15), but to avoid the state of war in the state of nature, where there is a "...want of positive laws, and judges with authority to appeal to...is one great reason of men's putting themselves into society, and quitting the state of nature" (16). Locke agrees with Hobbes that men living in, simultaneously, both the state of nature and the state of war, would want to flee to society. However, he does not agree

⁹ John Locke, *Second Treatise of Government*, 1688

¹⁰ Thomas Hobbes, *Leviathan*

with Hobbes' assumption that all men fight all other men and, thus, that the state of nature and the state of war are inextricably linked.

While for Hobbes the purpose of law and government is to free men from the state of nature, Locke, in stark contrast, had a very positive outlook about what entailed the nature of man and the purpose of law therefrom derived. Locke saw that all men are naturally in "...a *state of perfect freedom* to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature...a *state* also of *equality*, wherein all the power and jurisdiction is reciprocal, no one having more than another" (8). Locke believes man more than capable of efficiently running his own government and system of laws, without forfeiting all of his rights to an absolute power. To Locke, the state of nature is a state of equality, wherein, "...being all *equal and independent*, no one ought to harm another in his life, health, liberty, or possessions" (9). But Locke here is only espousing his ideal of the perfect state of nature; he states that man, in truth, will flee from the freeing, egalitarian state of nature, subjecting himself to the laws and rule of a government, because, "...every man his equal, and the greater part no strict observers of equity and justice, the enjoyment of the property he has in this state is very unsafe, very unsecure" (66). Locke's interpretation of the state of nature is in keeping with the Puritans' and early Americans' experience, their purpose in designing social covenants and, upon seizing their independence, maintaining the English common law already in place. Locke concludes that, while the state of nature provides freedom—as the physical frontier certainly did—it can also make those in it greedy, feeling entitled to it—as early Americans feared would happen if individuals went outside of civilization, that they would fall to these sorts of bad temptations. Fundamental to an understanding of Locke, and the importance of his thinking to the newly independent states, is what he argues becomes of man when he leaves the state of

nature: he joins “...with others, who are already united, or have a mind to unite, for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*” (66).

The purpose of law and government is the protection of property. Locke realizes that the chief goal “...of men’s uniting into common-wealths, and putting themselves under government, *is the preservation of their property*” (66).

It was thus that, in our nation’s post-Revolution years, those deciding that the English common law would stay in effect, influenced by Locke and Blackstone, came to their decision with a view to legally guaranteeing the protection of individuals’ property in the face of the great frontier that was our nation. Jefferson, in a 1789 letter, actually wrote that he considered Locke—along with Bacon and Newton—to be “the three greatest men that have ever lived, without any exception, and as having laid the foundation of those superstructures which have been raised in the Physical & Moral sciences”¹¹. Locke’s views had frequently been invoked by the Revolutionaries arguing against the Stamp Act, and by marginalized groups in America like women and abolitionists, and the prevalence of his views only continued after the Revolution (Goldie, introduction)¹². At the same time, between 1760 and 1805, Americans referenced Blackstone over all other political and legal thinkers, including Locke, because, as already explained, they had few written legal sources and material to rely on. This is emphasized by the finding that, “to American judges and lawyers who in the years following the Revolution looked to English law as a basis for American law, [Blackstone’s] writings were essential. As Mary Ann Glendon observes, ‘Blackstone’s systematic treatment of English law...was not only a source of great importance, but the only reference work that many lawyers had’...Americans during the

¹¹ Thomas Jefferson’s Letter to Richard Price Paris, January 8, 1789, <http://www.let.rug.nl/usa/presidents/thomas-jefferson/letters-of-thomas-jefferson/jefl74.php>

¹² Goldie, Mark. “Introduction.” *The Reception of Locke’s Politics*. Brookfield, VT: Pickering & Chatoo, 1999

Founding era embraced Blackstone...in short, Glendon writes, ‘it would be hard to exaggerate the degree of esteem in which the...*Commentaries* were held’” (Lubert, 272-273)⁶. All of this is to say, the importance of guaranteeing the protection of individuals’ property in the newly independent frontier nation, an importance of the highest degree to the English common law, as characterized by Blackstone’s treatise and reflecting Locke’s views, helped in large part lead America’s first leaders and lawmakers to opt for keeping the English common law system in place.

Origins of the American Codification Movement: Criticisms of the Common Law

From the very moment, post-Revolution, that American leaders like Jefferson advocated for maintaining legal continuity, disillusionment with the existing English legal system arose, and with it, the sense that pure continuity could not be a satisfactory solution (Cook, 5)¹. Demands for law reform by those early American critics of the English common law were centered primarily on the criticism that the law was inaccessible and uncertain, due to its being unnecessarily complex and overly technical, and similarly, that the English form and consent of the law could not be made applicable to America (5). Critics believed that our having a republican government necessitated a need for all citizens to be familiar with the laws by which they governed themselves; two Georgia lawyers, Robert and George Watkins, commented in 1800 that, “In a representative government, it is of the utmost consequence to the body of the nation to be rightly informed of those laws and regulations by which their duties are defined and their rights secured” (5). While the newly independent states had, in declaring that the English common law would continue to be upheld, decided what the source of law in our nation would

be, they had not, given the still glaring lack of written law, determined what the content of that law would be. And as noted earlier, the issue was not only that there was a lack of written law, but also that there was a lack of reported decisions. The unpublished oral opinions that existed led to legal uncertainty, making adoption of the English common law vital.

In addition to the lack of legal materials and reported decisions, a tremendous concern that persisted about the English common law was that it could not be properly adapted to our new federal structure. America was a democracy, England a monarchy. American lawyers, Cook writes, had learned from Blackstone “that the common law consisted of transcendent, enduring legal principles, but the reality of the federal system, with its numerous, largely autonomous jurisdictions, stood in contradiction to such notions” (10). Of the impact of our federal structure on the law, Joseph Story, in his *Selection of Pleadings*, concluded, ““A variety of English books on this subject [pleadings] are at once elaborated and learned, yet such is the difference of our customs, statutes and common law, that they will be formed, in many respects, inadequate to supply the necessities of our own judicial practice”” (10). The process of adapting the English common law to American circumstances, not surprisingly, proved very difficult. Adding to this difficulty was the fact that the critics who were not themselves lawyers believed that the complexity of the laws that were kept in place was intentional, that it profited attorneys to keep the law so, as “complex law created infinite possibilities for scheming chicanery to subvert the principles of justice...and allowed [lawyers] to take advantage of the public’s misfortunes and vices” (14). Thus, as states were attempting to adapt the English common law to the new American circumstances and system of government, critics were espousing the view that it was too complicated, and thus incapable, of being adapted, demanding instead that a simplified, codified form of law take its place.

A greater source still of the soon-to-form American Codification Movement than a displeasure with the legal complexity of English jurisprudence was the widely held conviction that “independence must be declared from English law because it was believed inapplicable to the genius of American government and institutions” (17). This belief was one of American exceptionalism, and harkens back to the early colonists’ —the first Puritans’ —view of what could be made of the frontier, of the egalitarian society that could be formed in a place with no perceivable limits. Myriad well-established and respected lawyers and jurists in this era argued for doing away with all signs of English jurisprudence—including the common law, of course—in favor of codified, purely native law. One such intensely critical voice was Nathaniel Chipman, a six-year US Senator from Vermont who would be the first professional lawyer to sit on the bench of the Vermont Supreme Court, and who would serve as its Chief Justice. As Perry Miller, in his collection, *The Legal Mind In America: From Independence to the Civil War*, provides for context, Chipman was a leader of the Vermont bar at a time when the state was still very much a frontier community, and his criticism represents the central problem so many Americans, dealing with how to establish law in a frontier land that was now entirely theirs to rule, had with the adoption of English common law (Miller, 19)¹³. In his 1793 volume, *Sketches on the Principles of Government*, Chipman expressed strong desire for “a system of laws applicable to our own governments,” arguing that English jurisprudence was the “jurisprudence of a foreign nation” that contained a mixture of “heterogeneous principles” not suited to American conditions (28). Chipman, echoing Locke, argued that while the state of nature might be myth, the concept of it has to be presumed in America, because “when applied to man, the laws of nature are the laws of social nature...man is formed for a state of society and civil government...in civil society only,

¹³ Perry Miller, *The Legal Mind In America: From Independence to the Civil War*

can man act agreeably to the laws of his nature...if society and civil government be founded in natural principles, the laws, which naturally and certainly result from such state, are laws of nature” (27-28). To Chipman, and to many other critics of the time, Cook writes, “the general course of the communal development must be posited upon the universal rules which prevailed in the hypothetical state of nature. Of these the most enduring is the sanctity of private property. This sanctity is not exclusive to any particular class...This sanctity of private property—the most enduring of natural laws—is the cornerstone of the democratic solution” (20).

While many critics of the time, like Boston merchant Benjamin Austin, would have destroyed “every vestige of Westminster Hall’s influence in America” (Cook, 17)¹, Chipman, like other more moderate critics, did concede that “there are many things in [Blackstone’s] Commentaries, which accord with the principles of the American governments, and which are founded in the universal principles of jurisprudence” (Miller, 29)¹³. Chipman found these agreeable English laws were “...derived from the democratic part of the British constitution” (29), and though he still thought the majority of English law to be aristocratically biased, and so inherently immoral (29), he advocated that “...it was necessary to borrow selectively from the English as the time was probably not ripe for the creation of a totally new system of laws congenial to American principles” (Cook, 17)¹. Hence, to Chipman and likeminded critics, construction of a body of law for our newly democratic society demanded “a gradual liberation of the American legal mind from the domination of Blackstone” (Miller, 21)¹³, but until we could create our own American jurisprudence, we would have to, to some degree, rely on Blackstone’s *Commentaries*. Chipman’s writing indicates that many critics of the adoption of English common law—at least, those more mild in their criticism—wrestled with how to reconcile their growing sense of American exceptionalism and the need for a wholly new, American body of

law that such a viewpoint demanded, with the reality of the difficulty the making of such a new system would entail, particularly in light of the fundamental, Lockean desire to protect individuals' property in the frontier state.

Other notable, influential critics at the time made similar, if more inclusive, observations. For instance, Jesse Root, a minister and lawyer from Connecticut who served as chief justice of that state's Supreme Court and worked in both the Connecticut House of Representatives and the Connecticut Constitutional Convention, firmly believed English common law to be utterly inapplicable to American society, and worked toward making American law independent from it. In his preface to the first volume of systematic *Reports* on Connecticut cases, 1798's *The Origin of Government and Laws in Connecticut*, Root urged Americans "to rear a system of jurisprudence purely American, without any marks of servility to foreign powers or states" (Cook, 17)¹, for, he argued, "We need only compare the laws of England with the laws of Connecticut, to be at once convinced of the difference which pervades their whole system. This is manifest in the spirit and principles of the laws, the objects, and in the rules themselves" (Miller, 33)¹³. Root, like Chipman and others, was influenced by the Lockean view of the state of nature and the need for the law to protect one's property, and claimed that early colonists, in developing their own common law and form of government, did so as a free, sovereign, and independent people—unlike the subjects of the English common law—and so the American common law "was derived from the law of nature and of revelation—those rules and maxims of immutable truth and justice, which arise from the eternal fitness of things...adapted to their conditions and circumstances" (33).

Unlike Chipman, though, Root suggests that "all countries and nations' possibly had something to offer. He observed that the American states should be like a 'republic of bees,'

extracting ‘their honey from innumerable flowers’” (Cook, 18)¹, and so while he proposed doing away with the English common law as not adaptable to America, he believed that in creating “a system of jurisprudence purely American, without any marks or servility to foreign powers or states” (Miller, 39)¹³, Americans should nevertheless be open to deriving “instruction and improvement from the observations, discoveries, and experiences of the literate, in all countries and nations, respecting jurisprudence and other useful arts and sciences” (39). Root and Chipman, and fellow critics like Austin, were essentially legal nationalists, critical of English law and wanting a purely American law, one tailored specifically to American circumstances, because its creation alone “would establish a certainty in the law so greatly desired by their craft” (Cook, 19)¹. Root’s detailed look into the advantages of the reported American laws over English law in America would actually later be enlarged into the slogan, “codification” (Miller, 32)¹³. But while both he and Chipman believed English law in part inappropriate and inapplicable to American conditions, Root was more tolerant of at least its partial incorporation into the American legal system, for he recognized that “a great deal of our [American] legal ideas were originally derived from the laws of England and the civil law, which being duly arranged, have been incorporated into our own system, and adapted to our own situation and circumstances” (Miller, 39)¹³.

Despite these arguments against adoption of the English common law by such legal nationalists, the arguments by many prominent legal figures in favor of it proved the more persuasive. Isaac Parker, who served as Chief Justice of the Massachusetts Supreme Court, claimed the English common law to be of “common sense and sound reason...the result of the researches and profound meditations of the wisest sages” (Cook, 18)¹. Parker acknowledged that aspects of the English common law which could not be readily applied to the changed American

circumstances or which were overly complicated needed to be removed or simplified, but he maintained his laudatory stance on it and believed that it should be the basis of American law, and should be “cherished as *our own*...as the *Common Law of Massachusetts*” (18). This view, of course, was that of the American revolutionaries, and he, like they, believed that any significant change to the English common law outside of what was minimally necessary for its adaptation to America would pose a grave danger that could destroy “the general safety and certainty of the laws as we now enjoy them” (18).

Still, so many in the legal profession were unchanging in their position that the English law, even if capable of being adapted to the American circumstances, was too complicated to warrant any adaptation and use. In response to this continuing criticism, states, by the early 1790s, began adopting and implementing a reform meant to solve this issue of the law’s perceived inaccessibility. This reform was the process of statutory revision, which was a “consolidation of statutes reprinted in a uniform style and usually in chronological order, from which were eliminated dead laws (repealed or expired legislation), private acts, and sleeping statutes (obsolete laws)” (24), the result being a comprehensive, authoritative statement of a jurisdiction’s statutory law in a manageable size. Local, American-born statutes were dealt with similarly, and by 1815, Vermont and ten of the original thirteen states had completed the revision processes, providing for the digestion of their ordinances (25). Although these revisions brought about a single authoritative statement of the law in the states that attempted it, this process cannot be thought of as codification, despite the impetus behind it bearing much similarity to the later American Codification Movement, because “those statutes found to be in force were merely reproduced in the revision as they were originally enacted; this was true of both American and British statutes” (25), and further, “nothing beyond the circumstances of random legislative

action established the arrangement of the revision” (25), meaning that no systematic arrangement was used, and instead, mere chronological organization employed. The completed revisions did not even meet the demands of those critics calling for the law to be simplified, who found these statutory laws just as complex and mysterious. As such, statutory revision was defeated in Pennsylvania and South Carolina, and by 1815, nine of the eighteen states then in existence had either not undertaken, or failed to complete, the revision of their laws (27).

At the same time, like the statute law, the common law America had adopted from the English was also unflaggingly perceived by critics as inaccessible and uncertain, but in contrast to their response to this same criticism of the statute law, states were relatively very slow in responding here. This tardiness in attempts to make the common law more certain was perhaps due to how, “unlike the statute law, which was periodically added to or subtracted from, the common law was viewed by most as a complete system of jurisprudence, or, as Judge Isaac Parker of Massachusetts put it, the common law was ‘a vast amalgamation of principles, axioms, and precedents applicable to every relation of life’” (29). It was thought by its supporters in the legal profession, like Parker, to already contain all necessary remedies and rules, and there was a fear that any attempt to change its structure, by reducing it to a written form, would endanger its completeness. However, reform eventually came, in the form of states compiling and publishing reports of their decisional law. By 1803, Massachusetts had appointed the first official American reporter, and by 1820, nearly all of the other states had done the same (30-31). These appointments of official reporters, and the subsequent regular public circulation of the produced reports represented a break from traditional British practice in American law, and also different was American states’ requirement that every decided case be included, no matter how redundant and insignificant, whereas the British included only important cases in their reports (31).

However, while this practice of publishing reports served, at least superficially, the republican need for all government to be made responsible to the people, serious problems continued to exist for the legal profession and critics of the American common law, who still found the complexity of the law far from abated, and who still took umbrage with its foreign, or English, content (32). The fact is, American legal literature was still scarce, a weakness that required our adopting doctrines from foreign jurisprudence, and our continuance with English law could only lessen with the development of a greater body of accessible native law. This development could only happen with time, but critics of our reliance on English law felt emboldened by what they saw as the failure of these various reform movements, and they heighten their criticisms, ultimately seeing codification as the proper solution to these problems that they perceived.

Just prior to the formation of the American Codification Movement, one more, notable, attempt at a reform to satiate the critics of the common law was attempted, and like those attempts that came before it, this one too failed, and only gave further impetus to critics to call for codification. Hugh Henry Brackenridge, a prominent Pennsylvanian and jurist, and the other members of that state's supreme court, in the face of the ongoing problem of not conclusively knowing the extent of English law that was in force in that state, proposed in 1808 that the common law be abolished in the state (37). Though Brackenridge had been a proponent of its adoption, the common law, he felt, left too much uncertainty. While similar proposals had often been made in the past, they were almost exclusively a part of fiery, passionate speeches, and never stated in as moderate a way as Brackenridge did. For he maintained that he still had much admiration and love for the common law's content, but felt that its form, as an unwritten body of legal rules, needed to be gotten rid of, though its content should be kept. Brackenridge viewed the content of the common law as the source of American liberty, and recommended its form be

separated from its content. In particular, “he proposed that the common law of England, as applicable to Pennsylvania, should be ‘reduced to writing and enacted by *Statute*’” (38). Of course, the written result would no longer be the common law. While this proposed measure failed to gain traction, it is of great importance because what Brackenridge suggested would become, two decades later, a core issue of the American Codification Movement—the desire to reduce the English and American common law to a written systematic form (38). What adds to this importance of Brackenridge’s proposal is that, “for the first time, this desire was seriously and responsibly adapted at length to American conditions and circumstances, and designed to meet America’s particular legal needs...such legislative enactments as an alternative to the uncertainty of the common law, within twenty-five years...had become a basis demand within the legal profession, and one of the most seriously debated issues in law” (39). The essential point of Brackenridge’s argument, the point which later formed the basis of one of the main arguments for codification, was that even though liberty in America had been derived from the common law, for the sake of the country’s future, it would now have to break away from the form of the common law so long as it continued to make knowledge of the law an uncertainty.

Soon, others in the legal profession who had supported adoption of the common law began voicing their support for Brackenridge’s sentiment, helping give rise to the American Codification Movement. One opponent of codification, lawyer Joseph Hopkinson, published an essay titled, *Considerations on the Abolishment of the Common Law in the United States*, two years after Brackenridge had made his proposal, and in it argued that any attempt to codify the common law would only serve to destroy the well-established and regulated aspects of American law, “most significantly those involving property rights. Only the courts could bring order out of the chaos that would result, but a settled legal system would not come easily or quickly

following the reduction of the common law to writing” (41). He and other opponents of codification felt that the conservative reforms aimed at widening accessibility to the law, without changing its form or content, were sufficient. They addressed their arguments to lay persons, appealing to their desire to keep their private property protected, making the point that that common law ensured individuals security of the known, while codification ensured chaos and a loss of protections (43). In making these arguments, those opposed to codification were appealing to Lockean ideals, but increasingly, as more and more of the frontier was being settled, and with it, the state of nature that was the frontier wilderness disappearing, critics of the common law were becoming ever more restless with the lack of major reforms, and were looking to codification in greater numbers.

In Effect: How the American Codification Movement was Formed

In his *The Federalist Era*, historian John C. Miller writes about the Federalists and their effect on government, the law, and Americans generally from 1789-1801, and his writings help shed further light on the mentality of those individuals who would form the American Codification Movement; a brief examination of Miller’s writings proves helpful. Miller wrote about this era with a view to exploring what measures were necessary to the promotion of prosperity and cohesion in our newly independent country, looking at which actions that the new federal government took were vital to protecting individuals in the exercise of their American constitutional rights. By examining the struggles between Republicans and Federalists, and in the distinction between Hamiltonian Federalists and Adams Federalists, Miller ultimately concludes that while the Federalist party itself disappeared after 1800, many of its key values continued to

impact the American point of view, one of which, relevant here, is a “respect for property rights” (Miller, 277)¹⁴.

To Miller, as others who have already been discussed, the protection of property rights had always been a fundamental aim of government and the law. Miller writes that, upon George Washington’s electing who would serve on his cabinet, the organization of the Federal government decided, the Washington administration “was in a position to embark upon a program designed to fulfill the cardinal purposes of the Constitution: the protection of property rights” (32) being one of those central purposes. At the time of the Articles of Confederation, according to Miller, the position of property rights were relegated to one of less importance, a precarious position that threatened a danger of potential monarchy, even, for that is how great the need for protection of individuals property is (78), and adjusting for this concern, amongst others, “the new government afforded ample protection to property” (79). Although the Federalists, in their constant fear of the possible consequences of a democratic majority led by demagogues, devoted much of their efforts to establishing an economic system designed to benefit merchants and bankers, one protected by a powerful central government with a very strong executive department that would be, as Alexander Hamilton called it, the “cement of the union” (81), and so the type of property they wished to see protected by law and government was stocks, bonds, factories (116), the sort of property interests small American landowners did not possess, still, the Federalists’ view on property rights was one all Americans could share. The Federalists, “upon the sanctity of property rights...based all the rights of man; if property could be invaded by a government acting at the behest of a majority, no other rights were safe” (117). To the Federalists, to the American mindset, as in the 1600s social covenants made by the

¹⁴ John C. Miller, *The Federalist Era: 1789-1801*

Puritans, and as in the proposed reforms to the law in the 1800s during the American Codification Movement, the law was designed for the protection of individuals' private property.

The American Codification Movement, which began in roughly 1820 and ended around 1850, was a strong force in that era's legal development, but its development was perhaps enabled, or at least enhanced, by the change in the American mindset that was then taking place. When the Puritans were settling this frontier nation, they had before them what might have seemed like endless wilderness—a state of nature—and naturally fearful of the consequences of man's entering and existing in such a state, they built law to protect property, and in turn, society. As the colonies expanded, more of the frontier was explored. As the nation gained its independence and began growing, forming new government, and building new, better means of travel and communication, Americans ventured further and further into the great frontier. And soon enough, the American mindset shifted. Tocqueville finds that, whereas the early Americans were driven by a passion for democracy and laws providing equal rights, the 1800's American was full of restlessness. On the whole, Americans had become less committed to building that perfect, egalitarian, democratic society the Puritans and the Founders had envisioned for this frontier, and were more engaged in the active pursuit of their own self-interests, seeking their own welfare, wanting everything they could possess. And in their pronouncedly avaricious nature, Americans had become restless: Tocqueville imagined that, "In the United States a man builds a house to spend his latter years in it, and he sells it before the roof is on" (Tocqueville, 535)³. Likely the greatest source of this restlessness is that feeling of American exceptionalism which first originated with the Puritans. As Americans, over time, came to believe they were special, they began to feel more entitled to have whatever they wanted. Tocqueville thought this bad for democracy, as it would undermine people's connections and relationships with those around

them, the argument being that, if everyone feels special, “born to no vulgar destinies” (536), they will come to think of themselves as more important than others, and as they come to want more, a new set of American social conditions will be made, one rife with inequality. These new American conditions, I posit, were reflected in the developing American law, in the dispute between adoption and abolishment of the common law that led to the American Codification Movement.

Democracy and the law, for Tocqueville, inherently had to be about a balance struck between liberty and equality, both for the individual and for the community. Unfortunately, bearing restless frames of mind, 1800’s Americans could be seen as simultaneously insatiable in their desire for having more, and easily discouraged if they could not readily get that which they yearned for. For them, Tocqueville ventured, “...the means to reach that object must be prompt and easy, or the trouble of acquiring the gratification would be greater than the gratification itself” (536). This tendency to be discouraged proved problematic because, “When men are nearly alike, and all follow the same track, it is very difficult for any one individual to walk quick and cleave a way through the dense throng which surrounds and presses him” (537). Being easily discouraged would have only meant Americans were even less likely to succeed in their endeavors and, therefore, less likely to stand out in this frontier land, or what was left of it. For the very reason that our democracy, and the laws established to protect and guarantee it, had created a relative equality of conditions and opportunities here, in contrast to England and other such states, Americans now demanded something even more, a perfect equality. Since “the desire of equality always becomes more insatiable in proportion as equality is more complete” (538), the restless Americans viewed the frontier’s large open space as offering them the prospect of this certain perfect equality of conditions, even though “...they can never attain the

equality they desire... At every moment they think they are about to grasp it; it escapes at every moment from their hold” (538). 1800’s Americans, restless, never satisfied with how much equality of opportunity was allotted them by the law, doggedly believed that the open space the frontier offered them meant everybody should have the chance to lead their life they wanted, and that if their desires could not be met in one city or one state, then just as the Puritans left England to realize their own dreams, so they could now realize theirs by moving to some other city or state, or even into untouched frontier land.

Taking into consideration the 1800’s Americans’ general restlessness and swelling desire in light of their sense of American exceptionalism, all of which only grew with the notion that in this ever-expanding frontier nation there could always be a better place to go to, the difficulty of adapting the English common law to this country, with its particular, changing circumstances and social conditions, was only exacerbated by this fact that the frontier increasingly made us a mobile people. Already in the years immediately following the Revolution, and then in the Federalist Era, the laws affecting those issues most vital to interstate affairs—including commerce and the protection of property—were quite varied from state to state (Cook, 10)¹. Cook notes, “the difficulties arising from this situation would increase as the society became more mobile...when a citizen ‘leaves the state or vicinity to whose laws and jurisprudence he is accustomed, he is lost...becomes a stranger in his own country...subjected to involuntary prejudice and error’” (10). And exactly this phenomenon was occurring, since, beginning in the first quarter of the nineteenth century and rapidly continuing thereafter, Americans grew restless and, resultantly, became even more mobile. The desire for the law to protect their property remained very much central to Americans, but as observed, they began wanting more property, in buildings, crops, material possessions, whatever they could have, and they used the mobility

offered them by the fact of their living in a frontier nation—a land free of border restrictions where they could settle wherever they chose—to attempt to gain more of whatever property it was they desired. That Americans became more mobile meant that the central grievance proponents of codification had voiced all along about the common law, that it was too complex and complicated for the average man to understand, was now given substantially greater conviction, for mobile Americans, moving from one legal jurisdiction to another, were discovering how different the laws in each could be, and how ignorant they could be of these laws.

In Conclusion: Legal Development at the Start of the American Codification Movement

As the American Codification Movement was beginning around 1820, the effect of the restless nature of 1800's Americans, and the aforementioned attempts at reformation of the common law prior to 1820, combined to create a sudden influx of American law. There was suddenly a relatively significant amount of native law, as a "restless America," one with a quickly developing economy and changing society, had created much increased legal needs, needs which only continued to rise (46). One legal contemporary, in 1826, said, "the unexampled prosperity of the nation...the almost incredible growth of population, and immense extension of commerce, a vast and rapid accumulation of wealth, wonderful inventions and discoveries in machines and the arts, the great public schemes of large capital in trade and manufactures have these past forty years combined to create a real demand for law adapted to the improved constitution and modern exigencies of society" (46). Thus, while that restlessness in Americans helped create the American Codification Movement by making them more cognizant,

through their travels to other legal jurisdictions, of what the proponents of codification viewed as the complexities and mysteries of the common law, this same restlessness and increased desire for property and self-wealth acted as a boon to commerce and the economy, and thereby offered many new situations that demanded legal solution. In meeting these demands, American lawyers helped vastly develop and expand American law, creating a remarkable increase in the amount of native legal materials, in both reports and statutes, available (47).

Nevertheless, satisfaction with the expanded American law could not dissipate the concerns of those whose criticisms would form the American Codification Movement. Lawyers after 1820 complained primarily about “problems arising out of the magnitude and diversity of the emerging legal product; the institutional role of the judiciary in the common law system; the continued close affinity of American law to English jurisprudence; and the difficulties encountered in dealing with these materials” (47). These areas of complaint would come to manifest themselves largely in the form of the same criticism that had always been waged by those opposed to the common law, that it was too hard to know and understand, particularly now that restless, mobile Americans could perceive its lack of uniformity across different jurisdictions. This overarching, continuing criticism of the common law can best be seen in Joseph Story’s September 1821 “Address Delivered Before The Members Of The Suffolk Bar,” wherein he compares American to English jurisprudence and concludes the former, our native law, in some respects narrower in its scope, and in others more comprehensive (Miller, 69)¹³. To a degree, he praises the body of American law then in existence, for example stating, “The progress of jurisprudence since the termination of the War of Independence, and especially within the last twenty years, has been remarkable throughout all America” (68), but likewise he warns of the danger that it has become too voluminous, “that we shall be overwhelmed by their

number and variety...our law is still sufficiently extensive to occupy all the time, and employ all the talents, and exhaust all the learning, of our ablest lawyers and judges” (67, 69), this despite the removal of many inapplicable English laws from the American common law.

In his address, Story also remarked on the troubling lack of uniformity in the common law across the states, and while he accepted that, with twenty-four states in the nation then, uniformity would be hard to achieve, American jurisprudence was, in his view, “perpetually receding farther and farther from the common standard...administering justice in the state as well as national courts, from the new and peculiar relations of our system, must be very laborious and perplexing; and the conflict of opinion upon general questions of law, in the rival jurisdictions of the different states, will not be less distressing” (68). Story’s concerns here reflect those of many lawyers, whether pro-codification or not, in the era of the American Codification Movement, whose “complaints about the enlarged size of the native legal product and its internal diversity focused on the common law” (Cook, 50)¹ because, by its nature, case law mattered much more in actual legal practice. As such, by 1820, the same criticisms as before were being leveled at the common law, but with much greater frequency now. The difference, however, was that though the common law, en masse, was still being criticized as too complicated to fully understand and not tailored to the American conditions, this criticism was no longer derived from any lack of legal materials, but as a result of too much legal materials (50), a change brought about by the frontier’s creation of a mobile people who, dictated in part by their feelings of American exceptionalism, had become restless in their expectation that they should easily get what they wanted, and discovering that, as they moved to different jurisdictions, though the common law there might be native and largely not English, it was nevertheless still

unknowable and mysterious to them, now because of a lack of uniformity in these greater number of laws, across these greater number of jurisdictions.

As this changed American mindset and conditions led to a booming economy, Americans profiting from, and helping create, this boom likely held more property, and new forms of it— with these gains and the increased commerce involved, one can assume that many of the new legal disputes arising at this time centered around the protection of property. This increase in the need for legal assistance, of course, only perpetuated the growth of the common law, as “Cases of first impression frequently made up an extraordinary portion of the work of the courts” (52). William Sampson, an incredibly anti-English lawyer who argued several major cases before the United States Supreme Court, in delivering a speech in 1823, “An Anniversary Discourse,” before the New York Historical Society, was fiery in his opposition to the English common law. He wanted the English common law entirely abandoned, “for with every deference due to the learning, wisdom, and integrity of English judges, they are not fit persons to legislate for us...Dependence can never cease if one nation is always to reach, and the other always to learn. Our condition is essentially different from theirs. They are appointed by a king, and he is the fountain of their justice and its administration...Must we tread always in their steps, go where they go, be what they are, do what they do, and say what they say?” (Miller, 128)¹³. His point was essentially that same recurring criticism, that the English common law could in no way be adaptable to our American conditions, and that we should have only completely American law.

As it happens to be, at that precise moment in American legal history, at what is roughly the start of the American Codification Movement, a product of such rampant criticisms to our adoption of the English common law, our legal system was undergoing tremendous doctrinal transformation. As a result of the countless cases of first impression being brought to the courts,

leaving few precedents that could be applied, the law “was undergoing dramatic changes in the process of being shaped by the courts to fit America’s practical legal needs. Old doctrines were thrown over or modified, and the new law, often totally at odds with English jurisprudence, was being created. English law had offered a handle of sorts by which to grasp the law, but this was being destroyed in the process of legal change” (Cook, 52-53). And while these dramatic changes were met with criticisms of their own, and many of the same criticisms still, it was clear that American legal development was progressing with more alacrity than ever before. As society kept changing, as the physical frontier closed and the American mindset and conditions kept changing, as the American Codification Movement came and went and American society kept changing some more, these sorts of ongoing debates over the direction of our nation’s body of laws and legal structures would only spur further, greater legal developments.