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Chad G. Marzen

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## LAW, POPULAR LEGAL CULTURE, AND THE CASE OF KANSAS, 1854–1856

*Chad G. Marzen\**

“Shall I tell you what this collision means? They who think that it is accidental, unnecessary, the work of interested or fanatical agitators, and therefore ephemeral, mistake the case altogether. It is an irrepressible conflict between opposing and enduring forces, and it means that the United States must and will, sooner or later, become either entirely a slave-holding nation, or entirely a free labor nation.”<sup>1</sup>

—The Hon. William Henry Seward

### I. INTRODUCTION

The year 2013 brings to the contemporary limelight memories of turbulent times in American history: the Civil War. New Year’s Day 2013 marked the 150th anniversary of a key historical milestone bolstering the movement toward freedom, liberty, and justice for all: the Emancipation Proclamation.<sup>2</sup> July 2013 marked the 150th anniversary of a turning point during the war—the clash of the Confederate army led by General Robert E. Lee and the Union army led by General George H. Meade on the battlefields of a famous Pennsylvania town

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\* Assistant Professor of Legal Studies, Florida State University, College of Business—Department of Risk Management/Insurance, Real Estate and Legal Studies. The author can be reached at [cmarzen@fsu.edu](mailto:cmarzen@fsu.edu). The author would like to thank Professor Sarah Purcell, Director of the Rosenfield Program in Public Affairs, International Relations, and Human Rights at Grinnell College, for encouraging an interest in popular culture and “Bleeding Kansas.”

<sup>1</sup> William H. Seward, *On the Irrepressible Conflict; Rochester, October, 25, 1858, in ORATIONS AND ARGUMENTS BY ENGLISH AND AMERICAN STATESMEN* 302 (Cornelius Beach Bradley ed., 1894).

<sup>2</sup> President Abraham Lincoln, United States President, Emancipation Proclamation, (Jan. 1, 1863), *available at* [http://www.archives.gov/exhibits/featured\\_documents/emancipation\\_proclamation/images/emancipation\\_01.jpg](http://www.archives.gov/exhibits/featured_documents/emancipation_proclamation/images/emancipation_01.jpg).

named Gettysburg.<sup>3</sup> Contemporary popular culture today recreates the historical memory of many milestones and experiences surrounding the war. For example, Steven Spielberg's epic film *Lincoln* emphasizes President Lincoln's and other congressional Republicans, such as Thaddeus Stevens',<sup>4</sup> efforts in securing passage of the Thirteenth Amendment of the United States Constitution outlawing slavery and involuntary servitude.<sup>5</sup> *Lincoln* is one of many films throughout time linking film, contemporary popular culture, and the law.

Academic discussions increasingly focus on the relationship between law and popular culture, and numerous scholars have addressed how elements of popular culture relate to law.<sup>6</sup> In an influential 1989 article in the *Yale Law Journal*,

<sup>3</sup> Gettysburg Foundation, 150th Anniversary Events in Commemoration of the Battle of Gettysburg and the Gettysburg Address, <http://www.gettysburgfoundation.org/101/gettysburg-foundation-commemorates-150th-anniversary-of-the-civil-war> (last visited Jan. 28, 2013).

<sup>4</sup> Congressman Thaddeus Stevens was one of the most prominent congressional advocates for equality during the 1860s. For an excellent discussion of Stevens' congressional career, see Aaron J. Walker, Note, "No Distinction Would Be Tolerated": Thaddeus Stevens, Disability and the Original Intent of the Equal Protection Clause, 19 YALE L. & POL'Y REV. 265 (2000).

<sup>5</sup> Brian Truitt, *SAG Awards: 'Argo,' 'Lincoln' stand tall*, USA TODAY (Jan. 28, 2013), <http://www.usatoday.com/story/life/awardcentral/2013/01/27/2013-sag-awards-online-story/1868589>. A vast number of legal scholars have discussed the Thirteenth Amendment in law review articles. Legal scholarship on the Thirteenth Amendment within the past two years includes: Jack Balkin & Sanford Levinson, *The Dangerous Thirteenth Amendment*, 112 COLUM. L. REV. 1459 (2012); Mark A. Graber, *Subtraction by Addition?: The Thirteenth and Fourteenth Amendments*, 112 COLUM. L. REV. 1501 (2012); Jamal Greene, *Thirteenth Amendment Optimism*, 112 COLUM. L. REV. 1733 (2012); Andrew Koppelman, *Originalism, Abortion and the Thirteenth Amendment*, 112 COLUM. L. REV. 1917 (2012); Darrell A.H. Miller, *Racial Cartels and the Thirteenth Amendment Enforcement Power*, 100 KY. L.J. 23 (2012); Darrell A.H. Miller, *The Thirteenth Amendment and the Regulation of Custom*, 112 COLUM. L. REV. 1811 (2012); Maria L. Ontiveros, *A Strategic Plan for Using the Thirteenth Amendment to Protect Immigrant Workers*, 27 WIS. J.L. GENDER & SOC'Y 133 (2012); George Rutherglen, *Constitutionalizing Employee's Rights: Lessons from the History of the Thirteenth Amendment*, 27 WIS. J.L. GENDER & SOC'Y 162 (2012); George Rutherglen, *The Thirteenth Amendment, the Power of Congress, and the Shifting Sources of Civil Rights Law*, 112 COLUM. L. REV. 1551 (2012); Alexander Tsesis, *Gender Discrimination and the Thirteenth Amendment*, 112 COLUM. L. REV. 1641 (2012); Alexander Tsesis, *Into the Light of Day: Relevance of the Thirteenth Amendment to Contemporary Law*, 112 COLUM. L. REV. 1447 (2012); Rebecca E. Zielow, *The Ideological Origins of the Thirteenth Amendment*, 49 HOUS. L. REV. 393 (2012); Rebecca E. Zietlow, *James Ashley's Thirteenth Amendment*, 112 COLUM. L. REV. 1697 (2012); William M. Carter, Jr., *The Thirteenth Amendment, Interest Convergence, and the Badges and Incidents of Slavery*, 71 MD. L. REV. 21 (2011); Jennifer Mason McAward, *Congressional Authority to Interpret the Thirteenth Amendment: A Response to Professor Tsesis*, 71 MD. L. REV. 60 (2011); Julie Novkov, *The Thirteenth Amendment and the Meaning of Familial Bonds*, 71 MD. L. REV. 203 (2011); James Gray Pope, *What's Different About the Thirteenth Amendment, and Why Does It Matter?*, 71 MD. L. REV. 189 (2011); Alexander Tsesis, *Congressional Authority to Interpret the Thirteenth Amendment*, 71 MD. L. REV. 40 (2011); Rebecca E. Zietlow, *Conclusion: The Political Thirteenth Amendment*, 71 MD. L. REV. 283 (2011).

<sup>6</sup> Law review articles relating to popular culture and the legal profession include: Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839 (2011); Russell D. Covey, *Criminal Madness: Cultural Iconography and Insanity*, 61 STAN. L. REV. 1375 (2009); Naomi Mezey, *The Paradoxes of Cultural Property*, 197 COLUM. L. REV. 2004 (2007); Douglas J. Goodman, *Approaches to Law and Popular Culture*, 31 LAW & SOC. INQUIRY 757 (2006); Jack M. Balkin, *Digital*

Professor Lawrence Friedman referred to legal culture as the “ideas, attitudes, values, and opinions about law held by people in a society.”<sup>7</sup> Friedman further refined the concept of popular legal culture, noting that it can be referred to in two senses. First, popular legal culture in a more general sense refers to the values, ideas, and attitudes laypersons hold about the law.<sup>8</sup> Second, it refers to “books, songs, movies, plays and TV shows which are about law or lawyers, and which are aimed at a general audience.”<sup>9</sup> Popular legal culture is of fundamental importance, often leading to social movements and social change.<sup>10</sup>

In the wake of *Lincoln* and the 150th anniversary of the Emancipation Proclamation and the Battle of Gettysburg, attention will likely be directed at the causes, effects, and legacy of the Civil War. Amidst the discussion, one particular historical moment and time should not be overlooked. The Kansas-Nebraska Act of 1854 marked the beginning of a period of time between 1854 and 1856 known as “Bleeding Kansas.”<sup>11</sup> As noted by Eli Thayer, founder of the New England Emigrant Aid Company, the year 1854 fell at a critical point in the trajectory of American history:

History gives abundant proof that a brief period of time has often determined the character and destiny of a nation. Such a period is properly called its controlling or dominating epoch. In the history of our own country the year 1854 holds this commanding position, and governs all our subsequent years.<sup>12</sup>

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*Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1 (2004); Lawrence M. Friedman & Issachar Rosen-Zvi, *Illegal Fictions: Mystery Novels and the Popular Image of Crime*, 48 UCLA L. REV. 1411 (2001); Steven Lubet, *Slap Leather! Legal Culture, Wild Bill Hickok, and the Gunslinger Myth*, 48 UCLA L. REV. 1545 (2001); Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. 3 (2001); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785 (1993); Michael Madow, *Private Ownership of Public Image: Popular Culture and Publicity Rights*, 81 CAL. L. REV. 127 (1993); Richard A. Posner, *The Depiction of Law in the Bonfire of the Vanities*, 98 YALE L.J. 1653 (1989); Barbara Yngvesson, *Inventing Law in Local Settings: Rethinking Popular Legal Culture*, 98 YALE L.J. 1689 (1989); Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229 (1987); and Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527 (1986).

<sup>7</sup> Lawrence M. Friedman, *Law, Lawyers and Popular Culture*, 98 YALE L.J. 1579 (1989).

<sup>8</sup> *Id.* at 1580.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 1587. (“These create popular legal culture; and popular legal culture makes law. Ultimately, social forces, social movements, social change—and social statics—lead to legal change. But the process goes through the stages described.”).

<sup>11</sup> GUNJA SENGUPTA, FOR GOD AND MAMMON: EVANGELICAL AND ENTREPRENEURS, MASTERS AND SLAVES IN TERRITORIAL KANSAS, 1854–1860 131 (1996).

<sup>12</sup> ELI THAYER, A HISTORY OF THE KANSAS CRUSADE: ITS FRIENDS AND ITS FOES 1 (1889).

This article applies Professor Friedman's popular legal culture framework to abolitionists' and Northeasterners' appeals for emigration to Kansas in response to passage of the Kansas-Nebraska Act. Nineteenth-century popular culture mediums—including circulars, handbooks, music, poetry, public meetings, speeches, and especially newspapers—heavily influenced migration to Kansas from 1854 to 1856 in response to the notion of popular sovereignty embraced by the Kansas-Nebraska Act. As emigration to Kansas increased, rhetoric advocating migration shifted from a two-pronged “business antislavery approach” and traditional abolitionist rhetoric, to one essentially casting proslavery supporters as foreign enemies. This article contends that the significant change of rhetoric explains how popular culture, and the response of popular culture to law, led to the growing polarization between the North and South prior to the onset of the Civil War.<sup>13</sup>

## II. THE KANSAS-NEBRASKA ACT OF 1854

Roots of the Kansas-Nebraska Act extend into the era of America's founding. According to one historian, conflict between the federal government and the states in early American history resulted from a number of issues.<sup>14</sup> The expansion of the young American republic west into the new territories and Missouri's request for admission into the Union as a slave state in 1819 launched the slavery issue to the forefront of the national debate.<sup>15</sup> The expansion also raised the future possibility that slave states could outnumber free states in the Union.<sup>16</sup> In 1820, the Missouri Compromise admitted Missouri as a slave state, but established a demarcation line in the United States prohibiting slavery north of the line but permitting slavery to the south.<sup>17</sup> Thus, for approximately three decades the Missouri Compromise settled the fate of slavery in existing states and territories.<sup>18</sup>

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<sup>13</sup> See *infra* Parts II, III.

<sup>14</sup> See DAVID M. POTTER, *THE IMPENDING CRISIS, 1848–1861* at 52–53 (1976). These issues described by Potter included the assumption of state debts and the establishment of a national bank.

<sup>15</sup> Jane E. Larson, “*A House Divided*”: *Using Dred Scott to Teach Conflict of Laws*, 27 U. TOL. L. REV. 577-78 (1996).

<sup>16</sup> POTTER, *supra* note 14, at 52.

<sup>17</sup> POTTER, *supra* note 14, at 55.

<sup>18</sup> POTTER, *supra* note 14, at 53.

However, in the 1850s, “Manifest Destiny”<sup>19</sup> and interests in the development of a transcontinental railroad from the East to West coasts<sup>20</sup> brought the Missouri Compromise back to the forefront of the national political arena. Democratic Senator Stephen A. Douglas of Illinois emerged as one of the main supporters of the proposed railroad.<sup>21</sup> For the proposed railroad’s completion, supporters needed to obtain a railroad right-of-way.<sup>22</sup> This meant that in order for the railroad to pass through the Nebraska territory, the territory needed to provide land.<sup>23</sup>

To obtain Southern support for a bill replacing the Missouri Compromise,<sup>24</sup> Douglas met with four key Southern Democrats in the Senate: Senators Robert Hunter and James Mason of Virginia, Andrew Butler of South Carolina, and David Atchison of Missouri.<sup>25</sup> After negotiations in the House and Senate, a Kansas-Nebraska Act proposed dividing the Nebraska region into two territories,

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<sup>19</sup> “Manifest destiny,” a term coined by John L. Sullivan, refers historically to movement toward expansion of the United States from coast to coast. For an excellent discussion of “Manifest Destiny,” see THOMAS R. HIETALA, *MANIFEST DESIGN: AMERICAN EXCEPTIONALISM AND EMPIRE* (1985). Professor Hietala states on page 262:

The expansion to the Pacific was not primarily an expression of American confidence. Anxiety, not optimism, generally lay behind the quest for land, ports, and markets. A powerful combination of fears led the neo-Jeffersonians of the 1840s to embrace territorial and commercial expansionism as the best means of warding off both domestic and foreign threats to the United States. The Jacksonians were proponents of laissez-faire only in a limited sense, and their sustained efforts to acquire land and markets were their equivalents for what they saw as the Whigs’ dangerous propensity to meddle in the domestic economy. Rather than give an “artificial” stimulus to the economy through protective duties or privileged charters, the Democrats preferred to assist American producers by means of territorial acquisitions, reciprocity treaties, improvements in the navy, and a liberal land policy. Frightened by rapid modernization in the United States, the Democrats warned that both European monarchs and the Whig opposition were threatening the Republic – the Europeans by their attempts to contain American expansion, the Whigs by their resistance to Jacksonian foreign policy and their support of legislation that would hasten industrialization, urbanization, and class polarization in the United States.

<sup>20</sup> PAUL CALORE, *THE CAUSES OF THE CIVIL WAR: THE POLITICAL, CULTURAL, ECONOMIC AND TERRITORIAL DISPUTES BETWEEN NORTH AND SOUTH* 207 (2008).

<sup>21</sup> *Id.* at 208.

<sup>22</sup> *Id.* at 213.

<sup>23</sup> *Id.*

<sup>24</sup> Louise Weinberg, *Dred Scott and the Crisis of 1860*, 82 CHI.-KENT L. REV. 97, 113 (2007). Professor Weinberg notes:

The 1850s found Southern leaders complaining that the customary line drawn at 36°30’, first established in the Missouri Compromise, could no longer bring in enough new slave states to maintain a fair balance of political power. Arguing that the Missouri Compromise applied only to Louisiana Territory anyway, they clamored for its repeal, demanding a new dispensation. This was a dangerous game. Southern leaders were seeking to tear down the Missouri Compromise as though it were a superfluous ornament of the Union, when it had become a structural support.

<sup>25</sup> CALORE, *supra* note 20, at 213–14.

a Nebraska Territory and a Kansas Territory.<sup>26</sup> “Popular sovereignty” would then determine the Kansas Territory’s admission into the Union as either a free or slave state.<sup>27</sup> In January 1854, proponents of the compromise, led by Senator Douglas, sought and obtained the key endorsement of President Franklin Pierce.<sup>28</sup>

Northern Free Soil<sup>29</sup> Democrats and Whigs were outraged by the backroom maneuvering and the proposal.<sup>30</sup> Senators Salmon P. Chase of Ohio and Charles Sumner of Massachusetts led unsuccessful attempts to scuttle the bill in the Senate.<sup>31</sup> Both Senators’ attempts were largely intended to garner moderate opposition to the bill and arouse Northern public sentiment against it.<sup>32</sup> Early in the morning on March 4, 1854, following several weeks of contentious debate, the Senate passed the Kansas-Nebraska Act by a 37–14 vote.<sup>33</sup> On May 22, 1854, the House of Representatives passed the Act by a 113–100 vote.<sup>34</sup> President Franklin Pierce signed it on May 30, 1854, making it law.<sup>35</sup>

Passage of the Kansas-Nebraska Act not only led to the fracturing of the Democratic Party, downfall of the Whig Party, and rise of the Republican Party,<sup>36</sup> but it was also a triumph of Douglas’ “popular sovereignty.”<sup>37</sup> Passage of the

<sup>26</sup> CALORE, *supra* note 20, at 215.

<sup>27</sup> Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 301 (2010) (“The term ‘popular sovereignty’ was the slogan that Stephen Douglas used to justify the Kansas-Nebraska Act of 1854 which authorized each new state to decide whether it would enter the Union as a slave or as a free state.”).

<sup>28</sup> CALORE, *supra* note 20, at 215–16.

<sup>29</sup> CALORE, *supra* note 20, at 173. Calore notes that the Free Soil Party was largely a combination of northern anti-slavery members of the Whig Party who supported the Wilmot Proviso and a ban on slavery in any new territories, former members of the Liberty Party, as well as Democrats who opposed slavery. The common slogan of the party was support for “free soil, free speech, free labor, and free men.”

<sup>30</sup> CALORE, *supra* note 20, at 216.

<sup>31</sup> DAVID HERBERT DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* 253–54 (Da Capo Press 1996) (1960).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 259.

<sup>34</sup> MICHAEL S. GREEN, *POLITICS AND AMERICA IN CRISIS: THE COMING OF THE CIVIL WAR* 70 (2010).

<sup>35</sup> CALORE, *supra* note 20, at 217.

<sup>36</sup> CALORE, *supra* note 20, at 217.

<sup>37</sup> NICOLE ETCHESON, *BLEEDING KANSAS: CONTESTED LIBERTY IN THE CIVIL WAR ERA* 27 (2004) (“Popular sovereignty’s appeal lay in its assumption that the people could best govern themselves. On its face, it widened liberty in the United States by overruling both the free-soil assertion that Congress decided the fate of the territories and should exclude the moral taint of slavery and the slave-state claim that the territories belonged to all the states and hence could not exclude slavery. Under popular sovereignty, the people of the territories would decide the issue of slavery

Act marked the beginning of the movement advocating increased Northern emigration to Kansas. The movement, buoyed by appeals of popular legal culture, sought to capitalize upon Northern skepticism of “popular sovereignty” and the Act itself. As the movement grew, it advocated the emigration of settlers to Kansas and eventually the conscious effort to bring Kansas into the Union as a free state. In doing so, it stands as one of the often-overlooked movements of political and social change in American legal history.

### III. POPULAR LEGAL CULTURE, THE KANSAS-NEBRASKA ACT, APPEALS FOR EMIGRATION TO KANSAS, AND RISING NATIONAL STAKES

In the early stages of advocating emigration to territorial Kansas, appeals to potential emigrants took two different approaches. One approach advocated Eli Thayer’s New England Emigrant Aid Company’s vision promoting “business antislavery” and the superiority of free labor over slave labor.<sup>38</sup> The other approach—particularly identified in Horace Greeley’s *New York Tribune* and the poetry and songs promoting the crusade—employed traditional abolitionist rhetoric emphasizing the themes of freedom, liberty, and the belief that slavery was fundamentally a sin.<sup>39</sup> Although tension existed between both approaches, the appeals ultimately complemented each other—representing a conscious effort to promote the inculcation of revolutionary republican values in the new territory.<sup>40</sup>

Over a span of less than two years, however, rhetoric advocating the “Kansas Crusade”<sup>41</sup> gradually shifted from a divided two-pronged approach to a more scathing, biting indictment of the “Slave Power.”<sup>42</sup> Violent events in Kansas,

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for themselves. With the passage of Kansas-Nebraska, the principles of popular sovereignty had triumphed, only its ‘practical application’ remained to be worked out by the migrants who now headed west for Kansas territory.”)

<sup>38</sup> See SENGUPTA, *supra* note 11, at 14 (stating that [Thayer’s] “proposed weapon was an emigrant aid company that would take Kansas the ‘free labor trophies’ of churches and schools, printing presses, steam engines, and mills, and “in a peaceful contest convince every poor many from the South of the superiority of free labor”) (quoting THAYER, *supra* note 12, at 31).

<sup>39</sup> Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835–37*, 89 NW. U. L. REV. 785, 799 (1995) (stating that “abolitionists sought to persuade Americans and slaveholders that slavery was a sin; they argued that slaveholders should voluntarily and immediately relinquish their slaves, just as other sins should be immediately abjured. Abolitionists except change through change in public opinion. Eventually, as Southerners were persuaded, slavery would be abolished by individual action or, perhaps, by state legislation. Abolitionist leaders were influenced by the great religious awakening of their time, and they used similar techniques to seek converts from the sin of slavery.”).

<sup>40</sup> SENGUPTA, *supra* note 11, at 13–14.

<sup>41</sup> THAYER, *supra* note 12, at 123.

<sup>42</sup> See generally Garrett Epps, *The Antebellum Political Background of the Fourteenth Amendment*, 67 LAW & CONTEMP. PROBS. 175, 180 (2004). Professor Epps wrote that the “Slave Power” was a political term that referred “not only to Southern whites who owned slaves but to constitutional provisions and political practices that gave them disproportionate power in the federal government.”



particularly the Wakarusa War of 1855<sup>43</sup> and the sacking of the free-state settlement of Lawrence in May 1856,<sup>44</sup> contributed to the growing animosity apparent in popular culture mediums.

### A. *The Kansas-Nebraska Act and Appeals for Emigration to Kansas*

As Northern distrust of “popular sovereignty” peaked, anti-slavery advocates soon encouraged Northeastern travel to Kansas in order to inculcate free labor and free soil values into the new territory. Dr. Eli Thayer set into motion emigration to Kansas by establishing the New England Emigrant Aid Company in the spring of 1854.<sup>45</sup> A prominent politician and educator in Massachusetts, Dr. Thayer “sought to demonstrate how the challenge of popular sovereignty, the heart of the Kansas-Nebraska bill, could be used as the means of making Kansas a free state.”<sup>46</sup> Thayer stated that emigration would consist of “an entirely new organization, depending for success upon methods never before applied.”<sup>47</sup>

In his efforts promoting emigration to Kansas through the new company, Thayer relied heavily upon methods of popular culture to disseminate the company’s message. On March 11, 1854, a public meeting in Worcester, Massachusetts presented Thayer with an opportunity to promote the company.<sup>48</sup> Uncertain how the audience would respond, Thayer advocated that “every effort be made, and every appliance be brought to bear, to fill up that vast and fertile Territory with free men—with men who hate slavery, and who will drive the hideous thing from the broad and beautiful plains where they go to raise their free homes.”<sup>49</sup> Thayer argued that since the plan received an “impetuous,

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<sup>43</sup> SENGUPTA, *supra* note 11, at 101 (“The political test of wills over slavery was accompanied by a bloodbath in the prairies of Kansas that reinforced antislavery perceptions of Slave Power barbarism, while affirming the free-state commitment to public service in the form of military readiness. In November 1855 a twenty-two-year-old Free Soiler named Charles W. Dow was cut down by a proslavery assassin’s bullet while on a visit to the blacksmith’s near Hickory Point in Douglas County. The murder, although prompted by a claims’ dispute, assumed ominous political overtones before long, erupting into the famous Wakarusa War.”).

<sup>44</sup> George Paul, *John Frank and the “Law Professors’ Brief,”* 35 ARIZ. ST. L.J. 241, 243–44 (2003) (“Events came to a head when in May 1856, a pro-slavery judge instructed a grand jury to indict members of the free-state government in Lawrence for treason. Eight hundred Missourians, deputized as a ‘posse,’ poured into Lawrence. They demolished newspaper offices, burned the hotel and the home of the Governor, and plundered shops and houses in what was instantly termed the ‘Sack of Lawrence.’ It was the most inflammatory event yet in the two year pressure-cooker, known as ‘Bleeding Kansas.’”).

<sup>45</sup> Horace Andrews, Jr., *Kansas Crusade: Eli Thayer and The New England Emigrant Aid Company*, 35 THE NEW ENGLAND QUARTERLY 497, 497–98 (1962).

<sup>46</sup> *Id.* at 498.

<sup>47</sup> THAYER, *supra* note 12, at 23.

<sup>48</sup> THAYER, *supra* note 12, at 25.

<sup>49</sup> THAYER, *supra* note 12, at 25.

spontaneous, and enthusiastic response,” the country became aware of the New England Emigrant Aid Company.<sup>50</sup> Meetings soon became a critical means of garnering stock subscriptions in the New England Emigrant Aid Company<sup>51</sup> and supporting emigration by creating local “Kansas Leagues.”<sup>52</sup> In September 1854, Thayer began lecturing throughout New England promoting the company. In three years of work he gave nearly 700 addresses and the New England Emigrant Aid Company started to flourish.<sup>53</sup>

As the New England Emigrant Aid Company continued its work, agents and supporters of the “Kansas Crusade” generally articulated a two-pronged approach utilizing “business antislavery” and traditional abolitionist rhetoric to potential Kansas territory emigrants.<sup>54</sup> For the “business antislavery” goals, the official charter of the New England Emigrant Aid Company explicitly described the “business antislavery” mission. Official objectives of the company included assisting emigrants in securing affordable accommodation rates on the journey and “erect[ing] or aid[ing] individuals in erecting and conducting Saw Mills, Grist Mills, Machine Shops, and similar establishments essential in new settlements.”<sup>55</sup> Additionally, the official charter contained elements of a “civilizing mission.”<sup>56</sup> Professor SenGupta argues that despite differences among northern opponents of slavery in terms of ideology and approach, they shared a common goal.<sup>57</sup> Opponents of slavery advocated “spiritual progress” to the West by establishment of “churches, schools, mills, towns and other ‘trophy of free labor’ on the untamed frontier.”<sup>58</sup> Additionally, opponents promoted the republican vision of meritocracy by offering the prospect of land ownership through hard work and effort.<sup>59</sup> The official charter of the New England Emigrant Aid Company explicitly articulated such a vision, referring to building “[s]chools and [c]hurches” and aimed to “advance civilization” in the Kansas Territory.<sup>60</sup>

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<sup>50</sup> THAYER, *supra* note 12, at 25.

<sup>51</sup> Andrews, *supra* note 45, at 498.

<sup>52</sup> Andrews, *supra* note 45, at 509.

<sup>53</sup> Andrews, *supra* note 45, at 503.

<sup>54</sup> See *supra* text and accompanying notes 38–40.

<sup>55</sup> NEW ENGLAND EMIGRANT AID COMPANY, CHARTER, OFFICERS AND OBJECTS OF THE COMPANY (1855), TERRITORIAL KANSAS ONLINE: A VIRTUAL REPOSITORY FOR TERRITORIAL KANSAS HISTORY 1854–1861, [http://www.territorialkansasonline.org/~imlskto/cgi-bin/index.php?SCREEN=view\\_image&document\\_id=100124&file\\_name=h000438](http://www.territorialkansasonline.org/~imlskto/cgi-bin/index.php?SCREEN=view_image&document_id=100124&file_name=h000438) (last modified Sept. 12, 2013) (hereinafter “New England Emigrant Aid Company”).

<sup>56</sup> *Id.*

<sup>57</sup> SENGUPTA, *supra* note 11, at 2–3.

<sup>58</sup> SENGUPTA, *supra* note 11, at 2–3.

<sup>59</sup> SENGUPTA, *supra* note 11, at 2–3.

<sup>60</sup> New England Emigrant Aid Company, *supra* note 55.

Thayer's project also allowed for direct, popular involvement in the anti-slavery cause rather than the traditional, politically-oriented approach of lobbying slavery issues. In testimony before the Massachusetts legislature's Judiciary Committee, Thayer stated that the anti-slavery cause encountered defeat for over thirty years.<sup>61</sup> To achieve success, Thayer contended the battleground must be changed from the halls of "Congress to the prairies," shifting the emphasis on politicians' appeals to the New England citizenry-at-large.<sup>62</sup>

Circulars and pamphlets provided a significant, popular means for advertising agents' and supporters' objectives of the New England Emigrant Aid Company. Arguably one of the most important pamphlets<sup>63</sup> was Thomas Webb's 1855 *Information for Kansas Immigrants*.<sup>64</sup> Webb's influential pamphlet clearly illustrated the early tension between both prongs in the two-pronged approach, "business antislavery" and traditional abolitionist rhetoric.

In addition to emphasizing business related aspects of moving to Kansas, *Information for Kansas Immigrants* also made appeals through usage of traditional abolitionist rhetoric. The document noted that no emigrant had to sign a written obligation or make a pledge to the company.<sup>65</sup> It also mentioned that the company's "great object is to secure freedom for all."<sup>66</sup> Further, the text advocated a revolutionary republican vision for the emerging territory.<sup>67</sup> Webb expressed this vision explicitly by encouraging establishment of institutions and settlements that "characterize[d] New England homes."<sup>68</sup> Specifically, Webb advocated emigration by those holding virtuous character to foster virtue in the new territory.<sup>69</sup> The company wanted the new territory modeled after the Northeastern vision of a community of hard-working individuals—those "men of determined energy, great self-reliance, industrious and temperate habits."<sup>70</sup> Efforts to turn Kansas into a free state were "inspired by a larger social vision that sought to weave

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<sup>61</sup> THAYER, *supra* note 12, at 26.

<sup>62</sup> THAYER, *supra* note 12, at 26.

<sup>63</sup> SENGUPTA, *supra* note 11, at 15.

<sup>64</sup> THOMAS H. WEBB, SECRETARY OF THE NEW ENGLAND EMIGRANT AID CO., INFORMATION FOR KANSAS IMMIGRANTS (1855), TERRITORIAL KANSAS ONLINE: A VIRTUAL REPOSITORY FOR TERRITORIAL KANSAS HISTORY 1854–1861, [http://www.territorialkansasonline.org/~imlskto/cgi-bin/index.php?SCREEN=view\\_image&document\\_id=101815&file\\_name=u002592](http://www.territorialkansasonline.org/~imlskto/cgi-bin/index.php?SCREEN=view_image&document_id=101815&file_name=u002592) (last modified Sept. 12, 2013) (hereinafter "WEBB").

<sup>65</sup> *Id.* at 7 ("The emigrants come under no written obligation or pledge to the Company; they leave here free agents and it is hoped they will continue so to be.")

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 16.

<sup>68</sup> *Id.* at 23.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 16.

the threads of Protestant civilization and republican liberty bequeathed by New England's Pilgrim fathers" and conquering the "morally and economically vulnerable West."<sup>71</sup>

Webb's pamphlet did not directly address political matters. Instead, in promoting the New England Emigrant Aid Company, Webb suggested the company's vision was inclusive, "know[ing] neither North, South, East, nor West, to the exclusion of the remainder."<sup>72</sup> Nonetheless, this document of popular legal culture implicitly addressed political questions. The pamphlet is viewed as popular legal culture directly responding to the Kansas-Nebraska Act, particularly in its articulation of an ideal Kansas. The ideal Kansas was portrayed as a place where "the true principles of Freedom and the pure spirit of Liberty invariably show are so essential to the perpetuity of good Governments, and prove absolutely requisite for securing and sustaining the greatest good of the greatest number."<sup>73</sup> Webb's reference to the "greatest good of the greatest number" was not only an implicit allusion to Senator Stephen Douglas's idea of popular sovereignty in the Kansas-Nebraska Act, but a subtle political appeal in an influential instrument of popular culture.

In addition to pamphlets and circulars, newspapers also played an influential role in promoting the New England Emigrant Aid Company and the "Kansas Crusade." Horace Greeley, editor of the *New York Tribune*, used his newspaper's editorial page to bolster the company. In early 1854, Greeley wrote a number of articles critical of the Kansas-Nebraska Act.<sup>74</sup> For example, in one editorial responding to the bill's passage, Greeley lamented "[n]ot even by accident is any advantage left for liberty in their bill. It is all blackness, without a single gleam of light—a desert without one spot of verdure—a crime that can show no redeeming point."<sup>75</sup>

Thayer believed a major newspaper endorsement was critical for the New England Emigrant Aid Company's promotional success and popular approval.<sup>76</sup> The *New York Tribune* ideal for just such an endorsement.<sup>77</sup> Thayer diligently sought the backing of Horace Greeley's influential *New York Tribune*. When Greeley

<sup>71</sup> SENGUPTA, *supra* note 11, at 80.

<sup>72</sup> WEBB, *supra* note 64, at 20.

<sup>73</sup> WEBB, *supra* note 64, at 23.

<sup>74</sup> ROBERT C. WILLIAMS, HORACE GREELEY: CHAMPION OF AMERICAN FREEDOM 172 (2006) ("Kansas-Nebraska galvanized Greeley into action. The *Tribune* fumed for months against the bill as 'inebriated political morality,' 'measureless treachery and infamy,' noxious and detestable 'infernal rascality,' 'political dishonesty,' and 'downright effrontery' to the nation.").

<sup>75</sup> THAYER, *supra* note 12, at 14.

<sup>76</sup> THAYER, *supra* note 12, at 40.

<sup>77</sup> THAYER, *supra* note 12, at 40.

asked why Thayer was visiting him, Thayer replied that the *Tribune* could “show the people that there is a chance to save Kansas, and if they are once convinced of this, our success is certain.”<sup>78</sup> In a May 29, 1854 *Tribune* editorial, Greeley gave a full-fledged endorsement of the “Kansas Crusade.”<sup>79</sup> After describing the New England Emigrant Aid Company’s charter objectives, purpose, and printing, Greeley campaigned for his readers’ investment in the company.<sup>80</sup> Greeley cloaked the purposes of the company in traditional abolitionist rhetoric by using the word “freedom.”<sup>81</sup> Greeley noted an “abundant opportunity for all who have money to invest or a heart to labor in the great cause of freedom.”<sup>82</sup> In the several days following, Greeley wrote three more editorials advocating the project he called Thayer’s “Plan of Freedom.”<sup>83</sup> Additionally, he published letters from his readers enthusiastically subscribing to the company. One eager reader subscribed for \$10,000 and wrote to Greeley in a published letter stating:

Need I say how delighted I am at the prospect of the “Plan of Freedom?” In a work so hopeful, so just, so grandly comprehensive, so prophetic of results potential, victorious, and final, I enter with a full soul, heart, hand, and purse; and sink or swim, live or die, survive or perish, I give myself to this great work, in the full confidence that souls are here enlisted who know no tie but that of universal brotherhood, no end but that of unselfish devotion to common humanity.<sup>84</sup>

In addition to major newspapers from the Northeast, Kansas Territory newspapers promoted the “Kansas Crusade.” One major newspaper, the *Kansas Herald of Freedom*, was started in October 1854 with the purpose of furnishing Northeasterners with facts and figures about Kansas.<sup>85</sup> Copies of the paper were circulated throughout the Northeast and influenced migration to the territory.<sup>86</sup> The authorized agent and promoter of the newspaper in Boston, Stephen Barker, circulated a letter on February 7, 1855 to citizens encouraging their subscription to the paper.<sup>87</sup> Barker stated in the letter that “after all of our anti-Nebraska

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<sup>78</sup> THAYER, *supra* note 12, at 40.

<sup>79</sup> THAYER, *supra* note 12, at 48–49.

<sup>80</sup> THAYER, *supra* note 12, at 48–49.

<sup>81</sup> THAYER, *supra* note 12, at 48–49.

<sup>82</sup> THAYER, *supra* note 12, at 49.

<sup>83</sup> THAYER, *supra* note 12, at 49–51.

<sup>84</sup> THAYER, *supra* note 12, at 51.

<sup>85</sup> SENGUPTA, *supra* note 11, at 19.

<sup>86</sup> SENGUPTA, *supra* note 11, at 16–17.

<sup>87</sup> Letter from Stephen Barker, *Shall Kansas Be Free?* (1855), TERRITORIAL KANSAS ONLINE: A VIRTUAL REPOSITORY FOR TERRITORIAL KANSAS HISTORY 1854–1861, [http://www.territorialkansasonline.org/-imlskto/cgi-bin/index.php?SCREEN=view\\_image&document\\_id=100120&file\\_name=h000404](http://www.territorialkansasonline.org/-imlskto/cgi-bin/index.php?SCREEN=view_image&document_id=100120&file_name=h000404) (last modified Sept. 12, 2013).

cries, the best thing to be done is to have a good paper on the ground to do the battle for Freedom.”<sup>88</sup> In the wake of passing the Kansas-Nebraska Act, Barker’s letter plainly called for a response to win the “hearts and minds” of those in the Kansas Territory.<sup>89</sup>

Newspapers were not the only instruments of popular legal culture supporting the “Kansas Crusade.” Poetry and music also evoked language of traditional abolitionist rhetoric, tying historical, political, and economic issues into popular lyrics. John Greenleaf Whittier, prominent New England balladist and poet, wrote at least three songs advocating emigration to the Kansas Territory: *The Freeman’s Song*,<sup>90</sup> *The Kansas Emigrant Song*,<sup>91</sup> and *The Kansas Emigrants*.<sup>92</sup> The initial New England Emigrant Aid Company migrants’ even sang *The Kansas Emigrant Song* as they departed for Kansas.<sup>93</sup>

The songs were intended to evoke emotions and feelings of the Pilgrims’ landing in America. Emigrants compared their impending journey to the Kansas Territory with the plight of the Pilgrims in their journey through lyrics such as “Men, who bear the Pilgrim’s name” in *The Freeman’s Song*<sup>94</sup> and “We cross the prairie as of old, [as] the pilgrims crossed the sea” in *The Kansas Emigrant Song*.<sup>95</sup> Whittier appealed to patriotism, as exemplified in the Kansas sojourners’ description in *The Freeman’s Song* as “Men, who love [their] country’s fame.”<sup>96</sup>

*The Freeman’s Song* not only promoted emigration to the Kansas Territory, but provided an example of popular legal culture directly responding to the Kansas-Nebraska Act. It openly attacked the legitimacy of the Act<sup>97</sup> and excoriated

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> John Greenleaf Whittier, *The Freeman’s Song* (1854), TERRITORIAL KANSAS ONLINE: A VIRTUAL REPOSITORY FOR TERRITORIAL KANSAS HISTORY 1854–1861, [http://www.territorialkansasonline.org/-imlskto/cgi-bin/index.php?SCREEN=view\\_image&document\\_id=100168&file\\_name=h000402](http://www.territorialkansasonline.org/-imlskto/cgi-bin/index.php?SCREEN=view_image&document_id=100168&file_name=h000402) (last modified Sept. 12, 2013) (hereinafter “Whittier, *The Freeman’s Song*”).

<sup>91</sup> John Greenleaf Whittier, *The Kansas Emigrant Song* (1854), TERRITORIAL KANSAS ONLINE: A VIRTUAL REPOSITORY FOR TERRITORIAL KANSAS HISTORY 1854–1861, [http://www.territorialkansasonline.org/-imlskto/cgi-bin/index.php?SCREEN=view\\_image&document\\_id=100168&file\\_name=h000403](http://www.territorialkansasonline.org/-imlskto/cgi-bin/index.php?SCREEN=view_image&document_id=100168&file_name=h000403) (last modified Sept. 12 2013) (hereinafter, “Whittier, *The Kansas Emigrant Song*”).

<sup>92</sup> John Greenleaf Whittier, *The Kansas Emigrants*, TERRITORIAL KANSAS ONLINE: A VIRTUAL REPOSITORY FOR TERRITORIAL KANSAS HISTORY 1854–1861, [http://www.territorialkansasonline.org/-imlskto/cgi-bin/index.php?SCREEN=view\\_image&document\\_id=100167&file\\_name=h000406](http://www.territorialkansasonline.org/-imlskto/cgi-bin/index.php?SCREEN=view_image&document_id=100167&file_name=h000406) (lastmodified Sept. 12 2013).

<sup>93</sup> Andrews, *supra* note 45, at 501.

<sup>94</sup> Whittier, *The Freeman’s Song*, *supra* note 90.

<sup>95</sup> Whittier, *The Kansas Emigrant Song*, *supra* note 91.

<sup>96</sup> Whittier, *The Freeman’s Song*, *supra* note 90.

<sup>97</sup> Whittier, *The Freeman’s Song*, *supra* note 90.

northern advocates of the bill as “Traitor’s shaped in Southern mould, Have our honest birthright sold.”<sup>98</sup> Some song lyrics directly addressed the unfolding political struggle over the fate of the Kansas Territory while also evoking a belief that Kansas would ultimately end up free.<sup>99</sup> As *The Kansas Emigrant Song* stated: “We’ll sweep the prairie as of old / Our fathers swept the sea, And make the West, as they the East, The homestead of the free!”<sup>100</sup>

### *B. The Rising National Stakes Concerning The Conflict in Kansas*

National implications concerning the fate of Kansas rose significantly following emigration to the territory. While many Northeasterners migrated to Kansas, a significant number of proslavery settlers from Missouri and other southern states established residence in the territory.<sup>101</sup> Before the end of 1855, the cities/towns of Leavenworth, Atchison, Lecompton, and Franklin stood as proslavery strongholds while Lawrence and Topeka became free-state settlements.<sup>102</sup> Events in Kansas during 1855 and early 1856 significantly shifted rhetoric of popular culture mediums toward a more scathing tone as violence cast a dark pall over the territory. As the first Governor of Kansas, Charles Robinson declared, “[i]n some respects the season of 1855 was the most disheartening of any in the history of the struggle. On the surface all was dark for freedom.”<sup>103</sup>

The first territorial election in Kansas brought to the region not only controversy, but violence between “free soilers” and “border ruffians.” In late November 1854, territorial Kansas governor Andrew Reeder called for the first election of a new legislature to be held in early 1855.<sup>104</sup> The election took place March 30, 1855 and resulted in a proslavery majority.<sup>105</sup> However, a significant number of proslavery settlers from Missouri, referred to as “border ruffians,” allegedly crossed the border from Missouri to Kansas, voted, and then returned home after the election.<sup>106</sup> Supporters of an antislavery State of Kansas responded by attacking the legitimacy of the newly-elected “bogus” legislature.<sup>107</sup> In October 1855, free-state sympathizers gathered in Topeka and drafted the Topeka Constitution prohibiting slavery in the territory.<sup>108</sup>

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<sup>98</sup> Whittier, *The Freeman’s Song*, *supra* note 90.

<sup>99</sup> Whittier, *The Kansas Emigrant Song*, *supra* note 91.

<sup>100</sup> Whittier, *The Kansas Emigrant Song*, *supra* note 91.

<sup>101</sup> SENGUPTA, *supra* note 11, at 79–80.

<sup>102</sup> Andrews, *supra* note 45, at 502.

<sup>103</sup> CHARLES ROBINSON, *THE KANSAS CONFLICT* 160 (1892).

<sup>104</sup> SENGUPTA, *supra* note 11, at 38.

<sup>105</sup> Andrews, *supra* note 45, at 504.

<sup>106</sup> SENGUPTA, *supra* note 11, at 38–40.

<sup>107</sup> SENGUPTA, *supra* note 11, at 39; Andrews, *supra* note 45, at 504–05.

<sup>108</sup> Andrews, *supra* note 45, at 505.

A month later, political tension and violence erupted in Kansas. On November 21, 1855, a proslavery sympathizer shot and killed Free-Soil supporter Charles Dow.<sup>109</sup> This sparked the “Wakarusa War” of 1855<sup>110</sup> and tensions escalated as a result of the war. On May 21, 1856, a band of proslavery supporters attacked and partially destroyed the town of Lawrence, including the burning of the Free State Hotel.<sup>111</sup> In response to the violence, preachers began shipping firearms to Kansas.<sup>112</sup> Henry Ward Beecher—a nationally-renowned preacher<sup>113</sup> who utilized popular religious oratory to urge emigration to Kansas—stated that Sharp’s rifles<sup>114</sup> had more power than a hundred Bibles, and sent more than fifty rifles to the free-state movement.<sup>115</sup>

With the escalation of tension and violence in Kansas, the northern press became even more urgent in its pleas for assistance. In the *New York Tribune* in May 1855, Horace Greeley described the controversial territorial legislative election as a “stupendous fraud.”<sup>116</sup> That same month, Greeley also implored his readers to support emigrants to Kansas, stating:

Such is the position of one side in the struggle for the possession of Kansas. On the other stands a little band of the sons of freedom, just now borne down by numbers, but resolute in purpose and ready to do their part in repelling the barbarian invaders. The question is whether they are to be seconded by the people of the North. Is there a genuine spirit of freedom in the country, ready to do something against the atrocious strides of the slave power to continental dominion? Are there those who are willing to migrate to Kansas to aid in maintaining the freedom of Kansas at the cost of such perils as may arise? Are the Northern people generally up to the demand of the civilization and the humanity of the times? Do they mean Kansas shall be free? If they do, that

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<sup>109</sup> SENGUPTA, *supra* note 11, at 101.

<sup>110</sup> SENGUPTA, *supra* note 11, at 101.

<sup>111</sup> SENGUPTA, *supra* note 11, at 109–12; *see also* KRISTEN TEGTMEIER OERTEL, BLEEDING BORDERS: RACE, GENDER AND VIOLENCE IN PRE-CIVIL WAR KANSAS 77 (2009).

<sup>112</sup> SENGUPTA, *supra* note 11, at 60.

<sup>113</sup> SENGUPTA, *supra* note 11, at 79.

<sup>114</sup> David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1441 (1998) (“The free-soil settlers asked for guns for themselves, and the Massachusetts Emigrant Aid Company promptly began smuggling Sharps Rifles to Kansas. (The Company falsely claimed that while some of its members might be sending rifles, the armament program was not officially run by the Company). The Sharps were high-tech rifles, incorporating the new breech loading design (as opposed to loading from the muzzle).”).

<sup>115</sup> CLIFFORD E. CLARK, JR., HENRY WARD BEECHER: SPOKESMAN FOR A MIDDLE-CLASS AMERICA 123 (1978).

<sup>116</sup> ROBINSON, *supra* note 103, at 114.



is enough. The force that shall drive out hordes of land pirates who have made their descent upon Kansas will not be long in forming. Swayed and inspired by the sentiments of freedom, they will scatter its enemies like chaff.<sup>117</sup>

Similar to his appeal backing Thayer's "Plan of Freedom" a year earlier, Greeley promoted the "Kansas Crusade," but with much more urgency and employing hostile rhetoric. In referring to the "slave power," "land pirates," and "barbarian invaders," Greeley portrayed proslavery sympathizers as a foreign enemy.<sup>118</sup> In his editorial, Greeley hinted at approval of using violence to fight for freedom by urging Northerners to be "resolute in purpose and ready to do their part in repelling the barbarian invaders."<sup>119</sup> This phrase, implying an ongoing invasion by southerners of Kansas, and other scathing indictments of proslavery settlers, reflected an important shift in the rhetorical strategy toward outright hostility of the "slave power."

Newspapers reporting on the violence in Kansas cast proslavery supporters as enemies of freedom. In its December 22, 1855 issue, the *Kansas Herald of Freedom* published Charles Robinson's remarks at the funeral of an antislavery settler killed in the Wakarusa War. In the eulogy Robinson stated:

Our Territory has been repeatedly invaded, and our dearest rights trampled upon, by the citizens of a foreign State. They have taken possession of our ballot-boxes, and by force of arms have wrested from us the right to make our own laws and choose our own rulers, and imposed upon us a system of laws uncongenial to our natures and wants. Having accomplished all this by invasion and outrage, it was but natural to suppose that invasion and outrage would be necessary to enforce their enactments.<sup>120</sup>

By early 1856, the *New York Times* ran stories reflecting growing criticism toward proslavery supporters. Professor Erik Schmeller contends that the two special correspondents in Kansas for the *New York Times*, James M. Winchell and William Hutchinson, openly advocated the Free-State cause.<sup>121</sup> Schmeller argued that "the correspondents [Winchell and Hutchinson] always stressed that Free-Staters abhorred violence and only intended to use their modern Eastern Abolitionist-funded weapons for self-defense. On the other hand, the Border

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<sup>117</sup> ROBINSON, *supra* note 103, at 114–16.

<sup>118</sup> ROBINSON, *supra* note 103, at 116.

<sup>119</sup> ROBINSON, *supra* note 103, at 116.

<sup>120</sup> ROBINSON, *supra* note 103, at 210.

<sup>121</sup> Erik S. Schmeller, *Propagandists for a Free-State Kansas: New York Times Correspondents and Bleeding Kansas* (1856), 23 HERITAGE OF THE GREAT PLAINS 7 (1990).

Ruffian was pictured as a dangerous Bowie-knife-wielding fiend.”<sup>122</sup> These characterizations further magnified divisions between portraying free-staters as advocates of freedom and liberty and border ruffians as agents of tyranny.

In summary, popular legal culture responding to the Kansas-Nebraska Act initially took a two-pronged approach. This approach included appeals to Kansas emigration based upon “business antislavery” and traditional abolitionist rhetoric emphasizing themes of freedom and liberty. However, as events escalated in violence during 1855 and 1856 in Kansas and the sectional divide between North and South widened, newspapers and other methods of popular culture assumed increasingly more scathing tones as the nation crept closer toward civil war.

#### IV. THE ATTACK ON CHARLES SUMNER

As the sectional divide between North and South widened on the national scale, the caning of Senator Charles Sumner represented perhaps one of the largest culminating moments of the Kansas controversy. Congressional debate over the Kansas-Nebraska Act in 1854 helped launch Senator Charles Sumner as a leading Senate anti-slavery advocate.<sup>123</sup> As a strong advocate of progress and the ideals of the Declaration of Independence, Sumner believed in the principle that both the Declaration of Independence and the Constitution should be interpreted *in favorem libertatis* (in favor of liberty), and thus in favor of the emancipation of all slaves.<sup>124</sup> Sumner’s advocacy against the Act and the idea of popular sovereignty did not end when the legislation passed. In the early months of 1856, Sumner received many letters from friends and observers concerning violence in Kansas.<sup>125</sup> In defense of Kansas’ free-state government, Sumner planned a stunning condemnation of both popular sovereignty, slavery, and slavery’s supporters in his “The Crime Against Kansas” speech.<sup>126</sup>

On May 19 and 20, 1856, Charles Sumner delivered his two-day speech.<sup>127</sup> Early in the address, Sumner described the “uncommon tragedy” of events in Kansas as the “rape of a virgin Territory, compelling it to the hateful embrace of Slavery; and it may be clearly traced to a depraved longing for a new Slave State, the hideous offspring of such a crime, in the hope of adding to the power of Slavery in the National Government.”<sup>128</sup> He also directly criticized the Kansas-

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<sup>122</sup> *Id.* at 9.

<sup>123</sup> DONALD, *supra* note 31, at 256–57.

<sup>124</sup> Chad G. Marzen, *Charles Sumner: History’s Misunderstood Idealist*, 35 OKLA. CITY U. L. REV. 607, 615 (2010).

<sup>125</sup> DONALD, *supra* note 31, at 278–79.

<sup>126</sup> DONALD, *supra* note 31, at 281–82.

<sup>127</sup> DONALD, *supra* note 31, at 283.

<sup>128</sup> CHARLES SUMNER, *THE CRIME AGAINST KANSAS* 5 (Arno Press 1969) (1856).

Nebraska Act, referring to it as a “swindle” of the whole country and of “God-given inalienable rights.”<sup>129</sup>

Significantly, Sumner delivered a scathing and direct personal criticism of Senator Stephen Douglas, the architect of popular sovereignty. He labeled Senator Douglas as slavery’s “Sancho Panza.”<sup>130</sup> Furthermore Sumner criticized Senator Andrew Butler of South Carolina, referring to slavery as his personal “harlot”<sup>131</sup> and calling him the “Don Quixote”<sup>132</sup> of slavery.

At the end of his speech, Sumner affirmed his intent to change the location of the Kansas debate from the halls of Congress to a popular stage. He stated:

The contest, which, beginning in Kansas, has reached us, will soon be transferred to a broader stage, where every citizen will be not only spectator, but actor; and to their judgment I confidently appeal. To the People, now on the eve of exercising the electoral franchise, in choosing a Chief Magistrate of the Republic, I appeal, to vindicate the electoral franchise in Kansas. Let the ballot-box of the Union, with multitudinous might, protect the ballot-box in that Territory.<sup>133</sup>

Several Senators heavily criticized Sumner’s speech after it concluded.<sup>134</sup> Senator Butler, not present in the chamber during Sumner’s address, never personally responded.<sup>135</sup> However, Representative Preston Brooks, Butler’s nephew, attended part of Sumner’s speech and considered the speech insulting to his native South Carolina and to his family.<sup>136</sup> Following the speech, Brooks planned an assault on Sumner.<sup>137</sup> On the afternoon of May 22, 1856, Brooks severely assaulted Sumner with a cane.<sup>138</sup> The attack left Sumner unable to regularly attend to his Senate duties for nearly three years.<sup>139</sup>

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<sup>129</sup> *Id.* at 18.

<sup>130</sup> *Id.* at 13.

<sup>131</sup> *Id.* at 9.

<sup>132</sup> *Id.* at 13.

<sup>133</sup> *Id.* at 94.

<sup>134</sup> DONALD, *supra* note 31, at 286–87.

<sup>135</sup> DONALD, *supra* note 31, at 285.

<sup>136</sup> DONALD, *supra* note 31, at 290.

<sup>137</sup> DONALD, *supra* note 31, at 290.

<sup>138</sup> DONALD, *supra* note 31, at 290–96.

<sup>139</sup> DONALD, *supra* note 31, at 312.

Reactions to the event transformed the caning into a form of popular political culture. Northern newspaper editorials generally expressed public outrage over the assault.<sup>140</sup> One commentator not only noted that Republican papers were unanimously critical of the assault,<sup>141</sup> but also that the assault gave the emerging Republican Party a major political issue concerning protection of free speech on which to stand for the 1856 election.<sup>142</sup> In particular, the *Boston Bee* noted that “[t]his bully Brooks who has disgraced the name of *man*, ought to be branded as a villain of the blackest dye . . . . The black mark of Cain will stand out on his brow to the last moment of his disgraced life.”<sup>143</sup> This editorial shifted rhetoric from religious imagery marked by an idealistic revolutionary republican vision of Kansas to condemnation of the “bully Brooks” who committed an “infamous and barbaric” act.<sup>144</sup>

Political illustrations depicting Sumner’s caning also directly linked Northern outrage concerning the assault to the events in Kansas. This connection marked the crescendo of growing polarization between North and South leading to the Civil War. An illustration entitled the “Democratic Platform Illustrated,” transformed the caning of Sumner into a unique event conveyed by a medium

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<sup>140</sup> Gregg McCormick, Note, *Personal Conflict, Sectional Reaction: The Role of Free Speech in the Caning of Charles Sumner*, 85 TEX. L. REV. 1519, 1536–37 (2007); see also WILLIAMJAMES HULL HOFFER, *THE CANING OF CHARLES SUMNER: HONOR, IDEALISM, AND THE ORIGINS OF THE CIVIL WAR* 87 (2010).

<sup>141</sup> McCormick, *supra* note 140, at 1536.

<sup>142</sup> McCormick, *supra* note 140, at 1551. McCormick contends:

Although Northern conceptions of the right to free speech were more inclusive than Southerners, given the conditions in which the Republican Party promoted protection for free speech, it is unclear if Republican adherence developed due to political expediency or if political expediency was the impetus for advertising preexisting party views. Regardless of the initial impetus for adopting a protective stance of free speech, the Republican Party and Republican editors emphasized free speech issues for political advantage. This emphasis is an indication of the importance of free speech issues to Northern voters. This exercise in induction is supported by the fact that newspapers in the antebellum period were enthusiastically partisan and attempted to attract readers to join their party. The fact that it is doubtful that Republican papers would have continued to trumpet free speech views absent a positive response from the public indicates that Northerners were concerned about free speech issues prior to agitation by the Republican press. This assertion is supported by the many indignation meetings held prior to extensive Republican reporting on the attack. Thus, Republican papers did not create the concern for free speech that existed in the North; they simply used the preexisting concern to their own advantage.

McCormick, *supra* note 140, 1551.

<sup>143</sup> *Attack on Mr. Sumner*, *The Boston Daily Bee*, May 23, 1856.

<sup>144</sup> *Id.*

of popular legal culture.<sup>145</sup> The illustration attacked the 1856 Democratic Party presidential ticket of James Buchanan and John C. Breckinridge by linking slavery, Cuban annexation, the sacking of Lawrence, and the caning of Sumner.<sup>146</sup> It emphasized the violent nature of the sacking of Lawrence and the caning and conveyed the increasing animosity of rhetoric of other instruments of popular culture. In representing the Sumner caning, while Sumner is still holding a pen in his hand, Brooks leans to physically grab Sumner's coat lapel.<sup>147</sup> As Brooks prepares to strike, blood flows from wounds on Sumner's forehead while his left arm falls aimlessly, conveying the impression of Sumner's helplessness.<sup>148</sup>

The illustration directly attacks popular sovereignty in another way. Violence in Kansas and the caning are placed alongside a depiction of slavery with two slaves asking the question "Is this Democracy?"<sup>149</sup> The illustration argues that the Kansas-Nebraska Act not only led to southern violence, but that a vote for the Democratic ticket in 1856 would lead to more violence. Furthermore, it implied that a vote for the Democratic ticket would lead to "democracy" with slavery extending to other territories, such as Cuba.<sup>150</sup> Thus, instead of freedom and liberty extending further to territories, slavery would abound. All forms of popular legal culture in response to the Kansas events reflect the importance of the movement to bring Kansas into the Union as a free state as a key component of freedom and civil rights.

## V. CONCLUSION

As Lawrence Friedman suggests, instruments in popular legal culture ultimately make the law and lead to social change and social movements.<sup>151</sup> The fateful Kansas-Nebraska Act of 1854 launched a movement responding in disapproval to the law by organizing emigration to Kansas. At first, these appeals were two-pronged in approach, based on "business antislavery" and traditional abolitionist rhetoric.<sup>152</sup> But they grew increasingly hostile in tone from 1854 to

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<sup>145</sup> Winslow Homer, *Democratic Platform Illustrated* (1856), HARPWEEK, available at <http://loc.harpweek.com/LCPoliticalCartoons/IndexDisplayCartoonMedium.asp?SourceIndex=People&IndexText=Sumner%2C+Charles%2C+beaten+in+Congress&UniqueID=7&Year=1856> (last visited Feb. 11, 2013).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> FRIEDMAN, *supra* note 7, at 1587.

<sup>152</sup> See *supra* notes 38–40 and accompanying text.

1856 as violent events relating to Kansas such as the Wakarusa War, the sacking of Lawrence, and the caning of Charles Sumner took place. A mere five years later, the Civil War would begin with the firing upon Fort Sumter in South Carolina.<sup>153</sup>

On the 150th anniversary of the Emancipation Proclamation and the Battle of Gettysburg, there is renewed focus on the causes of the Civil War. In history, however, some events are memorialized more than others. While some historical figures become legends over the centuries, a great number of stories and historical moments fail to find a prominent moment in the contemporary limelight. In 2015, the 150th anniversary of the end of the Civil War will take place. Much discussion will likely revolve around the legacy and effects of the war. But the time period preceding it may not receive as much attention. As our country still grapples with the issues of civil rights and social change, the history of popular sovereignty and the Kansas-Nebraska Act, with its ensuing response in popular legal culture, can serve as a reference. The efforts and movement to bring Kansas into the Union as a free state—a major historical moment in the advocacy of freedom, civil rights, and social change—should never be forgotten.

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<sup>153</sup> CALORE, *supra* note 20, at 279–80.