



John Phillip Reid. *Controlling the Law: Legal Politics in Early National New Hampshire*. De Kalb: Northern Illinois University Press, 2004. 265 pp. \$45.00 (cloth), ISBN 978-0-87580-321-0.

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## The Battle for Law

John Reid has once again placed New Hampshire on the map of American legal history. His first book on Charles Doe, chief justice of the New Hampshire Supreme Court, was one of a handful of excellent biographies of great New England judges. His new book returns to New Hampshire, this time to elucidate, with Reid's characteristic verve, a key struggle that took place in several states throughout the early Republic—that is, the battle to professionalize the courts at the expense of the jury's power. The decline of the jury's power in the early nineteenth century is a familiar story, at least in its broad outlines. Reid provides an in-depth, intriguing analysis of how that transformation took place.

Reid places the battle for control over the law within the contentious party politics of the early Republic, but resurrects the legal dimension of the story, seeing the conflict as essentially between two rival theories about “the meaning, the origins and the purpose of law” (p. 4). The era began with the domination of “common sense jurisprudence” which vested control over the law in the community and, by extension the legislature and the jury. Proponents of “common sense jurisprudence,” dubbed “republicanists” by Reid, rejected “lawyers law,” by which they often meant the technical rules and precedents of the common law, in favor of their neighbors' sense of equity. Thus, non-lawyers staffed New Hampshire courts, juries decided questions of law and fact, decisions were not recorded (for fear of creating binding precedent), outcomes rested on the “common sense” of the juries, and appeals consisted of *de novo* jury trials. That system raised the hackles of legal professionals, especially chief justice of the New Hampshire Supreme Court Jeremiah Smith, who sought reforms to put lawyers on the bench and introduce common law methods into New Hampshire courts. Only thus, believed the so-called “receptionist” reformers, could law

achieve consistency, predictability, and legitimacy. Reformers, Reid stresses, did not necessarily try to incorporate the substantive rules of the common law, but rather focused on its procedures, seeking to introduce common law pleading, law terms of the court, and published judicial opinions.

Reid's focus on procedure yields important insights, sometimes overlooked by other scholars' emphasis on developments in substantive law. For both “republicanists” and “receptionists,” the key issue was who should decide cases, and how. Smith, argues Reid, was less concerned about *which* rule was adopted, but that *some* rule be adopted and applied consistently. Thus, he concludes, other scholars' attempts to link the desire for the predictability and order of the common law with the policy goals of imposing an unequal legal regime favorable to commercial and industrial interests are anachronistic and do not take seriously enough the lawyerly concerns of men like Smith. Yet, as Reid acknowledges, the purpose of the procedural change was to “facilitate the promulgation of judge-made substantive law” (p. 183). One wonders how different procedural regimes affected the substantive decisions made by “common sense” juries and lawyerly judges. The paucity of the sources, and the focus of the author, obscure the answer to that question.

Though they were outnumbered and often out of political power, the “receptionist” reformers eventually secured control over the law in New Hampshire, and elsewhere—a puzzling victory given the odds. Reid's account ends before the final transformation took place and, while Reid provides persuasive hypotheses, a full analysis of the reasons for receptionists' success remains to be written. What Reid's splendid volume tells us is why control of the law mattered to the participants in the contentious battle and what legal stakes were involved.

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