Legal and Constitutional History

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Since the publication of the last *Legal and Constitutional History* survey two years ago,¹ the field has seen an extraordinary outpouring of significant literature. In part, the literature was a product of the bicentennial celebration. The *University of Pennsylvania Law Review*,² the *Virginia Law Review*,³ the *De Paul Law Review*,⁴ and even the *Public Contract Law Journal*⁵ published bicentennial issues, each of which contained several historical articles. In addition, the *Law and Society Review* published a two-issue *Festschrift* in honor of the retirement of the preeminent legal historian of the last three decades, James Willard

Hurst. These special issues, together with the volumes of the *American Journal of Legal History* that have been published during the past two years, contain extensive and important periodical literature to which many major figures in the field have contributed. Individual comment upon the articles is impossible; all that can be said is that most of them deserve examination by any scholar seeking to remain current in the field.

The bicentennial also spawned two books on legal history. One is entitled *Milestones! 200 Years of American Law: Milestones in Our Legal History*, by Jethro K. Lieberman. Although “written for the general reader,” the book is surprisingly well researched. The author is well versed both in the details of his subject matter and in the recent scholarly literature in the field. The other book, *The Sheriff’s Jury and the Bicentennial*, is a collection of essays edited by Joseph T.P. Sullivan; they are of somewhat more mixed quality.

Perhaps the most significant event of the past two years was the award of a Bancroft Prize to Morton J. Horwitz for *The Transformation of American Law, 1780-1860*. Horwitz’s *The Transformation of American Law* is a significant book. It is a pioneering effort in its detailed analysis of doctrinal change in important areas of private substantive law in the early nineteenth century. More importantly, it demonstrates beyond doubt that there was a cohesive body of American law in the early nineteenth century; that is, on most important issues, the


9. Id. at xvii.


13. Cf. Plucknett, Book Review, 3 New Engl. Q. 156 (1930) (reviewing a republication of a 1648 edition of Massachusetts laws), in which the author assumed that the laws of different states were developed independently in the 17th century.
law of the different states developed in parallel rather than divergent
directions. Finally, the book constitutes a systematic attempt to relate
legal change to social change—an attempt to which legal historians will
be reacting for years to come. At this early date, it can be said that The
Transformation of American Law is without doubt the most sophisticated
and subtle Marxist analysis of Anglo-American legal history that has yet
appeared.14

Horwitz's was not the only book during the two-year period that
was written from an essentially Marxist perspective. Another important
book—clearly the most controversial of the past two years—was Jerold
S. Auerbach's Unequal Justice: Lawyers and Social Change in Modern
America.15 Auerbach, who states that he is not writing "a comprehensive
history of the entire legal profession," but only a history of "the re-
sponse of the professional elite" that dominated major law firms and
controlled bar associations,16 is clearly correct in taking note of the
economic and ethnic prejudices among elite lawyers that persisted into
the 1960's. The controversy about his book develops when he moves
beyond his narrowly defined class of the professional elite to argue that
bias in the legal profession as a whole "has had particularly serious
consequences in a society that depends so heavily upon the legal pro-
fession to implement the principle of equal justice under law."17 I do not
believe that any reader will deny the existence of inequality and bias
throughout much of American society, or that there were and are
lawyers who share such social bias. Auerbach, however, seems to deny
the existence of another segment of the profession, which has not
shared the same bias—a corps of elite reformers, such as Louis Bran-
deis, Felix Frankfurter, Thurgood Marshall, and Earl Warren, who
have had a profound impact upon American society. It is this apparent
denial, I suspect, that has been at the root of the controversy about
Unequal Justice.

A third piece written from a Marxist perspective is Sidney L. Har-
ring's study of "Class Conflict and the Suppression of Tramps in Buf-
falo, 1892-1894."18 In an interesting and professional way, Harring
supports obvious Marxist points such as: "the police are not neutral in
the class struggle, but rather are an instrument of ruling class domina-

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14. Some readers have not been persuaded, however, by Horwitz's essentially Marx-
ist approach. See, e.g., Reid, Book Review: A Plot Too Doctrinaire, 55 Tex. L. Rev.
1307 (1977).
15. J. Auerbach, Unequal Justice: Lawyers and Social Change in Modern America
(1976).
16. Id. at 9.
17. Id. at 10.
18. Harring, Class Conflict and the Suppression of Tramps in Buffalo, 1892-1894,
tion." But Harring, like Auerbach, fails to document some significant claims. I had always assumed that the police were controlled by a governmental apparatus that in the late nineteenth century was, in turn, under "bourgeois" control. What Harring fails to do—indeed, what Marxist analysis is incapable of doing—is to ask questions such as why the working class frightened the bourgeoisie more in the 1890's than at other times in American history, and why the working class failed to turn to violence to redress its grievances.

The great bulk of legal history literature of the past two years, however, was not written from a Marxist perspective. Many writers took questions of intergroup conflict seriously, but their approach was often far removed from a Marxist one. For example, in a recent lecture, Lawrence M. Friedman agreed with Sidney L. Harring that there is "a clear connection between the goals of society's leaders and the goals of their system of criminal justice." But he then continued: "American society has been unusually broad-based for centuries, and it has gotten steadily more democratic, whatever its failings and faults." Friedman contended that increasing democratic participation in law-making and enforcement has produced a "puritanical" criminal code under which "compared to the past, the middle class is exposed to ordinary police operations in a way that would have been unthinkable in the nineteenth century." He concluded that "relationships of class, crime, and order are complex."

An outstanding book by Elliot W. Brownlee, Jr., on the Wisconsin income tax law of 1911 illustrates the complexity of the general relationship between class and the legal order. Brownlee reports that, after the Republican party had been defeated in the early 1890's by Democrats who had "capitalized on the rising impact of ethnic and religious associations on political alignments," Robert M. LaFollette and "a cadre of Republican leaders" decided to restore their party's position by reestablishing "the role of economic interests in electoral politics." More specifically, they proposed to charge the costs of government to the manufacturing rather than the agricultural sector of the state's economy by means of a corporate income tax in lieu of real

19. Id. at 874.
20. Id.
22. Id. at 272.
23. Id. at 273.
24. Id.
26. Id. at 44.
27. Id.
property taxes—a method of taxation that had the effect of driving industry out of Wisconsin. Thus, a normally powerful interest group—capitalist industrialists—in the end became the victim of government power. Another unusual tale of class conflict is reported by James P. Whittenburg in “Planter, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation.” The author argues that the North Carolina Regulation was not a rebellion of the poor against the rich, but rather a struggle on the part of planters, who saw political power slipping from their hands, against merchants and lawyers who were stepping into their places.

Other writers tell of interclass cooperation and amalgamation instead of conflict. In an article on workmen's compensation in the state of Washington, Joseph F. Tripp explains that, in 1909-1910, half of the state judiciary's time was spent adjudicating workers' claims even though only one in every eleven injured workers ever brought suit. He also notes that sixty percent of all insurance premiums paid by industry went for insurance company administrative expenses, thirty percent went for lawyers' fees, and only ten percent went for compensation payments. The result was that industry, labor, and government officials (particularly judges) wanted reform, and therefore joined together to obtain "a law suitable to their interests, which meant a compulsory law with liberal benefits." In a similar vein, Susan W. Prager argues that California adopted a community property system in its 1850 constitution because the Anglo-American majority wanted to secure the support of the Spanish minority for the new state government.

Finally, in a study of the social backgrounds of lower-court federal judges from 1829 to 1861, Kermit L. Hall notes that men of modest origins were able to assure their assimilation into the elite by being appointed to the federal bench, and that political ties rather than social origins were the keys to obtaining a judicial appointment.

By far the largest body of scholarship on the general question of intergroup relationships has been written by historians in the area of racial, ethnic, and sex discrimination. The most important study in the field is "Attorneys Black and White: A Case Study of Race Relations

30. Id. at 537.
31. Id.
32. Id. at 549.
Within the NAACP. This article, which is based upon NAACP files recently made available to historians, describes how the black community pressured the NAACP during the 1930's to use black rather than white attorneys; the article maintains that blacks assumed top positions only when well-trained black attorneys such as William H. Hastie, Charles H. Houston, and Thurgood Marshall became available in sufficient numbers to fill the positions. A related article reinforces the point, showing how the absence of national leadership from black lawyers resulted in local black attorneys' loss of the first effort, in *Grovey v. Townsend*, to end all-white primaries.

Two books also make important contributions to the study of race relations in American history. The more interesting one is *The Angelo Herndon Case and Southern Justice*, by Charles H. Martin. Martin's book is, in essence, a story about Southern radicalism in the 1930's, especially the communist-dominated International Labor Defense (ILD) and its efforts on behalf of black equality. Martin maintains that the ILD alienated white liberals and some blacks as a result of its doctrinaire position, but that other blacks, although they never accepted its ideology, respected the ILD for its efforts on their behalf. The second book, *The Anti-Lynching Movement: 1883-1932*, by Donald L. Grant, argues that blacks throughout the late nineteenth and early twentieth centuries perceived lynching as the ultimate recourse of white racists for keeping blacks in their assigned place and, accordingly, fought for its elimination as their first priority. In addition to these two books, several articles make valuable contributions to the legal history of black-white relations.

Three articles report on the history of women's rights. In "Barred from the Bar: Women and Legal Education in the United States, 1870-1890," D. Kelly Weisberg recites many familiar facts as well as

some new ones, such as the fact that many early women law students were either wives or daughters of lawyers.\(^42\) In "Radical Reconstruction and the Property Rights of Southern Women,"\(^43\) Suzanne D. Lebsock makes the important new argument that married women's property acts were "a significant new form of debtor relief," which "shielded the husband while it shielded the wife,"\(^44\) and hence the acts were not really examples of a lessening discrimination on the basis of sex. Finally, in "Who Sues for Divorce? From Fault Through Fiction to Freedom,"\(^45\) Lawrence M. Friedman and Robert V. Percival make the point that increases in divorce rates are, in effect, an important benchmark of the progress of women toward equality.

It is also necessary to take note of writing about other sorts of discrimination. In a book\(^46\) that is at times guilty of overstatement, Richard Gambino traces the actions of an anti-Italian mob that lynched several Italian immigrants who had been charged with murdering the police chief of New Orleans. Gambino's main argument is that the mob's prejudice was motivated by a desire to keep Italians from achieving the economic success they were beginning to attain. Gambino's book is a powerful one, but it regrettably fails to emphasize the fact that the Louisiana legal system's generally fair treatment of Italians resulted in many acquittals. Thus, for bigots to carry out their discriminatory aims, it became necessary to circumvent the law by assembling lynch mobs. A more balanced article by Yasuhide Kawashima\(^47\) concludes that the legal system of Puritan Massachusetts did not discriminate against Indians who were brought before it accused of crime, but treated them the same as it treated whites. Kawashima notes that discrimination existed, however, in that the criminal justice system did little to punish crimes by whites against Indians living outside white settlements.\(^48\) Perhaps the most interesting article on discrimination by Americans against outsiders\(^49\) discusses the jury \textit{de medietate linguae}—a body of six Americans and six aliens that was available in American courts to try criminal cases against aliens until well into the nineteenth

\(^{42}\) Id. at 494-95.  
\(^{44}\) Id. at 202-03.  
\(^{46}\) R. Gambino, Vendetta: A True Story of the Worst Lynching in America, the Mass Murder of Italian-Americans in New Orleans in 1891, the Vicious Motivations Behind It, and the Tragic Repercussions That Linger to This Day (1977).  
\(^{48}\) Id. at 367-68.  
The author, Lewis H. LaRue, argues that the jury *de medietate linguae* died out in the late nineteenth century because most aliens at that time were of a lower social and economic class, and judges, believing in the importance of having disciplined minds on juries, were unwilling to permit lower-class jurors to sit.

Issues of class conflict and of racial, ethnic, and sex discrimination have not, of course, been the only ones upon which legal historians have focused during the past two years. Indeed, they have focused upon many different kinds of issues. One group of historians has focused upon the impact of ideas on legal and social development. John P. Reid has been an extraordinarily prolific historian of the impact of ideas on the law, having published the equivalent of three books during the past two years. In one book, *A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation during the Early Years of European Contact*, Reid continues his work on the Cherokee Indians, in this instance tracing how the clash between Anglo-American and Cherokee conceptions of law led to fundamental misunderstandings between the two groups. In a series of five articles that constitute the core of another book, Reid studies how common law ideas, such as the principle that an advocate should "assert those arguments most calculated to win" and avoid "irritat[ing] the 'court' . . . by arguing the ultimate question," had a significant impact upon the arguments advanced by Americans during the pre-Revolutionary debate with Great Britain over the scope of parliamentary power. In a related article, he suggests that British legal ideas about the limited power of the military affected both the use to which the Crown put troops in pre-Revolutionary Boston and the way in which American crowds reacted


to the military's presence. But Reid's most important contribution comes in a series of six other articles, which are the equivalent of a third book, in which he describes how Americans from the East transplanted legal ideas to the West—how they strove "consciously . . . to carry beyond the line of forward settlement a mode of social behavior learned during a remembered youth in towns and cities they had left in body but not in spirit."56

John Reid, it should be noted, is not alone in the emphasis he gives to the impact of Eastern ideas upon frontier law.57 Nor is he alone in his emphasis upon ideas in general.58 Another legal historian who treats ideas seriously is G. Edward White. This serious treatment is apparent from the title to one of his articles, "The Intellectual Origins of Torts in America,"59 in which he makes an original contribution to legal history with a discussion of how the conceptualist impulse in Victorian America, along with factors listed by other legal historians, resulted in the emergence of torts as a discrete legal subject.60 In his book, *The American Judicial Tradition*,61 White emphasizes the importance of ideas generated by individual appellate judges. He maintains that there has been a distinctive American judicial tradition since the time of John Marshall—a tradition transmitted from the collective mind of one generation to the next.

The most detailed of the books studying the impact of thought on law is *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era*, by Phillip S. Paludan.62 Paludan asks why the Civil War amendments and Reconstruction failed to give genuine equality to

57. See Bakken, The Development of Landlord and Tenant Law in Frontier California, 1850-1865, 21 Pac. Hist. 374 (1977); Samaha, A Case of Murder: Criminal Justice in Early Minnesota, 60 Minn. L. Rev. 1219 (1976).
60. Id. at 673-78.
blacks. His answer focuses upon the desire of both conservatives and radicals within the Republican party for social stability. He suggests that conservatives fought the Civil War to save the structure of existing institutions rather than to revolutionize race relations. He then points to the radicals' conception of liberty as "the negation" rather than "the exercise of governmental power" and analyzes how denial of power to the national government inevitably precluded the attainment of racial equality.

A particularly excellent article traces the impact of Blackstone's ideas on American law; its author, Dennis R. Nolan, concludes that "Blackstone did not bring about the Revolution or even contribute significantly to the Declaration of Independence," while his "contribution to the Constitution . . . was limited to defining a few concepts." Furthermore, Nolan claims that Blackstone had only a slight effect on the outcome of the nation's early legal cases. Nolan concludes, rather, that Blackstone's influence was upon legal education; he writes that "from universities to private schools to simple offices, from courts in Philadelphia to roving justices in the West, and from law students and lawyers to laymen, the Commentaries shaped the form and content of the law of the nation." Two other noteworthy articles focusing on the relationship between ideas and the contributions of great legal thinkers are Stanley Katz's essay on "Thomas Jefferson and the Right to Property in Revolutionary America" and Don Fehrenbacher's piece on "Roger B. Taney and the Sectional Crisis.

Other historiographical approaches have also produced valuable work. The two best books, apart from Horwitz's *The Transformation of American Law, 1780-1860*, were written by young historians who engaged in precise analyses of the workings of institutions as a means of understanding the underlying social structures. In the first of the

63. Id. at 261.
64. Id. at 274-75.
66. Id. at 767.
67. Id. at 768.
68. Id. at 767.
71. See notes 11-14 supra and accompanying text.
books, *Crime and Law Enforcement in the Colony of New York, 1691-1776,*72 Douglas Greenberg attempts to use court records to analyze the social history of law and to "illuminate the history of society itself."

73 His is a history not only of the criminal courts and their doctrine, but also of "the many citizens of the colony who stood before them in criminal proceedings."74 In the second book, *The Municipal Revolution in America: Origins of Modern Urban Government, 1650-1825,*75 Jon C. Teaford presents a powerful analysis of the transformation of municipal corporations from institutions run by merchants for the promotion and regulation of trade to institutions responsible to the general populace for the provision of governmental services. A useful article that also focuses on institutional change is Barry D. Karl's essay on "Executive Reorganization and Presidential Power."76

Legal biographers have also made important contributions to the literature of the past two years. In *American Lawyers in a Changing Society, 1776-1876,*77 Maxwell Bloomfield uses biography to illustrate important themes in American history. For example, his essay on Peter Van Schaack78 illustrates the impossibility of remaining neutral during the American Revolution, and the difficulties of Loyalist emigres in reintegrating themselves into American life, their ultimate success, and their subsequent centrality in the early American conservative movement. His essay on William Sampson79 illustrates the place of immigrants in American life, including their treatment as second-class citizens, their love for their adopted nation despite that treatment, and their ultimate accomplishments within the American system. A third essay on William Pitt Ballinger80 shows how well-placed Confederates, even those active in the Confederate cause, were able to manipulate the postwar situation to improve their material well-being.

Two other biographies are of important twentieth-century legal figures. One is Peggy Lamson's portrait of *Roger Baldwin: Founder of the American Civil Liberties Union.*81 The other is David Wigdor's study of

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73. Id. at 12.
74. Id. at 13.
78. Id. at 1.
79. Id. at 59.
80. Id. at 271.
Roscoe Pound: Philosopher of Law.\textsuperscript{82} Both are highly readable and informative studies that focus upon the personal lives as well as the public contributions of their subjects. Another valuable biographical essay is Ellyn Ballou's article on Prentiss Mellen, the first chief justice of Maine.\textsuperscript{83}

Also represented in the scholarship of the past two years is work that brings to legal history the techniques of other disciplines. The best of this work is a book by Eric H. Monkkonen, The Dangerous Class: Crime and Poverty in Columbus, Ohio, 1860-1885.\textsuperscript{84} Monkkonen is a highly sophisticated statistician, whose very skill illustrates the limits of statistical analysis. The difficulty with his book is that a great deal of careful work led only to very narrow generalizations, such as that crime patterns in Columbus differed from those in Eastern cities\textsuperscript{85} and that urbanization and industrialization produced an increase in thefts by trick.\textsuperscript{86} In every other respect, however, Monkkonen's study is excellent. Two other studies are of more problematic value. One article\textsuperscript{87} brings to legal history the tools of economic analysis, arguing that doctrines providing greater protection to private property in land, livestock, and water emerged on the Great Plains in the nineteenth century because the benefits of asserting property rights rose and the costs of asserting them declined. The other article\textsuperscript{88} brings the tools of probability theory to history, arguing that Franklin D. Roosevelt erred in trying to pack the Supreme Court in 1937 because "the odds were already eleven to one in his favor that he would be able to name one or more justices by traditional means that very year."\textsuperscript{89} Each of these studies is excessively unidimensional, ignoring factors that contributed significantly to the historical events under study.

Less common than in past years were studies that focus upon how the authors and early expounders of particular constitutional provisions intended them to apply to issues troubling legal and political decision-makers today. Two books, Government by Judiciary: The Transformation of the Fourteenth Amendment,\textsuperscript{90} by Raoul Berger, and The Rise of

\textsuperscript{82} D. Wigdor, Roscoe Pound: Philosopher of Law (1974).
\textsuperscript{84} E. Monkkonen, The Dangerous Class: Crime and Poverty in Columbus, Ohio, 1860-1885 (1975).
\textsuperscript{85} Id. at 29-33.
\textsuperscript{86} Id. at 92-100.
\textsuperscript{87} Anderson & Hill, The Evolution of Property Rights: A Study of the American West, 18 J. L. & Econ. 163 (1975).
\textsuperscript{88} Morrison, Franklin D. Roosevelt and the Supreme Court: An Example of the Use of Probability Theory in Political History, 16 Hist. & Theory 137 (1977).
\textsuperscript{89} Id. at 144.
Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845-1969,91 by Ward E.Y. Elliott, argue that the Supreme Court has exceeded its mandate in applying the fourteenth amendment to problems other than the narrow ones with which its authors intended it to deal. Both books have a brief-like quality, emphasizing historical data that support their legal position and ignoring evidence about social, intellectual, and political development in the background that cuts in the opposite direction. Such a brief-like quality may be inevitable in any attempt to search the past for answers to current problems, because the ambiguity of the past generally can be overcome only by ignoring its richness. The real issue for historians of constitutional intention is that of identifying and evaluating permissible evidence of such intention. In the case of Berger, it appears from his previous writing92 that he examines intention by looking to statements in debate and to the common law background of those statements; if a scholar so limits his vision, it is possible to reach narrow conclusions like those of Berger with reference to the meaning and intent of the fourteenth amendment.

More expansive approaches than Berger's and Elliott's exist for evaluating historical evidence. One approach is exemplified by Abraham D. Sofaer's book, War, Foreign Affairs and Constitutional Power: The Origins93—an analysis of the powers claimed and exercised by the legislative and executive branches in regard to war and foreign affairs from the time of the constitutional convention to 1829. Unlike Berger and Elliot, Sofaer does not come to any definitive conclusion as to the location of constitutional power; on the contrary, he argues that the framers deliberately left the powers of the two branches vague94 and that, while each branch has been "jealous of its authority, and at times sought to increase its power," "neither branch [has] prevailed consistently enough to subordinate the other."95 An equally judicious approach is taken by Charles A. Lofgren in "Compulsory Military Service under the Constitution: The Original Understanding";96 Lofgren concludes that the framers intended to compel military service from all adult males, but only in the militia. In sum, both Lofgren and Sofaer seek to learn what men decided in the past in reference to issues they faced. They thereby recognize both the ambiguity and the richness of

94. Id. at 60.
95. Id. at xv.
the past in a way in which Berger and Elliott do not. The cost of such an approach is, of course, a recognition that the past cannot yield simple answers to issues of the present.

Lofgren and Sofaer were not, of course, the only legal historians during the past two years who wrote history without attempting to address current legal and political issues. Indeed, as has always been true, most scholars addressed rather narrow factual questions without regard to their present relevance. Some of this factually oriented work is especially noteworthy.

Three articles are noteworthy because they are based upon important primary source materials—the Felix Frankfurter and Jerome Frank papers—that have been made available for scholarly research only in recent years. The most newsworthy of the articles is Michael E. Parrish’s "Cold War Justice: The Supreme Court and the Rosenbergs," which recounts the intrigue and political maneuvering occurring among the Justices of the Supreme Court as they faced possible review of the Rosenberg case. Important legal process insights can be obtained from the two other articles: "How Questions Begot Answers in Felix Frankfurter’s First Flag Salute Opinion," by Richard Danzig, and "Portrait of the Judge as an Activist: Jerome Frank and the Supreme Court," by Robert J. Glennon, Jr.

Important factual contributions were also made by three books. Henry J. Bourguignon has written an extraordinarily thorough study of The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775-1787; subsequent historians should not find it necessary to retrace the steps he has plotted. The same can be said for Peter J. Coleman's Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900. A third valuable book is The Twenty-Fifth Amendment: Its Complete History and Earliest Applications, by John D. Feerick. In addition, the past two years saw many useful articles reporting research in primary sources, as well as some valu-

104. See Boskey, A History of Commercial Arbitration in New Jersey, 8 Rut.-Cam.
able books and articles summarizing existing factual knowledge.\(^{105}\)

Finally, it is necessary to mention two projects that have begun the publication of important records in our nation's legal and constitutional experience. The first is a project edited by Merrill Jensen, entitled *The Documentary History of the Ratification of the Constitution*, the first two volumes of which are now in print;\(^{106}\) it will include for every state both the standard materials and newspaper and private commentary on the ratification process. The second project is the publication under the editorship of Herbert A. Johnson of *The Papers of John Marshall*, the first volume of which has appeared.\(^{107}\) Both of these masterful compilations are of first-rate significance.\(^{108}\)

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\(^{108}\) Another valuable compilation is Basic Documents of American Public Administration, 1776-1950 (F. Mosher ed. 1976).