

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

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1. Nelson, *Legal and Constitutional History*, 1976 *Ann. Survey Am. L.* 427.

2. Black, *The Constitution of Empire: The Case for the Colonists*, 124 *U. Pa. L. Rev.* 1157 (1976); Johnson, *John Jay: Lawyer in a Time of Transition, 1764-1775*, 124 *U. Pa. L. Rev.* 1260 (1976); Smith, *An Independent Judiciary: The Colonial Background*, 124 *U. Pa. L. Rev.* 1104 (1976); Swindler, "Rights of Englishmen" Since 1776: Some Anglo-American Notes, 124 *U. Pa. L. Rev.* 1083 (1976); White, *The Path of American Jurisprudence*, 124 *U. Pa. L. Rev.* 1212 (1976).

3. Boyd, *On the Need for "Frequent Recurrence to Fundamental Principles."* 62 *Va. L. Rev.* 859 (1976); Gay, *America the Paradoxical*, 62 *Va. L. Rev.* 843 (1976); Herget, *The Missing Power of Local Governments: A Divergence Between Text and Practice in Our Early State Constitutions*, 62 *Va. L. Rev.* 999 (1976); Kettner, *Subjects or Citizens? A Note on British Views Respecting the Legal Effects of American Independence*, 62 *Va. L. Rev.* 945 (1976); Nolan, *The Effect of the Revolution on the Bar: The Maryland Experience*, 62 *Va. L. Rev.* 969 (1976); White, *Foreword: Placing the American Revolution*, 62 *Va. L. Rev.* 839 (1976).

4. Allemand, *Two European Influences on the American Revolution: Puritanism and John Locke*, 25 *De Paul L. Rev.* 805 (1976); Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant*, 25 *De Paul L. Rev.* 895 (1976); Kiely, *The Hollow Words: An Experiment in Legal Historical Method as Applied to the Institution of Slavery*, 25 *De Paul L. Rev.* 842 (1976); Newmyer, *Justice Joseph Story's Doctrine of "Public and Private Corporations" and the Rise of the American Business Corporation*, 25 *De Paul L. Rev.* 825 (1976).

5. Dickson, *Some Comments on Procurement Law in the Confederacy*, 8 *Pub. Cont. L.J.* 191 (1976); Joy, *Connecticut's Merchant Governor: Washington's Major Provisioner*, 8 *Pub. Cont. L.J.* 129 (1976); Joy, *Eli Whitney's Contracts for Muskets*, 8 *Pub. Cont. L.J.* 140 (1976); Moss & Gantt, *A Steam Engine and Contract Termination Settlement Procedures*, 8 *Pub. Cont. L.J.* 188 (1976); Roe, *Lincoln: The First Board of Contract Appeals*, 8 *Pub. Cont. L.J.* 179 (1976); Sobernheim, *Contracts for the Highway Transportation of the Mails*, 8 *Pub. Cont. L.J.* 157 (1976); Solibakke, *The First Successful Government Contract for "One (1) Heavier-Than-Air Flying Machine."* 8 *Pub. Cont. L.J.* 195 (1976); Vom Baur, *The Origin of the Changes Clause in Naval Procurement*, 8 *Pub. Cont. L.J.* 175 (1976); Whelan & Mains, "Cost Plus" or "I May Be a Robber But I'm Not a Thief," 8 *Pub. Cont. L.J.* 210 (1976).

Hurst.⁶ These special issues, together with the volumes of the *American Journal of Legal History* that have been published during the past two years,⁷ 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.⁸ Although "written for the general reader,"⁹ 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;¹⁰ 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*.¹¹ Horwitz's *The Transformation of American Law* is a significant book.¹² 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;¹³ that is, on most important issues, the

6. Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 *Law & Soc'y Rev.* 267 (1976); Gordon, Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography, 10 *Law & Soc'y Rev.* 9 (1975); Haller, *Historical Roots of Police Behavior: Chicago, 1890-1925*, 10 *Law & Soc'y Rev.* 303 (1976); McCurdy, *Stephen J. Field and Public Land Law Development in California, 1850-1866: A Case Study of Judicial Resource Allocation in Nineteenth-Century America*, 10 *Law & Soc'y Rev.* 235 (1976); Nelson, *Officeholding and Powerwielding: An Analysis of the Relationship Between Structure and Style in American Administrative History*, 10 *Law & Soc'y Rev.* 187 (1976); Scheiber, *Federalism and the American Economic Order, 1789-1910*, 10 *Law & Soc'y Rev.* 57 (1975); Tushnet, *The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy*, 10 *Law & Soc'y Rev.* 119 (1975).

7. 20 *Am. J. Legal Hist.* (1976); 21 *Am. J. Legal Hist.* (1977).

8. J. Lieberman, *Milestones! 200 Years of American Law: Milestones in Our Legal History* (1976).

9. *Id.* at xvii.

10. *The Sheriff's Jury and the Bicentennial* (J. Sullivan ed. 1977).

11. M. Horwitz, *The Transformation of American Law, 1780-1860* (1977).

12. See, e.g., Genovese, *Book Review*, 91 *Harv. L. Rev.* 726 (1978); Hurst, *Book Review*, 21 *Am. J. Legal Hist.* 175 (1977); Presser, *Book Review: Revising the Conservative Tradition: Towards a New American Legal History*, 52 *N.Y.U.L. Rev.* 700 (1977).

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 response 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 profession 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 Brandeis, 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. Harring's study of "Class Conflict and the Suppression of Tramps in Buffalo, 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-

14. Some readers have not been persuaded, however, by Horwitz's essentially Marxist 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*, 11 Law & Soc'y Rev. 873 (1977).

tion."¹⁹ 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.²⁰ 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."²¹ 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."²² 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."²³ He concluded that "relationships of class, crime, and order are complex."²⁴

An outstanding book by Elliot W. Brownlee, Jr.,²⁵ 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,"²⁶ 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."²⁷ 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.*

21. Friedman, John A. Sibley Lecture: The Devil Is Not Dead: Exploring the History of Criminal Justice, 11 *Ga. L. Rev.* 257, 270 (1977).

22. *Id.* at 272.

23. *Id.* at 273.

24. *Id.*

25. E. Brownlee, Jr., *Progressivism and Economic Growth: The Wisconsin Income Tax, 1911-1929* (1974).

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.”²⁸ 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,²⁹ 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.³⁰ 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.³¹ 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.”³² 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.³³ Finally, in a study of the social backgrounds of lower-court federal judges from 1829 to 1861,³⁴ 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

28. Whittenburg, *Planters, Merchants, and Lawyers: Social Change and the Origins of the North Carolina Regulation*, 34 *Wm. & Mary Q.* 215 (3d ser. 1977).

29. Tripp, *An Instance of Labor and Business Cooperation: Workmen’s Compensation in Washington State* (1911), 17 *Lab. Hist.* 530 (1976).

30. *Id.* at 537.

31. *Id.*

32. *Id.* at 549.

33. Prager, *The Persistence of Separate Property Concepts in California’s Community Property System, 1849-1975*, 24 *U.C.L.A.L. Rev.* 1, 16-18 (1976).

34. Hall, *240 Men: The Antebellum Lower Federal Judiciary, 1829-1861*, 29 *Vand. L. Rev.* 1089 (1976).

Within the NAACP."³⁵ 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 article³⁶ reinforces the point, showing how the absence of national leadership from black lawyers resulted in local black attorneys' loss of the first effort, in *Grove v. Townsend*,³⁷ 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.³⁸ 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,³⁹ 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.⁴⁰

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,"⁴¹ D. Kelly Weisberg recites many familiar facts as well as

35. Meier & Rudwick, *Attorneys Black and White: A Case Study of Race Relations Within the NAACP*, 62 *J. Am. Hist.* 913 (1976).

36. Hine, *Blacks and the Destruction of the Democratic White Primary, 1935-1944*, 62 *J. Negro Hist.* 43 (1977).

37. 295 U.S. 45 (1935).

38. C. Martin, *The Angelo Herndon Case and Southern Justice* (1976).

39. D. Grant, *The Anti-Lynching Movement: 1883-1932* (1975).

40. See Bishop, *Plessy v. Ferguson: A Reinterpretation*, 62 *J. Negro Hist.* 125 (1977); Hindus, *Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina*, 63 *J. Am. Hist.* 575 (1976); McMillen, *Black Enfranchisement in Mississippi: Federal Enforcement and Black Protest in the 1960s*, 43 *J.S. Hist.* 351 (1977); Spackman, *American Federalism and the Civil Rights Act of 1875*, 10 *J. Am. Stud.* 313 (1976); Stephenson & Stephenson, "To Protect and Defend": Joseph Henry Lumpkin, The Supreme Court of Georgia, and Slavery, 25 *Emory L.J.* 579 (1976); Wiecek, *The Statutory Law of Slavery and Race in the Thirteen Mainland Colonies of British America*, 34 *Wm. & Mary Q.* 258 (3d ser. 1977).

41. Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, 28 *J. Legal Educ.* 485 (1977).

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 book⁴⁶ 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 Kawashima⁴⁷ 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 outsiders⁴⁹ discusses the jury *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.

43. Lebsock, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J.S. Hist. 195 (1977).

44. Id. at 202-03.

45. Friedman & Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. Legal Stud. 61 (1976).

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).

47. Kawashima, *Forced Conformity: Puritan Criminal Justice and Indians*, 25 Kan. L. Rev. 361 (1977).

48. Id. at 367-68.

49. LaRue, *A Jury of One's Peers*, 33 Wash. & Lee L. Rev. 841 (1976).

century. 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*,⁵⁰ Reid continues his work on the Cherokee Indians,⁵¹ 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 articles⁵² 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,"⁵³ 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,⁵⁴ 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

50. J. Reid, *A Better Kind of Hatchet: Law, Trade, and Diplomacy in the Cherokee Nation during the Early Years of European Contact* (1976).

51. See J. Reid, *A Law of Blood: The Primitive Law of the Cherokee Nation* (1970).

52. Reid, *In Accordance with Usage: The Authority of Custom, the Stamp Act Debate, and the Coming of the American Revolution*, 45 *Fordham L. Rev.* 335 (1976); Reid, *In an Inherited Way: English Constitutional Rights, the Stamp Act Debates, and the Coming of the American Revolution*, 49 *S. Calif. L. Rev.* 1109 (1976); Reid, *In Legitimate Stirps: The Concept of "Arbitrary," the Supremacy of Parliament, and the Coming of the American Revolution*, 5 *Hofstra L. Rev.* 459 (1977); Reid, "In Our Contracted Sphere": The Constitutional Contract, The Stamp Act Crisis, and the Coming of the American Revolution, 76 *Colum. L. Rev.* 21 (1976); Reid, *In the First Line of Defense: The Colonial Charters, the Stamp Act Debate and the Coming of the American Revolution*, 51 *N.Y.U.L. Rev.* 177 (1976).

53. Reid, *In an Inherited Way: English Constitutional Rights, the Stamp Act Debates, and the Coming of the American Revolution*, 49 *S. Calif. L. Rev.* 1109, 1110 (1976).

54. Reid, *In a Constitutional Void: The Enforcement of Imperial Law, the Role of the British Army, and the Coming of the American Revolution*, 22 *Wayne L. Rev.* 1 (1975).

to the military's presence. But Reid's most important contribution comes in a series of six other articles,⁵⁵ 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

55. Reid, *Dividing the Elephant: The Separation of Mess and Joint Stock Property on the Overland Trail*, 28 *Hastings L.J.* 73 (1976); Reid, *Knowing the Elephant: Distinguishing Property Rights on the Overland Trail*, 10 *Creighton L. Rev.* 640 (1977); Reid, *Paying for the Elephant: Property Rights and Civil Order on the Overland Trail*, 41 *Huntington Lib. Q.* 37 (1977); Reid, *Prosecuting the Elephant: Trials and Judicial Behavior on the Overland Trail*, 1977 *B.Y.U.L. Rev.* 327; Reid, *Sharing the Elephant: Partnership and Concurrent Property on the Overland Trail*, 45 *U.M.K.C.L. Rev.* 207 (1976); Reid, *Tied to the Elephant: Organization and Obligation on the Overland Trail*, 1 *U. Puget Sound L. Rev.* 139 (1977).

56. Reid, *Prosecuting the Elephant: Trials and Judicial Behavior on the Overland Trail*, 1977 *B.Y.U.L. Rev.* 327, 350.

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).

58. See P. Conkin, *Self-Evident Truths* (1974); M. Cunliffe, *The Right to Property: A Theme in American History*, Sir George Watson Lecture, delivered at the University of Leicester (May 4, 1973) (published by Leicester University Press, 1974).

59. White, *The Intellectual Origins of Torts in America*, 86 *Yale L.J.* 671 (1977).

60. *Id.* at 673-78.

61. E. White, *The American Judicial Tradition* (1976).

62. P. Paludan, *A Covenant with Death: The Constitution, Law, and Equality in the Civil War Era* (1975).

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"⁶³ and analyzes how denial of power to the national government inevitably precluded the attainment of racial equality.⁶⁴

A particularly excellent article traces the impact of Blackstone's ideas on American law;⁶⁵ 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."⁶⁶ Furthermore, Nolan claims that Blackstone had only a slight effect on the outcome of the nation's early legal cases.⁶⁷ 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."⁶⁸ 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"⁶⁹ and Don Fehrenbacher's piece on "Roger B. Taney and the Sectional Crisis."⁷⁰

Other historiographical approaches have also produced valuable work. The two best books, apart from Horwitz's *The Transformation of American Law, 1780-1860*,⁷¹ 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.

65. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 N.Y.U.L. Rev. 731 (1976).

66. *Id.* at 767.

67. *Id.* at 768.

68. *Id.* at 767.

69. Katz, *Thomas Jefferson and the Right to Property in Revolutionary America*, 19 J.L. & Econ. 467 (1976).

70. Fehrenbacher, *Roger B. Taney and the Sectional Crisis*, 43 J.S. Hist. 555 (1977). The article will also appear as a chapter in the author's forthcoming book on the *Dred Scott* case.

See also Fetner, *The Law Teacher as Legal Reformer: 1900-1945*, 28 J. Legal Educ. 508 (1977); Parks, *Judicial Selection—The Tennessee Experience*, 7 Mem. St. U.L. Rev. (1977); Simson, *Jury Nullification in the American System: A Skeptical View*, 54 Tex. L. Rev. 488 (1976).

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

72. D. Greenberg, *Crime and Law Enforcement in the Colony of New York, 1691-1776* (1976).

73. *Id.* at 12.

74. *Id.* at 13.

75. J. Teaford, *The Municipal Revolution in America: Origins of Modern Urban Government, 1650-1825* (1975).

76. Karl, *Executive Reorganization and Presidential Power*, 1977 *Sup. Ct. Rev.* 1.

77. M. Bloomfield, *American Lawyers in a Changing Society, 1776-1876* (1976).

78. *Id.* at 1.

79. *Id.* at 59.

80. *Id.* at 271.

81. P. Lamson, *Roger Baldwin: Founder of the American Civil Liberties Union* (1976).

*Roscoe Pound: Philosopher of Law.*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.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.*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 cities⁸⁵ and that urbanization and industrialization produced an increase in thefts by trick.⁸⁶ In every other respect, however, Monkkonen's study is excellent. Two other studies are of more problematic value. One article⁸⁷ 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 article⁸⁸ 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."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,*⁹⁰ by Raoul Berger, and *The Rise of*

82. D. Wigdor, *Roscoe Pound: Philosopher of Law* (1974).

83. Ballou, *Prentiss Mellen, Maine's First Chief Justice: A Legal Biography*, 28 *Me. L. Rev.* 317 (1977).

84. E. Monkkonen, *The Dangerous Class: Crime and Poverty in Columbus, Ohio, 1860-1885* (1975).

85. *Id.* at 29-33.

86. *Id.* at 92-100.

87. Anderson & Hill, *The Evolution of Property Rights: A Study of the American West*, 18 *J. L. & Econ.* 163 (1975).

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).

89. *Id.* at 144.

90. R. Berger, *Government by Judiciary: The Transformation of the Fourteenth Amendment* (1977).

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 Origins*⁹³—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

91. W. Elliott, *The Rise of Guardian Democracy: The Supreme Court's Role in Voting Rights Disputes, 1845-1969* (1974).

92. See R. Berger, *Congress v. The Supreme Court* (1969); R. Berger, *Executive Privilege: A Constitutional Myth* (1974); R. Berger, *Impeachment: The Constitutional Problems* (1973).

93. A. Sofaer, *War, Foreign Affairs and Constitutional Power: The Origins* (1976).

94. *Id.* at 60.

95. *Id.* at xv.

96. Lofgren, *Compulsory Military Service under the Constitution: The Original Understanding*, 33 *Wm. & Mary Q.* 61 (3d ser. 1976).

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,"⁹⁷ 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,⁹⁸ and "Portrait of the Judge as an Activist: Jerome Frank and the Supreme Court," by Robert J. Glennon, Jr.⁹⁹

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*;¹⁰⁰ subsequent historians should not find it necessary to retrace the steps he has plotted.¹⁰¹ The same can be said for Peter J. Coleman's *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900*.¹⁰² A third valuable book is *The Twenty-Fifth Amendment: Its Complete History and Earliest Applications*, by John D. Feerick.¹⁰³ In addition, the past two years saw many useful articles reporting research in primary sources,¹⁰⁴ as well as some valu-

97. Parrish, *Cold War Justice: The Supreme Court and the Rosenbergs*, 82 *Am. Hist. Rev.* 805 (1977).

98. Danzig, *How Questions Begot Answers in Felix Frankfurter's First Flag Salute Opinion*, 1977 *Sup. Ct. Rev.* 257.

99. Glennon, *Portrait of the Judge as an Activist: Jerome Frank and the Supreme Court*, 61 *Cornell L. Rev.* 950 (1976).

100. H. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775-1787* (1977).

101. See also Bourguignon, *Incorporation of the Law of Nations during the American Revolution—the Case of the San Antonio*, 71 *Am. J. Int'l L.* 270 (1977).

102. P. Coleman, *Debtors and Creditors in America: Insolvency, Imprisonment for Debt, and Bankruptcy, 1607-1900* (1974).

103. J. Feerick, *The Twenty-Fifth Amendment: Its Complete History and Earliest Applications* (1976).

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

L.J. 1 (1976); Cox, History of the Adverse Possession Statutes of Tennessee, 6 Mem. St. U.L. Rev. 673 (1976); Ely, Charleston's Court of Wardens, 1783-1800: A Post-Revolutionary Experiment in Municipal Justice, 27 S.C.L. Rev. 645 (1976); Elv, "That no office whatever be held during life or good behavior:" Judicial Impeachments and the Struggle for Democracy in South Carolina, 30 Vand. L. Rev. 167 (1977); Laska, A Legal and Constitutional History of Tennessee, 1772-1972, 6 Mem. St. U.L. Rev. 563 (1976); Lee, Discretionary Justice in Early Massachusetts, 112 Essex Inst. Hist. Coll. 120 (1976); Lund, Early American Wildlife Law, 51 N.Y.U.L. Rev. 703 (1976); McKirdy, Before the Storm: The Working Lawyer in Pre-Revolutionary Massachusetts, 11 Suffolk U.L. Rev. 46 (1976); McKirdy, The Lawyer as Apprentice: Legal Education in Eighteenth Century Massachusetts, 28 J. Legal Educ. 124 (1976); Morano, Historical Development of the Interrelationship of Unanimous Verdicts and Reasonable Doubt, 10 Val. L. Rev. 223 (1976); Oaks & Bentley, Joseph Smith and the Legal Process: In the Wake of the Steamboat *Nauvoo*, 1976 B.Y.U.L. Rev. 735; Packel, The History of Pennsylvania's Juvenile Institutions: A Sesquicentennial Review, 22 Vill. L. Rev. 83 (1976-77); Parker, The Juvenile Court Movement: The Illinois Experience, 26 Toronto L.J. 253 (1976); Smith, An Historical Sketch of Oregon's Supreme Court, 55 Ore. L. Rev. 85 (1976); Vogel, Looking Back on a Century of Complete Codifications of the Law, 53 N.D.L. Rev. 225 (1976).

105. See W. Burrows, *Vigilante!* (1976); Countryman, A History of American Bankruptcy Law, 81 Com. L.J. 226 (1976); Helfand, Labor and the Courts: The Common-Law Doctrine of Criminal Conspiracy and Its Application in the Buck's Stove Case, 18 Lab. Hist. 91 (1977); Heller, Military Law in the Continental Army, 25 Kan. L. Rev. 353 (1977); Roberts, Edward Livingston and American Penology, 37 La. L. Rev. 1037 (1977).

106. 1 *The Documentary History of the Ratification of the Constitution: Constitutional Documents and Records, 1776-1787* (M. Jensen ed. 1976); 2 *The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States, Pennsylvania* (M. Jensen ed. 1976).

107. *The Papers of John Marshall* (H. Johnson ed. 1974).

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

