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BOOK REVIEWS

ELAINE FORMAN CRANE. *Killed Strangely: The Death of Rebecca Cornell.* Ithaca: Cornell University Press, 2002. xiii, 236 pp. $24.95.

On February 8, 1673, Rebecca Cornell of Portsmouth, Rhode Island, burned to death in her inner parlor while her son and daughter-in-law, Thomas and Sarah, six children, a border, and a visitor ate supper seemingly unaware of the "Unhappie accident" occurring a few scant feet away as they passed a large "salt-mackrill" among themselves and discussed the events of the day. According to Thomas's later testimony, Rebecca had earlier declined to leave her room for supper because she did not like the main dish. After the diners disposed of the mackerel, Sarah dispatched Richard, one of the children, to inquire if his grandmother wanted anything and he discovered her still-smoldering body. Thus began colonial America's only prosecuted case of matricide and the O. J. Simpson case of seventeenth-century New England.

Despite the original finding of accidental death, speculation soon ran rife that foul play had befallen Rebecca, and suspicion fell on her son, Thomas, the last person known to have seen her alive. Three months later, a grand jury indicted Thomas for murder, and after a five-day trial, the court convicted him and gave him the death sentence which was carried out a week later. Despite the sensational nature of the Cornell case, it has largely been ignored by historians until Elaine Forman Crane, a distinguished historian and an especially knowledgeable scholar of colonial Rhode Island, breathed life into it with this book. Why has she done so? Because Crane uses the Cornell case to probe the underpinnings of Rhode Island and New England society, which, according to her, betrayed dysfunctional gaps between expectation and ideology on one hand and reality on the other. Thus, just as the O. J. case rose above tawdry circumstances to reveal that black and white Americans had fundamentally different perceptions of the police and legal systems in modern cities, so, too, Crane argues, the Cornell case lay bare some ugly social truths that Rhode Islanders would have preferred to gloss over.

Was Thomas Cornell guilty? Crane leaves the answer open but clearly she thinks the evidence insufficient to sustain the verdict. Why then was he convicted? And what was wrong with Rhode Island? Thomas was convicted, Crane believes, because he challenged the appropriate behavior expected of him. He was not a dutiful son but instead had often been known to be rude to his mother; he resented his dependence on her financially; and he feared she would move to one of his siblings and leave him penniless. Additionally, Thomas had made enemies politically; he seemed acquisitive and self-serving; he was irreligious in contrast to his mother's Quaker piety; and he had a bad temper. In short, Thomas seemed to personify the shortcomings of the second generation of New Englanders who deserted the principles of New England's glorious founders. He was found guilty, according to Crane, not so much because of the specific evidence of the case but because the jury and court knew so much about him that they believed he was the sort of person who would kill his mother.

Crane is a fine historian who does, indeed, do a fine job of dissecting the tensions in late seventeenth-century New England. She writes beautifully and this book is engaging throughout. Some of the legal testimony she has discovered even

rises to the titillating level of modern court television drama. The criminal inquiry first began after Rebecca's brother, John, went to the authorities with his suspicions after he received a visit from her ghost. A later witness also recalled seeing "The Great Dogg" run from Rebecca's room, which—inasmuch as the Cornells had no pet—was taken to mean the Devil in disguise. Rebecca had also confessed to relatives to living "with an evil spirit," which we might well take to mean a clinical depression but authorities assumed was the Devil's temptation dwelling within.

But, as enjoyable as this book may be, it is not convincing. To continue the legal idiom, Crane is forced to rely almost entirely on circumstantial evidence. Her rhetoric and honesty betray any lack of clear proof: this is a book that uses phrases such as "probably" and "it is likely" too darn much. Rhode Island was a disputatious and contentious society, and Thomas was a grumpy fellow who would never have won a Mr. Congeniality award. But nothing connects these phenomena to his guilty verdict but wishful thinking. Crane's main proposition does not have to be right, however, for her book to be valuable. *Killed Strangely* is entertaining and it shines a bright light on parts of seventeenth-century Rhode Island.

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JOHN M. FERREN. *Salt of the Earth, Conscience of the Court: The Story of Wiley Rutledge.* Chapel Hill: University of North Carolina Press, 2004. ix, 577 pp. $26.37.

One can explain the fact that John Ferren's study of Wiley Rutledge is only the second book-length treatment of Franklin Roosevelt's last appointee to the U.S. Supreme Court by noting that "Rutledge served on the Court for only six and a half terms [1943-1949], leaving him relatively unknown among long-tenured colleagues" (p. 419), such as Hugo Black, William Douglas, Felix Frankfurter, and Robert Jackson. The lack of scholarly interest in Rutledge also stems from the fact that he had neither the "intellectual firepower" (p. 342) of these men nor their felicity of expression. Ferren performs a valuable service in demonstrating that such scholarly inattentiveness is undeserved, given that Rutledge, like his more famous brethren, contributed significantly to American constitutional jurisprudence.

This thoroughly researched judicial biography is divided into three sections of increasing length and depth. The first section focuses on Rutledge's early years, recounting his journey from Cloverport, Kentucky, his birthplace, to Boulder, Colorado, where he attended law school and, after two years of private practice, became an associate professor of law. The next section examines Rutledge's years as a professor of law and, then, dean at Washington University in St. Louis and, later, the University of Iowa College of Law. The book's final section addresses Rutledge's four years as a judge for the U.S. Court of Appeals for the District of Columbia and his six years on the U.S. Supreme Court. Here, Ferren combines an exhaustive treatment of the justice's decisions in major areas of constitutional law with discussions of his interactions with his colleagues. The reader learns that Rutledge managed to have cordial to close relationships with all of his brethren, which was no small feat, considering the hostility that existed between the Frankfurter/Jackson and Black/Douglas wings of the Court. More important, the reader is informed of Rutledge's jurisprudential contributions.

Rutledge joined the Court at a pivotal moment in its history—"when its

jurisprudential focus had largely shifted from property rights to individual rights—including the rights of enemies in wartime—for which the New Deal offered no particular policy" (p. 236). Rutledge was an early proponent of expanding the living Constitution concept beyond governmental powers to include individual rights. Indeed, Ferren notes, Rutledge was "a forerunner of the Warren Court" (p. 344) in the areas of criminal justice, free speech, establishment of religion, and (to some extent) racial equality, if not reapportionment. While the justice's willingness to "premis[e] denial of equal protection on poverty" (p. 353) has yet to win the support of a Court majority, his powerful statements on the "preferred place" of the First Amendment (p. 269), the "wall of separation between church and State" (p. 268), and the inseverability of the exclusionary rule and the Fourth Amendment (among other issue areas) became part of accepted constitutional doctrine.

Ferren regards Rutledge's dissent in the war crimes trial of General Tomoyuki Yamashita as one of the finest moments of the justice's short tenure. (The author wisely does not suggest that this opinion compensates for Rutledge's regrettable decision to join the Court majority that supported the federal government's internment of Japanese Americans after the bombing of Pearl Harbor.) In "one of the Court's truly great, and influential, dissents," Rutledge argued that "the law of war permitted conviction of a commander for failure to control his troops only if there was credible proof that the commander knew of the crimes his troops had committed in time to stop or at least punish them" (pp. 305-06). Ferren observes that, "in war crimes prosecutions after [*In re*] *Yamashita*...to the present day, the 'knowledge' deficiency identified by Justices Wiley Rutledge and Frank Murphy has been recognized the world over, beginning almost contemporaneously at Nuremberg and reaching the atrocities in Bosnia and Rwanda over a half-century later" (p. 318).

Rutledge's opinions are of more than historical interest because they also encourage Americans to reflect upon the question of what balance the nation should strike between the competing values of security and liberty in the so-called "war on terrorism." While "[o]ne can only speculate how Justice Rutledge...would rule on particular civil liberty restraints demanded by intelligence agencies to deal with a clandestine, terrorist enemy," Ferren believes the justice's *Yamashita* dissent should make one "reasonably sure" that, "[e]ven in era of international terrorism,...[he] would insist on the right of all detainees, even 'unlawful combatants,' to legal representation and some manner of due process" (p. 323).

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JAMES HITCHCOCK. *The Supreme Court and Religion in American Life,* vol. 1: *The Odyssey of the Religion Clauses.* Princeton: Princeton University Press, 2004. 218 pp. $29.95.

JAMES HITCHCOCK. *The Supreme Court and Religion in American Life,* vol. 2: *from "Higher Law" to "Sectarian Principles."* Princeton: Princeton University Press, 2004. 261 pp. $35.00.

James Hitchcock has written a two-volume work in support of his contention that the Supreme Court, for most of its history, recognized the role of government to encourage the growth and vitality of the Christian religion for the positive

social benefits that it provided. The two volumes are interdependent. The first provides a brief description of each of the Court's decisions arguably pertaining to religious freedom or establishment from the Court's inception to the present, and the second contains the author's interpretation of this body of juridical thought. Separating the descriptions of the cases from the author's analysis of their significance and meaning requires most readers to remember the details of the cases presented in volume one while reading volume two. It also creates a first volume that is rather encyclopedic and very tedious to read.

Hitchcock's audience is certainly not members of the law community. He writes that he "is less concerned with the technical aspects of Supreme Court jurisprudence than with the Court's view of the nature of religion and its role in society" (2:introd.). Using "technical" to simultaneously describe and deprecate judicial reasoning, he implicitly asserts that such material is irrelevant to his audience.

Many of Hitchcock's colleagues in academia will be similarly dissuaded from reading his text by his disparagement of "modern liberalism". Seemingly, American society started to decline after 1940, and the Supreme Court has embodied that decline in turning away from its earlier acceptance of the importance of religion to American society. Of course, in order to support this assertion, Hitchcock must find the Court supportive of religion prior to the mid-twentieth century. He does this largely by misrepresenting Court decisions.

Some of our best legal history has been written by non-lawyers. Yet scholars in this field are well-advised to study lawyers, judges, and the styles of case reporting before venturing into sophisticated legal analyses. Hitchcock's presentation of cases in volume one fails to recognize that judicial holdings derive from law, precedent, and judicial reasoning. In volume one, the author presents the facts and holdings in a series of Supreme Court cases touching on religion, but largely ignores the law, precedent, and reasoning of the Court in coming to its holdings. As a result, the cases appear to constitute a series of uncoordinated rulings. Hitchcock, like many non-lawyers, is inclined to see Court decisions as expressions of policy rather than of law, and the Court as a quasi-political body rather than as a juridical entity.

The author's description of Justice Story's decision in *Beatty and Ritchie v. Hurtz and the German Lutheran Church of Georgetown*, 27 U.S. 565 (1829), exemplifies the problems resulting from this approach. The case concerns a gift of Maryland land made to an unincorporated church by a Maryland resident who subsequently died. Hitchcock wants desperately to see the case as an early example of the Court's embrace of Christian principles, thereby providing evidence in support of his argument. He concludes that Story's opinion "was remarkable in terms of the Court's willingness to move beyond strictly legal considerations in order to protect religious values" (1:20). Frankly, this is nonsense. Hitchcock erroneously defines the issue as "whether 'the sepulchers of the dead are to be violated; the feelings of religion, and the sentiments of natural affection of the kindred and friends of the deceased are to be wounded'" (ibid.). Yet Story clearly defines but two issues in the case, well before the quoted passage. For Story, the issues were whether title could pass from the late Col. Charles Beatty to the unincorporated church and, if so, whether the church could enjoin Beatty's heir and this heir's assignee of interest, John Ritchie, from trespassing on church land and destroying the cemetery there. Story, in a ruling consistent with subsequent Court decisions in *Inglis v. Trustees of Sailor's Snug Harbor* (1830) and *Vidal v. Philadelphia (Girard's Will)* (1844), preliminarily found that the church, as an unincorporated private voluntary association, was not "legally capable of taking,

in order to support the donation in this case" (*Beatty* at 581). But Maryland had borrowed from the Elizabethan Statute of Charitable Uses in drafting its state law, providing in its bill of rights that: "any sale, gift, lease, or devise of any quantity of land, not exceeding two acres, for a church, meeting or other house of worship, and for a burying ground" would be valid (*Beatty* at 583). This specific provision in Maryland's state law constituted a legal exception to the law requiring a grantee to be incorporated. Story found the grant to the church to be valid and the church therefore able to protect its cemetery through an injunction. This case turned on specific facts—the unusual Maryland law. It cannot be used as an example of the Court endorsing Christianity in early America. To the contrary, but for the exception provided by Maryland law, the church would have lost its land.

The *Beatty* case is one of many that the author completely misconstrues because he is unfamiliar with the importance of legal reasoning. Yet just as problematic is his removal of the Court's decisions from their social and political context. In disregarding legal authority, Hitchcock separates court decisions from law. In ignoring the social and political environments in which the decisions arose, he renders those decisions historically irrelevant.

Earlier scholars have attempted, with more success, to document and analyze the decisions of the Supreme Court in regard to religious freedom. One thinks, in particular, of Robert Alley's work, *The Constitution & Religion: Leading Supreme Court Cases on Church and State.* What does Hitchcock add to this body of literature? While Hitchcock is far from the first to recognize the significance of the Dartmouth College case (1819) to separating church and state, his attention to this case in this context is compelling. He also has chronicled a broader range of cases decided by the Court that consider, even tangentially, religious issues. This too is a contribution.

Nonetheless, even postmodernist historians who embrace a subjective writing of history in response to the impossibility of doing objective history might bristle at Hitchcock's blatant political motivations. Of the Court's decision in *Roe v. Wade* (1973), he writes: "moral principles once thought of as common to all are now seen as merely 'sectarian'" (2:137). One almost wonders where the author has been since 2000 when he refers to the "modern Court" and the "liberal theorists" who influence it. He asserts that in contemporary society "[r]eligion is not allowed to offer final answers to public questions" and that "[g]overnment cannot even recognize 'spiritual interests' and cannot accommodate such interests in its policies" (ibid.). Yet he does find hope that recent decisions at least recognize "that religious persons and institutions have a right to share, without discrimination, in the benefits of the welfare state" (2:140). In this characterization of the early twenty-first century, Hitchcock may prove to be a better prognosticator than a historian.

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JOHN W. JOHNSON. *Griswold v. Connecticut: Birth Control and the Constitutional Right of Privacy.* Lawrence: University Press of Kansas, 2005. xiii, 266 pp. $35.00 (cloth); $15.95 (paper).

John Johnson concludes in his study of *Griswold v. Connecticut*, "[u]nsheathed by *Griswold*, the constitutional right to privacy has transformed the nation's legal landscape; its repercussions have touched the most intimate aspects

of human life" (p. 234). This is a sound conclusion. However, Johnson's work suffers from a common flaw of works dealing with the landmark case; he fails to focus on the history of the case, choosing instead to allow the legacy of the case to narrow his retelling. This analytical distortion is obvious in the strengths and weaknesses of the text

Despite his choice of title, Johnson's true focus is privacy, not birth control. He researches, discusses, and analyzes the Connecticut situation regarding birth control in order to get to the meat of his research the U.S. Supreme Court case. Those looking for the actual history of contraception in Connecticut are better served by David Garrow's *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* or Susan Wawrose's *Griswold v. Connecticut: Contraception and the Right of Privacy.* Johnson acknowledges he relies heavily on Garrow as a secondary source for the history of contraception in Connecticut, rather than doing his own original research. His original research of Connecticut consists of reviewing a few key state and national newspapers along with official publications of case records and edited collections of case reports. The pitfall here is many of the extant sources contain factual errors only revealed when one looks at the original records of Planned Parenthood League of Connecticut (PPLC), the state records and the personal papers of several key activists in PPLC.

His lack of research in Connecticut is curious considering *Griswold* was not a case brought before the Court by a quirk of solitary fate, but rather as part of a well developed strategy by the PPLC to further the legal status of public birth control. The limited history he does relate, less than a third of the book, tends to dismiss the contributions of most Connecticut actors with the exception of Fowler Harper and Thomas Emerson, the lawyers who argued the case before the Supreme Court. His characterization of Estelle Griswold, the PPLC Director, the named litigant in the case, is careless, even insulting. For example, his first characterization of Griswold states she was a "former office worker, sometime singer, and recently certified medical technologist" (p. 1). While she was these things, he fails to note several key points of her resume that made her an excellent candidate to lead the PPLC. During her lifetime, she worked for important human rights organizations and causes. While the comments are troubling for their inadvertent effect of diminishing the importance of Connecticut, PPLC and key individuals, they point to a larger problem. Johnson does little to seriously address the social landscape in bringing about a major sea change in judicial interpretation of the proper use of state police powers. Perhaps this is why the book seems to give so few answers as to why the justices felt compelled to support a constitutional right to privacy, or why legal experts persist in defending the right to privacy, despite a lack of consensus of its origin in the Constitution.

The scholarly criticisms of the book do not rest entirely on the author's shoulders. *Griswold v. Connecticut* is part of the series *Landmark Law Cases and American Society.* The editors intend the works for students and general readers and therefore omit formal citation from the texts, substituting a bibliographic essay. However, it is troubling to not have direct quotations and expert opinions even referenced. While one can understand not wanting to put off key readers with arcane footnotes, the editors do a disservice to the author by making the work almost useless as a source to engender future scholarship.

The strength of Johnson's original research and the book is his analysis of the Supreme Court and *Griswold* as the precedent of privacy. In order to present a detailed recounting, he delves into the Supreme Court Papers of key justices. Johnson's analysis of the court's views on privacy is commendable. His discus-

sions of the Court's dealings with *Poe v. Ullman* and *Griswold v. Connecticut* are detailed and at points insightful. What he does best is to make a convincing case that privacy becomes one of the important new foundational concepts of the legal landscape in the late twentieth century and contemporary times. In short, John Johnson's work has a limited usefulness for scholars of privacy and serious pitfalls for the neophyte.

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KEVIN J. McMAHON. *Reconsidering Roosevelt on Race: How the Presidency Paved the Road to* Brown. Chicago: University of Chicago Press, 2004. x, 298. $52.00 (cloth); $20.00 (paper).

In his new work on the development of the Supreme Court's modern civil rights jurisprudence, political scientist Kevin J. McMahon focuses on an unlikely protagonist: Franklin D. Roosevelt. Many studies have been made of the shift of the Supreme Court post-1937, in the wake of Roosevelt's failed effort to "pack" the Court and his appointment of a dominant group of new justices. During these years, according to the consensus expressed by such distinguished historians as William Leuchtenburg, the Court underwent a "Roosevelt revolution," passing from a restrictive standard of constitutionality grounded in outdated theories of "substantive due process" to a concern with economic reform and a concentration on deference to democratically elected authorities in constitutional interpretation. While McMahon does not challenge this basic narrative, he reconfigures it by posing a new question: how was it that justices such as Felix Frankfurter, Robert Jackson, Hugo Black, and William O. Douglas, appointed for their devotion to theories of judicial restraint, could have arrogated such a leading role to the courts in the absence of legislative initiative in undoing Jim Crow legislation and practices, and further how could the reactionary Southern Bourbons who controlled the Senate and the Democratic party in the Roosevelt years have overwhelmingly supported their appointment? His answer is to use a "historical institutionalist" analysis (p. 6) of the role of courts in the New Deal era. Roosevelt was primarily concerned with forging a progressive Democratic Party and a political system dominated by the federal government. Although this meant that he was cautious in supporting civil rights, especially when it did not conform to his dominant objectives, he also pushed the appointment of judges devoted to rights-centered liberalism. In hopes of expanding political participation by the disenfranchised, the Justice Department established the principle of intervention in civil rights cases before the Court, becoming an influential advocate of equal treatment. In 1939, Attorney General Frank Murphy (later a Roosevelt appointee to the Court) created the Civil Rights Section (CRS) to push litigation to defend the political rights of citizens, notably African Americans.

McMahon deserves credit for thinking deeply about the evolution of the executive branch into a force in support of civil rights. He is particularly good in

his discussion of the CRS's efforts to use the vaguely worded Sections 51 and 52 of the Reconstruction-era Civil Rights Act of 1866 as tools to prosecute lynchings and Southern police brutality in federal court. These were ultimately thwarted by the Supreme Court's 1945 decision in *Screws v. United States*, which interpreted the sections so narrowly as to eviscerate their effectiveness. However, I was not completely persuaded by McMahon's larger argument. He states that the Roosevelt administration was the chief catalyst of *Brown v. Board of Education* (1954) and even asserts that if Roosevelt's appointees Wiley Rutledge, Frank Murphy, and Harlan Stone (Roosevelt did not actually appoint Stone, although he elevated him to chief justice) had lived, segregation "would have met its legal death earlier" (p. 13). In fact, the Court's deadlock on desegregating schools was primarily caused by the recalcitrance of Justices Stanley Reed and Robert Jackson, both Roosevelt appointees, and there is little likelihood that the notoriously fractious Stone Court could have arrived at the unanimous result forged in 1954 by Chief Justice Earl Warren. The Roosevelt administration undoubtedly played a significant role in racial progress, but it is somewhat reductive to ascribe the chief credit to Roosevelt himself.

There are also a few odd omissions in McMahon's text. For example, he does not discuss Jonathan Daniels's race relations operation and how he and assistants such as Philleo Nash coordinated efforts to ease racial tension and combat lynchings, and his narrative excludes entirely the role of Eleanor Roosevelt. His understanding of Hugo Black's development would have been aided by consideration of Roger K. Newman's definitive biography. McMahon's discussion of the federal government's role as supporter of equal rights is incomplete. Nowhere does he mention the landmark 1944 case *Steele v. Louisville and Nashville Railroad Company,* in which Solicitor General Charles Fahy wrote a powerful *amicus* on behalf of black railroad firemen facing discrimination. Further, while McMahon mentions the Supreme Court's *Korematsu* case (1944), he discusses it as a wartime aberration and covers neither the preceding unanimous *Hirabayashi* ruling (1943) nor the postwar Japanese American cases of *Oyama v. California* (1948) and *Takahashi v. California Fish and Game Commission* (1948), which solidly implanted the doctrine of "strict scrutiny" first elaborated in *Korematsu.* These omissions obscure the usefulness of McMahon's contributions to the legal history of the New Deal era.

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JOHN PHILLIP REID. *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries.* DeKalb: Northern Illinois University Press, 2004. 150 pp. $32.00.

JOHN PHILLIP REID. *The Ancient Constitution and the Origins of Anglo-American Liberty.* DeKalb: Northern Illinois University Press, 2005. 188 pp. $32.00.

John Phillip Reid's latest offerings are two fine books about the origins of the Anglo-American idea of liberty and constitutional government. Those familiar with Reid's oeuvre will not be surprised by the erudition of these studies and their provocative interpretations of what often seem to be all-too-familiar doctrines and ideas. In order to understand the foundations of Anglo-American liberty, Reid

claims: "We must go back to the basics of an abandoned jurisprudence" (2005, 28). In *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries*, Reid begins this project of rediscovery by examining what he takes to be the historical origins of the rule-of-law concept in England with Bracton in the thirteenth century and traces its development and persistent prominence throughout the turbulent constitutional struggles of the seventeenth and eighteenth centuries. Reid argues that the basic rule-of-law principles familiar to modern readers such as equal protection, due process, and the notion of "government in accordance with established and performable norms" (2004:5) derive their origin in the late medieval Bractonian dictum that law is not power but rather a restraint on power. In his insightful analysis of seminal legal developments such as Magna Carta, the English Civil War debates over Ship Money and the trial of Charles I, the drafting of the first legal codes in colonial Massachusetts, and the Glorious Revolution-era Bill of Rights, Reid consistently demonstrates that events and controversies that seemed to relate to more-or-less exigent political or constitutional questions actually had much more to do with affirming and strengthening the traditional rule-of-law principle than we typically suppose.

In Reid's other recent work, *The Ancient Courstitution and the Origins of Anglo-American Liberty*, he proposes that among many eighteenth-century Anglo-American Whigs who sought to defend the venerable principle of limited government against emerging doctrines of "jurisprudence of sovereignty," the rule-of-law doctrine came to be embodied in the notion of the "ancient constitution." The seventeenth-century ancient-constitution concept based on the rule of immemorial law and custom was given new life in the eighteenth, Reid claims, with the recognition that parliament, rather than the crown, was now the most likely potential source of arbitrary government, especially for freedom-loving American colonists in the imperial context. Reid ably illustrates that the proponents of the ancient constitution understood it not as "scientific" history based on verifiable facts but rather as a "forensic tool with which to create, defend, and define the concept of liberty and of representative government" (2005:5). This history was meant to provide a form of civic education about the autonomous character of law rooted in the "artificial reason of immemorial custom" (2005:46). According to Reid, the notion of law as a manifestation of reason distinct from the will of a legislator was the touchstone for English and American Whigs horrified with the potential danger to liberty posed by unrepresentative, omnicompetent, and constitutionally illimitable legislatures. In the latter part of the book, Reid demonstrates how Whigs on both sides of the Atlantic employed forensic techniques drawn from the suppositive Gothic and Saxon history as authority from the past designed to be an antidote to the emerging orthodoxy of parliamentary sovereignty. Unlike their embattled brethren in England, Reid concludes, American Whigs were able to keep the "good old cause" alive and successfully champion the rule of law in their revolution against the British Parliament.

Among the real virtues of these compendia are the ambition of Reid's project and the great facility with which he illuminates central guiding principles in a complex and multifarious intellectual tradition. Where others notably have found the roots of Anglo-American liberty in Renaissance civic humanism (e.g., J. G. A. Pocock, Quentin Skinner) or the English Commonwealth tradition (e.g., Caroline Robbins, Bernard Bailyn), Reid sees the rule-of-law doctrine as the unifying thread in the Anglo-American idea of liberty from its first appearance in the judicial efforts to restrain monarchical power in late medieval England, through the constitutional and imperial struggles of the seventeenth and eighteenth centuries, and only meeting its demise when it was finally supplanted by positivist doctrines

of law and sovereignty in the nineteenth and twentieth centuries.

The other, more particular, merits of these works are manifold. For instance, they are exemplars of meticulous research as Reid plumbs the depths of rich sources in early modern legal theory often neglected by scholars. The discussion of the legal debates in colonial Massachusetts was especially fascinating. Moreover, Reid brings clarity to the notion of rule of law by articulating a sense of its original meaning that is quite distinct from, and even in considerable tension with, modern ideas of democratic legitimacy. He thereby illuminates an important intuitive dimension in the Anglo-American ideal of liberty often ignored in parallel studies. Finally, Reid highlights the important role judges, lawyers, and juries played in preserving the idea of rule of law in early modern England. While practitioners of the law generally receive much less attention in studies of this period than political theorists or political leaders, Reid argues persuasively that lawyers and judges were a crucial part of the English libertarian tradition not only as foot soldiers in the legal trenches of the common law courts but also as an important intellectual voice against arbitrary rule, whether monarchical or popular.

The defects in Reid's latest project are few. There is, of course, always opportunity for quibbles over interpretation of specific texts or thinkers. For example, Reid's celebration of Bolingbroke as a champion of rule-of-law thinking against parliamentary sovereignty is unpersuasive to this reader (2004:70-72). Was Bolingbroke's obsession with preserving the independence of parliament from executive corruption or "influence" not a defense of parliamentary sovereignty, albeit a reformed parliament? However, in the larger scheme of things, such interpretive differences are to be expected. Two other concerns, however, may be more significant. First, the quality of the two works is somewhat uneven. On the one hand, the earlier book on rule of law is concise, tightly reasoned, and generally well supported by the historical and textual evidence. On the other hand, the later work on ancient constitutionalisin is often sweeping in its claims and thus more vulnerable to the charge of conceptual overreach. The informed reader sometimes suspects that Reid ascribes too much importance to the role of the ancient constitution. This is the case with respect to eighteenth-century Britain but is perhaps even truer of Reid's analysis of American Whigs. There are a few notable examples of American writers in the period such as "Demophilus" who employed the ancient-constitution concept with great aplomb, but most did not, and arguably none of the most influential statements of the colonial cause in the dispute with Britain, such as those of Jefferson, Adams, Paine, and Wilson, made the ancient constitution the centerpiece of their argument against parliamentary sovereignty over America.

While Reid is correct to observe that the English and American inheritors of the Whig legacy "had drawn apart over the definition of liberty and role of the rule of law" (2004:78), there is little effort to explain why this schism emerged or how it related specifically to changing perceptions of the ancient constitution. Thus, Reid's claim that the American Revolution should be understood as a "look backward" (2005:52) to antiquity and a fight "to keep the ancient constitution" (2005:114) against British innovations is unpersuasive. It is hard to swallow the idea that the Declaration of Independence and the first state constitutions drafted in the revolutionary period, saturated as they were by the rhetoric and logic of natural rights, were backward looking or driven by the impulse to restore some lost ideal of immemorial custom and tradition. While Reid should be applauded for illuminating one aspect of American Whig thinking that was not simply natural rights philosophy, by attributing too much significance to the part, he runs the risk

of obscuring our sense of the whole.

Finally, Reid's halting effort to demonstrate the intellectual connection between contemporary original intent jurisprudence and the ancient constitution rather falls flat. Could one not argue that original intent, as it has developed in the United States, differs from ancient constitutionalism as a rule-of-law-based constitutional limit on government, precisely because in the United States there is a written constitution in place that needs to be interpreted and one that arguably ascribes considerable power to the national government, whether express or implied? One can hardly equate the U.S. Constitution with immemorial custom except by a most ideologically loaded method of interpretation (i.e., collapsing the will of the framers and amenders with the suppositious ancient constitution). Despite these minor objections, Reid clearly presents thoughtful and penetrating studies that will be of great service to anyone interested in understanding the legal roots of Anglo-American liberty.

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SILVANA R. SIDDALI. *From Property to Person: Slavery and the Confiscation Acts, 1861-1862.* Baton Rouge: Louisiana State University Press, 2005. x, 298 pp. $44.95.

The Fifth Amendment of the U.S Constitution, ratified in 1791, curtailed the powers of the Federal Congress, though not the constituent states, by stipulating that no American should be "deprived of life, liberty, or property, without due process of law." Then the Fourteenth Amendment, ratified in 1868, extended those governmental limitations to the States by insisting, "No State shall...deprive any person of life, liberty, or property, without due process of law." Americans clearly place a very high premium on private property.

It seems inconceivable, therefore, that the Civil War era federal government could wipe out property in slaves, the total cash value of which, according to David Brion Davis, was more than "all the farms in the South, including the Border States...three times the cost of constructing all the nation's railroads or three times the combined capital invested nationally in business and industrial property."[1] How was any confiscation of private property, let alone one so massive as emancipation, even remotely possible given America's prevailing cultural values and legal norms? And how did the Union war effort manage to assault the constitutionality of property in human beings while simultaneously preserving the integrity of the Constitution? Silvana Siddali, in her new book *From Property to Person*, argues persuasively that the national debate surrounding the Confiscation Acts of 1861 and 1862 cleared the way for emancipation and "laid the groundwork for the Reconstruction Amendments" (p. 6).

The constitutionality of confiscation, by this account, preoccupied Congress from 1861 to 1863. At stake were the rights of rebellious citizens, the very idea of slaves as property, the long-term durability of the Constitution, and the consequences of state-sponsored confiscation on the sanctity of private property. The press regularly reported and relentlessly commented upon the confiscation debates in Congress, yielding "a series of transformations in the public mind" (p. 11). While both the First and Second Confiscation Acts were "nearly useless" and "rarely enforced," a majority of northerners became convinced of three things:

Constitutional compromises with the Slave Power could be eradicated, the "so-called confederate states" would be punished, and the very notion of property in persons should be eliminated (p. 6).

The reality of war made confiscation possible. Beginning with the original confiscations of the war that most historians ignore, Siddali insists that it was actually the aggressive secessionist seizure of federal assets (forts, arsenals, and private property) that generated calls for revenge among northerners who "argued that secession was equivalent to theft" (p. 23). Northerners began to accept confiscation as quid pro quo for secession. The flames of northern resentment got further fanned when Jefferson Davis authorized privateering against Union merchant ships, then again when Georgia Governor Joseph Brown ordered the repudiation of northern debts. The humiliating Union defeat at Bull Run pushed the northern public even further. Once Union General Benjamin Butler issued his famous "contraband" policy, the confiscation of slave property became almost universally accepted.

The First Confiscation Act, passed in August of 1861, bad three objectives: punish the South, take back federal property, and deprive rebels of slave labor. Although the act did not directly free slaves, it stated that to "employ such person [slaves] in aiding and promoting any insurrection" would cause slaveholders to "forfeit all right to such service or labor" (quoted at p. 254). As Siddali points out, "the mere recognition that the slave and his labor were two separate entities can be seen as revolutionary...it was not the slave but his labor that was property" (p. 81). The Second Confiscation Act, in July 1862, took an even more punitive tone than the first, though it also fell short of full-scale emancipation. Indeed, the later law authorized the President "to make provision for the transportation, colonization, and settlement, in some tropical country beyond the limits of the United States of such persons of the African race made free by the provision of this act" (quoted at p. 261). Ultimately, neither the four clauses of the first act, nor the fourteen clauses of the second, provided sufficient operational detail to handle the colossal challenges they attempted to address.

Siddali could have been less repetitive throughout. Furthermore, the actual content of both acts was presented somewhat fuzzily and unsystematically, while comparison of the acts was peculiarly weak. Nonetheless, *From Property to Person* puts constitutional notions of property alongside emancipation as the pivotal issues of the Civil War. Although the Confiscation Acts were never about more than vigorous prosecution of the war, Siddali has successfully demonstrated that, without those radical laws, emancipation might never have been possible

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JOHN D. SKRENTNY. *The Minority Rights Revolution.* Cambridge: Harvard University Press, 2002. ix, 472 pp. $18.95 (paper).

This ambitious book provides a clearly written and detailed historical analysis of the evolution of civil rights law and policy in the post-World War II period. *The Minority Rights Revolution* in essence contends that the hard-fought civil

1. David Brion Davis, *Inhuman Bondage: The Rise and Fall of Slavery in the New World* (New York: Oxford University Press, 2006), chap. 15.

rights protections secured by African Americans, such as the Civil Rights Act of 1964, were extended to other minority groups without adequate consideration. Politicians supported the extension of rights to "other" minorities, according to John Skrentny, because of the political power wielded by those groups, not because they warranted the rights and protections that Blacks did.

The Minority Rights Revolution identifies Latinos as the unworthy recipients of civil rights protections, an intellectual thread that weaves itself through most of the book. By suggesting that the extension of civil rights protections to groups other than African Americans was ill-advised, *The Minority Rights Revolution* positions itself as critical of the extension of civil rights protections for Latinos, women, and the disabled.

Chapter 1 of the book analyzes how the "Black Civil Rights Movement" transformed the United States. Chapters 2 and 3 consider how national security concerns resulting from the communist world's use of Jim Crow as an anti-American propaganda device resulted in domestic pressure for the dismantling of the apartheid in the United States. This chapter complements the scholarship analyzing how foreign relations pressures contributed to the Supreme Court's landmark decision in *Brown v. Board of Education* (1954).

Chapter 4 critically traces the development of racial categorization of minorities, such as Hispanics, for affirmative action programs. As the history of racial classification schemes reveal, categorization of different groups for affirmative action purposes proved difficult Chapter 5 challenges the need for minority public contractor programs.

Chapter 6 discusses the U.S. Supreme Court decisions evaluating the constitutionality of affirmative action programs in higher education. The book was published before—and its negative view of affirmative action in tension with—the Court's two University of Michigan affirmative action decisions in 2003, decisions that made it clear that carefully crafted race-conscious programs can survive constitutional scrutiny.

Chapter 7 studies the emergence of bilingual education programs and sees them as little more than an effort to gain Latino votes rather than as a response to legitimate civil rights issues. Chapter 8, which considers the emergence of women's equality in education, sees the extension of rights to women in a similar skeptical light.

Chapter 9 looks at the groups—the disabled, white ethnics, and gays and lesbians—that did not immediately receive the full protections of minority status. *The Minority Rights Revolution* is sympathetic to white ethnics but considerably less so to the disabled and gays and lesbians.

Chapter 10 concludes the book and emphasizes the problems with the extension of civil rights protections to minorities other than African Americans.

Ultimately, *The Minority Rights Revolution* is a cautionary tale. It is an antidote to those who contend that the civil rights revolution of the 1960s transformed America as the moral power of the anti-discrimination principle spread like wildfire. The moral principles of the civil rights movement transformed modern sensibilities in ways that rendered many forms of discrimination in American social life untenable. This important intellectual transformation—and its power—largely goes unexplored in the book.

The Minority Rights Revolution fails to adequately analyze the status of Latinos in the United States, one of the groups that it suggests is unworthy of the civil rights protections afforded to African Americans. In an irritating tone, the book repeatedly emphasizes that many Latinos identify racially as white for cen-

sus purposes but does not question whether such identification is an attempt to evade the discrimination against Latinos rather than revealing that they in fact are white. In this vein, *The Minority Rights Revolution* does not consider the possibility that the extension of civil rights protections to Latinos occurred because it was self-evident that Latinos, especially Mexican Americans and Puerto Ricans, had historically suffered discrimination in the United States. The Supreme Court in *Hernandez v. Texas*, a little known case decided within weeks of the decision in *Brown v. Board of Education*, came to precisely this conclusion in finding that Mexican Americans had been wrongfully excluded for decades from serving on juries in Texas. Discrimination resulted from the fact that American society racialized Latinos as non-white, whatever their claimed identity.

The Minority Rights Revolution cynically suggests that the extension of rights to minority groups other than African-Americans was little more than a sop to the political power of these groups. But it was political pressure that resulted in the extension of civil rights to African Americans. One is left uncertain why it is inappropriate for Latinos, women, and other groups to use political action in an attempt to protect their rights.

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JOSEPH E. SLATER. *Public Workers: Government Employee Unions, the Law, and the State, 1900-1962*. Ithaca: ILR Press, Cornell University Press, 2004. x, 260 pp. $39.95 (cloth).

Public employees currently comprise forty percent of the U.S. labor movement, and, with membership rates of forty-three percent, public sector unions represent one of the few bright spots for the U.S. labor movement today. Surprisingly little scholarly research exists, however, on this important segment of the labor movement. *Public Workers*, by William Slater addresses this serious lacuna in the twentieth-century history of the U.S. labor movement. *Public Workers* focuses on the pre-collective-bargaining era in public sector unionism, beginning with the disastrous 1919 Boston police strike and ending with the 1962 Wisconsin state law permitting public sector organizing and quasi-collective bargaining. Slater's book considers four other cases, including the struggle of the American Federation of Teachers against yellow-dog contracts in Seattle from 1928 to 1931, the campaigns of the Building Service Employees International Union to gain recognition and informal bargaining agreements in Chicago and elsewhere in the 1930s, and the efforts of the Telecommunications Workers Union to gain recognition, informal bargaining, and a pay raise in New York City. The author does not attempt to provide a comprehensive history of public sector unionism during this period but rather highlights the more significant moments in the rise of public sector unionism. In addition, the book contains a very useful chapter that discusses legal doctrines regarding public sector unions prior to the 1960s. *Public Workers* explains how public sector unions prevailed despite the hostile legal and political environment during this period.

Public sector unions did not benefit directly from the passage of either the Norris-LaGuardia Anti-Injunction Act of 1932 or the National Labor Relations Act of 1935 (NLRA). Despite the fact that public workers had many of the same needs, interests, and demands as private sector workers—for labor organizations,

collective bargaining, better wages and working conditions, and fair treatment—judges refused to extend to public workers the fundamental rights to organize and bargain well into the post-war period. Just joining a union could be grounds for dismissal in many jurisdictions; those that did not discriminate against union membership did not permit other basic rights such as the right to bargain over the terms of employment.

Slater attributes the hostile legal environment to historical circumstances, older legal doctrines, and judicial misunderstanding of the nature of public sector unions. The 1919 Boston police strike instilled public officials with a fundamental opprobrium of public sector unions and inhibited public sector unions for decades. Well into the 1960s, judges referred to this strike in their rulings against public sector unions. Judges and public officials adhered to a variety of legal doctrines inimical to public sector unions long after they had accepted the basic principles of the NLRA. Unionization, they feared, would create divided loyalty, especially among the police. Public unions interfered with popular sovereignty and were detrimental to the public welfare. The right to strike for public employees would interfere with critical public functions. Judges were unwilling to interfere with the employment policies of executive boards and agencies. Finally, judges asserted that public sector unions were a non sequitur, because unions were by definition a product of the conflict between labor and capital. Ergo, state labor laws protecting collective rights did not apply to public sector unions even if they did not specifically exclude them. Public workers overcame these judicial hurdles with political action, demonstrations, public relations, coalition formation, lobbying, and informal agreements.

Slater raises a significant objection to labor scholars like Catherine Stone, Karl Klare, James Atleson and Christopher Tomlins, who argue that the decline in the private sector labor movement has its roots in the NLRA. Proponents of the "law turn" in labor studies must acknowledge that public employees overcame more restrictive labor laws and had fewer rights than their private sector counterparts. Private sector unions faced more hostile employers, and public sector unions had the ballot box and public opinion to pressure recalcitrant boards. Public sector unions framed their demands in terms of the public interest and formed broader coalitions with other social movements. Does the success of public sector unions provide any other lessons for their private sector counterparts today?

This reviewer would be interested in reading more about what factors besides the law accounted for the success or failure of public sector unionism. Is public sector unionism associated with cities with strong private sector labor movements, urban political machines, reformed municipal governments, or progressive urban coalitions? Given the large number of cities in the United States with public sector labor movements, labor scholars have the opportunity to use comparative data to study these factors systematically.

Slater has written an incisive book that investigates a significant gap in twentieth-century U.S. labor history. This reviewer looks forward to a possible next installment that addresses developments in public sector unionism since 1962.

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DIANE MILLER SOMMERVILLE. *Rape and Race in the Nineteenth-Century South.* Chapel Hill: University of North Carolina Press, 2004. xiii, 411 pp. $59.95 (cloth); $24.95 (paper).

In her new book, *Rape and Race in the Nineteenth-Century South,* Diane Miller Sommerville argues that class and gender mattered more than race in the Old South. She also finds that white southerners did not mythologize the black male as a sexual predator until late in the nineteenth century, at which point those whites turned to lynching.

Sommerville lays out her argument in nine chapters. First, she shows that antebellum southern courts went about their business of trying blacks accused of rape largely free of interference from mobs or lynchers. This happened, Sommerville claims, because white males valued slave property guilty of rape more than the poor white females most likely to be raped. The "marginalization of nonelite white women" (p. 132) persisted through the Civil War, as did leniency toward convicted black rapists. During Reconstruction southern whites lost control of their courts, "jeopardizing the long-standing, revered ties between the law and the traditional power sources" (p. 162). A resulting loss of faith in law followed, but this does not mean lynch mobs immediately took to the streets. Even under Republican control, the courts went about their business, mistrusting women and often giving black defendants fair or more-than-fair treatment. Only at the end of the century did rape take on "heightened importance," when the "vitriolic clamor about black rape" came (p. 201), but even then, lingering mistrust of female testimony meant that some black defendants still escaped justice.

Sommerville makes her anecdotal argument for the centrality of class based on over 250 cases of sexual assault, mostly from Virginia and North Carolina, though she draws widely on secondary work as well. Sommerville is to be congratulated for moving beyond the statute books to study the law in action. Her findings, though, are unlikely to close the book on the scholarly debates she wants to address.

Sommerville's concentration on circuit court cases neglects magisterial courts, the slave patrol, and extralegal justice administered by masters making her findings that lynching did not occur much under slavery suspect. If two or three whites beat to death a slave, did no lynching occur?

Sommerville concedes that considerable racial violence occurred in Reconstruction, much of it sexual. She mines the Congressional investigation of the Ku Klux Klan to find eleven rapes. She also relies on George Wright, *Racial Violence in Kentucky 1865-1940: Lynchings, Mob Rule, and "Legal Lynchings"* (1990), one of the few historical works to compare Reconstruction lynchings with those in the Gilded Age. Based largely on Wright, Sommerville asserts that the violence in Reconstruction was more political than sexual. There was "no vast preoccupation with black rape" (p. 196). Wright based his conclusions on 353 lynchings, 129 during the Reconstruction era (1865-1877). Of those 129, Wright's newspaper sources gave a reason 64 times. Of those 64 allegations, 21 involved rape, roughly one-third of the total, more or less the same percentage of rape charges statisticians have found in lynchings after 1880. While Sommerville is surely correct that lynchers charged their victims with a wide variety of crimes, available evidence cannot yet prove that the percentages changed in any meaningful way between Reconstruction and the Gilded Age.

Her most important conclusions about Gilded Age lynchings rely on statistical work by Fitzhugh Brundage, *Lynching in the New South: Georgia and*

Virginia, 1880-1930 (1993), Stewart E. Tolnay and E. M. Beck, *A Festival of Violence: An Analysis of Southern Lynchings, 1882-1930* (1995), and Terence Finnegan, "'At the Hands of Parties Unknown': Lynching in Mississippi and South Carolina, 1881-1940" (Ph.D. diss., 1993). As the dates in their subtitles attest, all of these works assume what Sommerville needs to prove, that a new wave of lynching started after 1880. More recent work by William Carrigan, *The Making of a Lynching Culture: Violence and Vigilantism in Central Texas, 1836-1916* (2004), Michael Pfeifer, *Rough Justice: Lynching and American Society, 1874-1947* (2004), and Christopher Waldrep, *The Many Faces of Judge Lynch: Extralegal Violence and Punishment in America* (2002) shows that lynching flourished well before end of the nineteenth century. Carrigan and Pfeifer published their books in 2004, the same year as *Rape and Race in the Nineteenth-Century South,* but the point is not that Sommerville neglected this or that book, but that she, perhaps necessarily, relied on secondary sources to prove what they cannot prove, that an explosion of racial violence occurred amidst a rape panic in the late nineteenth century but not before.

This book provides an interesting and useful study. Like every work of scholarship, it has shortcomings, but it still makes a fine contribution to an important scholarly debate.

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PETER WALLENSTEIN. *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History* (New York: Palgrave Macmillan, 2002). xii, 305 pp. $35.00.

The title of Peter Wallenstein's book comes from the moving words spoken by Richard Loving in the 1967 U.S. Supreme Court case of *Loving v. Virginia*, in which state laws prohibiting marriages across racial categories were struck down. Seventeen southern states enforced such laws in 1967 (the last such law was removed from state books in the year 2000). *Tell the Court I Love My Wife* opens and closes with the story of Mildred and Richard Loving, newlyweds arrested in their own Virginia bedroom in 1958 owing to the fact that she was black and he was white. In between, Wallenstein traces the legal relationship between race and marriage from the seventeenth century forward, concentrating on the century between the Civil War and the Civil Rights Movement.

Cases and laws most often concerned the categories of blackness and whiteness—and most often, the separation of white from not-white—but Wallenstein also pays attention to laws pertaining to such categories as American Indian, Chinese, Japanese. and Filipino. Particularly interesting are discussions of the ways in which courts struggled with defining and labeling accused husbands and wives, the problem of interstate comity, and contestations of inheritance based on the racial designation of heirs.

If there is an argument in this book, it is that "the law of miscegenation could be both variable and unyielding" (p. 2). The major point conveyed by the author is that prior to 1967, state legislatures and judiciaries made up their own rules. Which racial categories mattered and how those categories were defined, which marriages were illegal, and how rigidly laws were to be enforced all varied both geographically and temporally. "All was contingent, all was contested." This is

the message of the book if not an explicit argument (p. 4).

Although Wallenstein builds toward the triumph of the *Loving* case, this is not wholly a trajectory of progress. Notably, the era of Reconstruction in the South brought revolution and counterrevolution, and the latter lasted nearly a hundred years. Southern states, Wallenstein demonstrates, "moved from one rigid antimiscegenation regime to another" (p.96) until the twentieth-century South became "an even more rigid, more exclusive racial regime than the 1890s" (p. 106). Even after the Second World War, as new challenges to American racism began to erode laws of segregation pertaining to housing, education, and transportation, the Civil Rights Act of 1866 and the equal protection clause of the Fourteenth Amendment, ratified in 1868, made no difference to many state marriage laws. In 1948, thirty states retained prohibitive laws, and the Civil Rights Act of 1964 "left marriage as the one remaining pillar in the legal structure of Jim Crow" (p. 217).

Wallenstein wants to impart this history by "telling the stories" behind the court cases (p. 5), for the stories of individuals "help illustrate the complexity of these laws" (p. 19). Indeed, some stories are related in fascinating detail, though many are little more than recitations of legal actions and reasoning, more viguettes or examples than stories. Wallenstein also breaks up his narrative with subheadings every few pages, exacerbating the sense of a collection of disconnected examples: "Maine and Massachusetts" (p. 43) is followed by "A North Carolina Family" (p. 45), followed by "Identity and Property in Maryland and Georgia" (p. 46) and "Mixed Marriages in Alabama" (p. 48). Wallenstein is careful with language, mostly invoking the phrase "racial identity" rather than the more reified "race," and employing the contested term "miscegenation" (coined in 1864 by opponents of President Abraham Lincoln) largely in the context of the nation's "antimiscegenation regime." He also places "black" and "white" in quotation marks where appropriate (though he does not explain his use of "Caucasian," a term that rings of pseudo-scientific racial ideology).

Wallenstein takes his narrative beyond 1967, treating, among other topics, the relationship between *Loving* and arguments about same-sex marriage from the 1970s forward. He also offers a series of appendices, including brief discussions of Nazi Germany, apartheid South Africa, interfaith marriage in Israel, and transgendered people.

The great value of this book lies in its chronological and geographical sweep and in Peter Wallenstein's extraordinary amassing of legal evidence. It will serve as a reference not only for scholars of the law, but also for scholars of race, marriage, and the family.

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CHARLES L. ZELDEN. *The Battle for the Black Ballot:* Smith v. Allwright *and the Defeat of the Texas All-White Primary.* Landmark Law Cases and American Society. Lawrence: University Press of Kansas, 2004. x, 156 pp. $29.95 (cloth); $12.95 (paper).

Although it does not rank in the same class as *Brown v. Board of Education* (1954), the 1944 U.S. Supreme Court ruling in *Smith v. Allwright* is widely considered a landmark decision in the struggle for black rights in America. In

Allwright, the Court struck down the so-called all-white primary of the Democratic Party in Texas as a violation of the Fifteenth Amendment to the Constitution, which prohibits states from denying citizens the right to vote "on account of race, color, or previous condition of servitude." Even though the exclusion of black voters from the state's Democratic primary was based on a resolution of the party's state convention, the Supreme Court held that the Texas primary was not merely the private concern of a voluntary association but, in fact, amounted to state action within the reach of constitutional protections. As Justice Stanley Reed famously declared for an eight-to-one majority, the right of all citizens to participate in the choice of elected officials without restriction of race must not be "nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election." Although it took another twenty years until the 1965 Voting Rights Act effectively ended racial disenfranchisement in the Southern states, many historians and constitutional scholars argue that *Allwright* paved the way for a redefinition of modern citizenship and the public sphere in the United States. Moreover, the case was a major victory for the National Association for the Advancement of Colored People Legal Defense Fund under the guidance of the legendary Thurgood Marshall.

The short book by Charles Zelden provides the reader with an excellent overview of the history of *Smith v. Allwright* which both scholars and students will appreciate. Zelden's account of the approximately thirty-years of litigation against the white primary is skillfully embedded in the social and political history of Texas and the United States at large and presents the complex legal and constitutional issues in a highly readable way. Although the book does not include footnotes to allow the reader to identify the numerous direct quotations, it offers an instructive bibliographical essay and a chronology of events. Most of the author's interpretations and judgments are well-taken. Experts in field, however, may be a little bit disappointed that Zelden does not address some of the major controversies that have been raised over the years in connection with litigation as a strategy to advance black civil rights. The protracted legal battle against the white primary surely is an important case in point for asking the question whether favorable court rulings really have a positive impact in hinging about social and political change. Both civil rights activists at the time and subsequent scholars such as Gerald Rosenberg and Michael Klarman have answered this question with much skepticism.

Moreover, while *Allwright* certainly marks a victory for black participation rights, the decision was much more ambiguous than it seems from Zelden's narrative. After all, if race, for the sake of the argument, is excluded from the picture, it does not seem unreasonable to define parties as voluntary associations that should be largely free to determine their membership and to demand some degree of loyalty from their members. It was only because the guardians of white supremacy had perverted the concept of parties as private organizations to such an extreme that the Supreme Court ultimately felt compelled to acknowledge that there was no difference between the action of the southern Democratic Party and the action of the respective states. By doing so, the Court tacitly sanctioned a peculiarity that was clearly at odds with the American political system at large. The historical significance of Allwright—and a good deal of irony—lay in the need to accept the realities of white supremacy, so that a constitutional remedy could be devised to bring about its demise. In this sense, *Allwright* also reflected the advance of a more "realistic" constitutional thinking that was no longer content with relying on deductive reasoning but looked at the material consequences of laws and statutes.

These reservations notwithstanding, *The Battle for the Black Ballot* is a very good introduction to the history of the struggle against the white primary. Everybody who is interested in this topic will benefit from reading Zelden's book.

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MAUREEN MULHOLLAND AND BRIAN PULLAN, EDS., *Judicial Tribunals in England and Europe, 1200-1700: The Trial in History, Volume 1.* Manchester: Manchester University Press, 2003. 186 pp. £40.00.

A slim volume bearing an ambitious title, this provocative set of essays examines the diverse forms and functions of "trials" as well as the richness and limits of trial records as historical evidence. Its intent is not to offer a comprehensive survey, but to "provide a few illuminating examples of the operation in the past of different legal systems, applied by differently constituted courts, royal and manorial, secular and ecclesiastical, which adopted different procedures, adversarial and inquisitorial" (p. 2). In this it succeeds, particularly by transcending narrow technical issues of law and by illustrating how court records may be used to inform social, political, and cultural history.

Judicial Tribunals consists of nine essays that cover trials in widely different times and places while displaying varying methodologies and perspectives. The opening chapter, by Joseph Jaconelli, discusses the concept of the "trial" in history, as distinct from notions about "courts" or the "judicial function," and identifies three core elements: internal rationality, publicity, and independence (pp. 24-29). The next four chapters focus on variants of the English experience. Anthony Musson examines the role of judges at trials in the late medieval period and discerns no meaningful distinction between so-called "professional" and "amateur" justices (p. 51). Addressing whether and to what extent the jury was ever "self-informing," Daniel Klerman argues that thirteenth-century jurors brought their knowledge of the facts with them to the trial but that over time juries became more dependent upon evidence presented in court as the numbers of self-informed jurors dwindled (p. 59, 75-6). Maureen Mulholland examines the records of manorial courts, emphasizing their very different composition, function, and use of juries as a "mode of proof" (p. 91). The pivotal (literally) essay by R. H. Helmholz takes up trials and judges in the English ecclesiastical courts, which drew from the wellspring of the European *ius commune*. Helmholz cautions that although ecclesiastical procedure dramatically differed from the common law by giving primacy to written (documentary) evidence rather than oral testimony related in open court, the distinction must not be overstated (p. 105). English ecclesiastical trials were neither secret nor confined to documentary proof, rather, "it appears that these ecclesiastical proceedings fit comfortably within the definition of a trial given by [Jaconelli] at the outset of this volume" (p. 113).

The final four essays squarely address trials on the continent. William Naphy incisively examines more than a hundred years of sex-related prosecutions in Calvin's Geneva. Naphy's "tentative conclusions" illustrate a "subtle and discrete dialogue" among court officers, victims, doctors, and midwives while reflecting the records' promise as a fertile source for social, cultural, and women's history (pp. 140-41). Yet, as Mary Laven cautions, "trial testimonies are . . . seductive . . . because the protagonists in long-forgotten courtroom dramas have a continuing

ability to engage our sympathies" (p. 150). Laven uses the testimony of a seduced nun as the occasion for her fascinating remarks about historical methodology and the need to keep court records within their proper context—legal, social, and political (p. 151). Brian Pullan illustrates the "day-to-day workings" of the Roman Inquisition through the prosecution of "Swarthy George" Moreto, a "ribald Venetian sailor" whose transgressions in Venice's Jewish ghetto earned him three years of galley service (p. 160). Pullan's rich account is enhanced by an appended translation of the inquisition's records in the Moreto case, including the witness's statements and Moreto's own interrogation. The only puzzling entry in this volume about "trials" is Jeffrey Denton's assessment of the "attempted trial" of Pope Boniface VIII for heresy. Although Boniface's death forced his detractors to condemn him posthumously, Denton deftly uses the proceedings to remark on issues relating to political trials in general and the light these records cast on the "Franco-papal conflict" (p. 126).

The strength of *Judicial Tribunals* is its eclectic look at so many aspects of trial in England and Europe from the thirteenth through the seventeenth century. Mulholland's excellent introduction underscores the importance of examining trials from such a broad vantage point, offers a trenchant summary of each chapter, and provides background for the non-specialist. Although the chapters stand on their own, cross-references are helpful and not infrequent (e.g., p. 105). Legal historians whose research is locked into a particular place and time will profit from the broadened perspective, as will social and political historians interested in the promises and perils of trial court proceedings. Of course, one can easily list a dozen or more issues worthy of equally serious study, yet this book succeeds on its own terms.

Judicial Tribunals will be most valuable in graduate seminars on legal history or historical methodology as well as in law school courses interested in the origins and function of trials. Undergraduates and general readers seeking a comprehensive examination of trials in England and on the continent are forewarned by Mulbolland that this is not the volume's purpose.

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JAMES S. HART, JR., *The Rule of Law, 1603-1660: Crowns, Courts and Judges.* Harlow: Pearson Longman, 2003. x, 317 pp. $58.20.

James S. Hart deserves praise for his refreshing and ambitious attempt to examine England in the first half of the seventeenth century from a legal perspective. Placing the law and legal ideology at the center of an analysis of the key political events of these turbulent decades brings a renewed intensity and meaning to even the most familiar chronologies and debates. In place of the recent focus on "consensus" within the political vision of English elites, Hart begins by emphasizing the ideological gap that existed between the Stuart monarchs on one side and members of Parliament and common lawyers on the other over their respective understandings of the extent of crown prerogative. One symptom of this was the conflict between common law and equity that reached a crisis point in 1616, which Hart argues was clearly more than a clash of personalities, or of rival jurisdictions competing for business, that melted away once Coke, Bacon, and Ellesmere had left center stage. Another theme is the slow but steady undermining

of the independence and credibility of the judiciary in the eyes of the people, thanks to the pressures applied to judges by James, then Charles I, then Cromwell. *The Rule of Law* is a clearly written and accessible introductory history, even though the promise of its vision is not always fully realized.

The book begins with a concise introduction to the structure and workings of the legal system, paying particular attention to the judiciary. It then moves on to a chronological assessment of the key issues and landmark cases of the reigns of James and Charles, including the question of legal Union between England and Scotland, Bate's Case, Peachman's Case, the Case of the *Commendams*, the Forced Loan and the Five Knights' Case, the Revival of the Knighthood fines, the enforcement of Forest laws and the collection of Ship Money. The most novel chapters are those that continue this analysis into the 1640s and 1650s, examining repeated attempts at legal reform and showing how Parliament and then Cromwell and other protectorate officials encountered the same problems of government as their royal predecessors. Time and again throughout the first half of the seventeenth century the "integrity of the law" was "sacrificed to political expediency" (p. 181) and on each occasion public faith in judicial and constitutional authority was eroded. What Hart's focus makes clear is the irony of the situation where the rhetoric and publicity that accompanied these betrayals of "the rule of law" helped to place that principle at the center of the public's imagination.

Despite virtues of this book's sustained focus on "the evolving relationship between governance and the rule of law" (p. 297), and on the use and misuse of key legal principles and institutions, it suffers from some unfortunate limitations. The careful and accomplished analysis of selected cases and subjects exhausts the space that might have been devoted to other important topics, such as criminal and ecclesiastical law. Furthermore, Hart's reliance on secondary works, most of them older and noticeably conservative, results in an unashamedly top down approach in which "the law" is described more as an object disputed and fought over by kings, judges and members of parliament than as an administrative system relied on by citizens, utilized by litigants and shaped by social and economic forces. The key role judges played in local government is mentioned but the process this entailed is never really investigated. Hart's analysis also neglects that causes and effects of unprecedented rises in litigation levels, whirlwind developments in market relations and the near collapse of traditional credit networks. Even the initial emphasis on ideological differences soon gives way to an endorsement of consensus, in which most differences of opinion appear practical rather than theoretical, resulting from the governed misunderstanding, and their governors underestimating, the difficulties associated with running an increasingly complex state.

Disciples of Geoffrey Elton will find much to satisfy them here, but readers interest in the ideas and findings of scholars such as Christopher Brooks—*Pettyfoggers and Vipers of the Commonwealth* (Cambridge, 1986) and *Lawyers, Litigation and English Society since 1450* (London & Rio Grande, 1998)—or Craig Muldrew—*The Economy of Obligation: The Culture of Credit and Social Relations in Early Modern England* (Houndmills & New York, 1998)—will be sorely disappointed. The end result is a readable introduction to the legal world of seventeenth-century England that will be of particular use to students of political and legal history, but one that cannot stand alone.

TIM STRETTON
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PETER SAHLINS, *Unnaturally French: Foreign Citizens in the Old Regime and After.* Ithaca: Cornell University Press, 2004. xiv, 454 pp. $27.95 (paperback).

As issues of immigration, nationalism, and citizenship increasingly preoccupy the contemporary world, historians are intervening to provide much-needed perspective. While most of their accounts focus on the dynamic nineteenth and twentieth centuries, *Unnaturally French* unearths the pre-modern history of naturalization in France. Analytically sophisticated and exhaustively researched, the book delivers a powerful interpretation of citizenship from the old regime through the French Revolution and into the nineteenth century.

The first part of the book examines the making of what Sahlins calls the "absolute citizen." Here he introduces the reader to a seemingly obscure legal right, the *droit d'aubaine* or right of escheat, that forms the core of his study. Originating in a late medieval law that allowed lords to control the possessions of "aliens" who died on their seigneurial estates, the *droit d'aubaine* was usurped by the French crown to claim the property of all foreigners who died in the kingdom. In the sixteenth and seventeenth centuries, the absolute monarchy strengthened the royal *droit d'aubaine*, making it the principal marker by which national citizens were distinguished from foreigners. Thus, the absolute citizen "was first and foremost a legal being, defined in contrast and distinction to the foreigner" (p. 64).

Wealthy foreigners, however, found a way around the *droit d'aubaine* by paying a heavy fee (as much as 600 livres by the middle of the eighteenth century) and petitioning for a royal grant of naturalization. From 1660 to 1790 an average of 52 foreigners a year were granted declarations of naturalization assuring them that they would be treated "as if" they were native French people. In a subtle analysis of the theory and practice of naturalization, Sahlins argues that although foreign petitioners invoked the criteria of language, ethnicity, and cultural identity as they sought a place in the national community, the crown's approach to naturalization was legalistic and increasingly bureaucratic. From the state's perspective, naturalization had little to do with nationalist sentiment.

The second part of the book uses letters of naturalizations, combined with the rolls of the naturalization tax of 1697-1707, to provide a social history of naturalized foreigners. What follows is not a comprehensive history of early modern French immigration, for many immigrants never requested letters of immigration or were not inscribed in the naturalization tax rolls. But Sahlins makes an impressive contribution nonetheless: his is the first kingdom-wide database of French immigrants in the seventeenth and eighteenth centuries. We learn who naturalized foreigners were (their sex, social status, and profession), where they came from, where they settled, and when they moved. While some of the book's findings are not entirely surprising (the majority of immigrants came from lands near French borders), others more interestingly suggest the development of a "France of movement" (p. 140). Especially from the 1720s to 1750s, naturalization reflected and contributed to the emergence of an urban, commercial world that stood in sharp contrast to a traditional, immobile peasant kingdom. The next generation of scholarship on French immigration will have to test these claims and grapple with Sahlins's formidable compilation of evidence.

Unnaturally French makes its greatest historiographical intervention in its third part, which treats what the author calls "the citizenship revolution" in and beyond the eighteenth century. Sahlins contends that the structure of the absolute citizen began to crumble in the middle of the eighteenth century, as the conceptual foundations of citizenship shifted from law to politics. Here, the book intersects

with a rich secondary literature on prerevolutionary citizenship that has examined the pronouncements of famous political thinkers (notably Rousseau) and the ideological fallout of battles waged by the crown and sovereign law courts over religion and taxation. Sahlins deftly incorporates this historiography even as he makes his own decisive contribution. Whereas previous studies of citizenship focus on philosophy or public debate, Sahlins takes us deep inside royal administration and diplomacy to reveal a silent yet equally significant revolution in citizenship. As royal officials dismantled the droit d'aubaine through a series of international treaties (which abolished the right in exchange for reciprocal concessions from foreign governments), they effaced the principal legal distinction between foreigners and citizens, overturning the model of the absolute citizen. Under the influence of Enlightenment economic thought, which valorized the free movement of goods, people, and capital, royal officials tore down a symbol of royal authority that had served as the basis of French nationality law since the sixteenth century. The demolition of the *droit d'aubaine*, Sahlins argues, undercut the legitimacy of absolute monarchy.

What reforming royal officials initiated was only completed during the stormy years of the French Revolution, Empire, and Restoration. Between 1789 and 1819, the second phase of the citizenship revolution unfolded: the *droit d'aubaine* was temporarily abolished by revolutionaries, reinstituted by Napoleon, and finally abolished for good in 1819. By that date, the French had established the modern distinction between political citizenship (based on a socially and sexually exclusive notion of the rights-bearing citizen) and legal nationality (available to a much broader segment of the population). The book's treatment of the Revolution is significant insofar as it places revolutionary events and language within a broad historical context. Thus, it parts company with most scholarship of modern Western citizenship, which depicts the Revolution as the key turning point between traditional and modern definitions of citizenship. Sahlins complicates this thesis by emphasizing how the Revolution constituted only one step, albeit an important one, in a long history of citizenship in which the meaning of the term "citizen" was constantly evolving.

This is a book written by an historian at the height of his powers. Equally comfortable with legal, social, and cultural history, Sahlins provides an account of French citizenship that will serve not only historians of France and of modern immigration, but historians of the law in general. Indeed, the book stands as something of a methodological model, suggestively integrating legal history into a broad and compelling analysis. Given the relentless course of academic specialization, this is a major accomplishment.

MICHAEL KWASS
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LISA LINDQUIST DORR. *White Women, Rape, and the Power of Race in Virginia, 1900-1960.* Chapel Hill: University of North Carolina Press, 2004. viii, 327 pp. $49.95 (cloth); $19.95 (paper).

One effect of the justified critique voiced against the infamous "myth of the black rapist" was its displacement by yet another myth: the claim that African-American men were *always* wrongly accused of sexual assault of white women and more often than not faced death at the hands of racist white lynch mobs for

crimes never committed. This study by Lisa Lindquist Dorr aims at correcting the misconceptions of both revisionist history and common lore. Interrogating "what we thought we 'knew' about black-on-white rape" (p. 9), the author shows how many cases of interracial rape "made their way through the legal system" (p. 247) and offers her readers a more accurate understanding of how such cases were prosecuted during the first half of the last century.

Dorr's book opens with the Scottsboro trials, but the gist of its argument is based on the close examination of 288 cases of black-on-white rape in Virginia, many of which lacked mob action, media attention, participation of civil rights groups, or appeals to higher courts. Analyzing materials from more than sixty courthouse archives, from manuscript collections and newspapers, as well as from the many published sources on rape, lynching, and Southern culture, Dorr argues that the response to accusations of sexual assault made by white women against African-American men was by no means uniform and ranged from extralegal violence to cases of "legal lynching" (p. 17) to early releases and acquittals. While twenty-two percent of the 230 men convicted in these cases were executed and twenty-one percent received maximum prison sentences, the majority were convicted of a lesser crime, and thirteen percent were in fact acquitted.

This variability, Dorr argues, demonstrates that the maintenance of intertwined race, class, and gender hierarchies required a "balancing act" (p. 5). On closer examination, it also exposes some of the many paradoxes of Southern society, revealing that interracial relations under segregation were themselves highly varied. More often than not social alliances crossed the lines that discourse erected as supposedly impermeable, thereby adjusting the rules that governed race relations to the needs of particular communities. Instead of undermining segregation, though, the very flexibility and arbitrariness of legal procedures, the author claims, made the system an even more "durable ... mode of control" (p. 10).

The book suggests that Virginia is not representative of all Southern states in its treatment of black-on-white rape at law but that it can nevertheless serve as a basis for mapping an overall historical trajectory. Since Virginians tended to trust the legal system and often resisted lynch violence, the potential for violence became "woven into the legal system" (p. 17). As courts had to interpret evidence and differentiate "between desire and force, or intent and action" (p. 74), legal cases, in their course and outcome, redefined both inter- and intraracial relations. Retrospectively, they allow insight into cultural beliefs and power hierarchies among whites, both men and women. While black-on-white rape cases, as Dorr argues, could result in alliances between white and black men—oftentimes at the expense of the female accuser's social status—such cases eventually became an arena for black resistance.

Dorr leaves no doubt that cases of sexual assault took an entirely different course at every stage of the legal process depending on whether they involved African-American or white men and that prosecutions of black-on-white rape offer ample proof of a system of racial injustice. After all, eighty-seven percent of the African-American defendants faced convictions—a rare occurrence in intraracial rape cases, black or white. At the same time, her careful analyses complicate the intricate blend of race, class, and gender on the basis of which power was distributed in Southern communities. Insisting that we separate legal action from racist rhetoric, Dorr's argument simultaneously demonstrates how discourses on sexual violence inform and structure our perspectives on real rape. Her conclusion that "[t]he image of the black beast rapist and the innocent white female victim simply did not apply in every case" (p. 248) does not strike us as all that original,

though. Ultimately, the reader may even wonder whether the focus on black-on-white rape limits what this book can do to change "what we thought we 'knew' about black-on-white rape." Thus, Dorr's study takes the debate on rape, race, gender, and law into new directions and paves the way for work that goes beyond the familiar frame.

SABINE SIELKE
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ROBERTA SUE ALEXANDER. *A Place of Recourse: A History of the U.S. District Court for the Southern District of Ohio, 1803-2003.* Athens: Ohio University Press, 2005. xviii, 417 pp. $60.00.

Long ago, Felix Frankfurter famously complained that scholars were paying too little attention to the Supreme Court. Few would make that complaint today, as scholarship on the high court is now a virtual industry. However, as important as much of this work has been (and is), it has proceeded with a marked tendency to overlook the contributions of the lower federal courts—a matter very much apparent in the disappointingly thin historiography of the district courts. Book-length studies are especially scarce, and thus Roberta Sue Alexander's history of the U.S. District Court for the Southern District of Ohio is a welcome addition to the literature.

Alexander's account is richly detailed. She follows the court from its origins in 1803, tracking the evolution of its mission and operations within the contexts of Ohio history and the broader history of the federal judiciary. The District of Ohio was established after Ohio was admitted to the Union, with the early judges sitting in Chillicothe. In 1855, Congress divided the original district into northern and southern districts, with the new U.S. District Court for the Southern District of Ohio holding court in Cincinnati (and, much later, also in Columbus). By then, the court had worked out relations between its jurisprudence and state law, experienced the political realities of judicial appointments, and helped shape the state's anti-slavery sentiments as cases derived from the federal fugitive slave laws came into court. It was not always easy, but the federal courts in Ohio were able to address local concerns while simultaneously playing a key role in establishing federal authority in what was still a frontier state.

Alexander leaves little doubt that, over time, the case load of the court became very much a reflection of national affairs. Judges dealt variously with questions of civil liberties and dissent during the Civil War, the full gamut of economic, regulatory, and commercial litigation as the nation industrialized, the legal adventures inherent in the enforcement of Prohibition, and the challenges posed by the New Deal, both World Wars, and the modern civil rights movement. Moreover, the court also adapted to important personnel and institutional changes, notably the demise of the old circuit courts in 1911, the drawn-out evolution of the U.S. commissioners into U.S. magistrate judges, and the creation of a bankruptcy court within the district. Many of these changes were complicated matters, but Alexander makes them comprehensible.

The strongest section of the book addresses the court's early years. When the Southern District was established, the young republic's institutions were still evolving. The reach of federal authority remained uncertain, and the ease with which the country replicated federal institutions in new states was obvious only in retrospect. At the time, the extension of federal authority was still an experiment.

And the success of the experiment, at least in Ohio, was aided materially by the appointment of Charles Byrd as the first district judge. Byrd came from Ohio's political and social elite and brought to the bench the personal prestige necessary to secure local support for the new court. This support was important, as not all of Byrd's decisions were universally popular. His defense of federal law in the matter of the Bank of the United States, which put him squarely at odds with powerful Ohio authorities, was a prominent case in point. Byrd also promulgated court rules that allowed the district to operate its courts with relative efficiency from the start—an unglamorous but essential task. Most important, however, was the judge's insistence on an independent judiciary, a stance not shared by all of his fellow Jeffersonians. The early period was an especially critical chapter in the court's history, and the author handles it particularly well.

The final third of the book is a compilation of judicial biographies of the thirty-seven men and women who have served on the district bench since 1803. Presented chronologically, these concise accounts treat standard biographical details as well as matters influencing appointments and jurisprudence. In this last regard, Alexander soundly concludes that the Ohio judges, whatever their political backgrounds, have compiled a largely nonpartisan record on the bench. The profiles also highlight the impact of the social changes that ultimately saw the appointments of the first women and minorities to the district court. Like the rest of the volume, the biographical section is deeply researched. Indeed, Alexander's work is satisfying throughout. *A Place of Recourse* is a useful and much-needed addition to the scholarship of the federal courts.

MARK EDWARD LENDER
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SPENCER WEBER WALLER. *Thurman Arnold: A Biography.* New York: New York University Press, 2005. xi, 273 pp. $40.00.

Seldom have the gods have been so cruel. Spencer Waller has written a useful biography of Thurman Arnold, collecting in one place the available materials and adding the results of his own research. Unfortunately, his book was completed before the publication of Nicola Lacey's biography of H.L.A. Hart but reached print after it appeared. So radically has Lacey's work altered the standard for measuring the biography of an academic lawyer in terms of scope, necessary resources, and depth of analysis that it would be unfair to measure Waller's work against the bar that she has set. So, I shall venture forth without making comparisons.

In 1891, Thurman Arnold was born into the family of a prominent lawyer and rancher in Laramie, Wyoming. He went to high school at the University of Wyoming, thereafter attended Wabash College for a year, and then transferred to Princeton, where he was unhappy because as a rough westerner he felt, and probably was, socially excluded. From Princeton, Arnold went to Harvard Law School. He was not a particularly strong student, and so not on law review, a professional exclusion that also led to his not being particularly happy there either. Arnold practiced law in Chicago for three years and then used his father's political connections to become a commissioned officer in World War I. During his two years of active duty, he was shipped to France but never saw combat. After the war was over, he returned to Laramie, where he practiced law for eight years while working as an adjunct at the Wyoming Law School.

In 1927, Arnold accepted the deanship at the West Virginia University Law School, a position that came to him on the basis of recommendations from a Harvard classmate in practice in the state and from Roscoe Pound. Arnold seems to have been a very effective dean but used connections forged with Charles E. Clark, dean at Yale, over a shared interest in procedural reform to move there in 1930. While at Yale, Arnold wrote two very good books—*The Symbols of Government and The Folklore of Capitalism*—and, like many of his colleagues, took small summer and sabbatical appointments in various New Deal agencies. After turning down full-time appointments to two different federal regulatory agencies, Arnold, as part of Franklin Roosevelt's shift to a more competitive model of the economy in the Second New Deal, became in 1938 the assistant attorney general in charge of the Anti-Trust Division.

Arnold revitalized the Anti-Trust Division, greatly expanding its staff and bringing many very important cases. Arguably, he was the best leader the division ever had. But during World War II, when anti-trust enforcement was low on Roosevelt's list of concerns, Arnold was eased out with an appointment to the D.C. Circuit Court of Appeals. At this time, the D.C. Circuit was a quite sleepy court that largely heard appeals in ordinary civil and criminal cases. Arnold was quickly bored with this kind of caseload and so, in a little more than two years, resigned and began private practice again. Soon, the firm of Arnold, Fortas & Porter was born. Arnold acted as the creative brains of the operation; Fortas, as the tough provider of services to corporate America; and Porter, as the country club lawyer who developed a serious communications law practice. Arnold died in late 1969 soon after he lost a battle with his younger partners, who had refused to allow Fortas, when forced to resign from the Supreme Court, to rejoin the partnership.

In preparing this biography, Waller has added to our knowledge of Arnold's life by filling out our understanding of early Laramie, collecting additional interviews with partners and friends, further scouring Arnold's papers and exploring his father's, and recreating the work of the Anti-Trust Division and of the D.C. Circuit. For all of this, he should be thanked.

JOHN H. SCHLEGEL
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CHRISTOPHER COLLIER. *All Politics Is Local: Family, Friends, and Provincial Interests in the Creation of the Constitution.* Hanover, N.H.: University Press of New England, 2003. xi, 224 pp. $39.95.

Tip O'Neill's adage "All politics is local" was as true in the eighteenth century as it is today, argues Christopher Collier in his study of Connecticut's role in the framing and ratification of the U.S. Constitution. Collier contends that personal, familial, and local factors, not economics or ideology, determined the state's course at the Constitutional Convention of 1787 and during the subsequent ratification campaign.

Collier relies on the concept of "dual localism" (p. 2) to explain Connecticut's behavior in 1787 and 1788. Dual localism means that the Constitution was a patchwork of compromises among delegates pursuing the needs of their individual states, and that local circumstances, not national considerations, shaped the outcomes of the state ratifying conventions.

Connecticut's choice of Roger Sherman, William Samuel Johnson, and Oliver Ellsworth as its convention delegates, writes Collier, represented a compro-

mise between the nationalist and antinationalist forces in the state. Unlike James Madison, who pursued an overarching theoretical framework at Philadelphia, these men fought—rather successfully—to protect the interests of their constituents, who would ultimately decide the Constitution's fate. According to Collier, these delegates secured several provisions especially beneficial to the state. Heavily involved in the export trade, Connecticut wanted the Constitution to bar export taxes, and to require only a bare majority to pass commercial laws. Sherman, Johnson, and Ellsworth achieved this goal by allying with delegates from the deep South, promising in return to support a fugitive slave law and a prolongation of the slave trade. Instead of exports, the federal government would be empowered to tax imports. This provision was a great boon to Connecticut, a state that imported mainly though the New York. Instead of flowing into New York's coffers, import revenue would now flow to the federal government and then back to Connecticut though federal spending. Finally, Connecticut's delegates protected the claims of its citizens in Ohio's Western Reserve and Pennsylvania's Wyoming Valley. In pursuing Connecticut's interests, the state's delegates promoted compromises that facilitated the convention's success but that also helped to perpetuate slavery. Collier maintains that Sherman, who believed in a very limited federal government dominated by the legislative branch, did not really understand that the Constitution created a powerful federal government with coequal branches. Collier suggests that Ellsworth, on the other hand, understood the new framework quite well but deliberately hid the truth from his constituents to promote ratification in Connecticut, a state that cherished its "darling liberty" (p. 5).

Why did Connecticut, a state with a long history of jealously guarding its local autonomy, quickly and easily ratify the Constitution by a lopsided margin of 128-40? Collier's answer is that the Constitution was simply too good a deal for the state to turn down. The real question for Collier is why forty delegates to the state ratifying convention voted against the Constitution. The explanation is neither ideology nor economics but personal and family issues. In Connecticut, most rural delegates (often portrayed by historians as Antifederalists) voted to ratify, while many mercantile delegates (usually categorized as Federalists) voted against ratification. Several no votes came from eastern New Haven County, a commercial area. These men balloted not based on economics or ideology but on local family and militia ties. They were part of James Wadsworth's network, and they followed their leader in opposing the Constitution.

Collier only argues the "dual localism" thesis as far as Connecticut is concerned, but he suggests that it applies to all the other states. Though focused on Connecticut, *All Politics Is Local* has much to say about the Constitutional Convention itself. For example, Collier makes a compelling case that the Great Compromise—largely worked out by the Connecticut delegates—was not a compromise between big and little states. After all, South Carolina, Georgia, and New Hampshire voted "big," while New York voted "little." Rather, the Great Compromise blended a national government of the people and a federal government of the states. The national camp won in the House of Representatives, where representation was based on state population, while the federal camp (including Connecticut) won in the Senate, where each state got two senators elected by the state legislatures. Despite such valuable insights on the convention, Collier's book is mainly about Connecticut, and so its title ought to include the name of the state on which it is so heavily focused.

STUART LEIBIGER
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JOYCE W. WARREN. *Women, Money, and the Law: Nineteenth-Century Fiction, Gender, and the Courts.* Iowa City: University of Iowa Press, 2005. viii, 373 pp. $44.95.

Nineteenth-century American women lived hedged in by a cultural ideology of separate spheres that prescribed a purely domestic circle of activity devoted to husband and children, nurturing and consuming, a life outside of and "protected" from concern with work, money, finances, and economic calculation. But did this set of cultural expectations mirror women's real experience? Recent scholarship has eroded the assumption that women's lives were separated from economic matters. Joyce Warren's excellent study shatters it once and for all. Juxtaposing chapters that survey and analyze works of nineteenth-century American women writers with chapters that detail legal cases in which women appeared as parties, Warren demonstrates that for women of every class and race, economic concerns were very much a fact of life. The heart of Warren's study is her careful examination of more than 2,500 New York Supreme Court case files from 1845 to 1875, a treasure trove of historical material that reveals, in the facts and course of each lawsuit, the economically-tinged texture of women's daily lives. Warren's focus is not on substantive legal doctrines or legally significant cases but on describing the details of representative lawsuits. She has a true gift for transforming the dry, complex, often confusing, and sometimes indecipherable contents of these long-forgotten case files into eloquent, gripping narrative. Careful not to reduce the women who appear in the suits to categories or stereotypes, Warren's descriptions emphasize the circumstances of each individual case. Where some women were ignorant of the law—trusting, vulnerable, and apparently helpless—others were aggressive, worldly, and competent. Where some were taken advantage of by unscrupulous relatives or business partners, others successfully pursued or defended themselves against abusive or runaway husbands or nonpaying customers. Generalized images of Victorian women as sentimental and purely domestic disappear quickly in the face of Warren's accounts of very particular women suing and being sued, briskly foreclosing on mortgages held by impoverished widows with young children, running dressmaking businesses that employed twenty workers, and working in factory sweatshops for $1.50 a week.

Because her study is so firmly grounded in actual case accounts, Warren's conclusions are well-earned. When she suggests that rich women were often ultimately more financially dependent than poorer ones because social expectations prevented them from working in a factory or running a boarding house, she has the case histories to support her claims. Questioning the relationship between cultural assumptions about gender and women's lived experience, she shows that while domestic ideology may have kept women ignorant of their legal rights and severely limited their options, it did not in fact separate them from economic realities or remove them from the sphere of business and litigation. Covering precisely the decades in which the Married Women's Property Acts began to relieve women of the disabilities of marital coverture, Warren's case narratives allow readers to trace significant changes in how women operated both in the world and in the courtroom. Warren is keenly aware of the limitations of her sources: missing facts and outcomes, the muting of women's voices, the impossibility of telling whether factual claims are accurate, not knowing whether assertive legal strategies show a woman's knowledgeable shrewdness or her lawyer's. Yet, admirably, Warren compiles a richly textured, nuanced picture of women from all classes involved in all kinds of litigation.

Juxtaposed with three chapters on legal cases (women as plaintiffs, as defendants, as divorce litigants), Warren offers chapters that survey women writers during the same period, including Fanny Fern, Louisa May Alcott, Harriet Jacobs, E.D.E.N. Southworth, Charlotte Perkins Gilman, and others less well known. If the cases that she examines demonstrate the pervasive economic aspects of women's lives, the novels and stories that she discusses show how frequently plots that turn on romance, freedom from slavery, and personal independence have economic matters as their fulcrums and how centrally the law is linked to fictional women's economic circumstances. Warren's readings are especially sensitive to race and class and to the hesitancy of many writers to openly challenge cultural stereotypes and expectations.

While Warren's detailed factual descriptions are the greatest strength of *Women, Money, and the Law,* they are also, perhaps, its one mild weakness. Chapters tend to be more descriptive than analytical. Warren's conclusions are persuasive, and she is wise to avoid overgeneralizing, but the wealth of material she offers might have supported even stronger analyses and broader claims. Nevertheless, this fine, careful study should be of real interest to scholars of law, history, and literature.

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M. RUTH KELLY. *The Olmsted Case: Privateers, Property, and Politics in Pennsylvania, 1778-1810.* Selinsgrove, Pa.: Susquehanna University Press, 2005. 173 pp. $39.50.

This concise monograph unfolds the political and legal background of one of the least studied of the great constitutional cases of the early American republic. Beginning as a prize claim in a Pennsylvania admiralty court in 1778, the *Olmsted* case expanded into a complex test of the meaning and scope of state sovereignty, the Eleventh Amendment, and federal judicial supremacy. M. Ruth Kelly explores these issues while deeply embedding the *Olmsted* case in Pennsylvania's highly factionalized politics. The book will be of great interest to specialists in the history of federalism and sovereign immunity as well as scholars focused on the politics of revolutionary and early republican America.

The *Olmsted* case takes its name from Gideon Olmsted, a Connecticut seaman who in 1778 led three other Americans in an audacious takeover of the *Active*, a British sloop on which they were serving as crew members. The vessel was subsequently intercepted by two privateers, one of them owned by the state of Pennsylvania, and on this ground Pennsylvania's Court of Admiralty divided the prize equally among Olmsted, the two privateer captains, and the state. The Continental Congress's Committee on Appeals reversed that decree, awarding Olmsted the entire prize, and two federal court rulings later affirmed the committee's decision. But every branch of the state government of Pennsylvania prevented enforcement of the award. The Court of Admiralty executed its own award, disbursing the state's share to David Rittenhouse, the state treasurer. When Olmsted won a federal suit in 1803 against Rittenhouse's heirs, who still held the state's share, the state legislature ordered the heirs to pay the funds to the state and directed the governor to prevent execution of the judgment. In *United States v. Peters* (1809), Olmsted won a mandamus from the U.S. Supreme Court compelling federal district judge Richard Peters to enforce his 1803 judgment.

Rejecting Pennsylvania's longstanding legal arguments, the Marshall Court confirmed that the Continental Congress's Committee on Appeals had had jurisdiction in the case and that the state was not a party to the case within the meaning of the Eleventh Amendment. Still determined to resist, Governor Simon Snyder ordered the Philadelphia militia to stand guard at the Rittenhouse home and prevent the federal marshal from arresting the heirs. After a three-week standoff—the "Battle of Fort Rittenhouse"—the state of Pennsylvania finally agreed to pay Olmsted the money. General Michael Bright and his small band of militiamen were subsequently prosecuted and convicted for their role in the affair—Kelly makes effective use of Thomas Lloyd's vivid account of the trial—but President James Madison, who had unambiguously defended federal power throughout, immediately pardoned them.

Readers will be struck by the boldness of Pennsylvania's resistance to federal authority in this case. Kelly's narrative makes it possible to position the Olmsted resistance in the same line of opposition as the Whiskey Rebellion (1794) and Fries's Rebellion (1799). Indeed, the Olmsted resistance might have turned at least as violent had it taken place outside Philadelphia, where the governor had unusual difficulty rousing the militia to join General Bright. Meanwhile, one cannot help but be further struck by the full-throttle resistance of every branch of the Pennsylvania state government. From this point of view, the Olmsted resistance resembles less the disheveled rebellions of 1790s Pennsylvania than the state-driven legal standoffs characteristic of Georgia in *Chisholm v. Georgia* (1793) and the *Cherokee Cases* (1831, 1832).

That alone would give the *Olmsted* case high standing in American legal history. Kelly offers the additional argument that the *Peters* decision, including Madison's approval of it, emboldened the Supreme Court to issue the strong rulings in favor of federal judicial supremacy that followed in the 1810s (pp. 12, 13, 20, 147, 150n20). This is an intriguing thesis that merits fuller treatment. Clearly, *Peters* was part of a stream of federal judicial assertions that had begun virtually from the Court's inception. Among many examples, the most apt is the ruling in *Penhallow v. Doane's Administrators* (1795), a case so similar to Peters that it is difficult to regard the latter as a complete breakthrough. In *Olney v. Arnold* (1796), too, the Supreme Court reversed a state supreme court ruling—a decision that puts *Peters* as well as the rulings of the 1810s cited by Kelly in a less innovative light.

Despite this qualm, Kelly has vindicated her view that the *Olmsted* case "deserves a much higher rank in the canon of American constitutional history" than it has thus far received (p. 12). By interweaving the political history of the case with the legal, the author shows the great lengths to which an American state in the early republic was willing to go to assert its own interpretation of American federalism.

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R. KENT NEWMYER. *The Supreme Court under Marshall and Taney.* 2nd. ed. Wheeling, Ill.: Harlan Davidson, 2006. xii, 191 pp. $15.95.

With its publication in 1968, R. Kent Newmyer's *The Supreme Court under Marshall and Taney* became the standard overview of the early history of the U.S. Supreme Court. Adopted as a classroom text in courses ranging from the under-

graduate survey to graduate constitutional history seminars, Newmyer's book (his first) combined broad coverage, sophisticated analysis, and engaging prose. Nearly forty years later, with the benefit of having researched and written award-winning biographies of Joseph Story and John Marshall, Newmyer has issued a second edition of his classic synthesis. Like the first edition, this book will prove invaluable to scholars, teachers, and students.

Newmyer has retained the structure—the same number of chapters of approximately the same length—as well as the interpretation of the original edition. After an introductory chapter that explains the constitutional basis of the Court's authority and the nature of the judicial process, Newmyer devotes the first half of the book to the Marshall Court. In these chapters, he skillfully navigates a century of historiography while successfully blending narrative and analysis. Newmyer gives particular attention to *Marbury v. Madison* (1803) and the rise of judicial review. Placing the decision in its early-nineteenth-century political and constitutional context, Newmyer portrays *Marbury* not as an aggressive assertion of judicial power but as "a holding action that bought the court time" (p. 33). In other words, the decision marked the beginning of an extended battle between Marshall and President Thomas Jefferson over the role of the judiciary in the new republic. Newmyer perceptively observes that having declared an act of Congress unconstitutional in *Marbury* made the Court all the more powerful when it subsequently affirmed Congressional action. "[I]t was when the Court *upheld* the authority of Congress in *McCulloch v. Maryland* [(1819)] that the full meaning of judicial review became apparent," he concludes (p. 32). The rest of Newmyer's treatment of the Marshall Court highlights the justices' desire both to consolidate national power and to create an integrated American economy. He guides the reader through all of the great constitutional cases (as well as some less known decisions) regarding property, contracts, and commerce, and along the way he gives ample attention to the Marshall Court's agrarian states' rights opponents. Although the justices mildly retreated from their nationalistic posture during Marshall's final half-decade, Newmyer concludes, the Marshall Court laid the foundation for the nation.

Newmyer's examination of the Taney Court, although not as lengthy, is nearly as impressive. The author places Taney and his fellow justices squarely within the context of the democratic political impulses and liberal economic trends of the Age of Jackson. In examining the Court's rulings regarding commerce and contracts, Newmyer shows that the justices "dealt moderately and respectfully with the work of the Marshall Court" (p. 177). Commerce Clause jurisprudence perhaps proved the best example of this pragmatic approach, as the Taney Court in *Cooley v. Board of Wardens* (1852) crafted the doctrine of "selective exclusiveness" to resolve the thorny issue of whether the power to regulate commerce rested solely with Congress. This "unheroic style" and "nondoctrinaire approach to the Constitution," Newmyer contends, reflected the "dynamically chaotic history" of the period (pp. 115-16). More important, by building upon and modifying—rather than rejecting—Marshall-era precedents, the Taney Court increased its popularity and prestige. Only an issue as powerful and divisive as slavery, manifested tragically in the *Dred Scott* decision (1857), could undermine the Taney's Court's accomplishments. After thoroughly exploring the background of the case and the politics of the slavery issue, Newmyer argues that the Court's decision to deny Congress the power to limit slavery in the territories reflected the Democratic values of the justices. (The seven-justice majority was composed entirely of Democrats.) The Taney Court had, Newmyer points out, limited congressional regulatory power in other instances, and he draws a similar parallel between the

Court's protection of corporate capital and its commitment to "agrarian capitalism" in *Dred Scott*.

While historians have been much kinder to the Marshall Court than to the Taney Court, Newmyer's book implicitly shows that the two should be taken together. Both contributed to the development of the Supreme Court as an institution and both, even if their means sometimes differed, abetted the rise of a capitalistic economic order and the growth of modern material progress. Because Newmyer skillfully treats a large body of material in such a clear and compelling fashion, this book remains one of the best studies of the nineteenth-century Supreme Court.

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ELIZABETH BORGWARDT. *A New Deal for the World: America's Vision for Human Rights.* Cambridge: Harvard University Press, 2005. 437 pp. $35.00.

Elizabeth Borgwardt's central ideas in *A New Deal for the World,* although concerned with international law and multinational diplomacy, can be stated simply and concisely. As Franklin Roosevelt led the nation into World War II, he consciously sought to extend his domestic New Deal to a global arena. "Dr. Win-the-War" incorporated "Dr. New Deal" into presidential diplomacy. The Atlantic Charter, which Roosevelt signed with Winston Churchill at a secret meeting on a warship in the North Atlantic in August 1941, and the "Four Freedoms" speech, which the president gave the previous January, became the foundational documents of the modern human rights movement. Borgwardt suggests that Roosevelt's rhetoric, unlike Woodrow Wilson's "Fourteen Points" and his campaign for the League of Nations, resonated with American popular opinion at the time. By 1941, a majority of citizens, Borgwardt asserts, favored multilateral international initiatives and institutions, a sentiment that grew during World War II, as more than twelve million men and women served in the armed forces. Overall, Borgwardt portrays U.S. foreign policy prior to the Cold War as anti-imperialist, non-hegemonic, and humanitarian.

Beginning with the Atlantic Charter, progressing through the Bretton Woods agreements that created the International Monetary Fund and the World Bank, continuing through the planning for and establishment of the United Nations—including the 1948 Declaration of Universal Human Rights championed by Eleanor Roosevelt—and culminating in the Nuremberg war trials, Borgwardt discerns a common New Deal thread. Her imaginative linking of what appear to be discrete initiatives or events provokes thought. Yet two of her central contentions require more elaboration and proof. Did the documents and events that she explores share a common concern with what we today understand as human rights? Were they a repudiation of or a significant rupture with Wilsonian concepts of a postwar order? To both questions, I might answer "not proved." Like Roosevelt, Wilson preferred multilateralism to unilateralism, an international free trade regime, and the promotion of social and labor (human) rights on a global scale. Roosevelt, however, proved the more adept politician, and his plans for peace benefitted from a longer, wider war and a tectonic shift, at least according to Borgwardt, in public opinion. Moreover, it is not clear how the IMF and the World Bank, the Nuremberg trials, and the UN Charter, which denied the organization the ability to intervene in members' purely domestic matters, served to

establish global human rights. The Atlantic Charter was more a deft piece of propaganda to draw the American people and Congress to the side of the British in the war against Hitler's Germany and less a document intended to create a global regime of human rights. And the UN's Declaration of Human Rights offered pretty words rather than legally enforceable rules.

Perhaps Borgwardt is correct in maintaining that the years 1941-1948 marked a transformational epoch in the American vision of the world (p. 293), a "multilateralist moment" in which the United States promoted a global Keynesianism as "part of Roosevelt's vision of a New Deal for the World" (pp. 286-87). Certainly, between 1948 and 1973, what Charles Maier characterized as the "politics of productivity" and French economic historians defined as "Fordism" created in the West a form of capitalism in which manifest class conflict diminished, real wages and incomes rose for many people, and mass consumption prevailed. Borgwardt's global New Deal saved capitalism within the U.S.'s sphere of influence, just as it had saved domestic American capitalism during the 1930s. But it was a peculiar kind of Keynesianism and global New Deal, one that unleashed capitalism's animal spirits, magnified economic inequalities, and relied heavily on military spending to sustain demand. It was a system fated to implode, as happened after 1973 when the collapse of the politics of productivity presaged the arrival of a new era of savage capitalism under the rubric of globalization, a new era that recalled an earlier one of free trade in capital, goods, and people in the years between 1877 and 1914.

Rather than deepening our understanding of the structural forces and the contingent events that created the multilateral moment of rising prosperity among ordinary people in the Western industrial nations, Borgwardt draws promiscuously on the works and words of other social scientists and historians too numerous and disparate a group to identify in a review. An existing body of scholarship, rather than research in archives, provides Borgwardt with most of her central findings and her most salient interpretations. In her final two chapters when she turns from the "multilateral moment" to the era of global neo-liberalism, TINA ("there is no alternative"), and Bushian unilateralism, her words remind one of the come-on used by the *Law and Order* television franchise—"ripped from the headlines."

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PHILIP HAMBURGER. *Separation of Church and State.* Cambridge: Harvard University Press, 2002. xiii, 514 pp. $57.50 (cloth); $19.95 (paper).

Separation of Church and State by Philip Hamburger is, perhaps, the most talked about treatise on American church-state relations of the last generation. It is a weighty, thoroughly researched tome that presents a nuanced, provocative thesis and that strikes even seasoned church-state scholars as distinctive from most works on the subject.

Many Americans have come to accept "separation of church and state" as a defining principle of the American political experiment, supplanting, in many minds, the constitutional texts governing church-state relationships. Hamburger has written a sweeping survey of the conceptions and rhetoric of separation of church and state in American legal and political traditions from pre-colonial Western sources until the mid-twentieth century. He challenges the notion that church-state separation is a concept embedded deeply in the American constitu-

tional tradition of religious liberty. Rather, he argues, the rhetoric of separation emerged from the cynical politics of late-eighteenth-century disestablishment struggles and was picked up in the next century by nativists who sought to marginalize Catholics while preserving Protestant hegemony and by liberals and secularists who sought to promote a secular polity.

The book progresses chronologically, pausing in an opening chapter to reflect on European conceptions of church-state relations that left their mark on American thought. Closely scrutinized are theories, policies, and practices that informed state and national constitutions in the new nation. Most standard studies of church and state have focused on either constitutional developments in the founding era or judicial interpretations of the First Amendment in the second half of the twentieth century. This book's attention to the church-state controversies in the intervening years makes a welcomed contribution to the scholarship.

Hamburger's fresh appraisal of the historical record adds much to our understanding of church-state separation. He traces the evolution of this idea in America, starting as a political principle of separation between religion and politics, which began to gain currency in disestablishment debates of the late-eighteenth century and in the presidential contest of 1800. Jeffersonian partisans adopted the rhetoric, not to promote liberty but to silence Federalist clergymen who had denounced candidate Thomas Jefferson as an infidel. In a celebrated 1802 missive to the Danbury Baptist Association, with its metaphoric formulation of a "wall of separation," President Jefferson deftly transformed the political principle into a constitutional principle by equating the language of separation with the text of the First Amendment. The constitutional principle was eventually elevated to constitutional law by the U.S. Supreme Court in a series of influential mid-twentieth-century rulings, starting with *Everson v. Board of Education* (1947). A central concern of this study is how "the First Amendment, which was written to limit government, has been interpreted directly to constrain religion" (p. 484).

Although the terms "nonestablishment," "disestablishment," and "separation of church and state" are often used interchangeably today, Hamburger contends that in the lexicon of the late-eighteenth and early-nineteenth centuries, the expansive notion of separation was distinct from the narrow institutional concepts of nonestablishment and disestablishment. Advocates of disestablishment or nonestablishment, such as evangelical dissenters, did not necessarily embrace any of the various conceptions of separation. Hamburger also argues that the rhetoric and attendant political and legal doctrines of separation of church and state emerged much later in American thought than is often presumed. Not until well into the nineteenth century did separation of church and state come to be viewed widely as a constitutional principle. All of this has implications for the now conventional construction of the First Amendment as synonymous with the principle of separation of church and state.

Hamburger draws attention to the roles played by nativists, anti-Catholic Protestants, theological liberals, political progressives, and anti-Christian secularists in crafting separationist constructions of the First Amendment, which blossomed in the late-nineteenth and twentieth centuries. The objectives for many, but not all, separationists were to maintain a de facto Protestant establishment and to exclude Catholic immigrants from the mainstream of public life. Clearly, a variety of political, theological, and intellectual traditions have advanced notions of separation in American history. But as Hamburger compellingly documents, a particularly dominant strain in the nineteenth century and the first half of the twentieth century was born of ugly, bigoted impulses.

This study challenges conventional interpretations of separation of church

and state as a long-standing constitutional standard in American history and promises to reshape the debate on the constitutional relationship between religion and public life. And it does so largely devoid of the partisan ax-grinding that characterizes much church-state scholarship of the last century. Few pages in this richly documented and cogently argued book fail to excite reflection or challenge long-held assumptions.

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MARK DOUGLAS MCGARVIE. *One Nation Under Law: America's Early Struggles to Separate Church and State.* DeKalb: Northern Illinois University Press, 2005. xii, 256 pp. $22.50.

The separation of church and state is under attack today from many quarters. One encounters little difficulty in locating reams of literature that blame the separationist tradition for many of the nation's problems, especially its moral ills. For this reason, it is indeed refreshing to review a book that not only trumpets the separation of church and state as fundamental to the founders' project but also offers a somewhat new and insightful analysis of how the founders and their immediate successors implemented the separation of church and state in the early national period.

In this study, Mark McGarvie carefully documents how Jeffersonian liberals led the way in moving early America from a communitarian society in which private institutions, including churches, functioned as semi-public institutions under government nurture and control to educate the young, care for the poor and elderly, and shape moral values to a more individualistically grounded society that freed private institutions to operate independently of government control and influence. The process was complex and controversial, but it was accomplished, according to McGarvie, primarily through the disestablishment process in which the states, one by one, cut their formal ties with religion and stopped supporting one or more churches to the detriment of others. The end result, largely achieved by the advent of the Jacksonian era, separated church and state, enhanced religious liberty, deepened religious pluralism, and secularized the public domain. McGarvie finds these developments to be marks of progress, not setbacks, in shaping the character of the new nation.

Rather than speaking in generalities about the disestablishment movement and the key role it played in separating church and state, McGarvie focuses on the disestablishment process in three states—New York, South Carolina, and New Hampshire. In each case, McGarvie documents not only when disestablishment took place but more importantly how it took place and why. In each case, newly emerging conceptions of corporate law were instrumental. In colonial days, he argues, corporate charters were granted to individuals who agreed to use their grants of power to perform public tasks and meet public needs. This policy applied both to businesses and commercial ventures and to churches and institutions of higher learning. Thus, charters were awarded only to churches and colleges that furthered the colony's religious and educational goals, which were interrelated. Dissenters who wanted to incorporate their churches or schools were out of luck. McGarvie argues effectively that a cultural transformation took place in the first fifty years of nationhood, a legal and ideological transformation led by rationalistic Jeffersonian liberals who sought to enfranchise private organizations in business, religion, education, social welfare, public health, and other areas of

American life—all in the interest of diversity and competition.

All of this, says McGarvie, was facilitated and sanctioned by the Constitution's Contract Clause (art. I, sec. 10). "In this provision," he explains, "the supreme law of the land protects all matters of private interest expressed in contract from interference from government" (p. 3). The "transformation of the churches from public to private entities arose in the midst of contentious debate over American values, rooted in different conceptions of man and different understandings of religious truths" (ibid.).

While McGarvie's study is rich with examples of how this powerful legal and cultural transformation was implemented, he devotes an entire chapter to presenting *Dartmouth College v. Woodward,* decided by the U.S. Supreme Court in 1819, as the crowning illustration. In the early years of nationhood, many state legislatures reconstituted a number of colleges that in their earlier years had carried religious missions in favor of more secular approaches to education. In most cases, college trustees supported this shift of emphasis. McGarvie cites as examples Columbia, Penn, William and Mary, Yale, and Princeton. But in the *Dartmouth College* case, the Supreme Court used the Contract Clause to halt New Hampshire's efforts to similarly remake Dartmouth over the objections of its trustees. The college's charter, issued by the British Crown in 1769, was a private "contract," with which the state could not interfere. The trustees, like many dissenting Americans, sought to shape the nation in keeping with Christian ideals, and Dartmouth was protected in its mission by the Contract Clause, which coincidentally helped seal the "separation" of religious institutions from state authority, freeing them to advance their own ideologies often against the powerful ideas produced by the Enlightenment.

This is one of the best scholarly works in years to argue effectively for the separation of church and state as part of the founders' "original intent." The book's emphasis on the Contract Clause in facilitating separationism is instructive and makes this book one of genuine originality. McGarvie proves himself in this book to be a superb historian of law and the history of ideas.

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MICHAL R. BELKNAP. *The Supreme Court under Earl Warren, 1953-1969.* Columbia: University of South Carolina Press, 2005. xvii, 406 pp. $49.95.

Michal Belknap offers a comprehensive, subject-by-subject—indeed, case-by-case—review of what Associate Justice Abe Fortas called the "'profound and pervasive revolution'" wrought by the Supreme Court during the sixteen years that Earl Warren presided over it (quoted at p. 308). A revolution it was, to be sure. Anthony Lewis, a *New York Times* Supreme Court correspondent from the mid-1950s through the early 1960s, concluded that "only once before in this country has the Supreme Court played so large a part in shaping the national destiny; and that was John Marshall's court, writing on a clean slate."[1]

Belknap has arranged his history of that revolution by groups of cases: school desegregation, civil rights, church-state, criminal procedure, and so on. There seem to be no major holdings overlooked—of some 2,000 cases taken up by the Court in the Warren years as well as a handful in which certiorari was denied.

One can perhaps quibble about the placement of individual cases: Is *Loving v. Virginia* a civil rights case, as Belknap dubs it, or is it more properly a privacy

or freedom-of-association case? That 1967 decision striking down Virginia's 276-year-old anti-miscegenation law fits under any of the three rubrics. Belknap seems to have made his assignments depending on the logic of the decision rather than its impact.

More difficult in this arrangement of chapters by subject matter rather than by overarching chronology is the unsettling result that justices resign from the Court in one chapter only to reappear in the next. Felix Frankfurter, for example, is here, then gone to his reward, only to be resurrected farther along.

This sort of arrangement—useful if one wants to study a group of cases dealing with a particular issue—is confusing to those who might wish to read through the volume.

More important, the arrangement also tends to obscure the fact that these cases were decided by men with vital personalities, men of character and strong belief. There is little here beyond the reasoning of the decisions to explain why the justices ruled as they did. The result is a bloodless, impersonal chronicle that tells "what" but not "why" or "how." Economical as this approach may be, it is a grave error.

To paraphrase J.P. Morgan, "There are two reasons a judge writes an opinion. There's a good reason, and there's the real reason." What is missing here is the give-and-take of the judicial conferences, the political considerations—all but two of the nine men on Warren's first court had held elected public office—not to mention the friendships among the justices or their personal foibles. All of those things shaped the Warren Court's rulings just as they shaped decisions of courts before and since. (Even such "originalists" as Associate Justice Antonin Scalia read into the Constitution what they wish to see there.)

Critics and advocates of the Warren Court's holdings seem to agree that Earl Warren, the "Super Chief," as Associate Justice William J. Brennan, Jr., described him, led an activist, even, as Belknap puts it, a revolutionary court. But it was activist only because its predecessors were not. There was much yet undone when Earl Warren ascended the bench on October 5, 1953, and given the temper of both the times and the man, there was much that could be done.

Revolutions, judicial or otherwise, are man-made.

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MAEVA MARCUS, ROBERT P. FRANKEL, JR., ANTHONY M. JOSEPH, ROBERT F. KARACHUK, and STEPHEN L. TULL, eds. *The Documentary History of the Supreme Court of the United States, 1789-1800.* Vol. 7, Cases: 1796-1797. New York: Columbia University Press, 2003. xlvi, 983 pp. $150.00.

Volume seven of the *Documentary History of the Supreme Court (DHSC 7),* which covers cases decided by the Court in 1796 and 1797, is another superbly edited volume in an important collection of documents related to the Court in its first decade of operation. The documents collected in this and previous volumes are a treasure trove for students of the early republic, particularly those interested

1. Anthony Lewis, introduction to *The Warren Court: A Critical Analysis,* by Richard H. Sayler, Barry B. Boyer, and Robert E. Gooding, Jr. (New York: Chelsea House, 1969), vii.

in legal history.

DHSC 7 collects documents for well-known cases such as *Ware v. Hylton* (the British Debts Case), *Hylton v. United States* (the Carriage Tax Case), *Olney v. Arnold/Olney v. Dexter* (the first cases in which the Court reviewed and overruled state supreme court decisions involving a federal question), and the Southern Prize Cases (a series of cases pitting French treaty rights against American neutrality laws). The volume also includes documents for many lesser-known but still significant cases, such as *Pintado v. Ship San Joseph* and *Wiscart v. Dauchy,* which dealt with the Court's scope of review.

Maeva Marcus and her team of editors—Robert P. Frankel, Jr., Anthony M. Joseph, Robert F. Karachuk, and Stephen L. Tull among others—have collected material related to each case from many sources, including notes of arguments and opinions taken in court by counsel or justices, documents submitted to or issued by courts in the course of legal proceedings, correspondence written by attorneys or litigants, and reports and commentaries published in newspapers or pamphlets. This approach to selecting documents provides important context for and insight into the various cases. The editors include some 150 pages of material for *Ware, Hylton,* and the Southern Prize Cases—each.

Also for each case or group of cases, the editors include an introductory essay. These headnotes offer valuable historical and legal perspective as well as useful chronological and biographical information.

The documents, which reproduce insertions and emendations, are presented and annotated with meticulous care. The effort invested by the editors is exemplified by their handling of Alexander Hamilton's notes for argument ("brief") in *Hylton,* in which the former secretary of the Treasury represented the United States in defending the constitutionality of a controversial and precedent-setting federal carriage tax. Although Hamilton's notes already appear in print in the *Law Practice of Alexander Hamilton,* the editors of *DHSC 7* undertook their own "inspection of the original manuscript" and "determined an order for the [notes] that is substantially at variance with the version published [there]" (p. 457n). Hamilton's notes offer a fascinating and important glimpse of the political and intellectual history of the 1790s, and the work of the editors of *DHSC 7* makes a critical contribution to understanding them.

The decade covered by *DHSC 7* and the other volumes in the series has been aptly described by David P. Currie as the Supreme Court's "formative period." While the series has shed new light on some of the Court's earliest decisions, its real significance lies in its illumination of the Court's gradual emergence as an institution. In the factious first years of the early republic, the Court confronted a variety of politically sensitive legal and constitutional questions. On the evidence of *DHSC 7,* the Court often responded with astuteness, following existing law or practice when appropriate but departing from it when circumstances dictated. In the cases from 1796 and 1797, the Court successfully navigated the shoals of the supremacy clause, the taxing power, judicial review, federal question jurisdiction, the Rules of Decision Act, the scope of review, and various aspects of appellate procedure. But the Court seems to have explained the reasoning for its decisions only intermittently, or at least to have been indifferent about publishing its opinions through reports. Nevertheless, the justices could render their decisions quite clearly and authoritatively when they chose to do so (as in *Ware*). And when the justices did give their opinions, they often did so in a manner designed to calm political waters as much as establish legal doctrine. An incremental, common law approach to deciding cases preserved the justices from being burned in effigy,

unlike former Chief Justice John Jay.

DHSC 7 provides an important window on the emergence of the Court, but its focus on the documentation of cases will often require historians to use ofther means to recreate the broader context in which those cases were decided. The members of the Court in the 1790s were often active political leaders before they became justices (as was then true in major English courts as well), and they were working out the role of a major new governmental institution with little constitutional or statutory guidance during an era of bitter contention. The unsettled circumstances of the time make it anachronistic to expect doctrinal clarity or purity from the early Court. To understand the Court in its first years requires an appreciation of the political environment in which it operated.

Hylton provides an excellent example of this point. *DHSC 7* provides a close-up view of the Washington Administration's strenuous efforts to manipulate the legal system to make certain that the case was properly brought and then taken to the Supreme Court. Those efforts directly involved the president, the attorney general, the Treasury secretary, and other senior federal officials as well as Hamilton acting in a private capacity. The Court accepted jurisdiction of this unmistakably feigned case and decided it favorably to the Administration. But mindful of the case's political implications, the justices provided important reassurance to opponents of the tax in the Southern slave states regarding the limits of the federal taxing power. Law and politics were not neatly separated.

In 1796, Albert Gallatin, then a congressman from Pennsylvania, drew and important conclusion from *Hylton*: "One of the most important consequences, flowing from the principle of a Constitution binding the different branches of government, has been, in some instances, not a limitation of the powers of government, but a transfer of those powers from the legislative to the judiciary department. For the judges have exercised in all doubtful cases the authority to explain the Constitution, as they explain the laws, and to decide, even in cases of taxation, whether a law was constitutional or not, valid or a dead letter" (quoted at p. 505). The material in *DHSC 7* confirms that that transfer of power was under way well before John Marshall reached the Court. *DHSC 7* provides clear evidence that whatever might be said about the Court's limitations during the 1790s, there was in fact a functioning Supreme Court before Marshall's accession as chief justice.

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ERRATA

The review of Andrew Wender Cohen's *The Racketeer's Progress: Chicago and the Struggle for the Modern American Economy, 1990-1940*, which appeared in the previous number of The American Journal of Legal History, carried a misspelling in the attribution. The reviewer was Georg Leidenberger.