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BY THOMAS D. RUSSELL*

The task of collecting historical data on trial court activity is unpopular and often arduous. Trial court records, if they have not yet gone to the shredder or incinerator, usually are difficult to locate. When found, the records are brittle and laden with dust, mold, and other historical allergens. Historians find none of this news; the dusty empiricism is part of why we love what we do. Yet many scholars who write about the history of law eschew the grit and ardor of using trial court records. They instead confine their study of legal history to what they can see through the lens of appellate case reports. The result, largely foreordained by the nature of the sources and especially by the assumptions that support the use of appellate sources, often is history that misapprehends the world outside the appeals courtroom.

Scholars prefer appellate court records over trial court records in part because of convenience. Appellate reports are bountiful and easily accessible. As bound, printed volumes they line the shelves of law libraries and, increasingly, they occupy the electronic storage media of on-line database services. In either form, a scholar can use appellate reports in office comfort, without the bother of microfilm readers or the pencil-only rule of manuscript reading rooms. And, except for the orange powder that decaying leather bindings may leave on one's hands and clothes, appellate research is quite tidy.

Beyond the simplicity of their use, and more perniciously from the historian's point of view, the preference for appellate reports rests on questionable assumptions about courts and the common law. The use of appellate data to reach conclusions about either trial litigation or the world outside

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of courtrooms obviously presumes that these cases accurately reflect those other realms. More precisely, appellate historians suppose that their sources represent—in a combined republican and social-scientific-sampling sense—the work of inferior courts. Grade-school civics supplies the model: lower courts working with eyes upturned for the precedents formed above, with appellate review shaking out irregularities that mar the crystalline symmetry of law's great pyramid. Furthermore, the appellate predilection generally exaggerates the importance of courts in resolving social conflict and providing compensation for injury. These assumptions—the representative relationship of appellate to trial litigation; the importance of precedent in directing the outcome of trial court decisions; and the absolute importance of courts in resolving disputes and securing compensation for injured parties—are subject to empirical challenge.

The remainder of this essay considers appellate and trial court study of tort litigation. The first part criticizes the conclusions and assumptions of a recent addition to the body of appellate tort history. The section following the criticism reviews some of the challenges that historicist inquiry using trial court data poses to the assumptions and conclusions of historians who use only the published opinions of appeals courts.

I. Schwartz on Torts

Gary Schwartz, a law professor at UCLA, has recently brought into sharp contrast the conflict between the methods and conclusions of trial court and appellate study of personal injury litigation. Schwartz, after studying appellate opinions—not trial court data—published a study of three nineteenth century southern jurisdictions in which he challenges the conclusions of studies that *do* use trial court records.[1]

In the article, Schwartz ruminates on method, presenting his exclusive use of appellate reports as a methodological advantage. He notes that the reports—"original documents that have been largely unconsidered by previous historians"—were readily available to him in UCLA's law library. So, he says, any other scholar with access to a major library would be able to reconsider his treatment of the cases or extend the study:

an invitation for a close look at his argument.[2]

Unfortunately, the most readily available documents do not necessarily provide the clearest glimpses of history. Published speeches of senators, conference proceedings of bishops, and Federal Reserve reports are not the best sources for looking into politics, religion, or business life at the local level. Law is the same. One aim, therefore, of this essay on method is to lure legal scholars out of law libraries and down, say, to the local county courthouse. There they will find the bustle of today's trial litigation; and behind the counters, deep in the basement, or in the microfilm drawers, may lie the mundane historical documents of the trial court.[3]

After reading the readily available appellate opinions, Schwartz concludes that courts and tort doctrine were humane; they favored nineteenth century personal injury plaintiffs and disfavored the interests of economic—particularly mechanized or industrial—enterprise. Appellate justices worried about dangers posed by such modern enterprises as railroads and steamboats, he argues. Justices expressed their concern in the form of "solicitude for the victims of enterprise-occasioned accidents." In their decisions they acted with a "willingness to deploy liability rules so as to control . . . risks" and showed a "willingness to resolve uncertainties in the law liberally in favor of those victims' opportunity to secure recoveries."[4]

On the general issue of what relationship, if any, appellate decisions have to the humdrum work of trial courts, Schwartz claims to have taken no position. Despite this, he links appellate doctrine to trial court activity with two assumptions. First, he implicitly assumes that nineteenth century trial courts, through the mechanism of tort claims, played an important role in compensating injury victims. Second, he explicitly assumes that appellate precedents "at least had a considerable bearing on how subsequent disputes were resolved."[5] These two assumptions form the mechanism of precedent-guided compensation; with this model, Schwartz extends his conclusions about doctrine beyond, or rather below, appellate judicial chambers to the trial court realm of injury and death. There he finds tort law humane, generous, and warm.

Schwartz's historical conclusions do not accurately describe

the experience of ordinary personal injury litigants in trial courts during the nineteenth and early twentieth centuries. For about the first three-quarters of the nineteenth century, suits for and trials of personal injury claims remained quite rare. Few people sought and even fewer received compensation in trial courts for personal injuries. Tort suits began to comprise more substantial portions of trial court dockets toward the end of the century; but then, rather than fitting Schwartz's model of injury victims enjoying the generous concern of judges, trial courts formed part of an unresponsive larger system that established and maintained roadblocks and hurdles only lucky and persistent litigants could surmount.[6]

A. A Close Look at Schwartz's Argument

In both the recent article and an earlier one,[7] Schwartz dealt with what he calls "the enterprise case law," which he defines as "the tort liabilities of emerging industry."[8] For the earlier study, Schwartz read "all of the [published appellate] tort cases in nineteenth century New Hampshire and California."[9] The recent study focused on a southern state, South Carolina, and on Maryland and Delaware, with the latter two balancing his geographic coverage, he says, as "mid-Atlantic" states.[10]

All three states in his recent study—South Carolina, Maryland, and Delaware—were slave states, though the commitment to slavery varied widely among them. Although industrialization and slavery were not incompatible, substantial tensions existed between the capital and ideological investment incident to each.[11] Consequently, leading slave states were not industrial leaders. It is thus odd to base a historical study of the relationship of law and industrialism on slave jurisdictions—almost as if one studied the history of maritime law through cases in Utah or Kansas. South Carolina, which produced most of Schwartz's cases, was an early leader in railroad development, but not for long; railroad and industrial investment there soon lagged well behind such investment in many northern states.[12] South Carolinians invested instead in slavery and agriculture. The census offers a simple index of South Carolinians' investment and commitment: from 1820

until the Civil War the majority of the residents in the state were slaves.[13]

Thus, Schwartz's approach seems misguided at the outset. He supports and develops his thesis about tort-enterprise law by concentrating heavily on South Carolina, a jurisdiction where slavery and agriculture, not industrial enterprise, were central to the economy. Reports from Maryland—with a large slave population—and Delaware—with a smaller but not insignificant slave population—supplement the South Carolina appellate data. Moreover, early in the article, Schwartz announces that he relegates tort cases involving slaves to a final, fourth part of the article; "on account of their slavery facts, these cases," he says, "remain special—raising vexing questions and certainly calling for separate consideration."[14] Later in the piece, he considers these cases, which amount to fourteen of the eighteen South Carolina personal injury decisions before 1860 and one of the five from Maryland in the same period.[15] He then doubles back to fit the slave injury cases into the framework he developed with the enterprise cases. He admits that "these cases bear a very uncertain relationship to several of [his] theses,"[16] which apparently means that slaves did not experience the judicial concern that he argues other victims enjoyed. But he claims that "most of the slavery cases are consistent with the overall characterization of the enterprise tort law,"[17] meaning that when railroads were tortfeasors in slave cases, judges held the railroads to the high standards of liability that Schwartz claims applied in non-slave cases. Those cases that do not fit either his enterprise or judicial concern theses fail to, he says, because of the peculiarity of the institution.[18]

What is more, slavery was apparently not the only peculiar institution Schwartz encountered; also included with slaves in the fourth and final substantive section of Schwartz's recent piece is another anomalous group—rail workers—who fit even less well than slaves into his historical rubric.[19] Schwartz considers the fellow-servant rule, a judicial doctrine that "operated harshly on nineteenth century employee plaintiffs"[20] by preventing suits against an employer by a worker injured because of another worker's negligence. In an 1841 opinion in an employee's suit against the South Carolina Canal and

Rail Road Company, the South Carolina Court of Appeals became the first American appellate court to use this rule.[21] Schwartz regards the rule as an exception to the generally humane treatment of injury victims, including injured employees. He finds judicial bias against rail workers, but not a pervasive class bias against workers.[22] Based on his analysis of *two* federal admiralty cases brought in Maine and Massachusetts federal courts, he concludes that nineteenth century judges treated sailor-victims well.[23] On the other hand, judges "responded coldly" to the claims of rail workers.[24] He has an explanation for this difference: judges had sympathy for the plight of the conspicuously lower-class sailors; rail workers, on the other hand, were too well-off to inspire *sympathy* but still far enough below judges in the social order to make *empathy* impossible.[25] As a result, rail workers formed an exception to the general character of tort law as humane and generous to victims.

Schwartz's separate consideration of slaves and rail workers defends the integrity of the common law. His aim is to examine the natural evolution of a couple of general propositions or legal rules, specifically a standard of tort liability that applied without regard to the victim's status.[26] From the first sentence, he evokes an evolutionist model of history with his statement that the "negligence standard developed naturally, without major rejection of pre-existing or proposed rules of strict liability."[27] Any exceptions to what some would later identify as the general rule require explanation for their deviance or abnormality.[28] By segregating rail workers and slaves within his text, he highlights their anomalous character in relation to his arguments about doctrine.[29] He uses their exceptional status to support his more abstract conceptual goal or claim; that is, they are the exceptions that not only bolster the rule but make the rule seem to exist.

Schwartz's reading of the first published appellate case involving a railroad in South Carolina, *State v. Tupper*, provides an example of the distortive effects of analysis propelled by a doctrinal end-state; in this instance the *telos* being the negligence doctrine.[30] Schwartz describes the case as a nuisance action brought against the company because of the sparks emitted by its steam locomotives.[31] He looks for the

standard of liability the court's justices employed and uses the court's decision against the railroad along with two cases from the 1850s to support his argument that in railroad tort suits

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Aiken	at 7½ A M	at Blackville	at ¼ past 9 A M	Breakfast	46	2 25
Blackville	at 10 A M	at Branchville	at 12 M		74	3 75
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Tristam Tupper, president of the South Carolina Canal and Rail Road Company, was the defendant in the first published appellate case involving a railroad in South Carolina. (Reproduced from *Millers Planters' & Merchants' Almanac, 1837, for the States of South Carolina and Georgia)*

South Carolina justices and judges employed a standard that tended toward strict liability.[32] The strict standard, in turn, provides evidence supporting the theme of a humane tort law with liability rules that controlled the risks of new enterprises. He says the court "began its opinion with the following evaluation: 'Railroads have just commenced, but are already in vigorous growth—and the question naturally arises, how shall they be treated in law?'"[33] The justice, he notes, was unimpressed with the "railroad's claim of an implied right under its charter to use steam power." The unimpressed justice then considered, Schwartz decides, "a number of factors that makes it difficult to pin down the exact standard of liability that the court was applying."[34]

But Justice Richardson actually began his opinion two sentences earlier. "The question to be decided," wrote Richardson, "is whether the Railroad Company have, by their charter, or by the Acts of 1828 and 1832, the legal right to use locomotive steam engines, in transporting their cars from Line to Mary Streets."[35] Schwartz is right that the Appeals Court employed a standard of strict liability, but the reason—not hard to discern—for this strict review was that use of steam locomotives exceeded express limitations of the road's charter; the actions of the road had been *ultra vires*. Schwartz comes close to recognizing the reason for the strict standard when he acknowledges that *Tupper* had more the character of a public nuisance action than a "pure tort" suit,[36] but nonetheless he features *Tupper* in his characterization of South Carolina tort tendencies. *State v. Tupper* was thus a tort suit even less than Schwartz understands; the trial jury had found the railroad "guilty" in response to what the Appeals Court called an "indictment," and on appellate review, the issue was construction of the company's charter.[37]

Just as Schwartz's reading bends to accommodate negligence, his flexibility allows him to treat the laws that supported slavery as aberrations outside the otherwise sound corpus of common law. This outlook on doctrine allows him comfortably to excise slave torts from the general thesis.[38] In the same way, the common law doctrinal method forgives Schwartz's selection of South Carolina as a jurisdiction for the study of industrial torts. Troublesome factual and doctrinal

particularities are subordinate to and do not alter his consideration of the trans-jurisdictional meta-rules of the common law. Schwartz begins with such a meta-rule, the late nineteenth-century formal doctrinal structure of the negligence standard. He then describes the "natural" progress of the common law toward that end, discarding whatever fails to fit the pattern. The end-state of the doctrine propels both the standard's march and his analysis through time; this doctrinal inquiry is teleological, thus antihistorical.

Schwartz's misconstruction of the tort litigant's reality stems from his method: doctrinal analysis of appellate sources. His uncritical acceptance of the common law's intellectual and institutional apparatus as a mode for historical analysis supports this method. The common law apparatus permits, even encourages, the exclusion of categories of injury victims troublesome to his thesis and also lets him select slave states for his examination of industrial torts. And throughout, he forces older cases into newer conceptual molds; he analyzes early nineteenth century opinions using the intellectual apparatus of late nineteenth century formalism.

II. Historicist Challenge to the Doctrinal Method

A different, more historicist approach to the history of personal injury litigation asks basic, less lofty questions of the data. The analysis does not begin with doctrine; nor do doctrine's demands structure the inquiry and conclusions. Instead, this alternative approach first tracks the imperative power of law as exercised by trial courts. Several questions become fundamental. How many suits occurred? Who won and who lost? What were the costs? The historicist approach also wonders about the challenges facing those who sued, as well as the obstacles that kept others from litigating. Doctrine is less interesting in its own right than for its relationship to the empirical details of litigation: did doctrine match or predict outcome? The remainder of this essay will consider some of the elements of a historicist approach to personal injury litigation.

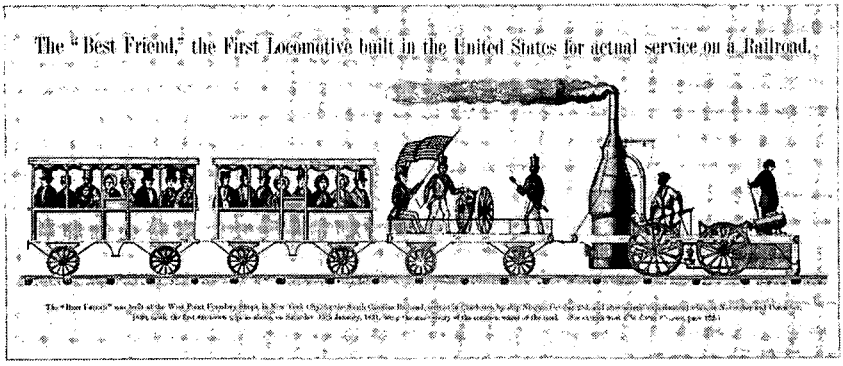
Perhaps the most striking thing about tort law in the United States before 1860 is how little there was; the few available

studies of trial courts show these courts mainly processed debt actions. In the Circuit Court for Chippewa County, Wisconsin, for example, torts comprised a mere 1.7 percent of the civil suits between 1854 and 1864, only 5 of 291 cases. During the same years, contract actions accounted for 61 percent of the court's civil suits. The fraction of Chippewa tort suits remained below 5 percent until the mid-nineties and below 10 percent through 1924.[39] In the St. Louis Circuit Court, tort suits ranged from 2.7 to 7.0 percent of the civil docket between 1820 and 1865, with a total of 57 tort suits in that forty-five year period. During the same years, 736 or 72.4 percent of the 1,016 St. Louis civil suits filed were contract actions.[40] Randolph Bergstrom's data from New York City between 1870 and 1910 show the same scarcity of tort suits. In 1870, only 32 of the 5,102 judgments (0.6 percent) in New York County's Supreme Court (a trial court) were tort suits, with debt and contract actions taking up 97.4 percent of the docket. By 1910, torts had grown to 11.8 percent of the docket.[41] In Alameda County, California, 2 percent of all actions filed between 1880 and 1910 were personal injury suits.[42]

In South Carolina, tort suits were also uncommon. In the Fairfield District civil trial court—the Court of Common Pleas—for example, every one of the more than 100 judgments in the spring term of 1845 was for debt; there were no tort judgments at all.[43] Fairfield's Common Pleas, like the antebellum trial courts of Missouri and Wisconsin, was mainly a court that creditors used either to secure or collect their debts, not a court in which tort plaintiffs sought compensation.

Suits against the South Carolina Canal and Railroad Company—whose president, Tristram Tupper, was the defendant in *State v. Tupper*—provide another example of the scarcity of tort suits. In the seven or so years of the railroad's operation before the appellate court's consideration of *Tupper*, the first South Carolina *appellate* case involving a railroad, there were only three personal injury suits against the railroad in the court most likely to hear such a suit: Charleston's Court of Common Pleas.[44]

The absolute scarcity of tort suits in South Carolina, Wisconsin, Missouri, New York, and California shows the insignif-



On 17 June 1831, six months after the "Best Friend" began operating, the boiler exploded and injured four workers. Two of the injured were leased slaves; the slave fire stoker *(pictured above, second from right)* died from his injuries. *(Courtesy Library of Congress)*

icance of civil courts in compelling compensation of personal injury victims. Obviously, when tort suits began to comprise more of the civil dockets, the courts became more important in this regard. Some tortfeasors, to be sure, compensated victims without legal compulsion; the South Carolina Canal and Rail Road Company, for example, considered and paid some requests for compensation, as did other companies. But it is clear that railroads did not consider such payments a legal, as opposed to a moral, duty.[45] There is, however, little data concerning such compensation; finding such data will require a trip from the county courthouse to the archives of railroads and other businesses.

A perfect safety record was not the reason for the paucity of suits against the railroad. For example, the boiler on the company's first locomotive exploded six months after the railroad put the engine into service. The explosion injured two slave workers, whose labor the company had rented, and two non-slave workers. One of the rented employees died from his injuries.[46] According to the 1834 report of the company's chief engineer, Horatio Allen, the breaking of axles, apparently not uncommon in the company's early years of operation, was the principal cause of accidents on the road.[47] The plaintiff in the original trial court railroad case alleged that his injuries occurred after the axle of the car in which he was

riding broke, causing the car to overturn.[48] He sought $5,000 in damages, but the jury found for the railroad; after the trial court loss, he eventually had to pay the company $29.00 in court costs.[49]

From a modern, presentist standpoint, it is hard to avoid wondering why there were so few lawsuits. Why did injured victims not seek compensation in the civil courts? This question becomes especially pressing if one believes that judges were kindly disposed toward injury victims; wouldn't favorable doctrine have lured plaintiffs into court? The answer is that institutional obstacles faced plaintiffs who sought compensation through legal process; and in the surrounding culture, people simply did not expect compensation for many of life's injuries.

A person injured in the first part of the nineteenth century and seeking compensation faced many institutional obstacles. Some of these obstacles match those which plaintiffs face today: costs of litigation, difficulty finding a good attorney, and the problem of a small plaintiff facing a large, experienced defendant, for example.[50] John McLaren's study of English nuisance law during the Industrial Revolution provides an instructive analogy. "The Industrial Revolution," McLaren graphically details, "was not only to dim, to choke and to poison, it was also to shatter the peace and tranquility of every community which it touched."[51] Yet poisoned and polluted property holders initiated little nuisance law litigation. The obstacle was neither common law doctrine nor the attitude of judges; indeed, McLaren reaches a conclusion similar to Schwartz's. "The judges," he found, "were more often than not very reticent about favoring industrial interest, and were not afraid to articulate very clearly just why they recoiled from accepting the pleas of the manufacturers."[52] Institutional barriers, not abstract doctrine, prevented nuisance suits. The obstacles included the cost and difficulty of litigation; causation or evidentiary problems involved in proving that a particular manufacturer's noxious emissions travelled through the air or water and damaged the litigant's property; and social barriers that kept government and legal officials from using the legal system to address a communal problem like pollution.[53]

In addition to institutional barriers, obstacles of another sort—cultural ones—kept injured people from litigating. Schwartz correctly notes that it is "extremely difficult to establish the existence of a legal culture."[54] But legal culture can nonetheless be real. Randolph Bergstrom has identified a change in legal culture as the most important cause of the efflorescence of tort, particularly personal injury, litigation between 1870 and 1910 in New York City. As causes of the almost twenty-three fold increase in tort judgments between 1870 and 1910, he examines and rejects increases in population, the number of accidents, use of contingent fees, judicial behavior, and doctrinal change.[55] Instead, a fundamental conceptual change in popular ideas about injury, causation, and responsibility brought people to law. "In New York, when people were injured," Bergstrom writes, "they increasingly refused to bear the burden themselves." In the trial court behavior of New Yorkers, Bergstrom found the emergence of "a new rights-assertive conception of injury responsibility," that is, a new legal culture.[56]

In a cultural and institutional environment in which injury victims did not become tort plaintiffs, scattered examples of solicitous language of appellate justices do not translate into compensation or redistribution of wealth. Likewise, when injured English property owners did not bring nuisance suits, doctrine that held industrial enterprises to strict standards cost manufacturer-polluters relatively little. This would be true even if trial courts knew of and assiduously followed precedents set by appellate courts. Whether they did so remains an open question. Bergstrom, asking whether doctrinal changes favorable to plaintiffs brought more litigation, found little change between 1870 and 1910 in the instructions that trial judges gave to juries. Despite flux in tort doctrine and legislation affecting injury victims, judges stuck with the same old rules.[57] If, as Schwartz claims, appellate opinions before 1860 exhibit a theme of judicial concern for injury victims, this says nothing about the benefit to injury victims and nothing about the cost to industrial enterprise.

Assessing the work of the courts in providing compensation for injury also requires a look outside the legal system toward those who suffered injuries. A methodology that, be-

cause of its insistent focus on doctrine, creates a fictional world in which rail workers and many slaves (in South Carolina!) form an exceptional category cannot explain the history of injury law or suit the reality of victims and tort litigants. Slaves, as noted above, comprised the majority of South Carolina's population after 1820. More than three-quarters of South Carolina personal injury appellate cases before 1860 involved injury to a slave. If there are themes worth finding in the history of South Carolina tort law, then a central theme must be about slavery.

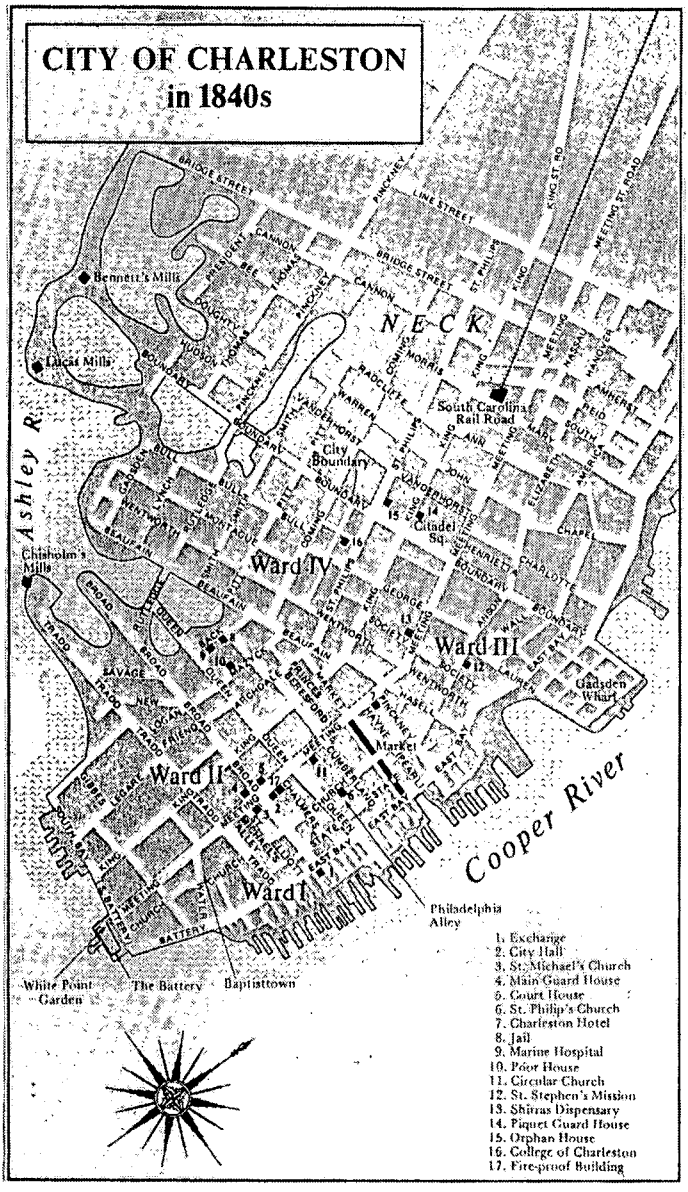
And beyond South Carolina, any theory about the historical character of tort law in the United States, especially for the second half of the nineteenth century, must accommodate the treatment of rail injury victims at its core as the paradigm case. Rail work was crippling and deadly. As Schwartz notices, in Massachusetts during the 1850s and 1860s, 64 percent of all employees killed on the job worked for railroads.[58] Across the nation in 1889, the workers aboard trains—fire stokers, conductors, and brakers—suffered 60 percent of all worker injuries and 56 percent of all on-the-job deaths, although they made up only 20 percent of the workforce. In per capita terms, as Walter Licht has noted, in 1889, one in every 117 train workers died a work-related death and one in every twelve was injured.[59] If biased against those who suffered injury in such massive and disproportionate numbers, how could tort law generally and enterprise liability in particular be "humane"?[60]

In addition to asking different questions, a historicist approach tunes in details that a doctrinal approach tunes out. *Tupper* again provides an example. At the end of the opinion, just before commenting on the importance of railroads and their role in holding the union together, Justice Richardson wrote, "I have now, through respect for the great numbers concerned for, or against the prosecution, considered the whole series of argument. . . ."[61] The reference to the "great numbers concerned" should flag the interest of the historian, for behind Richardson's remark lay a rich story about the railroad. The story reveals much about the basis for finding the railroad liable; it also reflects the ambivalence of South Carolinians in the 1830s toward commercial and industrial

development.

The South Carolina Canal and Rail Road Company had a rocky start and a turbulent early history. After the state legislature granted the company's charter in 1827, it took more than two and a half years and much chiding from the incorporators to convince people to purchase the initial offering of six thousand shares of stock. The Road also sought to have the national government subsidize internal improvements in South Carolina by buying twenty-five hundred shares of stock, but James Hamilton, a South Carolina member of Congress, refused to pursue that capital, given the inconsistency with his opposition to tariffs protective of manufactures. More important to the decision in *State v. Tupper* was the controversy over the road's route between Hamburg and Charleston. The original charter planted the railroad's terminus outside the city limits of Charleston at Line Street, nearly two miles from the wharves to which the railroad was to bring cotton and other freight. The legislature in 1832 passed an act that allowed the road to extend track from Line Street through an area known as the Neck to the city boundary, provided that no steam power was used past Line Street. After the company's president appealed to the citizens to allow the railroad to move closer to the wharves, work began in March 1834. Strong opposition to the extension, however, caused the track to stop two blocks from Boundary Street—the city line—with the depot an additional three blocks away at Mary Street. Subsequent efforts to extend the rail line to the water met the opposition of an interesting coalition of rich planters living in the Neck and of drayers—many of whom were free blacks—who made their living carting goods from the rail depot down to the wharves. As late as 1860, five years before General Sherman's troops would destroy much of the road, the connection to the water remained incomplete.[62]

Although Justice Richardson initially presented the issue in *Tupper* as how the common law would deal with a new technology, the details of the controversy and the early history of the railroad ground the case in the complex competition of the property and labor interests of railroad promoters, wharfingers, planters, and free black drayers. Richardson asked, with rhetorical intent, "how shall [railroads] be treated in



Appeals by the president of the South Carolina Canal and Rail Road Company to extend the rail line beyone Line Street to the water faced strong opposition. (From *The Web of Progress: Private Values and Public Styles in Boston and Charleston, 1828-1843* by William H. Pease and Jane H. Pease. Copyright © 1985 by William H. Pease and Jane H. Pease. Reprinted by permission of Oxford University Press, Inc.)

law?"[63] "According to law," he answered immediately. He then moved not to an abstract disquisition on the relative merits of the new technology, but to the details of the railroad charter, in particular the prohibition of steam locomotives past Line Street.[64]

Empirical grounding also complicates the presumption—common to appellate historians—that *dicta* in an opinion accurately reflect the world beyond the appellate court. This is the sense in which appellate cases become republican representatives: speakers for the courts and the world below. For this error, Lawrence Friedman—one of the legal historians Schwartz criticizes in his work—may be partly to blame. Friedman employs the metaphor of a mirror in describing his model for the relationship of law and society; he regards "American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society."[65] But only popular reduction of Friedman to nonsense finds society's image in every particle of law; sometimes—perhaps often with appellate opinions—the mirror is a funhouse mirror.

The last example from *State v. Tupper*, a seemingly pro-railroad remark in the opinion that Schwartz uses as evidence of a general enthusiasm for commerce and industrial development, shows the misuse of *dicta*. Justice Richardson concluded the opinion by musing on the "great and growing importance" and "incalculable value to commerce" of railroads, and concluded by noting that railroads were

> at this moment, welding together, link after link, the conservative chain, which is to hold in firm union, more than six and twenty States; but for such noble ends, we must engraft the railroad system in the affections, as well as the interest of the people; and the parents of so much enterprise, wealth, and national good, must not be justified wrong, else they might become the tyrants of the day.[66]

Schwartz concludes his own discussion of *Tupper* by noting that the passage "establishes a mood that was favorable to liability" and also that the closing comment "seems rich with an evidently republican ideological significance."[67]

Schwartz's quotation of Justice Richardson's florid prose about railroads—"the parents of so much enterprise, wealth, and national good"[68]—leads the reader astray regarding the

enthusiasm of all South Carolinians for railroads, commerce, and even (or especially) unionism during the 1830s. During South Carolina's nullification crisis of 1832-33, Justice Richardson was a unionist; he opposed South Carolina's efforts to nullify the federal tariffs of 1828 and 1832. He used the conclusion of the *Tupper* opinion as platform for unionism, which likely irritated nullifiers, who in 1832 had carried more than 60 percent of the state's vote.[69] But Richardson's railroad remarks comport with Schwartz's own view of the generality of antebellum enthusiasm for railroad development: "By the 1840s," Schwartz claims, "the new railroads had apparently succeeded in capturing the public's imagination."[70] The quotation from Justice Richardson links South Carolina to this alleged national consensus.

Charlestonians' successful resistance for over thirty years to the extension of tracks into the city limits and to the water shows that in South Carolina the enthusiasm for railroads was not universal. Even Richardson warned that if allowed to do wrong, railroads might become the "tyrants of their day."[71] Anti-railroad sentiments were an important though now largely ignored component of American railroad history.[72] Ironically, Schwartz may be right in presenting the South Carolina posture toward railroading as representative of the larger American outlook, but what makes the outlook of Carolinians typical is really the combination of opposition to and support for the railroad. This tension emerged more generally as ambivalence about commerce, a characteristic trait of the republican ideology that so many historians have associated with the history of the United States.[73] So, rather than reading South Carolina's appellate and trial cases before a backlight of commercial and industrial zeal, a better method views these cases in light of wariness about the changes wrought by the expansion of enterprise.

III. Conclusion

Schwartz, of course, is not the only legal scholar who relies too heavily on appellate cases. His method and the errors to which it leads are regrettably common among legal historians. These historians typically begin with an interest in a par-

ticular legal doctrine and then set out searching for its origins. Armed with the assumption that appellate precedent guided trial court judges as they settled disputes and awarded compensation, these historians dissect and reshape, as needed, past doctrine to find the germs of contemporary practice. Appellate cases, they assume, are accessible representations of the obscured world below. Schwartz differs mainly in his enthusiasm for appellate cases as sources; he regards his use of these cases as a methodological advantage. Like the other historians, Schwartz begins with the model of precedent-guided compensation. The assumptions of the common law methodology allow him to adopt a slave jurisdiction for the study of industrial torts, to recharacterize a society that was generally ambivalent about and often hostile to commerce as one that was enthusiastic, and to exclude inconsistent though paradigmatic data.

Trial court records and a more historicist method offer a different picture of the history of tort law. For the first half of the nineteenth century, tort trials were scarce. Faced with institutional obstacles and a legal culture in which injured parties rarely litigated, very few people became tort plaintiffs. Tort doctrine in this period, even if beneficent, generated little redistribution of wealth in the form of compensation; the doctrine had little social effect. To understand personal injury and issues of liability in this period, legal historians must employ techniques other than doctrinal analysis to understand a legal culture quite different from the one we know today. Only toward the end of the nineteenth and the beginning of the twentieth century did personal injury litigation grow to significance. Yet even in this period, trial court records do not reveal much that can be called generous, kind, or humane treatment of tort plaintiffs.

Endnotes

* The author would like to thank Lawrence M. Friedman, Robert W. Gordon, and Dale R. Prentiss for their criticism.

1. Gary T. Schwartz, "The Character of Early American Tort Law," 36 *UCLA L. Rev.* 641 (1989).

2. *Id.* at 645-6.

3. The availability of trial court records varies. For example, Cal. Govt. Code § 69503.1 (Deering 1976 and Supp. 1990) authorizes the destruction of California Superior Court records, papers, case files, and exhibits that are more than thirty years old, except, of course, when the action is still pending. The Code requires the microfilming only of minute book entries, minute books, and judgment books. However, a sensible 1989 amendment requires Superior Court clerks to notify the Secretary of State, county museums, and every college, university, and accredited law school in the state before destroying any records, Cal. Govt. Code § 69503.4 (Deering 1976 and Supp. 1990). The 1989 amendment also requires that clerks preserve a "scientifically valid sample of cases" amounting to "not less than 10 per cent or 100 cases, whichever is larger." Cal. Govt. Code § 69503(6)(e).

South Carolina, by contrast, seems to have retained almost all of its court records. For the most part, these records are all under one roof, in Columbia, where they are neither dusty nor inaccessible. See South Carolina Department of Archives and History, *A Guide to Local Government Records in the South Carolina Archives* (Columbia, S.C.: University of South Carolina Press, 1988).

4. Schwartz, "Character of Tort Law," *supra* note 1, at 665.

5. *Id.* at 646.

6. Lawrence M. Friedman, "Civil Wrongs: Personal Injury Law in the Late 19th Century," 1987 *Am. B. Found. Res. J.* 351; Friedman and Thomas D. Russell, "More Civil Wrongs: Personal Injury Litigation, 1901-1910," 24 *Am. J. Leg. His.* 296 (1990); Robert A. Silverman, *Law and Urban Growth: Civil Litigation in the Boston Trial Courts, 1880-1900* (Princeton: Princeton University Press, 1981), 99-121.

7. G. Schwartz, "Tort Law and Economy in Nineteenth-Century America: A Reinterpretation," 90 *Yale L.J.* 1717 (1981).

8. Schwartz, "Character of Tort Law," *supra* note 1, at 643, 641.

9. *Id.* at 642.

10. *Id.* at 643.

11. Paul Finkelman, "Slaves as Fellow Servants: Ideology, Law, and Industrialization," 21 *Am. J. Leg. His.* 269 (1987); Robert S. Starobin, *Industrial Slavery in the Old South* (New York: Oxford University Press, 1970);

Robert W. Fogel, *Without Consent or Contract: The Rise and Fall of American Slavery* (New York: W. W. Norton & Co., 1989), 103-13; Gavin Wright, *The Political Economy of the Cotton South: Households, Markets, and Wealth in the Nineteenth Century* (New York: W. W. Norton & Co., 1978), 107-20; Lacy K. Ford, Jr., *Origins of Southern Radicalism: The South Carolina Upcountry, 1800-1860* (New York: Oxford University Press, 1988), 244-77; Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* (New York: Oxford University Press, 1970), esp. 301-17; George M. Fredrickson, "Colonialism and Racism: The United States and South Africa in Comparative Perspective," in *The Arrogance of Race: Historical Perspectives on Slavery, Racism, and Social Inequality* (Middletown, CT: Wesleyan University Press, 1988), 216-35.

12. The South Carolina Canal and Rail Road Company began steam locomotive service in 1830, the nation's first regular steam railway service. Schwartz, "Character of Tort Law," *supra* note 1, at 651. Until 1848, when the road consisted of 248 miles of track in the low country between Charleston and Hamburg, with branches to Camden and Columbia, it was the state's *only* railroad. By 1860 there were a total of 11 different roads with almost 1,000 miles of track. Ford, *Origins of Southern Radicalism, supra* note 11, at 221. By contrast, New York reached 1000 miles of track during the 1840s, and more than 2600 in 1860. Pennsylvania in 1860 had 2,598, Ohio 2,946, Indiana 2,163, and Illinois 2,799. Gavin Wright, *Old South, New South: Revolutions in the Southern Economy Since the Civil War* (New York: Basic Books, Inc., 1986), 22.

13. The slave population of South Carolina was 51.4 percent of the state's total in 1820. That proportion increased to 57.6 percent in 1850 and declined slightly to 57.2 percent in 1860. In Maryland, the slave population was 26.4 percent of the total population in 1820. This percentage declined steadily to 1860, when 12.7 percent of the population was slaves. Delaware had proportionally fewer slaves at all times—6.2 percent in 1820 down to 1.6 percent in 1860. *The Statistics of the Population of the United States, . . . Ninth Census,* Vol. I, (Washington, D.C.: U.S.G.P.O., 1872), 18, 36-37, 60-61; Wright, *Old South, New South, supra* note 12, at 19-29.

14. Schwartz, "Character of Tort Law," *supra* note 1, at 655, n.84.

15. *Id.* at 685.

16. *Id.* at 687.

17. *Id.* at 692.

18. *Id.*

19. He considers non-slave rail workers. Rail workers included slaves hired, leased, and owned by the railroads, as well as free workers.

20. *Id.* at 692; When slaves were among the fellow servants, application of the fellow servant rule became complex indeed. For an analysis of the ideological and economic tensions in the application of this rule in the South, see Finkelman, "Slaves as Fellow Servants," *supra* note 11.

21. Murray v. South Carolina Canal and Rail Road Company, 1 McMul. (26 S.C.L.) 385 (1841).

22. Schwartz, "Character of Tort Law," *supra* note 1, at 710-15.

23. *Id.* at 705-12.

24. *Id.* at 712.

25. *Id.* at 713.

26. *Id.* at 653. See Thomas C. Grey, "Langdell's Orthodoxy," 45 *U. Pitt L. Rev.* 1 (Fall 1983).

27. Schwartz, "Character of Tort Law," *supra* note 1, at 641, 678. See Robert W. Gordon, "Critical Legal Histories," 36 *Stan L. Rev.* 57 (1984).

28. Schwartz, "Character of Tort Law," *supra* note 1, at 710.

29. He discusses slave and rail workers in a section entitled "Special Categories of Victims." This is the fourth part of the article, *Id.* at 685.

30. Dudley (23 S.C.L.) 135 (1838).

31. Schwartz, "Character of Tort Law," *supra* note 1, at 651.

32. *Id.* at 664, 670. The other cases are Danner v. South Carolina Railroad, 4 Rich. (38 S.C.L.) 329 (1851) and Zemp v. W. & M. Railroad, 9 Rich. (43 S.C.L) 85 (1855).

33. Schwartz, "Character of Tort Law," *supra* note 1, at 652.

34. *Id.*

35. Dudley at 136.

36. Schwartz, "Character of Tort Law," *supra* note 1, at 652, n.58.

37. Dudley at 135-36.

38. Schwartz, "Character of Tort Law," *supra* note 1, at 686 ("In a further set of cases, the courts were encouraged to formulate various sub-rules to handle the actual application of general tort doctrine to slavery practices.")

39. Francis W. Laurent, *The Business of a Trial Court: 100 Years of Cases* (Madison: University of Wisconsin Press, 1959), 161.

40. Wayne McIntosh, "150 Years of Litigation and Dispute Settlement: A Court Tale," 15 *Law & Soc. Review* 823, 829 (1980-81).

41. Randolph Emil Bergstrom, "Courting Danger: The Evolution of Tort Liability in New York, 1870-1910" (Ph.D. diss., Columbia University, 1988), 12, 19.

42. Friedman and Russell, "More Civil Wrongs," *supra* note 6, at 296.

43. Judgment Rolls, Spring Term 1845, Court of Common Pleas, Fairfield County, South Carolina Department of Archives and History [hereinafter SCDAH].

44. These suits were Kerr v. SCC&RR Co. (B1AE 002 1834 0167A 00), Morse v. SCC&RR Co. (B1AE 002 1834 0257A 00), Burn v. SCC&RR Co. (B1AE 002 1837 0186A 00), and Burn v. SCC&RR Co. (B1AE 002

1838 0125A 00), Judgment Rolls, Court of Common Pleas, Charleston County, SCDAH. The last two suits were the trial and retrial of the same suit against the railroad, which is why the four suits can be considered three.

There may have been other suits filed that never made it to a final judgment and there may have been suits in other Charleston courts: the City Court, for example. In the other districts—Colleton, Barnwell, and Edgefield—there may have been other suits as well. The records of these districts are not as complete as those for Charleston. Certainly there were more suits after 1838; I have not had the opportunity to consider these.

45. Samuel Melanchthon Derrick, *Centennial History of the South Carolina Railroad* (Columbia, S.C.: The State Company, 1930), 124-6; see also Christopher L. Tomlins, "A Mysterious Power: Industrial Accidents and the Legal Construction of Employment Relations in Massachusetts, 1800-1850," 6 *Law and His. Rev.* 375, 415 (1988).

46. Derrick, *Centennial History, supra* note 45, at 47-49, 83-84.

47. *Id.* at 31, 86; Report of H. Allen, *Semi-Annual Report of the Directors of the South-Carolina Canal and Rail-Road Company to the Stockholders* (Charleston: J.S. Burges, 31 October 1834), 6-8.

48. Kerr v. SCC&RR Co., Declaration at 2-3, SCDAH.

49. Obverse of declaration (the head of the jury recorded the verdict on the reverse side of the declaration) and *Postea*, *Id.*

50. Marc Galanter, "Why the 'Haves' Come Out Ahead: Speculation on the Limits of Legal Change," 9 *Law & Soc. Rev.*, 95 (1974); Silverman, *Law and Urban Growth, supra* note 6, at 115-18.

51. John P. S. McLaren, "Nuisance Law and the Industrial Revolution—Some Lessons from Social History," 3 *Oxford J. of Legal Stud.* 155, 166 (1983).

52. *Id.* at 221.

53. *Id.* at 194-99, 205-15.

54. Schwartz, "Character of Tort Law," *supra* note 1, at 665, n.147.

55. Bergstom, "Courting Danger," *supra* note 41, at 242-43. Boston's Municipal and Superior Courts experienced a parallel expansion of the fraction of the civil docket that torts comprised. Silverman, *Law and Urban Growth, supra* note 6, at 113.

56. Bergstrom, "Courting Danger," *supra* note 41, at 249. See also Lawrence M. Friedman, *Total Justice* (New York: Russell Sage Foundation, 1985).

57. Bergstrom, "Courting Danger," *supra* note 41, at 121, 148-51.

58. Schwartz, "Character of Tort Law," *supra* note 1, at 711, n.423.

59. Walter Licht, *Working for the Railroad: The Organization of Work in the Nineteenth Century* (Princeton: Princeton University Press, 1983), 191.

60. Just over 50 percent, 340 of 675, of the Alameda County person-

al injury suits between 1880 and 1910 had common carriers—railroads, street railways, and a very few steamships—as defendants. This is powerful evidence of the important role of railroad injuries to tort law. Friedman and Russell, "More Civil Wrongs," *supra* note 6, at 296. In Boston in 1900, railroads and street railways were defendants in 47 percent of the trial court personal injury cases, Silverman, *Law and Urban Growth*, *supra* note 6, at 106.

61. Dudley at 141.

62. William H. Pease and Jane H. Pease, *The Web of Progress: Private Values and Public Styles in Boston and Charleston, 1828-1843* (New York: Oxford University Press, 1985), 56-62; Derrick, *Centennial History*, *supra* note 45, at 20-26, 71-81, 116-19, 197-200; *Semi-Annual Report of the South-Carolina Canal and Rail-Road Company* (Charleston, A.E. Miller, 1837), 10. See also, Petition of Elias Horry, President of SCC&RR Co. to House of Representatives, South Carolina, ca. 1831, SCDAH; petition of James Gadsden, for self and others, to Senate and House of Representatives, South Carolina, n.d., SCDAH; Report of the Committee on Internal Improvements on the petition of Gadsden, n.d., SCDAH.

63. Dudley at 136.

64. *Id.* at 137.

65. Lawrence M. Friedman, *A History of American Law*, 2d. ed., (New York: Simon & Schuster, 1985), 12. Kermit Hall appropriates the mirror metaphor in *The Magic Mirror: Law in American History* (New York: Oxford University Press, 1989).

66. Schwartz, "Character of Tort Law," *supra* note 1, at 652 (quoting Dudley at 141).

67. *Id.* at 652.

68. *Id.*

69. The crisis was over before 1838, with South Carolina having rescinded the nullification ordinance after President Jackson proved willing to use military force against the state and after the compromise tariff of 1833. William W. Freehling, *Prelude to Civil War: The Nullification Controversy in South Carolina, 1816-1836* (New York: Harper and Row, 1965, 1966), 1-3, 260-97; Ford, *Origins of Southern Radicalism*, *supra* note 11, at 120-38.

70. Schwartz, "Character of Tort Law," *supra* note 1, at 658, n.98.

71. Dudley at 141; For a lively anti-railroad correspondence, see Iveson Brookes to Tristram Tupper, Iveson Brookes papers, South Caroliniana Library, University of South Carolina. In 1837, Brookes, a minister, opened this correspondence with a review of "the developements [sic] of the past 5 or 6 years," which he said "not [only] shew that my apprehension of disadvantage from the passing of the R Road thro' my premises were correctly founded but they also teach me the worth of that providential foresight which prevented our being committed to the mercy

of the RR agents." Brookes, Woodville, SC to Tupper, Charleston, SC, 21 March 1837.

72. See Dale R. Prentiss, "The Politics of Progress: Michigan and Mississippi, 1837-1860," chap. 5 (Ph.D. diss., Stanford University, 1990); Michael F. Holt, *Forging a Majority: The Formation of the Republican Party in Pittsburgh, 1848-1860* (New Haven: Yale University Press, 1969), 220-62.

73. Ford, *Origins of Southern Radicalism, supra* note 11, at 52. For more on republicanism in the eighteenth century, see Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge, MA: Harvard University Press, 1967); J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975). For critical views of the misuse of "republicanism" for the post-Revolutionary period, see Joyce Appleby, "Republicanism in Old and New Contexts," *William and Mary Quarterly* (1986), 20-34; John P. Diggins, *The Lost Soul of American Politics: Virtue, Self-Interest, and the Foundations of Liberalism* (New York: Basic Books, 1985); and Isaac Kramnick, "Republican Revisionism Revisited," 87 *American Historical Review*, 629-664 (1982).