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Bourbon and the Law: A Brief

Overview

Mark W. Podvia

Question: What type of whiskey has been defined by the United States government as "a distinctive product of the United States?"

Answer: Bourbon!1

Question: What is the name of one of Kentucky's most celebrated counties?

Answer: Bourbon!2

Question: What is the official beverage of the Commonwealth of Kentucky?

Answer: Milk.3

Bourbon is a type of American whiskey4 made primarily from corn. All Bourbon is whiskey but not all whiskey is Bourbon.

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2 Thirty-four present-day Kentucky counties were formed out of the original Bourbon County, usually referred to as “Old Bourbon County.” Ironically no Bourbon is distilled in modern Bourbon County.
3 What was the Kentucky Legislature thinking? You folks in Kentucky need to work on this one!
Pursuant to 27 CFR §5.22(b)(1)(i), Bourbon “is whisky produced at not exceeding 160° proof from a fermented mash of not less than 51 percent corn, rye, wheat, malted barley, or malted rye grain, respectively, and stored at not more than 125° proof in charred new oak containers; and also includes mixtures of such whiskies of the same type.” There is no minimum aging requirement for Bourbon, however Bourbon aged less than four years must state the age on the bottle. In addition, 27 CFR §5.22(b)(1)(i) provides that “[w]hiskies...which have been stored in the type of oak containers prescribed, for a period of 2 years or more shall be further designated as ‘straight’; for example, ‘straight bourbon whisky.’” Federal regulations further provide that there can be no artificial coloring or flavoring in Bourbon whiskey.

There is no legal requirement that Bourbon be produced in Kentucky. However, roughly 95% of all Bourbon is produced there. Really—who would want to drink Hawaiian Bourbon?

The production of whiskey was among the first industries of the American colonies. Isolated farmers, particularly those on the frontier, found it far easier to convert their excess grain to whiskey for shipment to market by wagon or raft. Whiskey produced in western Pennsylvania was usually made from rye; that made in Commonwealth of Kentucky was more often made from corn. Thus it should come as no surprise that, following the American Revolution, whis-

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4 Also spelled Whisky.
5 “Tennessee Whiskey” generally meets the requirements of Bourbon but—with the exception of Benjamin Prichard’s Tennessee Whiskey—it is required under Tennessee law to be filtered through sugar-maple charcoal, a procedure known as the Lincoln County Process.
6 The author recently had his first experience with Rye whiskey—wow! A bottle of Town Branch Rye now resides in his liquor cabinet.
7 According to legend, it was the Rev. Elijah Craig who first made Kentucky whiskey from corn in 1789.
key was among the first domestic products to be taxed by the Federal government.

The Excise Whiskey Tax Act—officially "An Act repealing, after the last day of June next, the duties heretofore laid upon Distilled Spirits imported from abroad, and laying others in their stead; and also upon Spirits distilled within the United States, and for appropriating the same"—was adopted by Congress on March 3, 1791 with the strong support of Secretary of the Treasury Alexander Hamilton. Designed to pay the Revolutionary war debts that the new Federal government had inherited from the states, the Act provided for the taxation of distilled spirits at a six- to 18-cent per gallon rate; smaller distillers often paid double what larger distillers paid, with payment being made in cash to a Federal revenue officer appointed for the distiller's county.

Needless to say, the new tax was opposed by the farmers/distillers in western Pennsylvania, western Maryland and Kentucky. Resistance gradually turned from disobedience to violence; in July, 1794, shots were fired at a Federal tax collector. Faced with armed rebellion—the first test of the new Constitution—President Washington lead an army from Carlisle, Pennsylvania to Bedford, Pennsylvania and the insurrection was quelled. Although Washington's army never reached Kentucky, distillers there generally complied with the law following the collapse of resistance in Pennsylvania. The Act was repealed in 1802 during the administration of Thomas Jefferson, only to be reintroduced briefly to help fund the War of 1812.

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8 1 Stat. 199 (1791).
10 The Militia Act of 1792, 1 Stat. 264 (1792), required that a United States Supreme Court Justice certify that local authorities were unable to enforce the law before troops could be raised. On August 4, 1794, Justice James Wilson, who had once practiced law in both Carlisle and Bedford, Pennsylvania, declared that western Pennsylvania was in a state of rebellion.
Please note that the “rebellion” suppressed by General Washington was called the “Whiskey Rebellion,” not the “Bourbon Rebellion.” This was for two reasons: 1) As already noted, the Whiskey produced in western Pennsylvania was primarily made from rye, and 2) the largely corn-based Whiskey being produced in Kentucky was only beginning to take shape as “Bourbon.”

No one recorded who first aged Kentucky’s corn-based Whiskey in a charred oak barrel. Most probably a distiller had received a shipment that arrived by barrel, and wanted to clean the container before reusing it to age Whiskey. It is the caramelized wood sugars in the barrel that are responsible for Bourbon’s unique flavor.

It is still unclear how “Bourbon” became the name of this delightful beverage. Some say that it was named after Old Bourbon County, Kentucky, where it was originally produced. However, the product was shipped by flatboat from Bourbon County down the Ohio and Mississippi Rivers to New Orleans where it was sold on Bourbon Street, another possible source of the name. It has also been suggested that it was named directly in honor of the Royal Family of France, the Bourbons.

However Bourbon was named, it is known that the “Great Compromiser,” Henry Clay, United States Representative and Senator from Kentucky from 1811 to 1852, regularly brought a barrel of Bourbon with him on his trips to Washington. One can only wonder how many of Clay’s com-

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11 Most of Pennsylvania’s distillers left the Commonwealth following the suppression of the Rebellion, the majority of them heading to the southern states. Whiskey production in Pennsylvania only recently began to recover. Boo General Washington!


13 Another famous Bourbon drinker was President Harry S Truman, who regularly had a glass of I.W. Harper Bourbon for breakfast. [American Presidents: Their Food & Drink Preferences & Dislikes](http://www.amicusveritas.org/archives/AmericanPresFoodPrefer)
promises can be attributed to the Bourbon that he shared with his colleagues. It is possible that this amazing beverage might have played a pivotal role in the passage of the Missouri Compromise, the Tariff Act of 1833 and the Compromise of 1850.\footnote{The Henry Clay Center on Statesmanship recently reinstituted Clay’s tradition by sending a barrel of Bourbon to the US Senate. http://www.henryclaycenter.org/site/washington-d-c/bourbon-summit-of-compromise/}  

Bourbon was again taxed by the Federal government during the Civil War beginning at the rate of $.20 per proof gallon (one gallon of 100 proof whiskey).\footnote{12 Stat. 447 (1862).} The tax was increased as the war went on, ending at $2.00 per gallon. Knowledge of how much revenue was raised by the tax, as well as what a morale-booster good Bourbon was for the Union troops, might have provided the inspiration for President Abraham Lincoln’s statement “I hope to have God on my side, but I must have Kentucky.”\footnote{Of course the strategic location of Kentucky might have also played a role in inspiring the President’s words.}  

By the late 1800’s, the availability of bad whiskey in the marketplace was hurting the industry as a whole. This ultimately lead to the adoption of “An Act to Allow the Bottling of Distilled Spirits in Bond” on March 3, 1897.\footnote{29 Stat. 626 (1897).} The Act required that whiskey be made at one distillery in one batch, aged for at least four years under government supervision and bottled at 100 proof.

Whiskey came under further Federal regulation with the adoption of the Pure Food and Drug Act of 1906.\footnote{34 Stat. 768 (1906).} The Act forbid the adulteration or misbranding of any “food, drug or liquor,” however it failed to define many specific terms, including the definition of “pure” whiskey. After considerable debate, that determination was left to President William Howard Taft. On December 27, 1909, after studying the is-
sue for months, Taft decided “that the term ‘whiskey’ might be used as descriptive of any liquor distilled from grain, no matter how it was composed. Other liquors, distilled from such substances as molasses, fruits, etc., he excluded from the definition of whiskey.” Taft further set forth the classifications of whiskey, including that of Bourbon, which he defined as being “made from mash that consists of at least 51% corn [maize].”

President Taft further determined that Bourbon “must be distilled to no more than 80% alcohol by volume, and must then be aged in new charred-oak containers.” With a few minor changes, this remains the legal definition of Bourbon today. No wonder that in 2009 Taft was inducted into the Kentucky Bourbon Hall of Fame by unanimous vote of the Kentucky Distillers’ Association Board of Directors.

However, Taft’s determination came at a time of increasing public sentiment against the consumption of alcoholic beverages. Perhaps this sentiment was best summed up by the words of social activist Robert G. Ingersoll: “I believe, from the time it [alcohol] issues from the coiled and poisoned worm in the distillery until it enters into the hell of death, dishonor, and crime, that it dishonors everybody who touches it—from its source to where it ends.”

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21 Id.
22 In a case that predated Taft’s decision, Justice Robb of the United States Court of Appeals of the District of Columbia had written that “it is well understood that Bourbon whiskey is a Kentucky product made principally out of corn, with sufficient rye and barley malt added to distinguish it from straight corn whiskey.” Levi v. Uri, 31 App. D.C. 441, 445 (1908).
24 What People Have Said About Whiskey, 34 McClure’s Mag. 700 (1910).
views were expressed by many American Courts; in State ex rel. George v. City Council of Aiken, for example, the Supreme Court of South Carolina held that “liquor, in its nature, is dangerous to the morals, good order, health, and safety of the people, and is not to be placed on the same footing with the ordinary commodities of life.”

A resolution calling for a Constitutional amendment to accomplish nationwide Prohibition was introduced in Congress and passed by both houses in December 1917. It provided as follows:

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Sec. 2. The Congress and the several States shall have concurrent-power to enforce this article by, appropriate legislation.

Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

By January 16, 1919, the Eighteenth Amendment had been ratified by 36 states securing its adoption. On October 28, 1919, Congress passed enabling legislation officially known as the National Prohibition Act, but more commonly known as the Volstead Act. Prohibition went into effect at midnight, EST, on January 17, 1920.

25 26 L.R.A. 345 (1894).
26 S.J. Res. 17, 40 Stat. 1050 (1917).
27 41 Stat. 305 (1919).
Prohibition, which lasted until 1933, had a devastating effect on the Bourbon industry. Six distilleries nationwide were permitted to remain open to manufacture whiskey for “medicinal” purposes. Only seven of the 17 distilleries that had been operating in Kentucky prior to Prohibition were operating in 1935 following its repeal.

However, the industry did gradually rebound; by the early 1940s “the distillers had managed to age sufficient quantities of straight whiskey to have an appreciable amount of good aged Bourbon and rye back on the shelves.” In 1933, the Roosevelt administration established the Federal Alcohol Control Administration to regulate alcohol, including Bourbon. It later became part of the Bureau of Alcohol, Tobacco, and Firearms.

On May 4, 1964, Bourbon was officially recognized as a “distinctive product of the United States.” The Congressional Resolution read as follows:

> Whereas "Bourbon whiskey" is a distinctive product of the United States and is unlike other types of alcoholic beverages, whether foreign or domestic; and Whereas to be entitled to the designation "Bourbon whiskey" the product must conform to the highest standards and must be manufactured in accordance with the laws and regulations of the United States which prescribe a standard of identity for "Bourbon whiskey"; and Whereas Bourbon whiskey has achieved recognition and acceptance throughout the world as a distinctive product of the United States: Now, therefore, be it Resolved by the Senate (the House of Representatives concurring) that it is the sense of Congress that the recognition of Bourbon whiskey as a distinctive product of

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29 Id. at 76.
30 Id. at 82.
the United States be brought to the attention of the appropriate agencies of the United States Government toward the end that such agencies will take appropriate action to prohibit the importation into the United States of whisky designated as "Bourbon whiskey".31

Bourbon was the first American spirit to be so recognized. However, speaking fifty years after the adoption of the resolution, U.S. Representative John Yarmuth of Louisville, co-founder and chairman of the Congressional Bourbon Caucus, noted that “it doesn’t take an act of Congress to know Kentucky Bourbon is the finest spirit in the nation.”32

The recognition of Bourbon as a “distinctive product of the United States” is reflected in several foreign agreements. The North American Free Trade Agreement, Annex 313 (Distinctive Products)33 accords special status to Bourbon:34 “Canada and Mexico shall not permit the sale of any product as Bourbon Whiskey...unless it has been manufactured in the United States in accordance with the laws and regulations of the United States governing the manufacture of Bourbon Whiskey.”35

The US/European Union Distilled Spirits and Spirit Drinks Agreement, March 15, 1994 likewise recognized Bourbon as a distinctive US product: “The EC agrees to restrict, within its regulatory framework (Council Regulation No. 1576/89, Article 11 or an equivalent successor regulation) the use of

34 Even those opposed to NAFTA would have to recognize that Bourbon is worthy of special status.
35 The Agreement also granted special status to Bourbon’s close cousin, Tennessee Whiskey. In exchange, the U.S. and Mexico recognized Canadian Whisky as a distinctive product of Canada, and the U.S. and Canada recognized Tequila and Mezcal as distinctive products of Mexico.
the product designations...‘Bourbon whiskey’/'Bourbon whisky’ and ‘Bourbon’ as...spirit drinks products of the USA.’ In exchange, the United States agreed to restrict the terms ‘Scotch whisky’, ‘Irish whiskey’/’Irish whisky’, ‘Cognac’, ‘Armagnac’, ‘Calvados’ and ‘Brandy de Jerez’ to distilled spirits/spirit drinks products of the Member States of the EC.’

Bourbon has also been the subject of a number of court cases, primarily involving trademark protection. Among the most recent of these was Marker’s Mark Distillery v. Diageo North America, where the United States Court of Appeals for the Sixth Circuit held that Maker’s Mark famed red dripping wax seal was a valid trademark.

Why the Commonwealth of Kentucky failed to name Bourbon as its official beverage is beyond the author’s comprehension—perhaps the dairy industry in Kentucky has a better-funded lobby. However, the Commonwealth does have an Official Bourbon Festival, the Kentucky Bourbon Festival, Incorporated, of Bardstown, Kentucky, a Bourbon Academy (http://filsonhistorical.org/education/the-filson-bourbon-academy/) and the Kentucky Bourbon Trail—complete with a Passport that can be stamped as you visit each historic distillery (http://kybourbontrail.com/).

To an extent that makes up for the Commonwealth’s unfortunate choice of milk as official state beverage.

A toast to Bourbon!

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37 Id.
38 697 F.3d 410 (2012).
39 Milk? Really?
41 Preferably made with a glass of Bourbon in hand!
**Select Bibliography**


This article had its origins in a program that the author presented at the 2015 SEAALL Annual Meeting. The author would like to thank Kurt X. Metzmeier, Associate Director and Professor of Legal Bibliography at the University of Louisville Law Library, for his suggestions that added to the quality of this article.
As a fragment of American history, the Hatfield-McCoy Feud is one of those legendary events that become more shrouded over time yet linger in our collective imagination. We are boggled by a family conflict that today seems to have nebulous beginnings; alternatively described as an argument over free ranging hogs, divided loyalties within families that emerged during the Civil War, and most popularly, the Kentucky - West Virginia Tug River border crossing romance of Roseanna McCoy and Johnson, the eldest son of Devil Anse Hatfield, called Johnse.

Today the feud is largely known to us through myth and legend. We are simply too far from the events to know the truth and what was known and understood has been sensationalized to such an extent by the media of the day and embellished over time that fact cannot be separated from fiction. Even the death toll is relatively unknown: fifteen members of both the Hatfield and McCoy families died in the feuding, but it is estimated that the toll could be much higher, with as many as 100 deaths from the larger conflict that lasted over a twenty year time period.

Many conflicting reports concerning information that comes down to us today about the Hatfield’s often center around Devil Anse’s son, William Anderson (Cap) Hatfield, the second child out of thirteen, who would grow to play a major role in the feud. One example of this conflicting information refers to how “Cap” got his nickname. According to

* Stewart Plein is Rare Book Librarian at the West Virginia & Regional History Center.
the family history, Hatfield’s Tale of the Devil, (81) as Anse’s namesake, Cap was referred to as “the little captain,” in deference to Anse’s military service, where he served as a captain in the Confederacy during the Civil War.

In another confusing instance, Hatfield (91) and King (77) describe an eye injury that led to partial blindness in Cap’s right eye when he was ten. King says the nickname stems from this injury, the result of an exploding cap while loading a rifle, causing his eye to turn a milky color. The first suggestion, in reference to his father’s military service, seems to be the more accurate of the two, as photos of Cap made throughout his life do not show a milky eye. However, he did lose sight in the eye.

Also up for negotiation is the gunshot wound that would lead to Cap’s death. It is said that Cap received a wound at age 16. (Hatfield & Spence 91) Whether that gunshot wound was received in the head, as some say or in the stomach, as others report, is up for debate. What is believed to be true is that this wound, suffered as a mere teenager prior to the beginning of the feud, led to cancer
which developed around the wound area and finally, after many years, took his life.

Described by his son, the family biographer, Coleman A. Hatfield, as a man of “strange and mixed emotions” (Hatfield & Spence 91), Cap was believed to be among the leaders of the feud’s activities. He was a young man of 25 when he participated in the most violent event, the New Year’s Eve Raid of January 1, 1888, that took five McCoy lives. (Hatfield & Spence 169)

What we can know with certainty is as interesting as what we are unable to determine and that is a shift in reasoning from one of the most notorious members of the Hatfield family to the law as a means to save himself, to support his family, and as a legacy to pass on to his children. William Anderson (Cap) Hatfield, a known participant and some contend, leader (King 186) in at least two of the feuds most violent conflicts, a prison escapee who left his family behind to hide from the law for extended periods including jaunts in Texas, Oklahoma and Colorado, in the end, turned to the law as his saving grace.

Having grown up without many opportunities for education and little encouragement, Cap Hatfield was an illiterate man, a farmer who also worked in timber and made moonshine. As bounties on his head reached $1, 250, (King 239) and with bounty hunters in constant pursuit of their prize, Cap grew weary of his inability to provide for his family. While he was constantly on the run and in hiding in Oklahoma (King 216, 329) Cap’s second son, Shepherd, died of malnutrition. (Hatfield & Spence 221) The fear of capture, exhausted from evasion, and the death of his son must have made an impact on Cap. Tired of the violent life that had consumed his youth, he was only 18 when the feuding began, Cap sought an alternative from his criminal past and a future of fear and anguish.

Cap’s fortune turned when he allowed his educated wife Nancy to teach him to read. From that point on, Cap came to enjoy reading and with this skill came a yearning to bet-
ter himself. The feud had drawn to a close over the intervening years and Cap left his family once again, this time traveling to Tennessee to enroll in a law class. (King, 168, 338) Though this course of study lasted only six months, its short duration made a significant impact on Cap’s life, changing its course and eventually inspiring his son and a granddaughter to follow in his legal footsteps. (Hatfield & Spence, 221)

From this small step, Cap entered a new profession. At home in Logan County, a county that served as the West Virginia side of the feud that stretched across the Tug River Valley into Kentucky, Cap brought not only his newfound legal skills to his new job as Logan County Deputy Sheriff, (Hatfield & Davis, 144) but also his ability to track and hunt criminals on the run, as well as his mastery handling a gun. A big, burly man, Cap would have been a force to be reckoned with and it must have felt good to be on the other side of the law for a change.

Not content to serve as Logan County’s Deputy Sheriff, Cap was admitted to the West Virginia State Bar (Donnelly 15) and also opened a law office in Logan County with his son, Coleman Alderson Hatfield. (Hatfield & Spence 221, King, 338, Hatfield & Davis, 56)

It was Cap’s son, Coleman A. Hatfield, (1889 – 1970) grandson of William Anderson Hatfield, better known by the famous moniker “Devil Anse,” (Hatfield & Spence 13) who would be inspired by his father to make the law his profession. It was also this grandson of Devil Anse who decided to become the family historian, to capture the family stories he had heard as a child at the knee of Devil Anse, and coupled with genealogical and historical research, to learn and write the history of the Hatfield family and the feud. (Hatfield & Spence 35) With a family history as immediate as it was for Coleman A. Hatfield, who spent his whole life living and working in the environs of the feud and among the people closest to it, it would have been imperative to marshal as much information as possible to understand his own family history.
Coleman A. Hatfield took his father’s interest in education a step further and enrolled in the College of Law at West Virginia University, graduating with his LL.B. degree in 1925. (Monticola 44). After graduating Coleman returned to Logan County and joined his father in the Hatfield law office. Although Cap never really practiced law, taking on only one family case, his son Coleman was to become a very successful attorney with a thriving law practice. During his legal career he went on to serve as Chair of the Republican Party, 1940-42, Member, Republican Executive Committee and Commissioner in Chancery. (WV Blue Book). The great distance Coleman A. Hatfield successfully traversed is best exemplified by these two photographs. First, Coleman is seen as a gun toting child next to his mustached father, Cap, and second, as a respected and successful attorney.

The Hatfield desire to enter the legal profession would pass on to the next generation. Coleman A. Hatfield’s daughter, Elizabeth Aileen Hatfield, (1908 -1946) during her short life, would step outside the ordinary path expected for women of her generation and enroll in her father’s alma mater, West Virginia University, where she would graduate in 1933 with an LL.B degree.

Aileen’s achievements at WVU would be many. An accomplished singer, Aileen performed several of the ancient Child
Ballads, traditional ballads from England and Scotland with their American variants. (Bronson ii). Aileen was actively engaged in many activities, serving as a member of the editorial staff for WVU’s yearbook, the Monticola, as a member of the Press Club, and News Editor for the Matrix, a club organized by the women students in journalism. She also held the office of Se Little Scop in Seo Beowulf Gedryht, (the Beowulf Club, founded by Prof. John Harrington Cox). Aileen was also a member of Delta Sigma Rho, the Honorary Forensic Fraternity, Head of the English Club, the Honorary English Society, and a member of Phi Mu, the second oldest sorority in the nation. Most importantly, Aileen was honored with membership in Kappa Beta Pi, the Honorary Women’s Law Organization, where she served as an officer in the role of Dean. (Monticola 299)

Aileen would join the family law office, (King 338) but would not practice, as women attorneys were seldom allowed to practice at this time. However, Aileen was one of the earliest women to graduate from the WVU College of Law, and although the first woman to graduate from WVU with a law degree would graduate in 1897, few women followed her path and even as a graduate in 1933, Aileen was still among WVU’s earliest women law graduates. More importantly, Aileen would be the first woman attorney in Logan County, an impressive feat.

While historical information on the feuding Hatfields is voluminous, scant information is available on the legal branch of the Hatfields. Though connected closely with the feudists, the hard work and success of the Hatfield attor-
neys moved the family beyond the violence of the nineteenth century and into the modern world of the twentieth century.

**Bibliography**

Books:


Web Resources:


Peeping Under the Judge's Robes: Preliminary Results of a Reputational Study of Nineteenth Century Kentucky High Court Justices

Kurt X. Metzmeier*

Legal historians of state courts have long run into hagiographic biographies of judges that portray them as handsome, refined statesmen, with encyclopedic familiarity of legal precedents and the wisdom of Solomon. In these accounts, judges are "all distinguished looking men with the charming personality and kindly manners of the Kentucky gentlemen of their day," each one a virtual "combination of Chesterfield and Cicero." The judges of these sketches are "untiring" and their "knowledge of the law and of the decisions of the courts [is] full and accurate." Actual evidence of the basis for the stellar reputation of the subject is often as thin as the praise is fulsome, and often the purported gentility of the judge is belied by knowledge of their participation in duels and caustic political vendettas.

I have long wondered if there was a way to test these literary accounts, at least as to the judicial work of these men. Recently, I have been experimenting with methods to do so by trying to gauge the national reputation of Kentucky high court judges by examining the inclusion of their opinions in very selective reporters like the Bancroft-Whitney Trinity Series and American Law Reports (ALR). The early results are preliminary but look fruitful.

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The idea of getting some objective data on state judges from the presence of their opinions in selective multistate reporters came from an off-hand remark by former Kentucky Chief Justice John S. Palmore in his recent judicial memoir, An Opinionated Career: Memoirs of a Kentucky Judge, where he praised Osso W. Stanley, a commissioner on the old Court of Appeals (then the state’s highest court). Before Kentucky had an intermediate appellate court, the Court of Appeals was swamped with work and the legislature created the unelected, non-voting commissioners to help write opinions in cases decided by the court. Palmore noted that while Stanley’s Republican party affiliation prevented him from ever being elected to the high court from his predominately Democratic district, he was a wonderful judge and “gifted writer,” who probably had “more of his opinions ... published in the American Law Reports (ALR) ... than any other judge who has served on the Kentucky court.” The passage alerted me to the role that selective national reports played in how state judges viewed the work of other judges.

I decided to test this by identifying the judges writing opinions in the Kentucky cases published in one of the early selective reports, the Bancroft-Whitney “Trinity Series.” The Trinity Series was a pre-West selective reporter by San Francisco law publisher Bancroft-Whitney Co. which included American Decisions (covering opinions from 1760-1869); American Reports (1868-1887) and American State Reports (1886-1911). The series sought to carefully collect leading state court decisions of the fifty states in the period from 1760-1911. The series was highly selective and numbered fewer than 300 volumes for the entire run, so it is reasonable to believe that the selection of several of a judge’s opinions was a distinction. Although decisions were picked based on the legal issue addressed in the case, the quality of writing and reasoning also played an important role. Moreover, the series editors likely chose opinions from judges who had a high reputation in the American legal community.
Working with the combined print index and Westlaw, my research assistant Sarah L. Johnstone and I were able to build a spread-sheet of Kentucky opinions and their writers in the Trinity Series. Luckily, the combined index had a table of cases that separated the decisions by state. Each of the cases from Kentucky was entered into the database. We then retrieved each case on Westlaw, determined the deciding judge, and entered them into the database. When the chief justice’s name was given for a per curium decision, that was also noted in the database. Although my study focused on Kentucky, there is no reason that the method can’t be applied to other states represented in the Trinity Series. (This index is typically shelved with one or all of the three Trinity series sets; any potential researcher who cannot access this index should contact the author who may be able to help them obtain a copy of their state’s cases).

It is clear from my preliminary results that George Robertson was the leading bluegrass judge in the century, with nearly double the number of decisions published nationally as his closest competitor:

Top ten Kentucky judges represented in the Trinity Series were:

1) Robertson, George -- 148 decisions (7 signed only as chief justice)
2) Pryor, William S -- 77
3) Boyle, John -- 69 (29 signed only as chief justice)
4) Marshall, Thomas A. -- 67
5) Mills, Benjamin -- 67
6) Owsley, William -- 53
7) Simpson, James -- 50
1) Ewing, Iphraim M. -- 43
2) Lewis, Joseph H. -- 40
3) Holt, William H. - 38
Although portraits of George Robertson hang in both the rotunda of the Kentucky Capitol and the courtroom of the University of Louisville’s Brandeis School of Law, he is almost unknown to modern Kentucky lawyers. Nonetheless, throughout the nineteenth and early twentieth century, he was regularly cited as its leading jurist. Robertson served on the Kentucky Court of Appeals from 1829 to 1834, when he resigned to resume his private practice and teach law at his beloved Transylvania University, where for twenty-five years he led the law department. He returned to the court from 1864-1871. His decisions were widely cited in the areas of criminal law, legal jurisprudence, and tort law, and Kentucky bar tributes marked him as a leading figure in the state legal firmament.

Robertson’s reputation is backed up by some recent scholarship. He is favorably viewed in Peter Karsten’s Heart Versus Head Judge-Made Law in Nineteenth-Century America. Karsten’s thesis is that 19th c. jurisprudence reflected a struggle between judges who applied the common law without concern its impact on individuals (especially workers and the victims of railroad injuries) against a more humanistic view of the law offered by other more compassionate jurists. Karsten sees Southern and Midwestern judges as trying to mitigate the harsh effect of doctrines like the fellow-servant doctrine that were promulgated by northeastern jurists in the thick of the industrial revolution. He uses George Robertson is an exemplar of this tendency.

In addition to Robertson, several of the other judges on the list meet the definition of a distinguished jurist. Two later went onto the federal bench, John Boyle as the Kentucky district judge and William H. Holt as the first judge of the District for Puerto Rico. Thomas A. Marshall joined Robertson on the faculty of Transylvania University law school, the first law school west of the Alleghenies and the alma mater of many prominent judges, including John Marshall Harlan (a pupil of Marshall). Of course, law and politics in the 19th century were always intertwined. Three of the "Trinity Top Ten" served in the U.S. Congress (Boyle, Mar-
shall, and Joseph H. Lewis) and one, William Owsley, was Kentucky’s sixteenth governor.

The preliminary results suggest the utility of the method in testing the reputations of state judges. Now obviously, there are caveats to this line of research. Judges with long tenures have a more opportunity for their opinions to be cited and those who served as chief justice may have had a better choice of the type of topics that would tend to be selected. (In Kentucky, the chief justiceship tended to rotate so this was less of an issue). Because of this, I plan to expand on the Trinity Series selection data with some citation analysis. I’m also trying to devise a way to track citations to Kentucky cases in the 19th and 20th century legal treatises in the Making of Modern Law database. This is somewhat difficult because, before the Bluebook, citation was both sparse and variable, making devising accurate searches is challenging. (In many treatises, something like "65 Mass. 97" would suffice as a citation; however, the same case might be abbreviated as "65 Ma. 97" in a treatise from the same publisher).

I’m also working in a parallel manner using American Law Reports selection patterns to create a similar ranking for 20th century judges, although the changing nature of both the Kentucky court and the continual re-purposing of the ALR by its editors makes that effort more of a challenge. (For example, early series of ALR were clearly built on leading cases, but by the 1980s it appears that editors were thinking up useful subjects for annotations, and then finding a case to go with them).

However, one early result of the preliminary ALR data is clear even at this stage: Palmore was right about Stanley!
Williams v. Board of Education of Fairfax District: Bringing a Long-forgotten West Virginia Case to Life

Mark W. Podvia

In recent years, a long-forgotten Civil Rights decision by the West Virginia Supreme Court of Appeals has gained public attention, largely thanks to the work of the J.R. Clifford Project. That case, Williams v. Board of Education of Fairfax District, 31 S.E. 985 (W. Va. 1898), had upheld an earlier decision issued by the Circuit Court of Tucker County that required that schools must offer students—both black and white—equal school terms.

The Fairfax School District was a segregated district; that issue was not in question. The Code of West Virginia in effect at the time mandated that “[w]hite and colored persons shall not be taught in the same school.”1 In 1896, only two years prior to the West Virginia Supreme Court’s decision in the Williams case, the United States Supreme Court had upheld racial segregation in Plessy v. Ferguson.2 There Justice Henry Billings Brown, speaking for the majority, wrote that “[l]aws permitting, and even requiring, [race] separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power.”3

However, the West Virginia law did require “the trustees of every sub-district to establish therein one or more primary schools for colored persons between the ages of six and twenty-one.”4 The act further provided that “such schools so established shall be

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2 Plessy v. Ferguson, 163 U.S. 537 (1896).
3 Id. at 544.
subject to the same regulations as are provided for the schools for white children.\footnote{Id.}

Carrie M. Williams, a black educator, was hired by the Board of Education of Fairfax District to teach at the Colored School in Coketon, Tucker County. Coketon was then a booming coal town whose citizenry included a number of African-Americans. Ms. Williams was offered a five-month written contract, but refused to sign it because she “knew the white school term was eight months.”\footnote{Transcript of Record at 10, Williams v. Board of Education of Fairfax District.} She thereafter taught without a written contract, receiving $40 per month salary from the district.

Instead of ending the school term after five months, Ms. Williams taught the full eight-month term. She received no compensation for the last three months of teaching and had $1 withheld from her final payment for failing to return the term register on time. At the end of the school year, Ms. Williams sued Fairfax District for unpaid salary plus the $1 withholding for the unreturned term register. Her attorney was John Robert “J.R.” Clifford, West Virginia’s first black lawyer.

J.R. Clifford was born in what was then Grant County, Virginia in 1848. Following service with the Union Army during the Civil War, he attended Storer College,\footnote{Storer College, an historically black college in Harper’s Ferry, West Virginia, closed in 1955. The campus is now part of the Harpers Ferry National Historical Park.} thereafter becoming a school teacher. In 1882 he became editor of \textit{The Pioneer Press}, an African-American newspaper. Five years later, in 1887, he passed the West Virginia bar exam and was admitted to the practice of law. He was the first person of color to be admitted to the West Virginia Bar.\footnote{See Connie Park Rice, \textit{“Don’t Flinch nor Yield an Inch”: J.R. Clifford and the Struggle for Equal Rights in West Virginia}, 1 W.V. Hist. N.S. 45 (2007) for a detailed account of the life of J.R. Clifford.}

Trial in the case of \textit{Carrie Williams v. Board of Education of Fairfax District} was held in October 1893 before the Circuit Court of Tucker County, the Honorable Joseph T. Hoke presiding. Attorney Clifford argued that the law required that both black and white children receive the same school term; counsel for the school district claimed that Ms. Williams deserved no additional pay because she lacked a written contract. The jury found in Ms. Williams favor, and Judge Hoke ordered that she be paid back salary, along with the fee for the unreturned register, plus inter-
est. The school district appealed to the West Virginia Supreme Court of Appeals.

Two years passed before the West Virginia Supreme Court heard the case. After hearing arguments from both sides, the Court affirmed the decision of the lower court. Justice Marmaduke Dent authored the opinion in which he wrote as follows:

Counsel insist that the colored pupils, having been allotted their pro rata share of the school funds, have no right to complain. The law guaranteed them eight months of school, and, though it cost many times in proportion what the white schools cost, they should have had it. Money values should not be set off against moral and intellectual improvement. A nation that depends on its wealth is a depraved nation, while moral purity and intellectual progress alone can preserve the integrity of free institutions, and the love of true liberty, under the protection of equal laws, in the hearts of the people.9

The Williams decision was largely ignored by the press—even the African-American press. It did receive cursory mention in the Wheeling Daily Intelligencer which reported “Carrie Williams vs. Board of Education of Fairfax [D]istrict, from Tucker county, opinion by Dent; judgement of circuit court affirmed.”10

Carrie Williams thereafter left West Virginia. Her descendants, who now reside in Illinois, only recently learned of the Williams case. J.R. Clifford continued to practice law until his death in 1933. In 1906, he and W.E.B. Dubois organized the first meeting of the Niagara Movement at Clifford’s alma mater, Stover College. That meeting was the forerunner of the modern NAACP.

The J.R. Clifford Project, administered by the Friends of Blackwater Project, was founded in 2004 to preserve and promote the memory of J.R. Clifford. The project was organized by Thomas W. Rodd, Esquire with the support of the Honorable Larry Starcher and Katherine E. Dooley, Esquire and many others. Historical information about J.R. Clifford—including the transcript and opinion from the Williams case—are available on the Project’s website at http://www.jrclifford.org/. Also available are posters, school lesson plans, PowerPoint presentations and other material dealing with J.R. Clifford.

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9 Williams v. Board of Education of Fairfax District, 31 S.E. 985, 986 (1898).
10 Supreme Court Decisions, Wheeling Daily Intelligencer, Nov. 18, 1898, at 6.
In 2004, Mr. Rodd wrote a four-act play entitled *J.R. Clifford and the Carrie Williams Case—A Historical Drama*, which tells the story of Carrie Williams’ case. In the final act of the play Ms. Williams pays an imagined visit to an 85-year-old J.R. Clifford in his Martinsburg, West Virginia home where they discuss the ramifications of the case. The play—the script of which is available on the Project’s website—has been performed around the State of West Virginia. Mr. Rodd also authored *Stories from West Virginia’s Civil Rights History*, published in 2015 by Quarrier Press, copies of which are distributed at no cost to classroom teachers.

In 2013, with the support of the J.R. Clifford Project, an historical marker was placed in front of the courthouse in Parsons, West Virginia to commemorate the *Williams* case. That marker reads as follows:

Williams v. Board of Education

In 1892, Coketon Colored School teacher Carrie Williams sued the local school board for equal pay. She was represented by the first African American lawyer in WV, J.R. Clifford, in front of Judge Hoke. Local jury found for her and she won appeal at WV Supreme Court. This early civil rights case affirmed equal school terms for African Americans in WV.

A second historical marker has been placed at the site of the former Coketon Colored School.

The papers of the J.R. Clifford Project are held by the Archives of the West Virginia University College of Law. They are currently in offsite storage while the law building is undergoing renovations.
John William Wallace (February 17, 1815-January 12, 1884): An Appreciation Upon the Two Hundredth Anniversary of His Birth

Joel Fishman, Ph.D.*

In 2015 we celebrated the two hundredth anniversary of the birth of John William Wallace—librarian, court reporter, historian—who was born February 17, 1815 in Philadelphia and died on January 12, 1884. Known mostly as a reporter for the U.S. Supreme Court, this short biography tries to expand on some of the other accomplishments of his life. He was the son of John Bradford Wallace and Susan Binney, sister of the eminent Philadelphia lawyer, Horace Binney and descendant of the two famous printers in Pennsylvania, two William Bradfords in colonial Pennsylvania. Wallace studied law in his father’s office and John Sergeant. He was admitted to the District Court of Philadelphia on October 27, 1836 and on the motion of William M. Meredith, to the Philadelphia bar on January 30, 1837. He then went to Europe for three years where he met several of the leading English jurists—Lord Chief Justice Campbell, Lord Chief Baron Pollock, and Sir Fitzroy Kelly—that he corresponded with over the years.

He did not practice law as a livelihood because he inherited a large amount of money from his father. Henry Flander later wrote: “Mr. Wallace never actively engaged in the practice of his profession. His tastes did not incline him to the conflicts of the forum, and his circumstances did not compel him to engage in them. To most members of the profession the law is “a service and a livelihood; to Mr. Wallace it was an abstract and liberal pursuit.”

Wallace served as the librarian (1841 to December 1860) and treasurer (1841-1864) of the Law Association of Philadelphia. He published a catalog of the library the following year of obtaining his job. The published library catalogs, however, do not give a count of books in the library. But we know that between 1828 and 1865, the collection grew from 1,069 to nearly 6,000 for 1865. He resigned his office in December 1860 when the Socie-

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ty received additional revenue from a new state tax used by the library and the “demands upon the librarian for more attention and a broader administration of its affairs.” As treasurer, he in September 1861, Wallace thought the library cost more than $15,000 for insurance purposes. Shortly after that, in March 1862, Wallace told the library board that he had found the original charter of the Law Association that had been given to him several years earlier by Benjamin Tilghman and he now turned it over to the Association.

Chief Justice John T. Mitchell, in his historical address celebrating the centennial anniversary of the Law Association, commented upon Asa Fish’s and Wallace’s roles in the Association:

Any account, however, brief, of the Law Association would be incomplete and ungrateful if it failed to make special mention of the services of two men to whom, more than to any others in its history, it is indebted—John William Wallace and Asa I. Fish. For nearly forty years, together and in succession as librarian and treasurer they gave the association, and particularly the library, that close, steady, intelligent person attention without which it could hardly have continued to exist, certainly not to prosper. A hard working and very busy bar troubled themselves little about the needs of the association. A good library had always been at their service and they expected it to continue so, with out apparent thought of the necessity of their own help beyond the payment of their annual dues. Fortunately the association had in its librarian and its treasurer, two who had deeper and more practical insights into its necessities, and a general willingness to meet them. Through times of apathy and discouragement they never lost heart, kept on to assured success.”

Mitchell further praised both men for their ability to ante up money to purchase books if they became available and wait to be paid back once funding was available.

In addition to serving as librarian and treasurer of the Law Association, Wallace began in the 1840s to contribute to legal literature. Following the passage of the Bankruptcy Act of 1841 (5 Stat. 440), he compiled the first collection of bankruptcy cases published in the United States that were printed serially in the first volume of the newly-published Pennsylvania Law Journal. Taking the bankruptcy cases of Judge Archibald Randall of the United States District Court for the Eastern District of Pennsyl-
vania, Wallace added headnotes and published them over five issues.

In 1844, Wallace wrote *The Reporters, Chronologically Arranged: With Occasional Remarks Upon Their Respective Merits*, published in the *American Law Magazine*. Cohen follows others in attributing this work as his major writing contribution to legal literature besides his role as a reporter for the United States Supreme Court. Gerald Dunne described the work as a “towering tour de force of scholarship, [which] firmly established Wallace’s reputation, and rightly so in view of its remarkable combination of solid research and lively style.” This work was republished in three editions in 1845, 1855, and 1884. The number of pages increased from 103 in the 1845 bound volume to 424 pages in the 1855 edition, and 654 pages in the fourth revised edition in 1882, under the superintendence of his friend Franklin Fiske Heard.

Wallace’s second position as a reporter started in 1849 when he published the first volume of reports of the United States Court of Appeals for the Third Circuit, *Cases Reported in the Third Circuit* contain cases from 1842 to 1862. The circuit court was organized back in 1802 and was both a trial court and appellate court under the legislation; it would not be until 1891 that the current U. S. Court of Appeals as an appellate court took place. The justices who were reported in these cases include the two Supreme Court Justices, Henry Baldwin and Robert Grier Cooper, and District Judge John K. Kane. There were 114 cases reported in the three volumes.

The first volume covers from April 1842 to October 1849. In his preface, Wallace states that Justice Baldwin asked him to undertake this venture. Baldwin’s illness and subsequent death in 1844, the failure to appoint a new Supreme Court justice until 1845, and the time it took for newly-appointed judges to restore the court led to the long delay in publishing volume 1. Volume 1 in addition to the reports contained rules adopted by the circuit in 1849, and two appendixes. The first one was a case from 1801 cited in a later case, and in an extended appendix contains the arbitration dealing with the Pea Patch Island Case. This case was a dispute between New Jersey and Delaware with the United States over an island in the middle of the Delaware River that had accreted in size to 45 acres. All parties agreed to the selection of John Sergeant, one of the eminent leaders of the Philadelphia bar, to be the sole arbitrator in the case, who settled the arbitration in favor of the United States.
Wallace published volume 2 of his Reports of the Circuit Court for the Third Circuit in 1854 covering the period from April Session 1850 to November Session 1853. One reviewer stated that “[t]his volume owes much of its value to the industry and learning of the Reporter.” He went on to praise the points reported, the statements are prepared with care, citations are verified, summing up that the “Reporter has spared neither pains, labor nor expense to give the profession a truly useful book...” He commended it “to all of our professional brethren, both home and abroad, as a volume which will (a rare thing certainly in law books) at once gratify the taste of the fastidious scholar, and instruct and enlighten the dryest, hard working, practical every day legal laborer.”

Wallace did not publish volume three until 1871 covering from October 1854 to April 1862. In an appendix, he added an 1829 circuit case, The Seneca, previously unpublished, reversing the case decided by Judge Hopkinson printed in Gilpin’s Reports at page 10.

He also wrote some short historical pieces and edited several different volumes during the 1850s and 1860s. Wallace presented The Want of Uniformity in the Commercial Law between the Different States of our Union,” as the annual address at the Law Academy of Philadelphia in 1851.

Following the death of his older brother, Horace Binney Wallace (February 26, 1817 – December 16, 1852), he assumed his position as an editor of the American edition of John Smith’s A Selection of Leading Cases for the fifth-seventh editions (1855, 1866, and 1873). He presented two addresses on the early printers, William Bradford, An Address Delivered at the Celebration by the New York Historical Society, May 20, 1863, of the Two Hundredth Birth Day of Mr. William Bradford and later wrote An Old Philadelphian, Colonel William Bradford, the Patriot Printer of 1776: Sketches of His Life.

Upon the nomination of Justice Robert Grier, Chief Justice Taney invited him, on the same day of Jeremiah Sullivan Black’s resignation, to serve as court reporter of the United States Supreme Court on March 21, 1864. Wallace acknowledged his private work, but “was gratified, quite unexpectedly to himself, by an invitation from the Supreme Court of the United States, to become the reporter of the decisions of that August tribunal. An invitation thus flattering it was not easy to resist. He repaired with but little
delay, to the seat of Government." Not possessing all of the papers needed, he still succeeded in publishing the first volume on time.

Wallace tried to get advice from the justices, but due to time restraints he could not. He explained in his preface that his method of reporting: “I have taken...the facts by the court, in the opening or narrative parts of the opinion as either the substantive basis or the very form of my own statement, leaving them off in the opinion itself. And I have in every case...presented what is meant to be a complete statement of the case; making such statement the first thing in the report, and a matter separated from both arguments and opinion.”

Beginning in December 1864 term, he abbreviated the titles of cases heard by the Supreme Court, and “occasionally” providing the arguments at some length.”

The publishers of the first two volumes of U. S. Reports, W. H. and O. H. Morrison, were highly impressed with Wallace:

The reporter’s pen, once held by accomplished Wheaton, has thus passed into the hands of a gentleman, who, like that of his predecessor, is peculiarly qualified by special studies, tastes and acquirements, to illustrate the jurisprudence of our great national tribunal....The publishers believe that the expectations entertained by the profession of when Mr. Wallace was called by the Judges to the reportership, have been realized in the volumes already before it. They are not the result of mere mechanical compilation, but the work of an accomplished author, who has faithfully labored to make the reporter’s art contribute to the advancement of legal science, illustrate, with best effect, the wisdom, learning, and ability of the court whose judgments he records, and enable lawyer and student to consult and use the adjudications with the utmost facility, convenience and pleasure.

But after publishing three volumes, reviewers were not pleased with the reports. In the American Law Review, the reviewers charged him “with inexcusable prolixity in his statements of facts and reports of arguments,” the length of his statement of the case, and the need for conciseness, the construction of his headnotes, that led them to the conclusion that Wallace should either “cease to be reporter” or make “an entire change in his theory and practice of reporting.”
Yet, Chief Justice Mitchell commented that “notwithstanding some criticisms which these qualities have called forth, his reports are among the very best that we have. He had made a profound study, through the best English models, of the art and practice of law reporting, and had a fixed and intelligent theory on the subject; he understood the cases he reported, and his syllabus, though sometimes diffuse, never missed the point of the decision.” Cohen and others have cited the memorial contributed by in the U.S. Reports: “[A]lthough his tastes inclined him rather to the studies of the closet than the contests of the forum–tastes which his ample means enabled him to gratify–yet through all his life, from first to last, he was a worker–not a dilettante legal tri-fler, but an earnest, accomplished and useful worker.” Wallace resigned his position on October 9, 1875.

As President of the Historical Society of Pennsylvania for almost sixteen years (April 13, 1868-January 12, 1884), a variety of events and affairs took place. Wallace was selected based on the needs of the Society and for a man in good health, with sufficient means and background to justify his selection. Carson wrote:

A man was needed in the prime of life, in comfortable circumstances, free from the distractions of active professional work, yet withal a man of affairs and influence, with a decided bent towards history, of literary abilities, but with experience in addressing audiences, zealous and ardent, capable of directing the labors of others and of inspiring in them enthusiastic performance, a president with a clear vision of an attainable goal, of persistent energy and of persuasive tact–in short a true leader and not a mere placeholder.

Upon the death of Dr. George Fahnestock in late 1869, the doctor willed a collection of 70,000 pamphlets to the Society. This collection was housed in the new Picture Building, at 820 Spruce Street, that the Society has recently purchased and which opened on March 11, 1872. In his inaugural address Wallace summed up some of the achievements of the Society:

We have 600 members; a library of 12,000 volumes; a collection of nearly 80,000 pamphlets, of which 70,000, the bequest of Fahnestock,... a gallery of 65 portraits, and of 12 historical pictures; numerous engravings; and manuscripts–I may say innumerable–including the collection of William Penn and of several of his descendants at Stoke, in England; recently presented to us by some of our liberal members, who had secured them at a price of
$4000. Our building fund amounts to $12,775; our publication fund to $17,000; our binding fund to $3500; our life membership fund to $4700.

His speech continued on the history of the Society and the need to write a history of the colony and pleaded for the restoration of Independence Hall.

Following the inaugural, the Society wrote to the “venerable” Horace Binney, aged 92, formally inviting him to become a member of the Society to which Binney graciously accepted the invitation and said he would attend once “his health and weather will permit.”

On June 13, 1870 the Society voted to create a committee, including Wallace, to meet with city officials and other societies to help plan for the centennial anniversary of American independence. Congress passed an act of March 3, 1871 authorizing a Centennial Commission. Carson lauded the work of Henry Armitt Brown, as the orator of the era, for his contributions in support of the centennial.

In 1876, Wallace gave a welcoming introduction to leaders of major libraries throughout the country who attended the Centennial Exposition in Philadelphia to organize the American Library Association. They met October 6-8, 1876 at the Historical Society of Pennsylvania where Wallace, as President, welcomed them to the Society. In attendance were 90 men and 13 women, among them Justin Winsor (Boston Public, Harvard), selected as President; A. R. Spofford (Library of Congress), James Yates of Leeds; William Frederick Poole (Chicago Public Library, Newberry), Lloyd P. Smith (Library Company of Philadelphia) were chosen as vice-presidents; and Melvin Dewey (Amherst College Library) and Reuben A. Guild (Brown University) as secretaries. Attendees came from as far west as Chicago and from England.

Two major purchases were acquired during the 1870s. The Society obtained through purchase by B. F. Stevens and John Jordan original William Penn documents numbering over 20,000 items, and included original Penn documents including the Charter and of Government from the early years of the colony. It also received $59,552.22 as well as a 17,000 volume library (mostly of classical books that did not contain books of Americana or Pennsylvaniana) from the estate of Henry Gilpin. Gilpin was the reporter of Gilpin’s Reports, government director of the Second Bank of the United States, Solicitor of the Treasury, Attorney-General of the
United States, plaintiff’s attorney in the Amistad Case of 1841). A legal controversy occurred over this gift, but eventually the Society obtained additional books and set up a Gilpin Trust.

Under Wallace’s administration, the publications of the Society continued the Memoirs of the Society, publishing volumes IX and X entitled The Correspondence between William Penn and James Logan (1870-72), volume XI entitled A History of New Sweden (1874), volume XII entitled History, Manners and Customs of the Indian Nations Who Once Inhabited Pennsylvania and the Neighboring States.... (1876). Also the Historical Map of Pennsylvania was published in 1875.

Carson attributed the first seven volumes of the Pennsylvania Magazine of History and Biography to the Wallace Administration and the editorship of Frederick Stone. Volume 1 began in 1877 and had more than 26,000 pages in fifty-three years. The Society contributed a “Centennial Collection” of the signers of the Declaration of Independence and others added sketches of officers of the Continental line, generals of the militia, diaries of contemporaries living in Philadelphia, and members of the Constitutional Convention of 1776. Other articles specifically mentioned dealt with a history of the Swedish settlements, the Records of Burials at Christ Church, Germantown Road, Thomas Wharton and his descendants, and notably two legal papers Lawrence Lewis’s “The Courts of Pennsylvania in the Seventeenth Century”(5:141) and “Edward Shippen, Chief Justice of Pennsylvania.” (7:11). In 1880, Wallace wrote an article, “Early Printing in Philadelphia.”

Finally, Carson related the passage of the act of April 18, 1873 providing “A Supplement to the Charter of the Historical Society of Pennsylvania altering and amending the same” that was accepted by the Society on March 4, 1874 and resulting in revised by-laws adopted March 9, 1874 and amended in January 3, 1876.

Carson then presented other events in the succeeding years. The city of Philadelphia’s plan to erect a statute of William Penn, brought a committee of the Society, led by George Harrison Fisher to describe Penn’s dress. This was followed by the first address given by the state’s governor before the Society, Henry Hoyt’s “A Brief of a Title in the Seventeen Townships in the County of Luzerne: a Syllabus of the Controversy between Connecticut and Pennsylvania.” In March, 1880, the Society received a portrait presentation of Civil War General John F. Reynolds, received cop-
ies of The Taylor Family from England, and The Whitney Family, and the library of George Brinley of Hartford, Connecticut. Among these works were works printed by the first three printers in Pennsylvania: William Bradford, Renier Jansen, and Samuel Keimer. Between 1881-1883, additional purchases included the first full printing of statutory law, Andrew Bradford’s Laws of Province of Pennsylvania (1714) and Zenger’s Trial (1737), and the German pamphlet file collection of Abraham H. Cassel.

Wallace last spoke at the Society’s dinner celebrating the two hundredth anniversary of William Penn’s arrival to Pennsylvania on November 8, 1882. The final achievement under Wallace’s administration was the purchase of the Patterson Mansion (1873-1905) that replaced the Picture Mansion (1872-73) as the home of the Society.

Carson was thankful for Wallace’s assistance to him when he was a young editor. He observed:

As a presiding officer, he was ever attentive and ready with apt words of acknowledgment of serving efforts. As a toast-master he was happy in his introductions, with a flavor of scholarship, unsuspicious of its quaintness, but never offending good taste by pendency or loquaciousness. As a speaker, he was nervous and excitable, with a high and penetrating voice, but never rapid to be inarticulate or too shrill to be irritating.

Carson also praised Wallace for his eloquence in praising the Historical Society of Pennsylvania:

Our Society, therefore, is showing to every Philadelphian wherefore and wherein he should value his birthright, teaches him that which it ought to teach. In collecting here, and seeking to preserve in influence and honour—in collecting and preserving all can see them, and each derive from the sight a virtuous strength—the names, the deeds, the fame of such men as I have referred to—provincial, revolutionary, republican alike—the Historical Society of Pennsylvania performs a high and serviceable, and patriotic office to the city, to the state and to the nation.

Our Society is not founded in the tastes of antiquaries, but in the philosophy of statesmanship.

In conclusion, John Wallace contributed to the legal profession of his day significantly in several different pursuits. He will be best
known as one of the Reporters of the United States Supreme Court, but his other contributions as law librarian of the Law Association of Philadelphia and President of the Historical Society of Pennsylvania cannot be forgotten. It is important that we remember these people who contributed so much to the library and legal fields in which we work.
The Outer Limits of Legal Ephemera: Finding Legal History in the Oddest Places

Kurt X. Metzmeier*

The slightest objects for the collector of the printed word are ephemera, minor items of print that are “not meant to have lasting value.” Ephemera come in all types, including those pieces related to the practice of law. Traditionally, the collectors of legal ephemera preferred handwritten legal documents like deeds, leases, contracts, and charters. There is hardly a law library that doesn’t have some old framed Latin sheepskin indentures on a wall (or hidden away in some closet if they have a dean that prefers more modern décor). Other popular print ephemera are broadside editions of English laws, printed dockets and briefs, and engravings of judicial portraits and courtroom scenes. But given that law in America is, as Alexis De Tocqueville noted in 1831, part of the “vulgar tongue” penetrating “into the bosom of society,” popular depictions of the law, in all its variety, are also collectable. Legal historian Michael H. Hoeflich’s The Law in Postcards & Ephemera 1890-1962 reveals a selection of such items drawn from his own excellent collection. However, the discerning eye can find the legal angle in all kinds of items. This short article will extract the legal history residing in some for unlikely printed objects: Congressional pass, a piece of campaign literature, and a National Football League trading card.

Item 1: The Future Justice and the Broadway Actress

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This item is a Senate chamber gallery pass issued by Sen. Hugo Black (D-Ala), a future senator, to a Miss Mary Orr, who may be the future author of a story that became an Oscar-winning movie. These passes are not extremely rare, as they were issued frequently and most, including this one, had a stamped signature, not an autograph. Nonetheless, like all historical artifacts they are an emotional connection to the past, a tangible, material item held by a real person who was an eyewitness to history.

Besides its association with a justice of the Supreme Court, date of the pass is the most interesting thing about this item. It was issued in April 1, 1937, in the height of the Senate debate over FDR’s ill-fated (and ill-considered) measure to reorganize the U.S. Supreme Court by adding a number of new justices. The so-called “court-packing” plan rocked the political world, raising fears that FDR’s landslide re-election victory in 1936 had spawned dictatorial ambitions in the president.

What is also intriguing is the recipient, a Mary Orr. The most prominent person in that era with that name was a young Broadway actress. The Canton Ohio-born Orr was very intelligent, later becoming a successful playwright and a writer whose first published short story became “All About Eve,” winner of the 1950 Academy Award for best motion picture. In 1937, Orr was still a sought after ingénue actress, but perhaps the drama of the Senate debate inspired her and her party’s visit.

Later in 1937, Senator Black would be appointed by FDR to replace Justice Willis Van Devanter, one of the “Four Horsemen” (the conservative justices who had banded together to oppose progressive ideas throughout the early 20th century) on the U.S. Supreme Court. Black’s brief membership in the Ku Klux Klan in Alabama would make his Senate confirmation rocky, but as a Supreme Court associate justice he proved a reliable supporter of civil rights. Within three years after Black joined the Court, the other three of FDR’s judicial foes were dead or had resigned, and had been replaced by progressives like Black. It seems time had its own reorganization plan.

Item 2: A Forgotten Law School Dean? Thomas R. Gordon and the University of Louisville’s Louis D. Brandeis School of Law
Like many modern educational institutions, the University of Louisville has absorbed the history, alumni and traditions of the many Louisville schools and colleges that it merged with over the years. Among these institutions was the Jefferson School of Law, which was founded in 1905 to provide legal education at night and weekends to working-class Louisvillians, and merged into the current Louis D. Brandeis School of Law in 1950. Its early boosters were attorney Benjamin F. Washer, Judge Shackelford Miller, and, the subject of today’s legal ephemera, Circuit Judge Thomas R. Gordon (1854-1929), who served as the night school’s dean in the late teens and throughout the 1920s (while still managing his full circuit court docket in the day).

Gordon, a Democrat, was first elected to the Jefferson County Circuit Court in 1902 and served in that capacity until his death in 1929. (Until 1975, Kentucky judges ran for office on a party slate alongside governors and congressmen). Gordon’s parents were both born in Georgia, but had settled in Owingsville, Kentucky by the time that young Thomas was born in 1854. I have not yet ascertained details of his early education, but in 1890 he joined with University of Louisville graduate John C. Strother (class of 1869), a Trimble County native, to form the extremely successful partnership, Strother & Gordon. The firm, which was dissolved by necessity upon Gordon’s election, had among its clients such prominent institutions as the Mutual Life Insurance Company of Kentucky and the Louisville Title Company.
After his election in 1902, the voters faithfully returned Gordon to office until 1929, when he died of a stroke, complicated by heart disease. (At this time, death did not prevent a good Democrat from voting; it was, however, a more severe impediment to standing for office). Judge Gordon was buried among his constituents in Cave Hill Cemetery.

The item reproduced is a campaign calling-card of a type widely used in elections in Kentucky during this era. The obverse has a simpler message, using the long-time symbol of the Kentucky Democracy, the proud rooster. In the lever-action voting booths of my youth, this symbol (or the Republican log cabin) marked the switch that you flipped to vote the straight ticket.

Item 3: Judge Alan Page, Tackling the Big Cases

Hall of Fame defensive tackle Alan Page (depicted here in a 1978 trading-card) is (with U.S. Supreme Court Justice Byron “Whizzer” White) perhaps one of the two great “two-sport” (football and law) players to ride a judicial bench. White may have reached a higher pinnacle (for now), but the Colorado-born running back’s three NFL seasons cannot compare with Page’s reign as one of the greatest defensive players of all-time.

Page began his career winning a national championship ring in 1966 for Notre Dame. He anchored the Minnesota Vikings famed
“Purple-People Eaters” defense in the 1970s, in 1971 becoming the first defensive player to be named as MVP. He was voted to nine consecutive Pro Bowls, 1969-1977 and in 1988 the Canton native joined the Football Hall of Fame.

At the same time he was flattening offensive backs in the autumn, he was attending law school in the spring. The reverse of Page's 1978 card highlights this fact, depicting him as a “generic” (i.e. white) football star proudly holding an oversized book of “Law.” (This is the book that many pro se litigants are convinced that we law librarians are withholding). In 1978, Page graduated University of Minnesota Law School and joined the law firm of Lindquist and Vennum (working as a lawyer in his off-seasons until his retirement from football in 1981). In 1992, Page was appointed as Associate Justice of the Minnesota Supreme Court, becoming the first African-American to join the state's high court. He has been repeatedly re-elected, most recently in 2010. In 2008, Page was asked to choose the three-judge panel deciding the election dispute involving Minnesota's U.S. Senate seat. Page has been suggested (at least by bloggers) as a possible appointee to the U.S. Supreme Court.

Judge Page is also a collector of ephemera himself. When PBS' Antiques Roadshow visited Minnesota in 2012, Page showed up with a banner mourning the death of Abraham Lincoln and in 2007 revealed that he was a collector of African-American and Jim Crow-related memorabilia.
Concluding Remarks

With the outsized role of the Supreme Court in American social and political culture and lawyers showing up everywhere from American sports to reality shows (recall for a moment that the O.J. Simpson murder trial is linked to the most popular show on the E! network by a lawyer named Robert Kardashian), legal ephemera can be any type of printed object. So, a "Notorious R.G.B" playing card featuring Associate Justice Ruth Bader Ginsburg or a 2000 ballot from Florida (complete with "dimpled chad") all could be valuable legal collectibles. All the item has to do is to serve as a ticket that brings whoever holds it just bit closer to a person or an event in legal history. Of course, the right ticket is ephemera, too. Perhaps a torn stub for one of Whizzer White’s 1940 Detroit Lions games ...
An Analysis of the Joseph Story Collection at Southern Illinois University Law Library

Douglas W. Lind*

Established in 1972, the Southern Illinois School of Law began with a surprisingly rich library collection, the foundation of which was built with the purchase of a large portion of the Chicago Bar Association library and the law items transferred from the main university library which dates from 1874. In 1985, the collection gained additional breadth and depth through a donation of almost one hundred and fifty volumes from the Illinois Fifth Appellate Court located in Mount Vernon, Illinois. This gift contained not only early American treatises, but an extensive collection of early English common law reports, spanning the seventeenth through nineteenth centuries. Those from the 1600s were described and recorded by SIU catalog librarian Elizabeth Matthews soon thereafter and published in a book now held by most academic law libraries but, for the most part, the items were boxed, stored, and forgotten for thirty years. But a recent inventory and shifting project of the library’s rare books room revealed an exciting discovery. Several items in that collection bear the signature of Joseph Story, and other evidence suggests the entire gift was part of Justice Story’s personal library.2

This discovery presents a number of fascinating bibliographic questions. How do we know the signatures are those of Joseph Story? What about other books in the gift collection – although unsigned, can we also associate these with Story? Why did an Illinois state appellate court own such an extensive collection of early English law reports and, if indeed they belonged to Justice Story, how, when and why did the court acquire them? Finally, what importance do such books hold for an academic law library?

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1 Elizabeth W. Matthews, Seventeenth Century English Law Reports in Folio: Description of Selected Imprints (Buffalo: W.S. Hein, 1986).

2 For an interesting discussion of serendipity in the historical research process, see Michael H. Hoeflich, Serendipity in the Stacks, Fortuity in the Archives 99 Law Lib. J. 813 (2007).
As with research about historical books, the lack of living witnesses requires a forensic examination of the textual artifacts to answer such bibliographic questions. In this instance, the questions were addressed through evidentiary protocol (evidence, inference, argument and omission) applied to the collection as a whole as well as a single Story-signed item. Chosen for examination was the first American edition of *Yelverton’s Reports*, printed in Andover, Massachusetts, in 1820.³

The principal task of verifying Story’s signature was relatively straightforward. It appears almost identical to the signature beneath his engraved portrait on the frontispiece of the two volume biography produced by his son.⁴ In addition to the many images found freely online, particularly the *Joseph Story Digital Suite* at Harvard Law Library,⁵ we examined and compared several books and letters in the Yale Law Library collection containing Story’s writing and signatures. Not only are all signatures quite similar to the one found in SIU’s *Yelverton*, all books examined have Story’s signature in the same location: the upper right hand corner of either the title page or front free end page.

The imprint date and location of Andover may seem immaterial but in fact they do offer some corroboration. It is important to understand that books printed in the United States until the mid-1800s tended to remain regional. Books printed in Boston, or Philadelphia, or New York, tended to remain around those metropolitan areas. There are several market and cross cultural reasons at play, but primary reason for the locality of printing and book migration derives from the simple fact that until 1851, books were not allowed to be sent through the U. S. Post Office.⁶ Applied to the copy of *Yelverton*, it is well recorded that in 1820 Story was dividing his time between Washington, D.C. and Salem, Massachusetts. The title would be of obvious interest to him and

³ Henry Yelverton, and Theron Metcalf, The Reports of Sir Henry Yelverton, Knight and Baronet ... Of Divers Special Cases in the Court of King’s Bench (Andover [Mass.]: Printed by Flagg and Gould, 1820).
⁴ William Wetmore Story, Life and Letters of Joseph Story, Associate Justice of the Supreme Court of the United States, and Dane Professor of Law at Harvard University 2 vol. (Boston: C.C. Little and J. Brown, 1851).
⁵ http://library.law.harvard.edu/suites/story/.
there is no reason to think he would not have the ability and means to purchase it for his personal library. Additionally, many of the nineteenth-century imprints in the Mount Vernon, Illinois gift bear a seller’s label for the New England law publisher and bookseller, T. & J. W. Johnson, which operated in Philadelphia from 1823 through 1865 and produced catalogs for customers throughout the northeast.

To better understand how books from Story’s library have found their way into academic institutions, court libraries, and those of collectors, one must understand the importance of books to Story and how his library was dispersed both during and after his death. It is in understatement to say that Joseph Story was book man. An omnivorous reader at a young age, he was also a legal scholar from early on, preferring analysis to the daily routine of the practice of law. Writing to his friend Thomas Welsh, a twenty-year-old Story explains, “[l]aw I admire as a science; it becomes tedious and embarrassing only when it degenerates into a trade.”

Story’s pursuit of his science was symbiotic with avid collecting and reading of law books. He not only authored several treatises now considered foundational to understanding early American law, he read, collected, and cared for the books in his library. He also was a bit of a librarian, frustrated by the defacing and wear and tear that occurred when he loaned his books to others, but unwilling to deprive them from access to knowledge.

Although it is well known that Story surrounded himself with books throughout his life, when we speak of “Joseph Story’s library,” we should, in fact, think of him as having two libraries – one which was sold in 1829, and another he rebuilt after the 1829 sale, which was dispersed after his death in 1845. As difficult as it is to now imagine, when Story became Dane Professor of Law at Harvard in 1829, the twelve-year-old law school had a very small library collection and students were expected to use the law titles shelved in the main college library. The first Harvard law library catalog, issued in 1826, nine years after funds were first appropriated for a separate collection, shows the law school as holding only 1,326 volumes. When Story arrived, he brought with him his library which was frequently used by students as the school’s primarily collection. In his words, “[t]here was no

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7 Story, supra note 5, v. 1 at 48.
8 Id., at 83.
9 Id., v. 2, at 40.
11 Story, supra note 5, v. 2, at 40.
Law Library, but a few old and imperfect books being there.” In 1829, with the school still relying on the insufficient law titles shelved in the college library, Story grudgingly sold his library to Harvard Law School. The exact number of volumes that Harvard acquired from Story is unknown, but the collection must have been sizable. According to the first and second catalogs of the Harvard Law Library, their collection more than doubled in size between 1826 and 1834 (jumping from 1326 volumes to more than 3500). Story, realizing he would need to replace his personal library, sold rather than donated (as he would have preferred) the collection to the school. Nevertheless, according to his son, Story priced it well below market value so that the school would be able to obtain the entire collection.

Story’s voracity to collect and accumulate did not diminish with the sale to Harvard and he soon began building his second library, the pursuit of which continued for the next seventeen years until his death in 1845. It was then that this second library was disbursed through two public auctions; the first seven months after his death, and the second, ten years later. We are fortunate that throughout the years a cadre of bibliographers, librarians, collectors, and book historians have had the foresight to not only gather and retain seemingly disposable commodities, such as auction catalogs, but to preserve, annotate, and index them for use by future scholars. It is not surprising then that there exists a union list of American book auction catalogs, and indeed there exists an indexed and annotated modern facsimile catalog of the first sale of Justice Story’s library. This sale, held April 3 and 4, 1846, offered almost one thousand titles on a variety of legal and nonlegal topics. It is not known what happened to those titles on an individual basis, but we know that the auction would have generated great interest not only from lawyers but also from collectors and individuals seeking an item belonging to a noted public figure. Although there exists no individual sale records, we do know that some books found their way into institutional collections as one Story-signed item found at Yale Law Li-

12 Id. at 532.
13 Arnold, supra note 11, at 17.
14 Id.
15 Story, supra note 5, v. 2, at 40-41.
17 Michael H. Hoeflich & Karen S. Beck. The 1846 Auction Catalogue of Joseph Story’s Library (Austin: Jamail Center for Legal Research, University of Texas at Austin, 2004).
library bears the penciled inscription, “Purchased at the sale of Judge Story’s Library April 4, 1846.”

Those attending the 1846 sale likely believed that they were vying for the Justice’s entire library, yet ten years later hundreds more titles from Story’s library appeared on the auction block. As with the 1846 sale, it was held in Boston and a catalog was issued. Although not subsequently reproduced and annotated like the 1846 catalog, there does exist a single extant copy of this 1856 sale catalog at Harvard’s Houghton Library. Described by the auction house as the “Select and Most Valuable Portion of the Law Library of the Late Judge Story,” the catalog lists 564 titles (mostly law reports) and “[a]bout 100 volumes not enumerated.” It is not known why these titles were not sold at the prior auction or where these books had been hiding during the intervening years. Michael Hoeflich in his introduction to the reissue of the 1846 catalog suggests they might be remainders, unsold from the prior auction, but an examination of the two sales reveals little overlap in the titles offered. It seems more likely that, as Hoeflich also suggests, it was perhaps the last of the father’s belongings to be sold off by the son, William Wetmore Story, as he prepared to leave the country to pursue a life of letters in Rome. A physical examination of the volumes donated to SIU show them to be in fair condition at best. If their present condition was not a result of heavy use while housed at the Illinois court library but rather the condition they were in when sold, perhaps they were held back from the first auction because they were considered to be of marginal auction value and would garner little in commissions as well as detract from the trophy volumes offered in 1846.

Applying the foregoing evidence to the Southern Illinois University collection, the Story–signed titles clearly derive from this second

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18 The compleat clerk, containing the best forms of all sorts of presidents, for conveyances and assurances, and other instruments now in use and practice: with the forms of bills, pleadings and answers in chancery, as they were penned and perfected by eminent lawyers, and great conveyancers, both ancient and modern: whereunto are added divers presidents ...: with alphabetical tables of the whole contents of the said book (London: Printed by G. Sawbridge, T. Roycroft, and W. Rawlins, 1677).
19 Valuable Law Library: Catalogue of the Select and Most Valuable Portion of the Law Library of the Late Judge Story ... To Be Sold by Action, on Tuesday and Wednesday, February 19 and 20, 1856 (Boston: Printed by Alfred Mudge & Son, 1856).
20 Hoeflich and Beck, supra note 18, at 9.
21 Id.
sale. They bear the Justice’s signature, they are listed in the 1856 auction catalog, and they do not appear in the prior sale listing. But what about the remaining titles in the gift collection? Many of the unsigned items are also listed in the 1856 catalog. Can we infer that these too were part of Story’s library? Fortunately, although an inventory of the gift does not appear to have survived, the volumes have been retained as a discrete collection and not integrated with the other common law reports held by SIU. Additionally, each item bears an “Illinois Law Library” brand on the spine, and all of the reports volumes were measured for and fitted with acid free boxes and shelved together in single location.22

One might argue that this is rather thin evidence upon which to associate the unsigned volumes to Story via the 1856 sale, but an examination of the 1846 sale catalog reveals that Story was neither systematic nor thorough when signing items in his personal library. Of the 597 titles listed for that sale, only 289, or 48 percent, are noted as “autographed.” Unfortunately, Leonard & Company, the auctioneers responsible for the 1856 sale, did not annotate their catalog as Phillips & Sampson did for that earlier sale. Nevertheless, because Story was not a methodical autographer of his library books, it strengthens the conclusion that the SIU titles which are unsigned but listed in the auction catalog were also purchased at the auction.

Addressing the remaining volumes in the gift collection – those that are unsigned and not listed in the sale catalog - might we also associate these with Story? It is important to recall the auctioneers’ note regarding “[a]bout 100 volumes not enumerated.” Why were they not listed? Surely it would be in the interest of the auctioneers, who were to receive a percentage of the sale or at least a commission, to take the small amount of effort needed to provide a brief title, imprint location, and date. Quite possibly these hundred or so were omitted because of undesirable condition and may have been intended to be sold en masse or as lots rather than individually. Indeed, most of the “unlisted” titles in the SIU gift collection are in rather coarse condition with detached boards, missing portions of spines, and loose signatures.

Although today it is difficult to fathom why any seventeenth-century title might be considered marginal and not worth the effort to list in an auction catalog, it is important to remember that the 1856 market value of those items was not great. An examination of T. & J. W. Johnson’s 1857 sale catalog reveals that the market preference was clearly for current American treatises, not the older English reports. For example, Joseph Story’s sixth edi-

22 Matthews, supra note 2 at 1.
tion of *Commentaries on Equity Jurisprudence* (Boston, 1853) was offered at eleven dollars while a 1682 London folio edition of *Popham’s Reports* fetched only one dollar and fifty cents. Given the lack of market interest in early English reports and the probable deteriorated condition of the items, it is likely that most, if not all, of the “100 items not enumerated” were early English reports in poor condition. It then can also be assumed that these titles would be offered as a lot or a series of small lots and could be obtained for a small price.

Having established that at least some, if not all, of the items in the SIU collection are indeed from Story’s personal library, it remains to be discussed how the books journeyed westward and how they became a part of a state appellate court library. To answer this, one needs first to understand a bit of Illinois court history. The appellate court building in Mount Vernon from which the Story collection was donated, was not always an appellate court. In fact, until 1877 there was no intermediate appellate court in Illinois—circuit court decisions were appealed directly to the Supreme Court in Springfield. By the mid-nineteenth century it became impractical to have all statewide appeals heard in a single location. In 1848, the newly ratified Illinois Constitution divided the state into three divisions to which circuit court cases were directly appealed and to which the Supreme Court travelled during designated terms. The First Division heard cases arising out of circuit courts in the southern portion of the state and was located in Mount Vernon. The Illinois Supreme Court met there and heard arguments from 1848 to 1897. In furtherance of the constitutional provision, the Illinois General Assembly passed an act authorizing funds to purchase law books for use at that location. The budget for the purchase of books was five hundred dollars annually which was later increased to one thousand.

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25 *Laws of the State of Illinois, passed at the first session of the sixteenth general assembly*, “An act to authorize the purchase of books for the use of the Supreme Court” (Springfield: Charles H. Lanphier, 1849), 57.

26 *Laws of the State of Illinois, passed by the sixteenth general assembly at the second session* “An act to authorize the purchase of
This collection, though, lived a somewhat transitory life until 1856. Six years after the constitutional edict, the Illinois Supreme Court still did not have its own quarters in Mount Vernon, and held sessions at the city’s Odd Fellows Hall until 1852 and then at the local Masonic Hall. The funds to build the courthouse and a “library room” were finally authorized in 1854.

Unfortunately it is not possible to positively tie the auction sale directly to the Supreme Court library at Mount Vernon. A shelf list of the appellate court’s library printed in 1935 contains those titles given to SIU, so we know that the court acquired them before that date, but that is about all that can definitively be shown. There exists no record of purchasers for the Story auction, and a haystack search of receipts at the Illinois State Archives would be likely be needleless, as the level of detail for purchases for that period were generally not very detailed. Nevertheless, it seems entirely reasonable and likely that in 1856 the Supreme Court librarian at Mount Vernon with a large budget and a permanent home, charged with building a law collection, and likely using as a model the court library in Springfield, would seek to acquire a collection of early common law reports.

In the mid-nineteenth century, retrospective collection development of out of print materials was not an easy feat, and auctions of the libraries of attorneys or law firms were an effective way of obtaining a large collection of otherwise unavailable law books. Perhaps the Illinois court bid directly or through an agent, or perhaps a reseller purchased a large portion of the sale and quickly resold the items to a growing law library market, which included not only a rising number of new law schools but also the new court building at Mount Vernon. It is likely that the court,

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27 Laws of the State of Illinois, passed by the twentieth general assembly, convened January 25, 1857, “An act authorizing the purchase of law books for the libraries of the Supreme Court” (Springfield: Lanphier & Walker, 1857) 44.
28 Database of Illinois Supreme Court Terms and Locations, in possession of Illinois Supreme Court Historic Preservation Commission, Springfield, IL
29 Laws of the State of Illinois, passed by the eighteenth general assembly at its second session, “An act to appoint commissioners to build a court and library room at Mount Vernon, for the use of the Supreme Court” (Springfield: Lanphier & Walker, 1854), 146.
30 Waller M. Buckham, Index of Appellate Court Law Library, Mt. Vernon, Illinois ([Mt. Vernon, Ill.]: [The Court], 1935).
with available funds and shelves to fill, was able to add a great amount of depth to its still growing collection relatively easily through the 1856 Story library auction.

So what can we conclude from all of this? In 1856, the court in Mount Vernon, Illinois had the funding, a legislative directive, and a permanent location to retrospectively build and house a law library for the state Supreme Court to access during its First Division terms. In that same year, an opportunity arose to purchase a large number of law titles (including early English reports) which certainly fit the needs of the court. Because unsigned volumes from Story’s library would not be desirable to the contemporary collector, and even less so if they were in poor condition, we can reasonably assume that many of the items were within the reach of the Illinois Supreme Court without much competition. Given the presence in the SIU/Mount Vernon collection of Story-signed items, the number of titles which appear in the auction catalog, and the existence of the Philadelphia bookseller’s labels, the physical evidence suggests that it is likely the Illinois court, on its own or through an agent or reseller, acquired a large number of volumes from this sale.

Finally, regarding the importance of this find, on one level, as trophy or museum pieces, it is nice for a small regional law school to claim ownership of items owned by an eminent American legal scholar and the signed items provide students with a tactile connection to the history they are tasked with learning. On a broader level, even though bibliographic work often results in questions being presented but not fully answered, what is gained through such analysis is a broader understanding of objects in their contemporary context and how they are thereby given meaning. The recording of these processes and their results, as has been done here, has the effect of presenting new opportunities for further analysis and scholarship by bibliographers, book historians, and legal scholars.

The author would like to thank the following individuals who, without their generous assistance and advice, this article would not have been possible: John Lupton, Executive Director at Illinois Supreme Court Historic Preservation Commission; Karen Beck, Manager, Historical and Special Collections, Harvard Law Library; Michael H. Hoeflich, John H. & John M. Kane Distinguished Professor of Law University of Kansas School of Law; Julie Graves Krishnaswami, Head of Research Instruction & Lecturer in Legal Research, Yale Law Library; and Mike Widener, Rare Book Librarian and Lecturer in Legal Research, Yale Law Library.
Books reviewed in this issue:

Ernst, Daniel R. *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900-1940.*


Klerman, Daniel (Ed.). *Economics of Legal History.*


O’Connor, Sharon Hamby, and Mary Sarah Bilder, with the assistance of Charles Donahue, Jr., comps. *Appeals to the Privy Council From the American Colonies: An Annotated Catalogue.*


Urofsky, Melvin I. *Dissent and the Supreme Court: Its Role in the Court’s History and the Nation’s Constitutional Dialogue.*

Verskin, Alan. *Islamic Law and the Crisis of the Reconquista: The Debate on the Status of Muslim Communities in Christendom.*

*Tocqueville’s Nightmare* is an intellectual legal history that focuses on the history of legal intellectuals. The general story told by Daniel Ernst is a history of the American administrative state from 1910-1940. This general story is generated by particular stories, stories that involve an intense study of the work of a relatively few lawmen. For American legal historians, and for at least some lawyers, these men remain well known: Charles Evans Hughes, a New York lawyer and twice a member of the Supreme Court (first as an Associate Justice (1910-1916) and later as Chief Justice (1930-1941)), Felix Frankfurter, Professor at Harvard Law School during the time of this study (he later served as Associate Justice of the Supreme Court), Roscoe Pound, Dean of the Harvard Law School from 1916-1936, and Jerome Frank, a lawyer tied to Franklin Delano Roosevelt’s New Deal and one of the prominent figures of American legal realism. Ernst also discusses the work of Ernst Freund, an emigrant from Germany and legal academic whose approach to the administrative state (the German *Rechtsstaat*) was rejected in favor of a particularly American model. Ernst’s history of legal intellectuals may be intuited by the titles of his five numbered chapters: all but one is named after one of those lawyers listed above.

The theme of Ernst’s book is how American lawyers and American lawmakers accommodated the rise of the administrative state. As Ernst states in his Introduction, Tocqueville praised the American system of government for avoiding an “insufferable despotism.” By 1940, Ernst argues, Americans largely accepted a system of administrative governance. More importantly, that system did not give rise to despotism, but “had confounded Tocqueville’s expectations.” How had it done so? Ernst argues that the American understanding of the rule of law involved “an appeal from government officials to independent, common-law courts.” The wherewithal of Americans to appeal an order or dictate of a government bureaucrat to the neutral and independent courts ensured a government of laws and not of men. Ernst traces the manner in which this understanding of the rule of law was slightly altered. The courts lacked the manpower to oversee bureaucratic governance, but unchecked bureaucratic governance might generate Tocqueville’s nightmare, the tyranny of the majority. To avoid either paralysis or petty tyranny, the American administrative state was given a “legalistic cast.” Legalization was “the key to
understanding the twentieth-century origins of the administrative state in America.” Legalization in part required government commissions to conduct hearings, gather evidence, explain their reasoning, and avoid *ex parte* communications. In general, administrative agencies were required to play fair, to follow generalized court-based notions of due process. Courts continued to oversee the actions of administrators, but “increasingly, court review was procedural rather than substantive.”

Ernst begins with a chapter explaining why Freund’s *Rechtsaat* model was shelved in favor of this American model. He ends in 1940 with an explanation of how a “day in commission” supplanted the traditional “day in court” model in the common law. This relatively short book begins by contrasting the approaches of Freund and Frankfurter, offers two chapters in which Hughes is the central character (first as lawyer and governor, and second as Chief Justice), discusses the failed effort to include an “anti-bureaucracy” clause in New York’s constitution, and ends with the “debate” between Pound and Frank regarding reform of administrative law making.

Part of the value of *Tocqueville’s Nightmare* is found in its explanation of how and why so many lawyers, who were trained and expert in the court-centered common-law model, were willing and ready (despite opposition by other lawyers) by 1940 to accept administrative governance. The shift to administrative governance redirected much of the energy expended by lawyers, but it seems unlikely lawyers accepted the administrative state because it would expand the practice of law. Ernst’s decision to analyze the legal progressives who created the foundation for the modern administrative state in the United States is sound. His pointillist work (the number of archives rummaged about is impressive) takes the reader from the particular to the general, and the result is satisfying overall.

Ernst includes a number of photographs, figures and cartoons. This is uncommon, and a welcome addition. The inclusion of photographs of the protagonists and political cartoons is a nice touch. More importantly, Ernst uses two murals found in the Library of Congress to emphasize the theme of his study. Again, the photographs reinforce the book’s study of the history of legal intellectuals.

One brief complaint concerns the title. *Tocqueville’s Nightmare* is inaccurate, as Ernst acknowledges. He concludes that the American administrative state has been neither Tocqueville’s nightmare nor a cure for the ills of legislative mismanagement or judicial in-
dolence or bias. Possibly the title was intended to grab the indifferent reader. Finally, I enjoyed the historical exegesis. But I doubt this history has much to say to us regarding our present circumstances, particularly disagreements regarding the role of legislative enactments since 2009.

Professor Michael Ariens
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The Old English Canons of Theodore (CT) consists of three edited Anglo Saxon texts—versions of the “penitentials” or manuals of penitence associated with Theodore of Tarsus, Archbishop of Canterbury from AD 669 until his death in 690. Editors Fulk and Jurasinski, both English professors, demonstrate in their introduction that siting and dating Saxon texts is a vexed undertaking. While the scribes who translated CT from Latin originals wrote in the style of the kingdom of Wessex, their work also contains idiomatic expressions that seem to be derived from Anglian prose (pp. xxviii, xxx). Of one scribe, the editors advance the possibility “that although he wrote the standard Late West Saxon literary dialect, he was himself of the Midlands.” (p. xxxv). To add even more complexity, Fulk and Jurasinski compare CT with a near-contemporary penitential, The Scriftboc, declaring that both show “a distinct admixture of apparently Mercian features” (p. xxxvii). Scholars have dated CT to the ninth or tenth centuries, thus identifying it as a product of the vernacular literary/theological movement set in motion by Alfred, king of the West Saxons (AD 871-899) and continued by his descendants. However, Fulk and Jurasinski consider numerous possibilities and (refusing to rule out the possibility of an early origin) date the composition of CT as somewhere between AD 690 and 1025 (pp. xxxvi-xlxi).

From the point of view of linguistic analysis and the deductive (textual) genealogies that flourish when several texts are being compared, the introductory material and detailed commentaries are splendid. Likewise the book contains an informative discussion of English penitential practice and its possible relation to the “Carolingian dichotomy,” a system of penitence by which the “gravest sins were atoned for by a public, ceremonial ‘excommuni- cation’ during Ash Wednesday followed by reconciliation on Maundy Thursday” (pp. lvi-lix). However, invoking Alfred’s reign and the impact of Carolingian practices invites the reader to think historically. And truth to tell, Mssrs. Fulk and Jurasinski make scarcely a nod in the direction of broader historical analysis. There is no discussion of the continental elements of Alfred’s intellectual program—beyond passing references to Benedictine religious reforms and to communications between Alfred and Fulk, Archbishop of Reims (pp. lvi, lx-i). Nor is there any treatment of

1 For “Sources and Background,” for example, see pp. xlii-lv.
the reasons why vernacular translations such as CT would have been especially pleasing to the royal house of Wessex, whose members combined pride in English language and culture with the Carolingian view that religious authority was a functional component of right government.²

Most startling of all, CT contains little biographical information on Theodore or discussions of the milestones of his career. Certainly Fulk and Jurasinski know that Theodore was well known to his younger contemporary Bede (AD 673-735), who was the author of many notable books, including *A History of the English Church and People*. Bede saw Theodore as a cultivated, charismatic man whose teaching (together with that of his associates and students) helped bring about significant advances in Latin culture among the Saxons. In addition Bede shows Theodore at work in synods, notably that of Hertford (AD 673), in which the archbishop emphasized certain canons as particularly important and persuaded an audience of bishops and high-ranking clergy to agree with him. The Hertford canons prescribed celebration of Easter on dates determined by the Roman method of reckoning, replacing the method prevalent among Celtic Christians. The Hertford canons also laid down lines of jurisdiction and authority for bishops and abbots, and mandated laws and regulations regarding marriage and sexual conduct.³

Theodore likewise figures in several passages of the *Anglo-Saxon Chronicle*, itself a product of Alfred’s cultural program. One of Theodore’s *Chronicle* appearances reveals the Archbishop’s participation (AD 675) in a ceremony proclaiming papal confirmation of

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a charter issued by the king of Mercia. The charter had granted lands, privileges, and freedom from taxation or service to the monastery at Medeshamstede. Subsequently, in noting Theodore’s death, one of the scribes who composed the *Chronicle* observed that the archbishop’s passing marked a turning point in post-Roman history: “Before this time the [arch-] bishops had been Roman, but afterwards they were English.” The Roman Empire had fallen; but tenth-century Saxons were still tracking its prestige. ⁴

The most effective way to write a negative review is to describe whatever the target book is *not*, and then denounce the book for not being that. It would be easy to subject Fulk and Jurasiński’s CT to that sort of review. But in truth, the Early English Text Society (EETS) does not publish the type of translated, contextualized texts that the Selden Society produces, and that legal historians have come to expect. Rather, EETS remains true to its nineteenth-century origins. According to its website, EETS was founded in 1864 as a club dedicated to bringing “the mass of unprinted Early English literature within the reach of students,” and likewise to assisting the ongoing labors of what would become the *Oxford English Dictionary*. EETS’ mission to reproduce all manner of medieval writing is much broader than that of the Selden Society, or for that matter of the Stair Society, Ames Foundation, or similar organizations. ⁵ The EETS editors assume that their target audience will be versed in all of the variations of Early English. The Society’s website notes that though its books “normally provide a glossary and notes, no translation is provided.” Operating under these criteria, EETS has published 475 works in three series—an enormous contribution.

It is difficult not to wonder about the impacts church canons may have had on the enforcement of justice. The literature on Alfred the Great’s *Domboc*, for example, makes it clear that the celebrated ruler was deeply influenced by clerical writings on secular

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⁵ The Quotes and information that follow come from the Early English Text Society website (http://users.ox.ac.uk/~eets/). Accessed June 25, 2013.

laws.\textsuperscript{7} The church’s impact upon the largely customary law of the shire moots is less clear.\textsuperscript{8} Still, thanks to Fulk and Jurasiński’s CT, we have access to the thinking of a post-Roman clergyman whose influence shaped the lives of later Englishmen from Northumbria to Kent.

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\textsuperscript{8} For discussion of these questions with regard to royal justice of the post-Norman years, see Frederick Pollock and Frederic William Maitland, \textit{The History of English Law Before the Time of Edward I} (1895; Indianapolis: Liberty Press, [2009]), I: 140-144. And see Maitland’s related work \textit{Roman Canon Law in the Church of England: Six Essays} (London: Methuen & Co., 1898).
Daniel Klerman, the Charles L. and Ramona I. Hilliard Professor of Law and History at the University of Southern California, has compiled a hefty selection of seminal articles on law and economics as a lens through which to examine legal history and history, in general. This mammoth tome is organized in seven parts. Part I is entitled “Dependent Variable: Efficiency and Beyond” and is followed by Part II, “Independent Variable: Women’s and Minority Rights.” Part III is entitled “Independent Variable: The Glorious Revolution,” while Part IV is designated, “Bidirectional Histories: The Reciprocal Interactions of Law and Society. Part V is “Private Ordering, “Part VI is “Litigation and Contracting,” and Part VII, “Critique of the Economic Approach to Legal History,” concludes the text. All told, this volume includes twenty-one articles drawn from scholarship produced over the course of the past fifty years.

Part I, “Dependent Variable: Efficiency and Beyond,” offers four articles principally dealing with property rights. Editor Klerman characterizes “law as dependent variable” as a genre that “tries to explain why societies have the laws they do and why laws change over time. (ix) He also notes that such economic analysis is evolving, moving from an efficiency model to a more inclusive one involving groups and transactions costs. (Id.) Part I includes the following articles: Harold Demsetz’ “Toward a Theory of Property Rights;” Zeynep K. Hansen and Gary D. Libecap’s “The Allocation of Property Rights to Land: US Land Policy and Farm Failure in the Northern Great Plains;” Paul G. Mahoney’s “The Political Economy of the Securities Act of 1933” and the editor’s own “Jurisdictional Competition and the Evolution of the Common Law.” These articles grapple with the notion that legal history can be explained in terms of efficiency. While this paradigm held currency for some time, it has been challenged by new emphases upon interest group theories and the role of legislation in shaping behavior. Klerman’s representative sampling of major scholarship traces the evolution of thought concerning law and economics as explanation of human behavior and the course of legal history.

Part II, “Independent Variable: Women’s and Minority Rights,” provides three articles exploring the complicated relationships between marginalized status, the law, and economic development. Klerman describes the “law as independent variable” approach as an attempt to “look at the effect of law and legal change on human behavior.” (ix) The articles he features as exemplars of this approach are the following: James J. Heckman and Brook S.
Payner’s “Determining the Impact of Federal Antidiscrimination Policy on the Economic Status of Blacks: A Study of South Carolina;” John R. Lott, Jr., and Lawrence W. Kenny’s “Did Women’s Suffrage Change the Size and Scope of Government?;” and Grant Miller’s “Women’s Suffrage, Political Responsiveness, and Child Survival in American History.” Econometrics factor heavily in the “law as independent variable” analysis. These articles argue that significant advances in the law, such as federal antidiscrimination and women’s suffrage legislation, bear an important role in economic development.


Part IV, “Bidirectional Histories: The Reciprocal Interactions of Law and Society,” showcases three articles exemplifying application of the bidirectional approach. The following articles constitute this section of the book: Abner Greif and David D. Laitin’s “A Theory of Endogenous Institutional Change;” Avner Greif’s “History Lessons: The Birth of Impersonal Exchange: The Community Responsibility System and Impartial Justice;” and Claire Priest’s “Creating an American Property Law: Alienability and Its Limits in American History.” The bidirectional method focuses upon the claim that causation is not restricted to one direction alone; it flows both ways. Thus, the effect of law on society works along with the effect of society on law to provide an understanding of legal history and law and economics.

Part V, “Private Ordering,” presents three pieces representing the “private ordering” method of analysis. According to Klerman, “A significant body of historical work investigates the ability of groups to develop norms and practices partly or wholly independent of the state.” As evidenced by the titles of the articles,
whaling, mining and medieval trade are archetypes for the “private ordering” method. The articles are ordered as follows: Robert C. Ellickson’s “A Hypothesis of Wealth-Maximizing Norms: Evidence from the Whaling Industry.” Karen Clay and Gavin Wright’s “Order Without Law? Property Rights during the California Gold Rush;” and Avner Greif’s “Reputation and Coalitions in Medieval Trade: Evidence on the Maghribi Traders.” Klerman asserts: “Writers in this genre tend to argue that law is not as important as it may seem, and groups, especially small groups, can generate effective solutions to social problems without governmental assistance.” (xvi) While the “private ordering” approach remains controversial, it has gained some traction among factions of law and economics scholars.


Finally, Part VII, “Critique of the Economic Approach to Legal History,” proffers a single powerful article to challenge the validity and limits of applying the law and economics lens to explain legal history. Klerman selects Robert W. Gordon’s 1984 Stanford Law Review article, “Critical Legal Histories,” to emphasize the point that there are numerous perspectives and methodologies employed by scholars to understand the complex and inextricably intertwined relationships between and among law, economics and history. According to Klerman, “Robert Gordon criticized legal historians for implicitly or explicitly assuming “evolutionary functionalism,” the idea that there is a process of social development common to most “advanced” or “dynamic” societies, culminating in...liberal-capitalist forms of economic organization,’ and that ‘law and legal institutions are best understood as facilitative technologies that are adaptive responses to social needs and demands resulting from these modernizing processes.” (xix) Gordon proposes, instead, that “legal historians view law and society as ‘mutually constitutive.’” (xx) In other words, law and society cannot properly be viewed as separate categories, since each contributes to the constitution of the other. Part VII is the ideal capstone to Economics of Legal History because it further problematizes an already complicated law and economics approach to understanding legal history and this, in turn, challenges the
reader to examine anew the claims made in the preceding sections of the book.

Ultimately, *Economics of Legal History* is not for the faint-of-heart. Spanning 783 very dense pages, this book delves deeply into law and economics methodologies and their in/ability to fathom legal-historical developments. Readers who are not schooled in econometrics will need to take much on faith because complex mathematical formulae dominate whole sections of the book. Nonetheless, Daniel Kerman does a fine job in assembling articles representing a number of paradigms from the law and economics perspective. Even more importantly, he juxtaposes them in a manner that invites and provokes readers to compare and contrast the relative efficacies—and efficiencies—of each method. Yes, there are significant “transactions costs” in terms of the reader’s time, but, on the whole, this impressive book is a worthy investment for scholars who wish to investigate the possibilities of fruitful application of law and economics techniques as a means of understanding legal history.

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In the seventy years since the end of World War II, the most inhumane laws created by the National Socialist (Nazi) party have been repealed, but other less blatantly offensive laws, such as those concerning marriage and divorce, remain part of the family law system in several European countries. The existence of in-force laws created by the Nazi party might not carry the negative implications one might expect. Only by analyzing the development of family law before, during, and after the reign of the Nazi party can one accurately assess its continuing influence. In *National Socialist Family Law: The Influence of National Socialism on Marriage and Divorce Law in Germany and the Netherlands*, Mariken Lenaerts shows how the current state of family law in these countries has been directly influenced to varying degrees by the laws and regulations created by the Nazi party.

Lenaerts asserts that her book is not merely a recounting of what happened during the Nazi period, but provides a deeper understanding of the essence of law. “…although remembering our past may not prevent evil from happening again, it can help us to develop a better understanding of what happened. And understanding might help us to prevent evil from happening. To me this knowledge justifies another book on the Nazi period, about which so many books have already been written, to help us understand not just what happened during those dark years, but also what the essence of law is: rules that regulate human behavior in order to make life liveable.” (P. 1).

Lenaerts begins by describing the disturbing developments that carried social and scientific thought from Darwin’s theories of evolution to social Darwinism and eugenics. She explains how the Nazi party was able leverage political and economic failures with social Darwinism to create increasingly oppressive family laws. Understanding the scientific and social theories of the 1930’s is necessary to understand Nazi justification for the enactment of racial purity laws. These laws, generally known as the Nuremburg Laws were designed to increase the size and purity of the so-called Aryan race while preventing other races from procreating, or inter-breeding with Aryans.

Lenaerts circles back, chronologically speaking, to discuss the changes in family law in the late 1800’s as well as during the
Weimar Republic in the early 1900’s before analyzing the laws created by the Nazi party in Germany, the laws proposed during the German occupation of the Netherlands, and the police regulations enacted by the Nazi party. This close analysis reveals not only why the laws were developed, but also the many attempts at family law revision which failed. In surprising, but strategic instances, Hitler restrained the party from enacting far more extreme forms of marriage and divorce laws which would have supported the racial purity concepts of the Nazi party.

The laws concerning who should be permitted to marry and under what circumstances divorce should be permitted were of the highest concern for the Nazi party. The Nazi party promoted a society which placed the needs of the community above those of the individual. Under this ideal, the purpose of marriage was to have racially “pure” children to populate and strengthen the Aryan race. The Nuremburg Laws were enacted to institutionalize the racial ideology of the Nazi party. However, German marriage and divorce laws did not contain discriminatory language but were interpreted in light of the Nuremburg Laws. Therefore, when the Nuremburg Laws were repealed after World War II, the German family laws could remain as written. To a great extent, those laws remain in place today.

The goal of family law reform in the Netherlands by the Nazi party was to create laws that mirrored those in Germany, but corrected for unexpected gaps and oversights. To achieve immediate change, Germany was forced, by international law, to enact regulations rather than comprehensive legal reform. As in Germany, the enforcement of these new regulations resulted in systematic genocide. Even after World War II, the Netherlands was slow to modify its family law and only added a no-fault divorce option in 1971.

It probably goes without saying, but bears repeating, that reading a historical, systematic explanation of the development of some of the most shocking events in modern history is no easy task. The Nazi agenda, which began with the scientific principles of the time and progressed to the extermination of individuals asserted to be “hereditarily ill,” or racially impure, as defined by the laws, continues to shock and enrage the reader.

This book is highly recommended to anyone with an interest in the development of family law, past and present. The development of family law in Germany during the Nazi era may seem like an obscure and disturbing topic, but given the daily relevance of governmental control over marriage and divorce, it is both timely and
relevant. Unfortunately, if the reader does not have some language skill with both German and Dutch, some important information will be missed. Although the author faithfully quotes relevant laws, an English translation was not always provided, which may impair the reader’s complete understanding of the author’s analysis. Therefore, with some reservation as to translation issues, this book is recommended to readers interested in a scholarly analysis of family law.

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The digitization of English and American legal primary and secondary sources has received important progress over the past two decades. English caselaw and treatises have been published on Early English Books Online (http://eebo.chadwyck.com/home), Heinonline (http://home.heinonline.org/) (English Reports-Full Reprint, Selden Society publications) and LLMC-Digital (http://www.llmc.com/) with cases and treatises as well. All three are subscription databases available chiefly through university sources. Three free databases are Professor Robert Palmer’s Anglo-American Legal Tradition (AALT) (http://www.aalt.law.uh.edu) consisting of 8.5 million pages of primary source documents of medieval and early modern English legal materials from the National Archives at Kew and British History Online (http://www.british-history.ac.uk/) providing documents from the 1300 to 1800 including the Calendar of State Papers series between sixteenth and eighteenth centuries; and, the Avalon Project at Yale Law Library (http://avalon.law.yale.edu) providing documents in law, history, and diplomacy over the centuries.

Given this interest in English and American legal history, the Ames Foundation (http://amesfoundation.law.harvard.edu) has now sponsored the second title of an eseries publication apart from its publication of the *Yearbooks of Richard II*. The first volume of this new series was Daniel Williman and Karen Ann Corsano, eds. *The Spoils of the Pope and the Pirates, 1357: The Complete Legal Dossier from the Vatican Archives* (2013) (http://amesfoundation.law.harvard.edu/DossierFinal4.pdf).


In 1950, Professor Joseph Smith of Columbia Law School wrote his *Appeals to the Privy Council from the American Plantations* that has become the standard work on the subject since its publica-
tion. Julius Goebel, Jr., (author of Law Enforcement in Colonial New York: A Study in Criminal Procedure (1664-1776) and Antecedents and Beginnings to 1801, volume one of the Oliver Wendell Holmes Devise History of the Supreme Court of the United States) contributed a useful introduction to Smith’s work.

The current authors of the work are Professors Sharon Hamby O’Conner and Mary Sarah Binder with the assistance of Charles Donahue, Jr. O’Connor is well known to law librarians as co-author with Morris Cohen of A Guide to the Early Reports of the Supreme Court of the United States (1995). Bilder is one of the leading younger historians of American colonial legal history at Boston College who has written Transatlantic Constitution: Colonial Legal Culture and the Empire (2004) (dealing with colonial Rhode Island) and a number of articles on colonial law including a chapter in the prestigious Cambridge History of Law in America, edited by Michael Grossberg and Christopher Tomlins (2008). Donahue (of Harvard Law School) is a major legal historian of medieval English history (latest book was the Law, Marriage, and Society in the Later Middle Ages: Arguments About Marriage in Five Courts (2007)) and his contribution to this work is as literary editor of the Ames Foundation and a short essay on the law of ejectment which affected forty-seven cases in the volume.

Professors O’Connor and Bilder’s work provides a listing of 257 cases by colony and then chronologically to create a digital collection of documents that tie into the court cases presented by Professor Smith. Smith’s Appeals to the Privy Council is first reproduced electronically in digitized pdf format page-by-page (unfortunately the reader cannot download more than one page at a time to read the book) and then the entire catalog is also digitally available.

The Privy Council served as the review body within the English government for both colonial legislation and judicial cases. The Catalogue applies to only the appellate function that the Council had vis-a-vis the colonial courts. The number of cases vary chronologically from 1680 to 1776 with only 26 cases from the seventeenth century and 231 from the eighteenth century:

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A discrepancy in the total numbers are reflected by a list of 288 cases listed by colony: Connecticut (9), Delaware (2), Georgia (2), Maryland (14), Massachusetts (50), New Hampshire (18), New Jersey (5), New York (23), North Carolina (3), Pennsylvania (13), Rhode Island (87), South Carolina (2), and Virginia (60). Over half of the cases are from the two colonies of Rhode Island and Virginia.

The three major Privy Council primary sources are printed cases which are similar to case briefs providing the arguments from both appellant and appellee. Only a small number of briefs survive in print, though there are some in manuscript as well. Second, registers are the written docket books that contain an account of the case. These volumes are kept chronologically and cataloged at The National Archives with the reference number ‘PC2.’ These page numbers are drawn from summaries of the registers published in the *Acts of the Privy Council: Colonial Series* (APC). Third, miscellaneous records from the Privy Council, cataloged as ‘PC1,’ contain petitions, orders of reference, and committee reports. For secondary sources, the authors recommend reading Smith’s *Appeals* and Bilder’s *The Transatlantic Constitution* (ch. 6). (469-70).

The website version incorporates the full-text of Joseph Smith’s *Appeals from the Privy Council* and the cases listed in the catalog arranged by colony and then by date using a three-digit number of colony, year, and first case number before the Council, e.g., 01_1699_01 for a Connecticut case, beginning in 1699, and the first case decided (16-17). A more complete case was Winthrop v. Lechmere, Report no. 01_1727_00. (23-28). Each case is broken down into its Case Name Short, Case Name Long, *Acts of the Privy Council, Colonial Series* with both its APC citation and PC Register Citation, Colonial Courts (history of the case), Participants (names people in the case as well as the colonial agent and attorneys), Description of the case, Disposition of the Case by the Privy Council, Notes added by compilers, and references in Smith’s *Appeals to the Privy Council*. This is followed by Documentation, con-
taining a listing of Printed Cases (if available), and Privy Council documents found in ‘PC1’ at The National Archives. The online version provides links to the primary source documents found in the National Archives published in the Anglo-American Legal Tradition (AALT) website.

Charles Donahue’s contribution is a discussion on ejectment cases (475-81), the legal description of ejectment in English law along with a list of forty-seven cases in which ejectment or its equivalent is mentioned.

Although there were no court reports published in the colonial period, the publication of volume 1 of Dallas’s Reports for Pennsylvania covering 1754 to 1788 and Quincy’s Reports for Massachusetts covering from 1761 to 1772 provide at least some published cases cited in the Catalogue.

Rather than supply an index, the authors provide ten lists cross referencing the various parts of the case: case names long, case names short, vessels, printed cases, all printed cases, printed cases according to the English Short Title Catalog (ESTC), cases that are not ‘true’ appeals, counsel, repositories of libraries and archives where one may find printed cases, and a conversion chart comparing the names and numbers of the registers published in the APC with those that are currently in use at The National Archives. (492-537) In addition, there are two lists of Canadian Appeals, and Caribbean Appeals that provide case information without the links to view the documents. (538-628) A third, shorter file list contains Caribbean Appeals, Printed Cases Found in three manuscript collections at the British Library, Library of Congress, and Columbia University. (629-635)

The authors also provide a section on “Further Research.” (469-74). In addition to description of the privy council records, Professor Bilder suggests research on a case study of an appeal, a comparison of two or more cases on the same subject, the development of the law either in English law or American law raised through the case documents, an investigation of the Privy Council appeals process, investigation of English lawyers and related officials. This is followed by a listing of Abbreviations and Bibliography for the catalogue. (482-91)

As the main inspiration for the project, Professor Bilder as a legal historian has used her expertise to develop this important and useful Catalogue. Historians and students interested in American colonial history have been given a new, useful primary source for
further research and it is hoped that other historians will provide similar types of projects.

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Despite Louisiana’s unique mixed legal system, interest in the state’s legal history remains largely regional. Though most U.S. lawyers and legal scholars have a passing awareness of Louisiana Civil Code, few have studied in depth the complex history of the state’s civil law and its role in continuing the continental legal tradition in the Americas. Through the Codes Darkly: Slave Law and Civil Law in Louisiana, by Tulane law professor Vernon Palmer, is a work that transcends mere regional interest to appeal to readers well beyond the boundaries of Louisiana. Beginning with the drafting of Louis XIV’s 1685 Code Noir to govern his territories in the Antilles, and tracing its journey through the Caribbean and eventually to Louisiana, Palmer presents an extraordinarily detailed and thoroughly engaging explanation of the development of Louisiana’s unusual slave laws, situating them with the state’s larger legal history and exploring their French, Spanish, Roman, and Caribbean influences.

It has occasionally been argued that Louisiana’s slave laws were more permissive or protective than those of the other states. The differences between Louisiana’s slave laws and those of the other states have been attributed largely to the differences between the civil law and common law traditions and to the alleged adoption of ancient Roman slave laws during the drafting of the Code Noir. Because the Romans owned slaves of all races, some scholars have argued that the Roman laws were “color-blind” and that their incorporation into the Code Noir laid the groundwork for a more permissive body of slave law in the French territories. These scholars contrast the civil slave laws to the body of case law that developed to govern slavery in the other states, and argue that, while the common law developed specifically within a racial system, the civil law did not develop from the intent to oppress any particular race.

In Through the Codes Darkly, Palmer breaks with the earlier scholarship claiming that the Code Noir was based on Roman law. He instead relies on archival research, examining Code Noir drafters’ backgrounds, the instructions they received from France, and the notes they generated during the course of their work. Palmer argues that the Code Noir was in fact based on the drafters’ own experiences in the New World, and that the Roman slave laws, which would have been largely irrelevant to slavery in the Ameri-
cas, did not, in fact, form the substantive basis of the *Code Noir*. In breaking with Romanist scholarship, Palmer owns that the drafters of the *Code Noir* created a “profoundly racial document embodying the prejudices of their own white supremacist society.” Palmer leaves open the question of whether the French laws are in fact more permissive or protective than the common law: “Why French slave law could seem milder than English law (if indeed it was) seems to have nothing to do with the different traditions of civil law and common law.”

In addition to breaking with earlier Romanist interpretations of the *Code Noir*, Palmer introduces the idea of customary slave law, which was incorporated into the original *Code Noir*, and which continued to develop and change in order to supplement (and at times supersede) the provisions of the *Code Noir* and subsequent slave legislation. Palmer notes that slave customs were common in all jurisdictions, and urges contemporary readers to read historical slave statutes with an eye to the custom rather than from an entirely positivist point of view. Rather than assume that the written laws were under-enforced, he argues, the reader should consider that the appearance of under-enforcement may in fact represent the development of a custom that was incompatible with the written law but that served a necessary purpose and came to represent a legal obligation. Palmer suggests that the driving force behind the development of most customs was the need to create incentives for productivity in involuntary laborers. Customs relating to the use of free time, food rations, the trading and sale of property, and the ability to enter into contracts, for example, created incentives for productivity levels that could not be achieved solely through punishment and intimidation. As Palmer points out, the theory that custom was based largely on the creation of incentives, and of commitments between slaves and their masters, also suggests that the slaves took an active role in the development of custom. Arguing that slaves were conscious participants, Palmer provides examples from antebellum case law in which individual slaves are shown to have had an understanding of the customary slave law and to have used that knowledge to their own advantage. While Palmer does not adopt the Romanist view that Louisiana law was fundamentally less racist and more permissive than that of the other states, he does suggest that custom “created a small sphere of liberty within

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1 VERNON PALMER, THROUGH THE CODES DARKLY: SLAVE LAW AND CIVIL LAW IN LOUISIANA 8 (2012).
2 Id.
slavery” that “amounted to a retrocession of rights to otherwise rightless people.”

The final two chapters of the book focus on the incorporation of slave law into Moreau-Lislet’s 1808 Digest, followed by the 1825 Civil Code. By the time Moreau-Lislet began work on his Digest, the Code Noir had been replaced by a newer Black Code drafted entirely by Louisiana legislators. Despite the decision to incorporate the slave laws into the civil law rather than leaving them to exist as a stand-alone code, Moreau-Lislet somewhat mysteriously left out any reference to race, instead defining three castes of persons – slaves, former slaves, and free men – and leaving the question of how the slaves became slaves more or less to the imagination. Also mysterious is Moreau-Lislet’s codification of principles that did not reflect the state of Louisiana slave law at the time of his work. The 1825 Civil Code would take a more realistic approach, incorporating the existing custom and better addressing the reality of slave law on the ground. The 1808 Digest and the 1825 Civil Code, being the only civil codes in the world to have incorporated the topic of slavery, also gave rise to a vast body of Louisiana “slave jurisprudence” filled with references to the French and Spanish civil codes and to the Roman law, and unlike the case law in any other state.

*Through the Codes Darkly* should appeal to a wide variety of readers interested in slave law and early American history, as well as civil law, customary law, and mixed jurisdictions. Readers interested in the more technical aspects of legal drafting will no doubt find the second part of the book fascinating, while more casual readers are likely to enjoy the first half of the book. Though some knowledge of the civil law tradition and of early Louisiana history will be helpful, one need not have a background in Louisiana law in order to understand and enjoy *Through the Codes Darkly*. Palmer introduces the central questions surrounding Louisiana slave law and provides enough of an overview of the previous literature that even a reader new to this topic will be able to approach the book without extensive background research. *Through the Codes Darkly* is an essential addition to any law library, and certainly any collection relating to slavery, race relations, or the American south.

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Louisiana State University

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3 *Id.* at 79.

This slim work is divided into three parts: Paul Pruitt and David Durham write a biographical sketch of Tait’s life; Sally Hadden presents a discussion of his legal career and the presentation of three federal jury charges in 1822, 1823, and 1825; and the text of the three charges. Charles Tait (February 1, 1768 -October 7, 1835) was a Virginian, who grew up in Georgia as a teenager, and after educated at Cokesbury College in Maryland he became an instructor there while studying for the bar. He was admitted to the Georgia bar in 1794. He became rector at Richmond Academy for three years and then became a state senator for one term in 1799. In 1803, he was elected a superior court judge serving until 1809 when he won election to the United States Senate for a one-year term until 1818. He supported the war effort, the re-chartering of the Bank of the United States, the growth of the navy, and supported the purchase of Thomas Jefferson’s library for the Library of Congress. In 1817 he supported the creation of Mississippi as a state and introduced the legislation that would provide for the creation of Alabama in March 1819. In October 1819 the Alabama Senate passed him over for a position of senator, but President Monroe appointed him to the position of first judge of the federal district court of Alabama from May 1820 to 1826. It was unclear why Tait gave up his federal judgeship, and spent the remaining years traveling and studying science to improve the crops and slavery population on his plantation. In 1828, he even rejected President John Quincy Adams’s offer of an ambassadorship to Great Britain.

Professor Hadden’s discussion of Tait’s legal career reviews some of the events that Pruitt and Dunham relate. Whether he was admitted to the Georgia bar in 1794 or 1795, Tait still became involved with the Yazoo scandal that affected Georgia politics for two decades. Hadden points out that “studying law” by reading only Blackstone and still be called “an astute lawyer” meant that he knew Blackstone better than his other contemporaries. (46-47) Tait had a difficult time as a federal judge traveling through Alabama from 1820 to 1824 similar to the justices of the U.S. Supreme Court’s traveling their circuits. She discusses the geographical importance of Cahaba and Mobile as capital for Tait’s judicial hearings. The charges become more important when there are no published decisions of Tait’s cases published in *Fed-*
Hadden provides a useful discussion of the role of the grand jury during early nineteenth century: how the jury was called and its role in the presentment of a case. Judges like Tait could educate jurors on new areas of American law that needed enforcing and alert grand jurors to a newly changed legislation that required attention on their part; demonstrate the legal knowledge of the judge; elevate his social standing upon the social hierarchy in the location that he worked; and provide an educated lecture/oration to his audience. (56-64).

Her discussion of the three grand jury charges opens with a description of the similar introductions of all three charges, reflecting the presentation in three different locations geographically. Tait discussed the limitations placed upon a grand jury and then discussed the specific topics in each charge. In 1822, Tait dealt with piracy and the African slave trade; in 1824, the role of lawlessness in society and also piracy; and the 1825 charge dealt with the safety of the mails along post roads and preservation of court records from destruction or alteration. (79-97)

Two appendixes contain the original manuscript of the 1825 charge and a bibliography of Tait’s law books. It is interesting that his mixed collection of English and American publication reflects what many members of the legal community would have possessed at this time.

Pruitt, Durham, and Hadden present a useful biographical account of a lesser-known judicial officer of early nineteenth-century United States and the description of the three grand jury charges. With less than a dozen published charges found in Making of Modern Law database, Hadden’s chapter makes an important contribution to the history of grand juries. Pruitt and Durham as co-editors of the Occasional Publications series deserve congratulations on another useful legal historical work on Alabama history. It is only hoped that other librarians interested in legal history would begin such series in their states.

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Nothing is more romantic to a legal historian than a love-letter to a federal statute. It warms the heart like a song-bird in January, or a rare utterance from Justice Thomas during an oral-argument. Hidden away in drab volumes of the Statutes at Large, an aging act of Congress is hardly a natural object of affection. But, like the brainy wallflower on a 1960s sit-com who blossoms into a heart-throb simply by removing his glasses, a change of perspective is sometimes all a dramatic makeover needs. This precisely what George A. Rutherglen does with the Civil Rights Act of 1866 in *Civil Rights in the Shadow of Slavery,* he takes a piece of legislation often treated by historians as a stepping-stone between the 13th and 14th Amendments and reveals it as the granite foundation for a new American common law in which civil rights were real, tangible, and litigable rights.

Rutherglen begins by surveying the key issues faced by the 39th Congress in 1866. The end of the civil war left many unanswered questions, but the foremost was the legal status of former slaves. The Thirteenth Amendment only abolished slavery, placing the issue of the citizenship and civil rights of freed slaves in the hands of Congress. The phrase “civil rights” had little of the meaning it would take in American history. Looming over the entire question was *Dred Scott v. Sanford,* the divisive pre-war in which Chief Justice Roger Taney had declared that Americans could not be citizens.

The sparsely worded Thirteenth Amendment called for “appropriate legislation” to enforce the end of slavery, but as Congress began work it was clear that the citizenship freed slaves must be taken up. The legacy of *Dred Scott* had put the citizenship of all African Americans in doubt by linking it to race. Citizenship was a difficult concept in the nineteenth century, Rutherglen shows, bound up as it was in international law, and confused by jurisprudence regarding the Privileges and Immunities Clause of the Constitution. The debate over the Thirteenth Amendment had not given legislators much guidance, with much of discussion centering on whether the measure offended the principles of federalism.

One of Rutherglen’s central theses is that the 1866 Act changed the meaning of civil rights in the common law. The traces the term in English law as the mirror image of private wrong, analyzing its meaning in sources from Justinian’s *Institutes* to Matthew
Hale’s *Analysis of the Law* through Blackstone’s *Commentaries.* The framers of the 1866 Act took the private rights and liberties of citizens understand in the common law and added a new right: the right to be free from racial discrimination. The threat was a real one, as Ruthenglen notes, because by the time the 39th Congress met, many states had enshrined racial discrimination into black codes.

The structure of the Act begins with a section which defined the rights protected by the Act, beginning by affirming the citizenship of all Americans “without regard to any previous condition of slavery or involuntary servitude.” The Act then enumerates all rights including the right to contract, sue or be sued, participate fully in trials, to inherit, buy and sell property, as well as the right to the “full and equal benefit of all laws and proceedings for the security of person and property.” It then turns to enforcement provisions. Rutherglen makes a strong case that the framers saw these provisions as being fully within the common law range of remedies.

The passage of the 1866 Act raised some doubts as to whether it pushed the federal courts into areas of state law and whether it went beyond its mandate to effectuate the Thirteenth Amendment. Almost immediately, the work on the Fourteenth Amendment began—a measure that would incorporate and overshadow the 1866 Civil Rights Act. Rutherglen describes the development of the Amendment and its continuities with the law that came before it.

In later chapters, Rutherglen examines restrictive interpretations of the 1866 Act in the *Slaughterhouse Cases,* *Plessy v. Ferguson,* and the 1883 *Civil Rights Cases* amidst the end of reconstruction. He then describes “the quiescent years,” as the Act was interpreted in cases in involving the rights of aliens, property, and state action. It remained always in the shadow of its “fraternal twin,” the Fourteenth Amendment for which it served “as a resource for determining the original intent of the framers.” The one interesting note of independence was *Hurd v. Hodge,* a case involving restrictive covenants in the District of Columbia. There, the Court recognized that the property rights protected by the 1866 Civil Rights Act extended to the federal government—an area left unprotected by the Fourteenth Amendment.

This would slowly begin to change as the Supreme Court began to take up the school segregation cases. In desegregating the D.C. schools in *Bolling v. Sharpe,* it cited *Hurd.* Nonetheless, as Congress took up the Civil Rights Act of 1864, it was reluctant to
base its actions on the Reconstruction amendments and laws, turning instead to the robust Commerce Clause for authority. However, Rutherglen argues, the 1866 Act was beginning to reemerge into legal consciousness. In the case of Jones v. Alfred H. Mayer, the Court found that the Act’s prohibition of housing discrimination was fully within the enforcement provisions of the Thirteenth Amendment. In doing so, the Court revived the potential power of the both the Act (now codified as section 1982) and the Amendment.

Rutherglen concludes with a summary of cases expanding Jones v. Alfred H. Mayer, noting that transformed the possibilities of plaintiffs seeking remedies for racial discrimination. These powers were incorporated and perhaps expanded in the Civil Rights Amendments of 1991. This suggests, he argues, future tensions between the national legislature and its courts over civil rights—which would really just be more of the same in the twisting century-and-a-half epic romance of the Civil Rights Act of 1866.

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The name Francisco Suárez (1548-1617) may be vaguely familiar to many of us, but we probably cannot quite place him. We may associate him with Francisco de Vitoria, but that’s likely the extent of it. Why in the world would a book of essays about this sixteenth century scholastic and his work be of interest in the twenty-first century to the readers of this newsletter?

There are several reasons for interest, not only in the present book of essays on Suárez, but for two others about him that have been written since 2012. Francisco Suárez was old-school—a scholastic—but he was of the Second Scholastic School and a transitional figure into modern philosophy and jurisprudence (in addition to being a major theologian). His areas of endeavor that are of special importance for legal historians are: natural law theory, the law of nations—especially the law of war (*ad bellum, in bello*, and *post bellum*), a quasi-contract theory of the State, and a refutation of the divine right of kings. Born two years after Vitoria died, Suárez elaborated on the former’s theories, influenced his own contemporary, Grotius, as well as the later Pufendorf, and, more generally, helped to create the foundation of modern public international law.

*A Companion to Suárez* looks broadly at Suárez’s body of work, including his theology and metaphysics, whereas the other two—*The Philosophy of Francisco Suárez* (Oxford University Press, 2012), and *Interpreting Suárez* (Cambridge University Press, 2013)—attend solely to his philosophical and legal theories. The editors of this collection note their awareness of the earlier collections and indicate that theirs includes much more on Suárez’s theological contributions, since he thought of himself primarily as a theologian. Moreover, the other two collections overwhelmingly represent an Anglo-American perspective and have English as their original language, while most of the contributors to *A Companion to Suárez* are continental European scholars and not all of them write in English. As a consequence, three of the essays in the essays in this volume are translations into English.

Three contributions to the present volume and the bibliographic apparatus will be of particular interest to those interested in law. The editors’ introduction is one of them, as it provides a highly informative biography of Suárez, surveying his major activities and writings in the context of the events and ideas of his era. This his-
torical context is quite useful in understanding why Suárez focused on certain topics—such as the divine right of kings—and why he may have adopted certain of his positions. The introduction is particularly extensive in its explanation of his natural law theory. While this piece is called an introduction, it’s as long and as substantive as a regular chapter and should be viewed as such.

The second chapter of considerable interest to the readers of this review is "Political Thought and Legal Theory in Suárez." This essay examines two of Suárez’s works: De legibus ac Deo legislatore (1612), which is the culmination of his jurisprudence and includes his ideas on divine law, natural law, international law (the ius gentium), as well as human, positive law; and Defensio Fedei Catholica (1613), which deals with social contract theory and the divine right of kings. The latter was especially relevant to the dispute between James I of Great Britain and Pope Paul V over the independence of royal power from the power of the Church in secular affairs.

This chapter on the political thought and legal theory of Suárez was written by a French professor of philosophy and translated into English by one of the editors. It is the only one of the translations that I found difficult to read. Consider the following:

“This opposition [that of ecclesiastical power to the Rechtsstaat] marks the emergence of a process working towards the autonomization of the civil power in relation to the law, and leads to a recognition of the irreducibility of the State’s foundation to the law, thus opening the need for a moral point of reference: one which shows that the State has the increase of well-being as its primary purpose, and that the law is only an institutional means for attaining this end.”

This, and a few similar passages, want several re-readings. However, as the other chapter translated by the same editor is much more readily comprehended, I assume the fault lies more with the nature of French philosophical writing than with the translation.

“Suárez and the Natural Law” is the other chapter that is likely to be worthwhile for students of law. Natural law has been reintroduced the modern era, mainly through human rights advocacy. This makes the history and development of natural law theory relevant generally, even if the divinely-based version of Suárez, set out in book two of his De legibus ac Deo legislatore is not es-
especially popular today. The author of this chapter offers an accessible account of Suárez’s natural law thought, which he deems not to be known as well as it deserves to be, on account of the jurist’s “impenetrable style” and the absence of modern editions.

This mention of “modern editions,” leads neatly to a discussion of the collection’s bibliographic apparatus. The appended bibliography of the editions of Suárez’s *opera omnia* considered to be authoritative is very helpful, as is the selective bibliography of medieval and scholastic texts and the ten-page bibliography of secondary sources. Otherwise, the editors rely on a reference to what they say is the definitive Suárez bibliography by one of their contributors, Jean-Paul Coujou’s *Bibliografía suareciana* (Universidad de Navarra, 2010). These are fine, but I was disappointed to see no references in the collection to online sources for any of the texts, whereas many are offered in *The Philosophy of Francisco Suárez*.

In addition, *A Companion to Suárez* has no bibliography of translations into English or other languages. Yes, some of this collection’s audience probably can read Suárez in the original Latin, but surely there are competent philosophers and jurists who cannot handle his “impenetrable style” and would benefit from access to translations in modern languages. Here, again, by contrast, *The Philosophy of Francisco Suárez* provides a reference to a website containing links to Suárez in translation. (Sydney Penner, *Suárez in English Translation* [www.sydneypenner.ca/SuarTr.shtml](http://www.sydneypenner.ca/SuarTr.shtml) and id., *Suárez in non-English Translation* [www.sydneypenner.ca/SuarTro.shtml](http://www.sydneypenner.ca/SuarTro.shtml).)

In sum, *A Companion to Francisco Suárez* is very well done and worthy inclusion in any library collecting extensively in the fields of legal history and the philosophy of law, and it is especially well suited to the interests of theologians. However, a law library that collects more selectively might be better served by one of the other two recent books about Suárez that focus more on his philosophy and legal theory.

Professor Emeritus Timothy Kearley
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Eminent legal history scholar Melvin I. Urofsky, Professor of Law and Public Policy and Professor Emeritus of History at Virginia Commonwealth University, provides yet another important book on the United States Supreme Court and the role of dissent in the evolution of high court decisions. With fascinating specificity, Urofsky analyzes the patterns of dissents and incisively dissects the rhetoric that shapes them. Ultimately, he succeeds in illuminating the way in which U.S. Supreme Court dissents contribute to the dialogue concerning the shifting interpretation of the Constitution. Along the way, he provides insightful discussion of landmark Supreme Court cases, thereby offering a focused, but comprehensive, history of the law as proclaimed by the Supreme Court.

Initially, Urofsky draws attention to the shifting patterns in rendering opinions of the Court. Thus, early Courts employed the se-riatim method, whereby each justice wrote and delivered an individual opinion. According to Urofsky, “In this way, the justices could openly disagree with each other without explicitly dissenting.” (43) Justice Marshall, however, favored a unanimous opinion rendered in univocally. (45) From this perspective, “dissents can be viewed as undermining the legitimacy of the Court’s voice.” Id. Subsequently, though, disagreement with the majority opinion became acceptable, and, to greater or lesser degrees, justices employed the dissent as a means of memorializing their quarrels with majority opinions. Moreover, setting the stage for future opinions, justices learned to employ the dissent in a strategic fashion at times even laying the grounds for reversals consonant with the changing times.

Next, Urofsky focuses upon the role of the Chief Justice in setting the tone of the Court, but he also pays careful attention to the concurrences and dissents of the other justices. Principally, he scrutinizes landmark cases such as Dred Scott, the Slaughter-house cases, Olmstead v. United States, Lochner v. New York, et al. He also identifies justices who are known for their dissents, citing, for instance, John Marshall Harlan as “the first great disserter.” Id. at vii. In particular, he analyzes the language of dissenters Harlan and Holmes in Lochner v. New York and Holmes and Brandeis in Olmstead v. United States. Happily, Urofsky’s analysis covers great cases and dissents up to, and including, the Roberts Court. Romer v. Evans and Lawrence v. Kansas feature
prominently here, along with dissents from Justices Scalia and Ginsburg.

Ultimately, *Dissent and the Supreme Court* is a cogent analysis of dissents as a means of jurisprudential dialogue. Indeed, dissents may be regarded as a sort of dialectic, challenging majority opinions and sowing the seeds engendering a new synthesis, as the law evolves within a shifting sociopolitical culture. Thanks to Urofsky’s superb research, readers can gain insight into the process that catalyzes such dynamic outcomes. In the end, today’s Supreme Court dissent may very well become tomorrow’s law, an inevitability that legal scholars should acknowledge and embrace.

Lynne F. Maxwell
West Virginia University College of Law Library

The period of Iberian history known as the Reconquista, seven centuries of intermittent warfare that ultimately resulted in a collection of Christian kingdoms conquering and replacing the Muslim kingdoms that once occupied modern-day Spain and Portugal, had profound consequences for the cultural development of all of the civilizations that became involved in the conflicts. In *Islamic Law and the Crisis of the Reconquista*, Professor Alan Verskin of the University of Rhode Island examines one of these consequences: the development of a new concept in Islamic law, that of a Muslim community existing in the absence of an Islamic political authority.

For the reader unfamiliar with the religious history of Islam, Dr. Verskin begins his work by providing the historical context necessary to understand the problems these communities caused for the Islamic jurisprudence of the time. The opposed Islamic religious concepts of tradition and innovation, the significance of the division between Islamic and non-Islamic territory, the role of the fatwā in Islamic jurisprudence and the significance of physical migration in Islam are all introduced before the first numbered chapter; for a reader new to the subject, the book’s introduction alone could be as informative as a full academic paper.

*Islamic Law and the Crisis of the Reconquista* is of interest for both its religious and its historical scholarship. Though its focus is on a religious question, this work does not neglect to examine the historical and political developments that made examination of this question necessary from the perspective of those involved. Neither does the work ignore how the various answers to the central question of religious jurisprudence were developed under pressure from various parties with conflicting personal stakes in the outcome of the religious debate. Even a reader with no interest in the religious issue might still appreciate reading this book as a cultural history, if only to reflect on how situations that a modern reader might take for granted were once considered radical to the point of impossibility.
The substance of this book focuses on the many answers Islamic jurist-theologians made to the primary question that the Reconquista posed them: was the practice of Islam possible in the absence of an Islamic government? Dr. Verskin examines how this question was answered immediately after the Reconquista concluded in the Fifteenth Century, and how it was answered again when the issue was revived in the Nineteenth Century following the French conquest of the Maghreb and the European colonization of North Africa. Overall, this book is a thorough and well-documented study of how (and why) a particular question of Islamic jurisprudence has historically been addressed by Muslim religious scholars and political theorists; anyone interested in further details would likely enjoy reading the book to find them.

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Joel Fishman, Ph.D., M.L.S.
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Duquesne University Center for Legal Information/
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