BOOK REVIEW

American Legal History Revisited

James W. Ely, Jr.[*]

G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME 1: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR (Oxford University Press, 2012).

The history of America's legal past is hardly an untouched field. Aside from a large number of fine specialized studies, there are several comprehensive surveys of our legal history[1] as well as volumes covering constitutional history.[2] An inevitable question, therefore, is whether there is room for yet another treatment of the role of law in the development of the United States. This excellent and accessible volume by G. Edward White answers that inquiry in the affirmative. The first in a projected three-volume series, this work is compellingly written and offers perceptive insights into our legal past. Far-ranging in scope, it is largely synthetic and relies heavily upon secondary sources.

White's work differs in several important respects from standard accounts of legal history. First, he does not attempt to chronicle the myriad topics addressed in other historical studies. White has little to say, for example, about domestic relations, criminal law, debtor-creditor relations, poor relief, or the evolution of tort and

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1. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW (3d ed. 2005); KERMIT L. HALL & PETER KARSTEN, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY (2d ed. 2009).

2. ALFRED H. KELLY, WINFRED A. HARBISON & HERMAN BELZ, THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT (7th ed. 1991); MELVIN I. UROFSKY & PAUL FINKELMAN, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES (3d ed. 2011).

contract law. Instead, White concentrates on those legal issues that he believes were central to policymakers at the time and seeks to recreate their understanding of events. Thus, White focuses on the colonial era, the Revolutionary experience and the formation of the Republic, the emergence of the Supreme Court, slavery and the sectional crisis, and the transformative character of the Civil War. As this suggests, the author gives more attention to public law than private law.

Second, this is no backward-looking Whiggish narrative that simplifies history and excises inconvenient segments in order to affirm the inevitable triumph of a particular view of American society. On the contrary, White stresses the importance of fortuitous factors that shaped American legal culture. He rejects any notion of steady progress toward some preordained end. Indeed, White cautions against "such an after-the-fact structuring of American legal history."[3] In short, he warns that readers should not read history backward. Things might well have turned out differently. For instance, as White aptly reminds us, the British might not have prevailed over the French and Spanish in the colonial wars, and the American Revolutionaries could easily have lost the War of the Revolution.

White also discusses different approaches to the writing of legal history. He expresses skepticism about the explanatory power of the thesis—first advanced by Lawrence M. Friedman in 1973—that law is "a mirror of society." Treating law as a product of its social context, Friedman saw law not as autonomous but "as relative and molded by economy and society."[4] This view has proved very popular with legal historians. To White, however, the "mirror" thesis is potentially misleading. The relationship between law and its social context, White maintains, is often elusive, and thus the "mirror" approach ultimately fails to adequately explain the past. It gives inadequate weight to the professional training and experience of lawyers and judges, and it slights judicial reasoning and legislative declarations. Moreover, it leads to a focus on policy outcomes. The "mirror" thesis, according to White, sometimes "requires the attribution of motives to judges or legislators for which there is no extant historical evidence" and "requires the historian to engage in imaginative gap-filling."[5] Judges of the late nineteenth century have been particularly stigmatized by the tendency to assign motives for

3. G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME 1: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR 484 (2012).

4. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 10 (1973). This theme was reiterated in the third edition of this work. FRIEDMAN, *supra* note 1, at ix ("Law is a mirror of society."). *See also* HALL & KARSTEN, *supra* note 1, at 1–2.

5. WHITE, *supra* note 3, at 9.

their decisionmaking while ignoring what they actually said in judicial opinions.[6] It will be interesting to see how White handles this question in the later volumes of his history.

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Two of the book's most engaging chapters deal with the colonial era, a period that is often shortchanged in standard histories. White reminds us that during the seventeenth century European settlers were a minority in North America, surrounded by a much larger Indian population. Although the role of the Indian tribes is frequently relegated to the margins of American history, White explores in detail the interaction between the European settlers and the indigenous population. He highlights the influence of Native American culture on the early formation of colonial law, discussing treaties and the recognition of Indian culture by colonial courts in adjudicating disputes between settlers and Indians.

Treaties, which commonly involved land, were complicated by widely varying concepts of land ownership held by Europeans and Indian tribes. The indigenous peoples had no notion of "exclusive" ownership, and so when they "sold" land to the settlers they simply intended shared access. Europeans, on the other hand, thought in terms of fee-simple title, which conferred exclusive possession and encompassed the right to enclose and improve parcels. This divergent understanding of ownership meant that the parties did not attach the same meaning to land treaties, and it predictably became a fertile source of controversy.

White stresses the emergence of the agricultural household as a crucial factor in the American economy of the eighteenth century. In so doing, he reiterates the pivotal role of property law. Indeed, White tellingly observes that "no area of law was more significant than the law of real property."[7] He notes a seeming paradox. Even as the Anglicization of the legal system quickened, the colonists jettisoned aspects of English land law that did not fit the conditions of North America or the desires of the settlers. In England, where land was scarce, the law was designed to preserve the social and political position of the elite by keeping land within family lines for future

6. *See* James W. Ely, Jr., *Property Rights and the Supreme Court in the Gilded Age* (Vanderbilt Law and Econ. Working Paper No. 12-17, Vanderbilt Pub. Law & Legal Theory Working Paper No. 12-19, 2012), *available at* http://ssrn.com/abstract=2070275 (challenging the conventional scholarly wisdom toward the Court's property-rights jurisprudence during the Gilded Age).

7. WHITE, *supra* note 3, at 80.

generations. In contrast, North America offered vast amounts of undeveloped land. Not only was the English concept of a perpetual family estate a hindrance to economic development, it ran afoul of the colonial practice of granting land widely to individuals in order to encourage settlement.[8] Land was the key to social mobility. Not surprisingly, the colonists wished to facilitate the acquisition, use, and transfer of land. To this end, they pioneered the recording of land titles and largely abandoned the payment of quitrents to the Crown or colonial proprietors. Seeing land as a commodity, the colonists early moved toward partible inheritance among children and engaged in widespread land speculation.[9]

As is well known to historians, fear that the British government threatened the property rights of the colonists was a prime factor in the coming of the Revolution. The principle of "no taxation without representation" was an overriding issue for the colonists during the Revolutionary era. This principle implicated both the question of sovereignty and the right of owners to be free of arbitrary taxation. White points out that behind the invocation of this argument "one can see ideas about the rights associated with private property ownership and the liberties of English citizens in place."[10]

This emphasis on property ownership during the colonial period helps to explain the significance of the Proclamation of 1763 as a cause of Revolutionary sentiment. Following on the heels of the French and Indian War, the Proclamation by the British Crown established a boundary line that closed the trans-Appalachian region to settlers. In effect, the Proclamation ended the almost unlimited opportunity for settlers to acquire western land and dashed dreams of economic independence.[11] According to White, the colonists viewed this as "an extremely provocative act."[12] The Proclamation, coupled

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8. The significance of property-owning arrangements for constitutional democracy can hardly be overstated. For an argument that a political order based on property rights was one of the crucial factors for the predominance of North America over Latin America, see NIALL FERGUSON, CIVILIZATION: THE WEST AND THE REST 97, 109–12, 117–19 (2011). Ferguson maintains that widely distributed property rights in the United States prompted prosperity and stability. *See id.* at 117–19 (noting the "tightness of the nexus between land and liberty in the early history of the United States").

9. *See* James W. Ely, Jr., *Economic Liberties and the Original Meaning of the Constitution*, 45 SAN DIEGO L. REV. 673, 687–92 (2008) ("By the founding era, land was treated as a market commodity.").

10. WHITE, *supra* note 3, at 187.

11. *See* FERGUSON, *supra* note 8, at 115 ("Significantly, land played a vitally important part in the American Revolution. The British government's attempt to limit further settlement to the west of the Appalachians struck at the heart of the colonists' expansionist vision of the future . . . .").

12. WHITE, *supra* note 3, at 105.

with tightened customs enforcement and the imposition of new taxes, adversely impacted a large segment of colonial society. Increasingly the colonists pictured steps by the British to assert control over their American colonies in terms of a political conspiracy to destroy colonial rights. Still, the journey to independence was neither obvious nor linear. White stresses that many colonial leaders were reluctant to break from Britain and futilely sought a compromise solution even after military hostilities had commenced.

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White offers a similarly nuanced analysis of the formation of the New Republic. Independence from Great Britain ushered in a period of constitutional experimentation, as political leaders attempted to frame governments, both state and national, that reflected republican ideals.[13] A few salient points warrant particular attention. The first is the contested notion of equality, proclaimed in the preamble to the Declaration of Independence. White is dubious that the lofty rhetoric had much meaning in its own time or that equality was adopted as a constitutional ideal. He notes that the Declaration's preamble was the sole endorsement of equality in the founding era. In fact, White concludes that "most Americans of the founding period did not believe that all humans were created equal."[14]

White is also careful to point out that judicial review was not understood as treating the Supreme Court as the sole authoritative expositor of the meaning of the Constitution. He explains that "a minimalist conception of judicial review seems to have been relatively uncontroversial in the late eighteenth and early nineteenth centuries."[15] Judicial review, however, did not connote judicial supremacy. It was expected that each branch of government would independently weigh the constitutionality of their actions. White explains that neither *Marbury v. Madison*[16] nor anything in the jurisprudence of John Marshall established the Supreme Court as the exclusive and final interpreter of the Constitution. The view that decisions of the Court were conclusive on the other branches of government would only appear later in American history.

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13. *See generally* WILLI PAUL ADAMS, THE FIRST AMERICAN CONSTITUTIONS: REPUBLICAN IDEOLOGY AND THE MAKING OF THE STATE CONSTITUTIONS IN THE REVOLUTIONARY ERA (1980).

14. WHITE, *supra* note 3, at 190.

15. *Id.* at 218.

16. 5 U.S. (1 Cranch) 137 (1803).

White's assessment of the role of private property in framing the Constitution is perhaps more problematic. To be sure, he recognizes that behind debates over sovereignty were ideas of liberty, "conspicuous among them liberties associated with the ownership and use of private property and liberties connected to protection from tyrannical or arbitrary government."[17] He further agrees that several provisions of the Constitution and Bill of Rights "were efforts to uphold the sanctity of private property, and expectations of property holders, against efforts on the part of the states or federal government to diminish or undermine those assets."[18] But White goes on to contend that "the ideas of liberty and property were not central concerns of the framers of the Constitution"[19] and served just as background ideas. Not only is there some unresolved tension between these arguments, but other historians have persuasively insisted that the desire to secure property rights was a key factor in the movement to adopt a new Constitution in 1787. For example, Stuart Bruchey observed: "Perhaps the most important value of the Founding Fathers of the American constitutional period was their belief in the necessity of securing property rights."[20] Yet even if White downplays the significance of property—a concept linked to liberty in the mind of the founding generation—he acknowledges that property and liberty were part of the constitutional dialogue. The same cannot be said of equality as a constitutional norm.

White next probes the achievement of John Marshall in transforming the Supreme Court from an insignificant institution into a tribunal that by the Civil War "would have intervened in nearly every contentious issue in American political life."[21] Marshall, according to White, was mindful of the need to avoid partisan politics and never veered far from the political center. Consider Marshall's famous Contract Clause decisions, which somewhat curtailed state autonomy in economic matters. Marshall read the Contract Clause broadly to encompass legislative grants of land and corporate charters as well as private contracts. *Fletcher v. Peck*,[22] in White's words, was "an imaginative, and arguably bold, decision," which "began a long line of cases in which the Court used the Contracts Clause to prevent

17. WHITE, *supra* note 3, at 189.

18. *Id.*

19. *Id.*

20. Stuart Bruchey, *The Impact of Concern for the Security of Property Rights on the Legal System of the Early American Republic*, 1980 WIS. L. REV. 1135, 1136.

21. WHITE, *supra* note 3, at 193.

22. 10 U.S. (6 Cranch) 87 (1810).

state legislatures from interfering with 'vested' property rights."[23] White does not explore the much-debated question of whether Marshall enlarged the application of the contract clause beyond the limited objective of the framers.[24] He does point out, however, that when the Court invoked the Contract Clause to strike down state laws, "it did so recognizing that most Americans believed in the sanctity of property rights."[25] This widely shared popular attitude may help to explain why a number of Marshall's Contract Clause decisions became constitutional landmarks despite intense local opposition.[26]

White then shifts his focus to the relationship between the legal system and entrepreneurial activity. This is an area well covered by historians, and the author breaks little new ground here. Steady westward expansion into new territories after 1800 necessitated the removal of Indian tribes and raised the divisive issue of slavery in the territories. The Transportation Revolution further exacerbated sectional differences, as the plantation economy of the South had less need for canals and railroads. In contrast, railroads were instrumental in linking the Midwest to the eastern states. White notes the emergence of the business corporation as the most common form of business organization and the change from special laws of incorporation to general incorporation laws. Although he correctly describes early transportation ventures as a "mixed public-private partnership form of enterprise,"[27] one wishes White had wrestled more fully with the disputed question of how canals and railroads used eminent domain. It is not at all clear that eminent domain regularly "functioned as a kind of subsidy to transportation companies."[28] The record is too varied and complex to sustain such a casual conclusion. In fact, states soon began to devise compensation rules more

23. WHITE, *supra* note 3, at 229.

24. *See* CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW 72–78 (1996) ("In reading the contract clause expansively, Marshall believed he was faithfully adhering to the letter and spirit of the Constitution."); James W. Ely, Jr., *The Marshall Court and Property Rights: A Reappraisal*, 33 JOHN MARSHALL L. REV. 1023, 1029–33 (2000) (discussing reasons "to conclude that the framers envisioned an expansive reading of the Contract Clause").

25. WHITE, *supra* note 3, at 244.

26. *See* C. PETER MAGRATH, YAZOO: LAW AND POLITICS IN THE NEW REPUBLIC: THE CASE OF *FLETCHER V. PECK* 114 (1966) ("The decision in *Fletcher v. Peck*, reflecting a bias in favor of vested property rights, was in nearly perfect harmony with the attitudes and values of most politically conscious Americans.").

27. WHITE, *supra* note 3, at 274.

28. *Id.* at 262.

protective of landowners when their property was taken for "public use."[29]

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The final four chapters of the volume are devoted to the related issues of slavery, the sectional crisis, and the legal problems raised during the Civil War. This, of course, is a path well traveled by historians. Nonetheless, White provides a balanced account of this familiar story.

White traces the growing sectional discord over slavery to westward expansion, which made clear that the labor systems of the North and South were becoming increasingly antagonistic. This hostility was heightened by the appearance of abolitionist and proslavery thought after 1830. Both of these ideologies became steadily more strident and uncompromising. Added to this explosive mix was the controversy over fugitive slaves. Although liberty and property were commonly linked in constitutional discourse, the pressure to return fugitives to their owners laid bare an uneasy tension between these fundamental values. Against this background, White details how the political parties, governmental institutions, and eventually the Supreme Court were unable to bridge the estrangement of the free and slave states. Indeed, White shares the general view that by its decision in *Dred Scott v. Sandford*[30] the Supreme Court under Chief Justice Roger B. Taney "not only failed to save the Union; it precipitated its dissolution."[31] White devotes considerable attention to this complex case, arguing that the Court majority sought "to constitutionalize proslavery ideology."[32] The immediate and forceful opposition to *Dred Scott* demonstrated that any consensus about the place of slavery in the American republic had irrevocably shattered. In the end, as White points out, war, not law, was responsible for the elimination of slavery.

In hindsight it is easy to emphasize the transformative nature of the Civil War. Certainly the nation that emerged in 1865 was different in many respects from antebellum America. But White again cautions readers against casual retrospective judgments. Rather, he stresses that the historical figures of the Union and the Confederacy

29. *See* JAMES W. ELY, JR., RAILROADS AND AMERICAN LAW 190–95 (2001) (expressing doubt that eminent domain amounted to a subsidy for the rail industry).

30. 60 U.S. (19 How.) 393 (1857).

31. WHITE, *supra* note 3, at 351.

32. *Id.* at 367.

"were dealing with contingencies, not determined outcomes or even probabilities."[33] No one knew how or when the war would end, or the future status of the slave population. Things always seem more obvious after the fact.

The Civil War posed a number of novel and vexing constitutional issues. White examines the legal status of the Confederacy (in the eyes of the Lincoln administration), the suspension of habeas corpus, the legal and practical problems with military conscription, suppression of free speech, and the revamping of the Supreme Court. A glance at White's handling of two of the most contested points of dispute illustrates his thoughtful approach to much-debated questions. In discussing Chief Justice Taney's order invalidating Lincoln's suspension of habeas corpus, White grapples with the question of whether Lincoln should have complied with the order despite plausible arguments to sustain the suspension. The author concludes that "Lincoln deliberately ignored a legal obligation imposed on him by Taney's order, and was incorrect in believing that he could ignore it because he disagreed with the basis of Taney's decision."[34] Yet White gives the Lincoln Administration high marks for handling freedom of expression during the war. Both newspapers and prominent individuals generated a steady torrent of severe criticism concerning the conduct of the war. Lincoln, however, made little systematic effort to curtail such speech.

White casts welcome light on constitutional developments within the short-lived Confederacy, an interesting topic that often receives short shrift from historians. He notes the apparent anomaly that the Confederacy, founded on states' rights principles, nonetheless largely used the United States Constitution as a model for its own. Curiously, the Confederate Constitution contained a clause barring the states from impairing the obligation of contracts. This was the very provision that the Supreme Court under Marshall and Taney had repeatedly invoked to curb state interference with economic arrangements. As this indicates, the Confederacy could not escape sharp clashes between the national government and the states, a conflict made more acute by the pressing need to conduct a modern and large-scale war.

Still, states' rights ideology markedly shaped the constitution-making process of the Confederacy. Although the Confederate Constitution provided for a Supreme Court, it eliminated diversity-of-citizenship jurisdiction. Moreover, the Confederate Congress trimmed

33. *Id.* at 424.

34. *Id.* at 452.

the jurisdiction of the Confederate district courts. It was evidently assumed that the state courts would handle most of the judicial business in the Confederacy. In any event, the Confederate Congress never created a Supreme Court. This was no mere oversight. Rather, according to White, it reflected deep divisions over the authority of a Confederate Supreme Court to review decisions of the state courts. It also meant that the Confederate government, with no national tribunal to render a uniform interpretation of the Confederate laws and Constitution, would be handicapped in enforcing unpopular measures, such as conscription. Ironically, the ideological commitment to the rights of the states undermined the effectiveness of the Confederacy.

A striking omission in White's extensive coverage of Civil War constitutional problems is the highly controversial confiscation policy. Both the Union and the Confederacy took steps to confiscate the property of disloyal persons or enemy aliens, but the difference in their approaches to confiscation was glaring and revealing. The Union's 1862 Confiscation Act required an individual determination of guilt in a judicial proceeding. In addition to this procedural hurdle, the Lincoln Administration was ambivalent about confiscation as a policy and made little effort to enforce the law. The Supreme Court, moreover, narrowly construed the power of Congress to confiscate property, ruling that any confiscation lasted only for the life of the offender.[35] Consequently, the Union actually confiscated very little property. In contrast, the Confederacy followed an aggressive course of seizing property owned by Union residents who were deemed enemy aliens.[36] The Union proved more protective of property rights during wartime than did the Confederacy, a point that White might have profitably pursued in his discussion of legal issues growing out of the Civil War.

Reservations and caveats, however, do not detract from White's achievement. Any history on this scale is challenging. White has integrated a vast amount of material and added to our understanding of what Americans at the time saw as the great issues of the day. White has authored a masterful account of law in American history to the Civil War. It sets a high standard for the succeeding volumes in the series.

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35. Bigelow v. Forrest, 76 U.S. (9 Wall.) 339 (1870).

36. *See generally* DANIEL W. HAMILTON, THE LIMITS OF SOVEREIGNTY: PROPERTY CONFISCATION IN THE UNION AND THE CONFEDERACY DURING THE CIVIL WAR (2007); Brian R. Dirck, *Posterity's Blush: Civil Liberties, Property Rights, and Property Confiscation in the Confederacy*, 48 CIVIL WAR HIST. 237 (2002).