
Book Review

Friedman's Law

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American Law in the Twentieth Century. By Lawrence M. Friedman.* *New Haven: Yale University Press, 2002. Pp. 722. \$35.00.*

In this appraisal of Lawrence M. Friedman's *American Law in the Twentieth Century*, I begin in Part I with a survey of the several "schools" of American legal history that have risen to prominence in the years since World War II, utilizing a suggestive framework first offered by Professor Stephen Presser two decades ago. In Part II, I discuss Professor Friedman's intellectual debt to Willard Hurst, as well as his previous scholarly efforts to synthesize major developments in American law over the last century. Part III assesses the organizational framework, methodology, and interpretations of evidence offered by Friedman in the present book, while Part IV provides a critical discussion of these strategies. Part V raises the question of the relationship of American legal history to what has been characterized, and criticized, by some historians as "Whig" history, and offers a final assessment of Friedman's newest volume.

I. LEGAL HISTORY AND LEGAL HISTORIANS

Two decades ago, as the second wave of post-World War II American legal history crested,¹ Professor Stephen B. Presser of Northwestern

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1. The first wave came ashore in the late 1940s, strongly influenced by the desire of scholars to locate the historical roots of government intervention into economic affairs prior to the New Deal. Often labeled the "commonwealth school," these studies included OSCAR HANDLIN &

University School of Law surveyed its impact, categorized its major practitioners, and suggested how such historical studies might contribute to the traditional law school curriculum.² Presser began his inquiry with a sketch of what he called “the core values” of American legal history, and proceeded to analyze the works of four contemporary groups of legal historians whose general interpretative approach exhibited a commitment to one or more of those values.

Presser ranked the core value of the “rule of law” first on his list, and defined it as the belief that “any compulsion in the society must not take place arbitrarily, but must be subject to some restraints.”³ This is an idea embodied in the concept of due process and those limitations upon official power enshrined in written constitutions and bills of rights, guarded by an independent judiciary.

Presser listed “popular sovereignty” second among the core values. This he defined as the belief that “the best way to prevent the exercise of arbitrary power is to disperse political power as widely as possible and to lodge ultimate sovereignty in the citizenry.”⁴ Rooted in republican ideas of representative government and the structure of American federalism, popular sovereignty emphasized, in addition to limitations upon arbitrary power, the necessity for law to reflect closely the dominant social opinions. It tended therefore to privilege the role of legislatures and statutory law as the authoritative expression of the people’s will.

In the nineteenth century, beginning in the pre-Civil War era of universal male suffrage, American lawmakers forged a third enduring core value, which Presser described as the commitment to the “maintenance of

MARY FLUG HANDLIN, *COMMONWEALTH: A STUDY OF THE ROLE OF GOVERNMENT IN THE AMERICAN ECONOMY: MASSACHUSETTS, 1774-1861* (1947), LOUIS HARTZ, *ECONOMIC POLICY AND DEMOCRATIC THOUGHT: PENNSYLVANIA, 1776-1860* (1948), and RICHARD B. MORRIS, *GOVERNMENT AND LABOR IN EARLY AMERICA* (1946). A landmark volume created during this wave is JAMES WILLARD HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950). On the impact of these works, see Harry N. Scheiber, *Government and the Economy: Studies of the “Commonwealth” Policy in Nineteenth Century America*, 3 J. INTERDISC. HIST. 135 (1972). Unfortunately, this first wave is often overlooked by those who stress the formative impact on American legal history of later works such as LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973), MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977), JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956) [hereinafter HURST, *LAW AND THE CONDITIONS*], and WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830* (1975). A recent revival of the “commonwealth school” appeared in WILLIAM J. NOVAK, *THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA* (1996).

2. See Stephen B. Presser, “*Legal History*” or the *History of Law: A Primer on Bringing the Law’s Past into the Present*, 35 VAND. L. REV. 849 (1982). In 1980, Professors Presser and Jamil S. Zainaldin had published the second wave’s first legal history casebook, *Law and American History: Cases and Materials*, which was revised and retitled in 1989 as *Law and Jurisprudence in American History: Cases and Materials*.

3. Presser, *supra* note 2, at 853.

4. *Id.* at 854.

maximum economic opportunity and social mobility.”⁵ Echoing President Jackson's attack on the Second Bank of the United States⁶ and Chief Justice Taney's opinion in the *Charles River Bridge* case,⁷ legislators and judges attacked special legal privileges, rejected social deference as a remnant of arbitrary power, and encouraged “individuals to accumulate wealth and rise in social standing and commercial power.”⁸

Finally, according to Presser, nineteenth- and twentieth-century lawmakers promoted a fourth core value as a further restraint upon arbitrary power and a source of social mobility: “maximum protection and promotion of private interests and initiatives,”⁹ an ideal with roots in the eighteenth-century struggles over religious liberty in Virginia,¹⁰ and which reached its zenith in the freedom-of-contract doctrine around the turn of the last century¹¹ and the right-to-privacy debate during the 1960s and 1970s.¹²

Presser's most important insight stressed the enduring historical conflict among the core values. The rule of law, for instance, often warred with popular sovereignty, especially when juries engaged in nullification¹³

5. *Id.* at 855 (emphasis omitted).

6. In his veto of Congress's bill to recharter the Second Bank of the United States, Jackson declared his determination to “take a stand against all new grants of monopolies and exclusive privileges, against any prostitution of our Government to the advancement of the few at the expense of the many.” Andrew Jackson, Veto Message (July 10, 1832), in 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 576, 591 (James D. Richardson ed., 1898).

7. In *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, the Taney Court sustained the authority of the Massachusetts legislature to authorize the construction of a second, toll-free bridge from Charlestown to Boston against the claims of the Charles River Bridge proprietors that their 1786 charter had granted them exclusive rights to collect tolls across the river. 36 U.S. (11 Pet.) 420 (1837). In rejecting the argument that the state had impaired the obligations of a contract, the Chief Justice opined that reading implied conditions into such charters would be destructive of progress. “We shall be thrown back to the improvements of the last century, and obliged to stand still,” he wrote, until those who claimed exclusive privileges “permit these states to avail themselves of the lights of modern science, and to partake of the benefits of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world.” *Id.* at 553.

8. Presser, *supra* note 2, at 855.

9. *Id.* at 856 (emphasis omitted).

10. See An Act for Establishing Religious Freedom, 1785 Va. Acts ch. 34, reprinted in 12 STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 84 (photo. reprint 1969) (William W. Hening ed., Richmond, George Cochran 1823). The Virginia Constitution still contains a free exercise provision. VA. CONST. art. I, § 16.

11. See, e.g., *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923); *Adair v. United States*, 208 U.S. 161 (1906); *Lochner v. New York*, 198 U.S. 45 (1905); Charles W. McCurdy, *The Roots of “Liberty of Contract” Reconsidered: Major Premises in the Law of Employment, 1867-1937*, 1984 SUP. CT. HIST. SOC'Y Y.B. 20.

12. *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

13. In 1735, a colonial jury in New York acquitted John Peter Zenger of the crime of seditious libel, despite judicial instructions to the contrary. See JAMES ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER, PRINTER OF *THE NEW YORK WEEKLY JOURNAL* 41-105 (Stanley Nider Katz ed., Belknap Press of Harvard Univ. Press 1963) (1736). For a more recent example of what many regard as jury nullification, see JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON* (1996).

and courts invalidated legislative acts on constitutional grounds.¹⁴ A strong presumption in favor of “maximum protection and promotion of private interest and private ordering” could clash with an equally powerful devotion to “maximizing economic opportunity and social mobility.” Under the common law and antitrust statutes, “freedom of contract” ended where “restraint of trade” began.¹⁵ And private ordering, rooted in religious belief and practice, could trump laws designed to promote economic opportunity and social mobility through mandatory school attendance.¹⁶

After this sketch of core values, Presser analyzed the scholarship of many legal historians by placing them into four corresponding interpretative clusters, which he labeled the “conservative school,” the “Wisconsin school,” the “radical transformation school,” and the “heroic school.”¹⁷ Members of the conservative school, according to Presser, stressed the continuity and stability of the American legal system—above all the belief that, from their perspective, American law “followed an orderly evolution according to fixed intellectual principles,” with its development “predominantly . . . proceed[ing] according to certain neutral principles.”¹⁸ So although the substance of law changed over time, “the basic principles . . . have not changed.”¹⁹

Presser pointed to Oliver Wendell Holmes, Jr., and Roscoe Pound²⁰ as the founding fathers of the “conservative school,” while G. Edward White had become its “latest proponent” as a scholar who contended that “certain legal principles—mostly procedural ones—circumscribe the role of judges and ensure that they adhere to a coherent ‘American judicial tradition.’”²¹

14. In 1943, for example, the Supreme Court ruled a mandatory flag-salute requirement unconstitutional on First Amendment grounds. *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). A half century later, the Justices also struck down a popular Texas law that made flag burning a criminal offense. *Texas v. Johnson*, 491 U.S. 397 (1989).

15. See, e.g., *N. Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898); *Richardson v. Buhl*, 43 N.W. 1102 (Mich. 1889).

16. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that a state may not compel school attendance beyond the eighth grade when to do so threatens the religious beliefs and practices of a faith such as that of the Old Order Amish).

17. Presser, *supra* note 2, at 857-68.

18. *Id.* at 857.

19. *Id.*

20. See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Little, Brown & Co. 1944) (1881); ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* (1938).

21. Presser, *supra* note 2, at 858; see also G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION* (1976); G. EDWARD WHITE, *THE MARSHALL COURT AND CULTURAL CHANGE, 1815-1835* (1988); G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* (1980). White’s latest book stresses the intellectual boundaries and contradictions that produced a crisis of judicial authority during the Great Depression with respect to both constitutional law and common law. See G. EDWARD WHITE, *THE CONSTITUTION AND THE NEW DEAL* (2000). As Presser observed, “White appears to recognize to a greater degree than Pound or Holmes that judges self-consciously may be molding doctrines that are influenced by current political issues, [but] he still finds dominant elements that continue from John Marshall to Earl Warren.” Presser, *supra* note 2, at 858 n.39.

These scholars, who stressed the rule of law, placed "primary emphasis on intellectual judging paradigms" and relegated "economic, political, and social influences to a secondary level."²²

If Holmes's *The Common Law* and Pound's *The Formative Era of American Law* represented foundational texts of the conservative/rule-of-law school, J. Willard Hurst's *Law and the Conditions of Freedom in the Nineteenth-Century United States*²³ occupied a similar status for the "Wisconsin school," so named because Hurst and scholars influenced by him, notably Lawrence Friedman, either studied or taught at Madison's state university. Instead of placing an emphasis upon the intellectual structures that shaped and gave consistency to judicial behavior, for example, the Hurstians, according to Presser, viewed "economic needs as the primary determinants of law" and rested their interpretations "primarily on the third core value . . . of maintaining maximum economic progress and social mobility."²⁴

Hurst and his followers argued that American lawmakers had seldom displayed strict adherence to doctrinal consistency or the rule of law. Instead, they had been willing to bend or abolish "even the most fundamental principles or tenets of legal doctrines in the promotion of economic progress,"²⁵ as they pursued what Hurst labeled "the release of energy."²⁶ At least in the first half of the nineteenth century, Hurst claimed,

22. Presser, *supra* note 2, at 858. This characterization seems a bit broad even with respect to Holmes and Pound. Holmes may have believed that tort law had rested always upon a fault principle, for example, but he also made the famous declaration that "the life of the law has not been logic: it has been experience." HOLMES, *supra* note 20, at 1. Leaders of the Legal Realist movement in the interwar years also looked upon Holmes as one of their principal intellectual founders. As for Pound, he spearheaded the attack upon legal formalism at the turn of the century by advocating "sociological jurisprudence." See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909). More recent and perhaps more appropriate candidates for inclusion in Presser's "conservative school" are Barry Cushman and Richard D. Friedman, who have vigorously challenged conventional accounts of the constitutional conflict between the New Deal and the Hughes Court that focus upon Franklin Roosevelt's Court-packing plan and other political forces to account for shifting judicial decisions in 1936 and 1937. In rejecting such "externalist" explanations, Cushman and Friedman stress the continuity in intellectual paradigms that shaped the Supreme Court's jurisprudence from the Progressive Era through the 1930s. See BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); Richard D. Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994). A similar "internalist" approach has guided the revisionist interpretations of Justice Stephen J. Field and other nineteenth-century judges by Charles W. McCurdy who, like White and Cushman, teaches at the University of Virginia. Perhaps we now have a "Virginia school" as well as a "Wisconsin school." See Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863-1897*, 61 J. AM. HIST. 970 (1975); Charles W. McCurdy, *The Knight Sugar Decision of 1895 and the Modernization of American Corporation Law, 1869-1903*, 53 BUS. HIST. REV. 304 (1979).

23. HURST, *LAW AND THE CONDITIONS*, *supra* note 1.

24. Presser, *supra* note 2, at 858.

25. *Id.*

26. HURST, *LAW AND THE CONDITIONS*, *supra* note 1, at 3-32. Because so much of the evidence Hurst marshaled concerned economic issues, commentators, including Presser, have

American law privileged “dynamic” property rather than passive, *rentier* interests.²⁷ In place of a conservative consensus rooted in immutable legal principles, Hurst suggested that the promotion of economic progress and social mobility sprang from popular sovereignty and a “societal consensus” on appropriate values.²⁸

Morton J. Horwitz, the most vigorous proponent of the “radical transformation school,” agreed with the Hurstians that American lawmakers crafted legal rules to promote economic development, but he spurned the belief that these profound changes in doctrine rested upon a broad societal consensus. Rather, an elite of strategically placed lawyers, judges, legislators, and treatise writers, all responsive to the claims of commercially minded entrepreneurs, forged new rules of tort, contract, and property that overwhelmed the claims of farmers, artisans, and small shopkeepers.²⁹ This legal coup d’état in the first half of the nineteenth century advanced economic inequalities soon confirmed by the post-Civil War triumph of legal formalism. In Horwitz’s legal history, Presser argued, the ceaseless quest for development maintained social privileges and usually trumped popular sovereignty.

sometimes concluded that his conception of “the release of energy” remained limited to market relations. *See, e.g.*, PETER KARSTEN, HEART VERSUS HEAD: JUDGE-MADE LAW IN NINETEENTH CENTURY AMERICA 300, 325 n.2, 330 n.28 (1997). In fact, Hurst used a broader phrase, “the release of individual creative energy,” which could include intellectual and spiritual values as well as material ones. HURST, LAW AND THE CONDITIONS, *supra* note 1, at 5-6.

27. HURST, LAW AND THE CONDITIONS, *supra* note 1, at 9-10, 23-29. However, the emergence of large-scale industrial production and financing after the 1870s, Hurst claimed, created new *rentier* interests. *Id.* at 71, 79.

28. Presser, *supra* note 2, at 859. Sometimes grouped with the so-called “consensus school” of American historical writing in the 1950s, Hurst has been criticized for softening the sharp edges of legal and political conflict in nineteenth-century America by giving little attention to the struggles over slavery, religion, temperance, and women’s suffrage. *See* Stephen Diamond, *Legal Realism and Historical Method: J. Willard Hurst and American Legal History*, 77 MICH. L. REV. 784 (1979). But for an interpretation that challenges this point of view and places Hurst outside the consensus school, see Aviam Soifer, *Willard Hurst, Consensus History, and the Growth of American Law*, 20 REVS. AM. HIST. 124 (1992).

29. *See, e.g.*, HORWITZ, *supra* note 1, at 161-73, 180, 197-201 (discussing the historical development of doctrines in contract law). Critics of Horwitz’s thesis questioned his reliance upon a small regional sample of appellate judicial decisions, noting that many of the doctrinal changes he stressed had taken place much earlier and that American judges displayed far less compassion for capital than he allowed. *See* KARSTEN, *supra* note 26, at 325 n.2; Harry N. Scheiber, *Back to “The Legal Mind”? Doctrinal Analysis and the History of Law*, 5 REVS. AM. HIST. 458, 462 (1977); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717 (1981); A.W.B. Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979). In his 1992 sequel, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, Horwitz traced the overthrow of legal formalism by progressive jurisprudence and Legal Realism, but concluded his account prior to the Warren Court with the triumph of a new conservatism represented by the Legal Process movement and the search for “neutral principles.” Both of Horwitz’s volumes have generated their share of praise as well as criticism. *See* Daniel R. Ernst, *The Critical Tradition in the Writing of American Legal History*, 102 YALE L.J. 1019 (1993); Wythe Holt, *Morton Horwitz and the Transformation of American Legal History*, 23 WM. & MARY L. REV. 663 (1982).

Presser identified a fourth “heroic school” of legal historians, represented by Grant Gilmore,³⁰ Leonard Levy,³¹ and Robert Cover,³² whose writings emphasized the impact of individual personalities upon legal development and how the “psychological and philosophical problems of the human condition determine their subjects’ legal behavior more than do the means of production or economic development.”³³ Often employing the method of biography, “heroic school” scholars probed how particular legal actors sought to reconcile conflicting aspects of both personal and legal values. They shared with the conservative school a preoccupation with the internal intellectual and emotional world of their subjects, but their focus upon conflict made them “better equipped to account . . . for all the inconsistent core values in American law.”³⁴

Professor Presser’s suggestive framework of core values and interpretative schools did not exhaust, either in 1982 or in the decades since, the possibilities of conceptualizing the many approaches to American legal history. With a heavy emphasis upon scholarship that focused on the nineteenth-century transformation to capitalism, his survey paid little attention to either the colonial period or the twentieth century. And apart from Horwitz, it ignored virtually all of the legal history research then associated with the Critical Legal Studies movement.³⁵ While he recognized that American legal history had become a mansion of many methodological rooms, Presser’s framework often failed to capture subtle distinctions among its practitioners, and it became less useful as the field continued to expand after 1982. G. Edward White’s sustained interest in the intellectual paradigms that both limited and emancipated judges, for example, never blinded him to the political, economic, and social forces that played upon the inner world of judicial thought. Horwitz, often labeled as an economic determinist, devoted considerable effort to deconstructing the mental

30. See, e.g., GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1977); GRANT GILMORE, *THE DEATH OF CONTRACT* (1974).

31. See, e.g., LEONARD LEVY, *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963); LEONARD LEVY, *THE LAW OF THE COMMONWEALTH AND CHIEF JUSTICE SHAW* (1957).

32. See, e.g., ROBERT M. COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS* (1975).

33. Presser, *supra* note 2, at 863.

34. *Id.* at 866. Recent, powerful examples of what Presser described as the “heroic school” are GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* (1994), JOHN T. NOONAN JR., *PERSONS AND MASKS OF THE LAW* (1976), RICHARD POLENBERG, *THE WORLD OF BENJAMIN CARDOZO: PERSONAL VALUES AND THE JUDICIAL PROCESS* (1997), and G. EDWARD WHITE, *JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF* (1993).

35. See, e.g., Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984); Morton J. Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 *AM. J. LEGAL HIST.* 275 (1973); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 *BUFF. L. REV.* 209 (1979); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 *RES. L. & SOC.* 3 (1980); Mark Tushnet, *A Marxist Analysis of American Law*, *MARXIST PERSP.*, Spring 1978, at 96.

universe of judges and legal intellectuals. Bruce Ackerman demonstrated that one need not privilege an economic interpretation in order to find historical moments that produced radical transformations in the legal order.³⁶ More recently, Michael J. Klarman may have founded an entirely new “ironic school” of American legal history by reminding us that Supreme Court decisions seldom initiate social change and often generate unintended consequences, and that so-called great cases may not have been so great after all.³⁷

Hurst himself, of course, stressed the economic forces influencing American legal policy in the nineteenth century. But he also posited a broad “working principle” of the law that appeared to transcend material conditions. Judges and legislators, he claimed, believed that law “should increase men’s liberty by enlarging their practical range of options in the face of limiting circumstance.”³⁸ Hurst did not pursue either this theme or “the release of creative energy” trope much beyond nineteenth-century American legal history. But in the concluding chapters of *Law and the Conditions of Freedom*, he sketched some of the conditions that would lead to the transformation of that working principle and “the release of creative energy” in the twentieth century: the realization that unchecked economic aggrandizement had produced many social costs that needed to be paid and that the expansion of some men’s liberty had come at the expense of others’ oppression.³⁹ Had Hurst, the former Brandeis clerk and New Dealer, authored his own sequel to *Law and the Conditions of Freedom*, one suspects he would have written one very much like Lawrence Friedman’s newest volume.

II. FRIEDMAN’S LAW AND THE HURSTIAN TRADITION

During his seven years teaching at Madison (1960-1967), Friedman came under the intellectual influence of Hurst, then already far along the path that, as Friedman now writes, would throw “open the doors and [bring] law back into society, as part of society, flesh of its flesh, bone of its bone. [Hurst] broke down the barriers between legal history, and general social and economic history.”⁴⁰

36. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

37. See Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 13-75 (1994) [hereinafter Klarman, Brown, *Racial Change*]; Michael J. Klarman, Brown v. Board of Education: *Facts and Political Correctness*, 80 VA. L. REV. 185 (1994); Michael J. Klarman, *How Great Were the “Great” Marshall Court Decisions?*, 87 VA. L. REV. 1111 (2001) [hereinafter Klarman, *Marshall Court Decisions*]; Michael J. Klarman, *What’s So Great About Constitutionalism?*, 93 NW. U. L. REV. 145 (1998).

38. HURST, *LAW AND THE CONDITIONS*, *supra* note 1, at 53.

39. *Id.* at 33-108.

40. LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE TWENTIETH CENTURY* 501 (2002).

While at Madison, Friedman researched and published in 1965 his first major monograph, *Contract Law in America: A Social and Economic Case Study*, a work that bore a striking similarity to Hurst's own pioneering study, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915*, which appeared a year earlier. In addition to their utilization of local Wisconsin legal materials, both books exemplified a cardinal goal Hurst had set for a new American legal history: It should explore the law in action, as it actually entered the daily lives of people, and not simply as it became manifested in the decisions of appellate courts.

Since 1965, Friedman has authored or coauthored more than twenty books, and scores of articles, that range over topics as diverse as the legal profession, housing policy, criminal justice, and age discrimination.⁴¹ In 1973, he published *A History of American Law* (revised in 1985), the first attempt at a comprehensive survey and synthesis of American law from colonial beginnings to the late nineteenth century. This was a work that, drawing upon the rich outpouring of monographic literature since the 1950s, quickly became a standard text in most undergraduate, graduate, and law school legal history courses, and placed its author in the first rank of those identified with Hurst and the Wisconsin School. And with the passing of its founder, Friedman has assumed by virtue of his prodigious and imaginative scholarship the custodianship of the Hurstian tradition.⁴²

As Hurst conceived of and practiced the new legal history project, it emphasized the importance of lawmakers other than appellate judges (the traditional focus of lawyers' legal history); examined the law in action rather than simply the law in books; and demonstrated the responsiveness of the legal order to the manifold forces of economic, technological, and social change. His writings always reflected the formative influence of the 1930s, of the Legal Realist movement, and of the New Deal and Justice Brandeis. Along with his methodological concerns, Hurst displayed an abiding faith in the progressive direction of legal developments in America, with progress defined along a material axis (wealth), as well as along

41. See, e.g., LAWRENCE M. FRIEDMAN, *LAW AND SOCIETY: AN INTRODUCTION* (1977); LAWRENCE M. FRIEDMAN, *YOUR TIME WILL COME: THE LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT* (1984); LAWRENCE M. FRIEDMAN & STEWART MACAULAY, *LAW AND THE BEHAVIORAL SCIENCES* (2d ed. 1977); LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA, 1870-1910* (1981); *LEGAL CULTURE AND THE LEGAL PROGRESSION* (Lawrence M. Friedman & Harry N. Scheiber eds., 1996).

42. This is not to say the Hurstian tradition does not have other, equally talented and productive scholars, notably Stanley Kutler, Harry N. Scheiber, Charles McCurdy, and William Novak, to name but a few. And, as Friedman himself notes, "all legal history since Hurst has been necessarily Hurstian, even when it struggles to revise his messages." FRIEDMAN, *supra* note 40, at 502. He might point to the scholarship of Peter Karsten, who studied with Hurst and absorbed his social-economic approach to legal history, but came finally to reject much of it. See KARSTEN, *supra* note 26, at 8-9.

political, moral, and spiritual ones (equality and justice). Hurst, Alfred Konefsky observed not long ago, remained “a (small ‘d’) democrat, with all the frustrations and hopes a believer in democracy inspires,”⁴³ a historian who believed that society slowly, but inexorably, achieved greater civility and fairness at the level of important human relationships.

In its basic thesis concerning the relationship between law and society, and in the broad sweep of its interpretation, Friedman’s *American Law in the Twentieth Century* builds upon, and extends, the Hurstian tradition in legal history. In Friedman’s narrative, the legal system functions largely as a dependent variable, with lawmakers responding to underlying developments in science, medicine, technology, economic organization, and shifting moral beliefs. The legal system’s general trajectory has been to accommodate these forces and to expand the range of opportunity available to ordinary men and women. In short, “the release of creative energy” continued into the twentieth century, and there gained new momentum. Friedman states his case clearly:

The main theme of this book is that law is a product of society. Perhaps law has a life of its own; but if so it is a very limited life. Law certainly has its own language. It has its customs and rituals. Every case discussed in this book presented a legal issue; each one came wrapped in a cloak of technicality, the lawyer’s own special ropes, strings, and bits of glue. But every case—and every statute, every administrative rule—also had a context, a background. And it is the background which made the problem seem like a problem in the first place—defined it, constructed it—and in the end, help [sic] dictate, or influence, the way the system solved it (or failed to solve it).⁴⁴

If Hurst was the first to breach the walls separating legal history from general social and economic history, Friedman tears them down completely. In this legal history, the light tractor and the mechanical cotton picker play as large a role in toppling debt peonage and Southern racial segregation as the Supreme Court and lawyers from the NAACP. George Eastman’s little Kodak reshapes popular attitudes and law with respect to matters of privacy and decency. Alfred C. Kinsey and Hugh Hefner share the spotlight with Justices Douglas and Blackmun in creating constitutional landmarks such as *Griswold v. Connecticut*⁴⁵ and *Roe v. Wade*.⁴⁶

American Law in the Twentieth Century is Hurstian in other key respects. “Great cases” and a few seminal appellate judges receive their just

43. Alfred S. Konefsky, *The Voice of Willard Hurst*, 18 LAW & HIST. REV. 147, 165 (2000).

44. FRIEDMAN, *supra* note 40, at 517.

45. 381 U.S. 479 (1965).

46. 410 U.S. 113 (1973).

due, but Friedman's broad canvas provides abundant space for all of the other significant actors and institutions that have reshaped American legal culture since the turn of the century: legislators, executives, administrative agencies, interest groups, probation officers and other penal officials, law firms, law schools, litigants, journalists—even motion picture and television studios. The coverage of topics is equally broad, ranging from high constitutional politics through products liability, crime and punishment, military justice, charitable immunities, property, landlords and tenants, trusts, pension law, adoption, guardianship, patents, trademarks, and even the billable hour.

Friedman, like Hurst, writes about law in action as well as law in books, including the law quietly molded each day outside of formal legal institutions in countless law offices and judges' chambers. "The working rules of contract," he notes, "are not necessarily the rules the casebooks talk about Business cannot go on without contracts; but it also cannot go on without trust, understanding, and common sense. The real world of contractual behavior was far more complex than the lawbooks suggested."⁴⁷ More often than not, he confesses that the evidence is too thin or contradictory to draw firm conclusions about the impact of the law upon social and economic relationships. How effective have the federal regulatory agencies that sprouted from the 1930s to the present been? "Impossible to say. Each agency had its own story. Some were efficient. Some were sloppy. A few were downright corrupt."⁴⁸ State laws designed to protect farmland and open space? "Whether these . . . laws have done any good—or done anything at all—is an open question."⁴⁹

As for heroes of the law, there are plenty of them in Friedman's account, but not necessarily with names like Holmes, Cardozo, Brandeis, Hughes, Warren, Darrow, Nader, Belli, or Kunstler. Friedman's heroes are those like Jo Carol LaFleur, the junior high school teacher in Cleveland who lost her job because the school board believed her pregnancy would prove an embarrassment in the classroom. Turned down by her union, the ACLU, and lower courts, LaFleur and her attorney—law professor Jane Picker—carried their fight to the United States Supreme Court, where they won a major victory for gender equality in 1974.⁵⁰ This is legal history from the bottom up rather than from the top down. Ordinary people and their sense of injustice—LaFleur, Gladys Escola,⁵¹ George W. McLaurin,⁵² and Joseph Lee Jones⁵³—made law in the twentieth century to the same extent

47. FRIEDMAN, *supra* note 40, at 385.

48. *Id.* at 203.

49. *Id.* at 426.

50. *Id.* at 517-19; *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).

51. Escola v. Coca Cola Bottling Co., 150 P.2d 436 (Cal. 1944).

52. McLaurin v. Okla. State Regents for Higher Educ., 339 U.S. 637 (1950).

53. Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

that Hurst's Pike River Claimants Union did on the Wisconsin shore of Lake Michigan a hundred years earlier.⁵⁴

Throughout *American Law in the Twentieth Century*, Friedman draws heavily upon a body of concepts he first developed in three earlier books published since the mid-1980s: *Total Justice* (1985), *The Republic of Choice: Law, Authority, and Culture* (1990), and *The Horizontal Society* (1999). Those volumes also had a strong Hurstian flavor as Friedman explored how America's old nineteenth-century republic of chance became a new republic of choice. When Hurst's nineteenth-century lawmakers released energy, the benefits flowed largely to those who were white, male, and Protestant. But such hierarchies of race, ethnicity, gender, and religion, Friedman argued, crumbled in the course of the twentieth century, to be replaced by a regime of plural equality and expressive individualism. From minimum wage laws and workmen's compensation statutes to the G.I. Bill and Medicare, a general expectation of social security and entitlement cushioned many of the uncertainties endemic to a capitalist economy. Finally, the complexities and interconnectedness of social and economic problems in an urban, industrial culture necessitated administrative regimes in both the public and the private sectors, and increased greatly the mediating-regulatory role of lawyers and the law.

The triumph of plural equality, rights consciousness, the welfare state, and the pervasiveness of law in the twentieth century, Friedman pointed out, "have been a long time growing; they are not pathologies, errors, miscalculations, or random noise . . . [L]east of all are they the outcome of a lawyers' plot."⁵⁵ The "heart of the new legal culture," he added,

gives primacy to the concept of individual choice Each person deserves the right to choose whether to live or die . . . the thoughts to hold or express, the jobs, ideas, and religions to pursue . . . the partners to have sex with, the family patterns to follow, and so on. All ought to be open to selection by individuals—as open as the choice of this or that brand of soup or soap in the supermarket just around the corner.⁵⁶

Hurst's metaphor of "the release of creative energy," appropriate to a nineteenth-century preoccupation with production, had been transformed by Friedman into "expressive individualism," a metaphor suitable to a twentieth-century supermarket culture of consumption. While New Left gurus like Herbert Marcuse denounced these developments forty years ago

54. See HURST, *LAW AND THE CONDITIONS*, *supra* note 1, at 3-6.

55. LAWRENCE M. FRIEDMAN, *THE REPUBLIC OF CHOICE: LAW, AUTHORITY, AND CULTURE* 192 (1990).

56. *Id.*

as “surplus repression” or “repressive tolerance,”⁵⁷ Friedman largely celebrated them in the 1980s and 1990s as the inevitable fulfillment of the nation’s cultural and legal destiny. “I like the spread of due process,” Friedman wrote twenty years ago. “I like the welfare state; I like justice for minorities; I like the broader meaning of equality, the great reach and depth of individual rights.”⁵⁸ A decade ago, he gave voice to some doubt. Expressive individualism, he noted, had also become “the natural breeding ground for all sorts of liberation movements,” serving as both “a fairy godmother, blessing oppressed races and minorities” and “the wicked witch breeding violent, fanatical movements.”⁵⁹ In *American Law in the Twentieth Century*, Friedman now tells the full story of how and why the republic of chance became the republic of choice—became both a fairy godmother and a wicked witch with attendant social benefits and social costs. It is a tale he tells in three parts: The Old Order, The New Deal and Its Successors, and finally, The Way We Live Now: Reagan and the Post-Reagan Years.

III. FROM THE OLD ORDER TO THE WAY WE LIVE NOW

For a scholar who has dedicated much of his career to breaking down the boundaries between legal history and social history, Friedman’s choice of narrative landmarks in *American Law in the Twentieth Century* is a bit surprising. He adopts essentially a “presidential synthesis,” a framework that many political historians have forsaken in favor of longer historical markers such as those that define a generation. Few would dispute the critical importance of Franklin Roosevelt’s New Deal with respect to the transformation of public law in the 1930s, the decade during which the Supreme Court ceded broad authority to Congress and the President over the nation’s basic economic policies. But the choice of Ronald Reagan’s eight-year presidency as a second major turning point in American legal history seems more curious, especially in view of Friedman’s repeated emphasis upon the social and cultural underpinnings of legal change. Despite fierce rhetoric sometimes emanating from the White House between 1981 and 1989, Reagan, who often quoted FDR, did not dismantle a single, significant program of the New Deal.

True, Reagan’s first Supreme Court nominee, Sandra Day O’Connor, and his new Chief Justice, William Rehnquist, led the charge against the inherited constitutional mandates given to Congress by the Supreme Court since World War II, but Rehnquist was appointed during the Nixon

57. See, e.g., Herbert Marcuse, *Repressive Tolerance*, in *A CRITIQUE OF PURE TOLERANCE* 81 (Robert Paul Wolff et al. eds., 1965).

58. LAWRENCE M. FRIEDMAN, *TOTAL JUSTICE* 151 (1985).

59. FRIEDMAN, *supra* note 55, at 206.

Administration and did not gain significant victories for his brand of state-centered federalism until 1992 and 1995, after Reagan left office.⁶⁰

From 1966, when he won the governorship of California (a watershed not noted by Friedman), until his election to the presidency in 1980, Reagan rode the rising crest of middle-class anger and reaction against many of the very lifestyle issues and changes that Friedman sees as fundamental to the creation of the new legal culture of expressive individualism and plural equality: the civil rights movement, the youthful counterculture, antiwar protests, third-wave feminism, sexual experimentation, and the gay awakening. But like Reagan and the New Right, these social and cultural movements all had their origins in the 1960s and 1970s, the decades that changed America far more decisively and permanently than the shallow Reagan revolution of the 1980s.

Friedman may have stressed the importance of one political moment at the expense of an earlier cultural one, but few people will dispute his general description of the nation's Old Order and that American law and society are better off for its demise. McKinley's America was almost exclusively a white man's republic and a republic of chance, with security and opportunity allocated according to race, ethnicity, religion, gender, and class. This Old Order promoted the "release of energy" for the owners and managers of capital and for those fortunate enough to be born Caucasian and Protestant. For most Americans, however, back-breaking labor, low wages, discrimination, and a host of plagues made daily life nasty, brutish, and short. The majority of African Americans, residents of the rural South, endured segregation, disfranchisement, and an economic system of sharecropping, tenancy, and debt peonage that made them, in James Agee's memorable phrase, "social integers in a criminal economy."⁶¹

The material conditions of life were only marginally better for the average white farmer of the South, the Great Plains, and the Midwest, trapped in the vicissitudes of a world market for cotton, tobacco, wheat, and hogs. In the mines, mills, factories, packing plants, and railroads of the industrial economy, those who suffered the loss of fingers, arms, legs, or eyes stood little chance of receiving compensation through the tort system.⁶² For the unemployed and those physically disabled or simply too old to work, the social safety net consisted largely of private efforts.⁶³ Single women and widows could still claim somewhat more legal rights than married women, but few women, whatever their marital status, could

60. *Lopez v. United States*, 514 U.S. 549 (1995); *New York v. United States*, 505 U.S. 144 (1992).

61. JAMES AGEE & WALKER EVANS, *LET US NOW PRAISE FAMOUS MEN* 100 (1941).

62. FRIEDMAN, *supra* note 40, at 352.

63. *See id.* at 180-81, 183.

vote or practice law, medicine, or other learned professions.⁶⁴ Criticizing a state supreme court's behavior could result in a conviction for contempt.⁶⁵ Defending nude swimming could get you two months in prison for encouraging or advocating disrespect for law.⁶⁶ Most people went to hospitals expecting to die, not to be cured of their illnesses.

But Friedman reminds us that even within the Old Order that gave us *Lochner v. New York*,⁶⁷ the labor injunction,⁶⁸ the lynching of Leo Frank,⁶⁹ and the Comstock Act,⁷⁰ lawmakers planted the seeds of legal change that grew more robust during the New Deal and post-New Deal years. Congress and the states wrote the first consumer protection laws. State courts, led by Judge Cardozo's New York Court of Appeals, raised the liability for manufacturers who sold defective products⁷¹ and businessmen who made negligent representations.⁷² Workmen's compensation statutes reduced some of the misery of life's misfortunes by removing industrial injuries from the uncertain area of tort litigation.

During the Old Order, in addition, the Supreme Court affirmed the authority of state and local governments to zone real property and limit its use,⁷³ as well as the federal government's broad power to spend money through specific grant-in-aid programs.⁷⁴ Legal reformers launched the NAACP and the ACLU to fight discrimination and defend the Bill of Rights. While the automobile, national radio networks, movie theatres, and chain stores forged a new national consumer culture, the Supreme Court reversed a state criminal conviction for the first time on due process grounds.⁷⁵ During the years of the Old Order, Hans Berger developed the

64. *Id.* at 32-33.

65. *Patterson v. Colorado ex rel. Attorney Gen.*, 205 U.S. 454 (1907) (upholding a contempt conviction based on the publication of articles and a cartoon criticizing the Colorado Supreme Court).

66. *Fox v. Washington*, 236 U.S. 273 (1915). Both *Patterson* and *Fox* were written by Justice Holmes.

67. 198 U.S. 45 (1905).

68. *See, e.g., Truax v. Corrigan*, 257 U.S. 312 (1921); *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229 (1917).

69. JEFFREY MELNICK, *BLACK-JEWISH RELATIONS ON TRIAL: LEO FRANK AND JIM CONLEY IN THE NEW SOUTH* (2000).

70. An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use, ch. 258, 17 Stat. 598 (1873).

71. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916) (holding that an automobile manufacturer had a duty to inspect wheels purchased from another manufacturer prior to selling the automobile).

72. *Glanzer v. Shepard*, 135 N.E. 275 (N.Y. 1922) (holding that a public weigher was liable to a buyer for understating the weight of a proposed purchase).

73. *See, e.g., Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Welch v. Swasey*, 214 U.S. 91 (1909).

74. *See Massachusetts v. Mellon*, 262 U.S. 447 (1923).

75. *Moore v. Dempsey*, 261 U.S. 86 (1923). On the impact of consumer culture and popular culture in the years from 1900 to 1930, see LIZABETH COHEN, *MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919-1939* (1990); WILLIAM LEACH, *LAND OF DESIRE: MERCHANTS, POWER AND THE RISE OF A NEW AMERICAN CULTURE* (1993); ROBERT SKLAR,

electroencephalogram (EEG), John Abel isolated insulin, and F.A. Hartman first treated Addison's disease successfully with cortin. At the same time, the Justices struck down state laws that discriminated against the teaching of foreign languages and minority religions.⁷⁶

Franklin Roosevelt's New Deal and the Supreme Court under Chief Justice Hughes launched a legal transformation in the 1930s that overturned the Old Order and gained momentum well into the 1970s. From Franklin Roosevelt to Richard Nixon, lawmakers combined with medical scientists, cultural producers, and the creators of a Cold War and service-oriented postindustrial economy to fashion what Friedman has called "the security state," the "due process revolution," and the pursuit of "plural equality" and "expressive individualism."⁷⁷

The New Deal put a floor under wages and a ceiling on hours. It gave industrial workers the security of collective bargaining, and agricultural producers a safety net of farm subsidies and crop insurance. After 1935, the federal government provided old age pensions, unemployment compensation, and direct aid to the blind, disabled, and dependent children.⁷⁸ The FDIC guaranteed bank deposits, the SEC promulgated uniform accounting procedures, the Federal Housing Administration standardized appraisal methods, and the Home Owners Loan Corporation subsidized mortgages. The Servicemen's Readjustment Act of 1944,⁷⁹ also known as the G.I. Bill of Rights, became the largest New Deal social program of all by allocating to veterans extended unemployment benefits, home mortgages, medical care, and tuition for college.⁸⁰

While the New Deal broke the Anglo-Saxon Protestant monopoly on government service by recruiting Catholics and Jews, Alexis Carrel and Charles Lindbergh developed the first artificial heart, and pharmaceutical firms marketed sulfa drugs. At the same time that Interior Secretary Harold Ickes hired African-American architects and engineers for the Public Works Administration, Attorney General Frank Murphy (a Roman Catholic)

MOVIE-MADE AMERICA: A SOCIAL HISTORY OF AMERICAN MOVIES (1975); and SUSAN STRASSER, SATISFACTION GUARANTEED: THE MAKING OF THE AMERICAN MASS MARKET (1989).

76. See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Justice McReynolds's opinions stressed fundamental rights not expressly articulated in the Constitution (such as the liberty of parents to control the education of their children) and were cited by later Justices to support a right to privacy with respect to contraception and abortion.

77. For discussion of expressive individualism, see FRIEDMAN, *supra* note 40, at 516-19. Friedman drew the concept of expressive individualism from ROBERT BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985). He first utilized it in *The Republic of Choice*. FRIEDMAN, *supra* note 55, at 42.

78. DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945*, at 131-380 (1999).

79. Act of June 22, 1944, ch. 268, 58 Stat. 284.

80. On the scope and impact of New Deal programs, see KENNEDY, *supra* note 78, at 131-380.

created a civil rights group in the Department of Justice that resurrected Reconstruction-era statutes to protect voting rights for African Americans⁸¹ and to prosecute state officials who brutalized them.⁸² In 1941, the year that Roosevelt issued the first executive order prohibiting discrimination on grounds of race, color, creed, or nationality in federal contracts,⁸³ doctors successfully treated trachoma and pneumonia with sulfanilamide, and Cheerios appeared for the first time on American breakfast tables.

The New Deal set the foundations of “the security state” and “plural equality,” while the Supreme Court under Chief Justice Charles Evans Hughes launched the “rights revolution.” Between 1930 and 1941, Hughes and his brethren extended the Due Process Clause of the Fourteenth Amendment to “incorporate” an expanding menu of the Bill of Rights, including freedom of the press,⁸⁴ the right to assemble peaceably,⁸⁵ the right to engage in peaceful picketing,⁸⁶ and the right to exercise one’s religion freely.⁸⁷ And for the first time, the Court invoked “the clear and present danger” test to reverse a conviction for allegedly inciting insurrection against organized government.⁸⁸

The Hughes Court also advanced the cause of plural equality by requiring the states to provide legal counsel to impoverished or illiterate defendants charged with capital offenses,⁸⁹ by overturning a conviction on the ground that African Americans had been systematically excluded from the grand and petit juries,⁹⁰ and by ordering the admission of an African American to the all-white law school in Missouri.⁹¹ In the same year as the *Gaines* decision, Justice Harlan Fiske Stone also penned his famous footnote number four in *United States v. Carolene Products Co.*,⁹² in which he argued that the judiciary should scrutinize with special care laws that violated the Bill of Rights, restricted access to the political process, or discriminated against “discrete and insular minorities.” There Stone gave birth to a concept that proved captious enough ultimately to protect plural equality and expressive individualism for political dissenters, racial and religious minorities, gays and lesbians, and even those with physical disabilities.

81. *United States v. Classic*, 313 U.S. 299 (1941).

82. *Screws v. United States*, 325 U.S. 91 (1945).

83. Exec. Order No. 8802, 6 Fed. Reg. 3109 (June 27, 1941).

84. *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

85. *De Jonge v. Oregon*, 299 U.S. 353 (1937).

86. *Thornhill v. Alabama*, 310 U.S. 88 (1940).

87. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

88. *Herndon v. Lowry*, 301 U.S. 242 (1937).

89. *Powell v. Alabama*, 287 U.S. 45 (1932).

90. *Norris v. Alabama*, 294 U.S. 587 (1935).

91. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

92. 304 U.S. 144, 152 n.4 (1938).

The new American security state, increasingly managed by a permanent bureaucracy and festooned with growing entitlements and an expanding bundle of individual rights, gathered steam for the next thirty years, and reached something of a climax during the presidency of Richard Nixon, whose administration adopted the Environmental Protection Act, the Consumer Products Safety Act, and the Occupational Health and Safety Act, in addition to proposing a guaranteed cash income to the poor in the failed Family Assistance Plan.⁹³

During these years, from Truman's order to desegregate the military, through the Montgomery bus boycott, the adoption of the Civil Rights Act of 1964, the Stonewall riot, and congressional passage of the Equal Rights Amendment, Americans marched, demonstrated, legislated, and litigated against all of the forms of racial, gender, and sexual discrimination. Conks went out; afros came in. Black was beautiful. Mexican Americans discovered they were also Chicanos. Japanese Americans demanded redress for their relocation during World War II. Women declared the personal to be political. Gays and lesbians came out of the closet. Nonobservant Jews returned to kosher. Bumper stickers proclaimed, "I'm Polish, kiss me." Conservative pundits bemoaned the balkanization of America politics and culture and "the twilight of authority" generated by the triumph of plural equality and expressive individualism.⁹⁴

During these same years, the class action lawsuit and changes in tort law appeared to spawn an explosion in litigation as people sought both compensation and total justice from private and public institutions that had injured them or failed to meet their expectations for a life free of pain and misery.⁹⁵ Americans now lived in a world of medical and technological miracles—penicillin, vaccinations against polio, fluoridation, organ transplants, lithium, gene synthesis, and test-tube babies—and they came to expect similar miracles from their legal system to soothe all manner of misfortune. In the year John Glenn, Scott Carpenter, and Walter Schirra orbited the earth, the California Supreme Court handed down *Greenman v. Yuba Power Products, Inc.*,⁹⁶ holding manufacturers strictly liable in tort for injuries arising from defective products. If the security state could put men into space, surely manufacturers could market safe merchandise.⁹⁷

93. For a discussion of the Family Assistance Plan, see JONATHAN SCHELL, *THE TIME OF ILLUSION* 47-49 (1975).

94. See JOHN MORTON BLUM, *YEARS OF DISCORD: AMERICAN POLITICS AND SOCIETY, 1961-1974*, at 252-318 (1991); ALLEN J. MATUSOW, *THE UNRAVELING OF AMERICA: A HISTORY OF LIBERALISM IN THE 1960S*, at 180-271 (1984); ROBERT A. NISBET, *TWILIGHT OF AUTHORITY* 1-52 (1975).

95. FRIEDMAN, *supra* note 40, at 361-69.

96. 377 P.2d 897 (Cal. 1963).

97. Seven years after *Yuba Products*, the California Supreme Court extended strict liability to bystanders who had no relationship to either buyers or sellers. *Elmore v. Am. Motors*, 451 P.2d 84, 89 (Cal. 1969).

However faintly, the Old Order contained glimmers of the future New Deal and its successor regimes. Likewise, the New Deal and its successors sowed the seeds of their own demise, an irony Friedman might have explored in greater depth. By supporting organized labor and the first federal programs such as the Farm Security Administration to address the structural problems of poverty and economic inequality, Roosevelt and the New Dealers placed class high on the agenda of American politics. But the benefits of the New Deal's class-oriented politics flowed largely to white males in industry and agriculture. Despite a few notable achievements and good intentions, the New Deal did little to change the opportunity structure for racial minorities and women.⁹⁸

Beginning with Harry Truman in 1948 and reaching its climax during the Kennedy and Johnson years, Franklin Roosevelt's successors had little choice but to address those neglected constituencies of race and gender. By doing so, they propelled forward the movement for plural equality and economic opportunity. But simultaneously, their efforts alienated white, working-class males both in the North and the South, and reconfigured American politics. Less than a week after Lyndon Johnson, FDR's protégé, signed into law the Voting Rights Act of 1965,⁹⁹ African Americans rioted in Los Angeles, where the right to vote had little relevance to their experiences with poor schools, deteriorating public services, joblessness, and police brutality. The Act hastened the migration of Southern whites from the party of Roosevelt to the party of Richard Nixon and Ronald Reagan, a movement that had inexorably gathered momentum since 1948. The riot, on the other hand, terrified millions of blue-collar ethnic voters in the North, a process hastened by the deep divisions over the Vietnam War, the urban riots and youth revolt of the 1960s, and the third wave of feminism. In 1966, the year Virginia Masters and William Johnson published *Human Sexual Response*, which asserted, among other conclusions, that women possessed at least as much sexual desire and energy as men, Reagan triumphed in California by running against the welfare state and the 1960s culture of protest and hedonism. By 1968, cultural politics, rooted in plural equality and expressive individualism, had begun to trump class politics, with devastating consequences for American liberalism.

Nixon won the White House in the same year feminists nominated a pig and dropped girdles and bras in trash cans to protest the Miss America

98. See generally ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 250-72 (1982) (describing the combined effects of New Deal initiatives and gender-based labor segregation on women in the work force); HARVARD SITKOFF, *A NEW DEAL FOR BLACKS* 34-83 (1978) (describing the combined effects of economic depression and the New Deal on the civil rights of African Americans).

99. Pub. L. No. 89-110, 79 Stat. 437 (1965).

contest.¹⁰⁰ In 1972, William Rehnquist took his seat on the Supreme Court, replacing John Marshall Harlan. Three years later, the first challenge to affirmative action reached the high court,¹⁰¹ and not long thereafter, a majority of the Justices refused to equate sex discrimination with racial discrimination,¹⁰² but reaffirmed the constitutionality of capital punishment in *Gregg v. Georgia*,¹⁰³ and brought an end to any meaningful school desegregation in metropolitan areas of the North.¹⁰⁴ One year after the voters of California approved Proposition 13, imposing a fiscal straitjacket on state and local government, the Equal Rights Amendment also died, having been ratified by only thirty-five of the required thirty-eight states.¹⁰⁵

But even in the wake of Reagan's election to the presidency, Friedman claims, the security state, the rights revolution, plural equality, and expressive individualism continued to influence, if not dominate, American legal and political culture.¹⁰⁶ Despite much huffing and puffing about a bloated federal bureaucracy, excessive regulations, extravagant welfare payments to "the undeserving poor," the need to "reinvent government," and the collapse of "traditional values," neither Reagan nor his successors significantly reversed the course of social and legal change. As budget deficits grew during the 1980s and early 1990s, so did the size of the federal government, the divorce rate, the incidence of abortion, the number of Americans living together outside of marriage, and the growing number of annual parades celebrating gay and lesbian life. A Democrat, Bill Clinton, tamed the deficit and ended a significant federal entitlement, Aid to Families with Dependent Children, when he signed the so-called Personal Responsibility and Work Opportunity Reconciliation Act of 1996.¹⁰⁷

As the new century turned, no single ethnic or racial group could claim majority status in California, the nation's social and behavioral frontier, and over 100 language groups attended its largest urban school system in Los Angeles.¹⁰⁸ Gary Locke, an Asian American, sat in the governor's chair in the state of Washington, a state where in 1942 Gordon Hirabayashi, then a university student, had been convicted for violating a curfew that applied

100. *No More Miss America! Ten Points of Protest*, in *SISTERHOOD IS POWERFUL: AN ANTHOLOGY OF WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* 521, 521 (Robin Morgan ed., 1970).

101. *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

102. *Craig v. Boren*, 429 U.S. 190 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

103. 428 U.S. 153 (1976).

104. *Milliken v. Bradley*, 418 U.S. 717 (1974).

105. FRIEDMAN, *supra* note 40, at 544.

106. *Id.* at 523-29.

107. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

108. David Ferrell & Robert Lee Hotz, *Ethnic Pockets Amid a Vast Fabric of English*, L.A. TIMES, Jan. 23, 2000, at A1.

only to those of Japanese descent.¹⁰⁹ The college education gap between men and women had closed to attain virtual parity for the two groups,¹¹⁰ and women headed leading American corporations including Hewlett-Packard and eBay, major advertising and publishing firms, several universities, and three major Hollywood film studios.¹¹¹ An African American ran the Department of State, while another served as the President's top national security adviser.

Few scholars will challenge Friedman's assertion that America's old formal apartheid system is "dead beyond recall."¹¹² So, too, the rigid patriarchy of the Old Order is not likely to be restored. Gays and lesbians enjoy greater toleration in 2002 than they did in 1960. While the United States Supreme Court has yet to overrule *Bowers v. Hardwick*,¹¹³ which sustained a conviction under Georgia's law against sodomy, the Georgia Supreme Court in 1998 struck down the same law without even a passing reference to *Bowers*.¹¹⁴ Two years before that, six Supreme Court Justices overturned Colorado's referendum intended to block all governmental action to protect the status of persons based on their sexual orientation. No state, declared Justice Kennedy, may "deem a class of persons a stranger to its laws."¹¹⁵ The Court also ruled in 1998 that the sex discrimination provisions of Title VII of the Civil Rights Act of 1964 protect men as well as women from sexual harassment.¹¹⁶ But, over four dissents, the Court held that the Boy Scouts could ban gay members because opposition to homosexuality was part of the organization's expressive message.¹¹⁷

Thus Friedman must concede that America has not yet achieved a truly equitable and just society. Peter Irons reports that a half century after the *Brown* decision, its promise remains unfulfilled, as de facto racial segregation remains the rule in our public schools, North and South. He puts it bluntly: "[T]here has not been a single year in American history in which at least half of the nation's black children attended schools that were largely white."¹¹⁸ In America, year 2002, more minority males remain locked up in prisons than sitting in college classrooms. In America, year 2002, the average professional woman still earns less than a man, despite

109. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

110. Robert A. Rosenblatt, *College Gap Between Sexes Narrows, but Pay's Uneven*, L.A. TIMES, Mar. 15, 2001, at A16.

111. See, e.g., Rachel Abramowitz, *A Hollywood League of Their Own*, L.A. TIMES, Apr. 30, 2002, at A1; *Ohio State Chooses Its First Female President*, L.A. TIMES, July 26, 2002, at A25.

112. FRIEDMAN, *supra* note 40, at 528.

113. 478 U.S. 186 (1986).

114. *Powell v. State*, 510 S.E.2d 18 (Ga. 1998).

115. *Romer v. Evans*, 517 U.S. 620, 635 (1996).

116. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998).

117. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

118. PETER IRONS, *JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION* 338 (2002).

comparable education and experience. Hundreds of criminal defendants who languished on death row have been exonerated, the apparent victims of malfeasance by police or prosecutors. Elderly men and women forgo meals in order to pay for life-saving drugs. Neither the security state nor the rights revolution, plural equality, and expressive individualism have eliminated these disgraceful conditions.

IV. HOLMES'S DRAGON AND FRIEDMAN'S LAW

The venerable Holmes takes an occasional critical blow from Friedman for several of his opinions that have become politically and constitutionally incorrect,¹¹⁹ but he would be among the first to applaud and acknowledge the significance of what the author of *American Law in the Twentieth Century* has achieved. More than a century ago, Holmes, the legal historian, declared it to be

perfectly proper to regard and study the law simply as a great anthropological document. It is proper to resort to it to discover what ideals of society have been strong enough to reach that final form of expression, or what have been the changes in dominant ideals from century to century. It is proper to study it as an exercise in the morphology and transformation of human ideas.¹²⁰

Holmes also knew the formidable adversary that the legal historian confronted when he attempted a bold synthesis of legal history. He called it the dragon of the law:

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal.¹²¹

The dragon had grown large even in Holmes's time, but it has taken on truly gargantuan proportions in the century since, and few scholars would have been capable of mastering the range of primary and secondary literature on display in Friedman's book while presenting such a compelling interpretation of the information therein. He has pulled the dragon from the cave, made him a useful animal, and succeeded in writing a true

119. See, e.g., *Buck v. Bell*, 274 U.S. 200 (1927) (holding forced sterilization by the state to be constitutional); *Bailey v. Alabama*, 219 U.S. 219, 245 (1911); *Giles v. Harris*, 189 U.S. 475 (1903); FRIEDMAN, *supra* note 40, at 110, 114, 116.

120. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 444 (1899).

121. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

anthropology of our legal culture during the twentieth century, one that ranges thoughtfully over legal institutions and actors, high and low, as well as their creations, sublime and ridiculous.

Friedman has eschewed turgid academic prose in favor of a more colloquial and sometimes whimsical style that will surely appeal to the educated, general reader. Police courts, he tells us, always constituted “the plankton of the criminal justice system,”¹²² while old-stock Americans believed immigrants were “breeding like rabbits,”¹²³ somewhat similar to the loyalty oaths that “multiplied like flies” during the McCarthy era,¹²⁴ or the lawyers, who since the 1960s, have also been “breeding like rabbits.”¹²⁵ He also admits that many of the statutes, judicial decisions, and institutions covered in 722 pages constituted in the great scheme of things only “small potatoes.”¹²⁶

Friedman also leavens his narrative with dashes of humor, such as the case of the poor defendant denied probation in California at the turn of the century because of the report that he had “masturbated since about 14,” visited a brothel “three times,” seemed “fond of theatre,” and possessed “no library card.”¹²⁷ Between 1918 and 1940, Leo Stanley, chief surgeon at San Quentin prison, performed ten thousand “testicular implantations” on inmates after he read that goldfish, fed a diet of ground testicles from rams, increased their activity by four hundred percent compared to goldfish fed only ordinary shrimp.¹²⁸ Whether California prison patients experienced similar increased vitality from the good doctor’s scalpel is not a matter of historical record.

Friedman can be tough-minded and critical, however. When it comes to shaping most legislation, he argues, “special interests usually get their way The public, by and large, is inert—busy with its own affairs or, after the dawn of the glorious age of television, sitting with a six-pack in front of the flickering screen.”¹²⁹ Regulated industries usually had their way with the regulators because the latter possessed “money, clout, lobbies, and persuasive voices. . . . The public was more fickle and distant.”¹³⁰

Nor does Friedman hold a very high opinion of venues similar to this one. “There was no academic equivalent of a birth control pill for law reviews,” he writes, and they remain “not only distressingly many, and

122. FRIEDMAN, *supra* note 40, at 83.

123. *Id.* at 96.

124. *Id.* at 334.

125. *Id.* at 457.

126. *Id.* at 73, 81, 478.

127. *Id.* at 90 (quoting FRIEDMAN & PERCIVAL, *supra* note 41, at 232-33).

128. *Id.* at 109 (quoting LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 338 (1993)).

129. *Id.* at 61.

130. *Id.* at 203.

distressingly long-winded; as they sit on library shelves, they are also quite fat.”¹³¹ Justice Brandeis may have been the first Supreme Court Justice to cite one, but most lawyers never read them. “[W]hy should they? There is precious little practical guidance to be gotten from the reviews (if there ever was).”¹³² Legal treatises do not fare much better. They are “on the whole utterly devoid of anything that could be called literary merit.”¹³³

Friedman does not shy away either from making judgments or advancing his opinions, most of them unabashedly liberal. The same people who demand states’ rights, he notes, “are quite eager for federal intervention when it suits them; they forget all about states’ right and local rule when the question is about . . . cyberporn or tort reform, or stopping states from validating marriages of same-sex couples.”¹³⁴ Chief Justice Rehnquist and Justices Scalia and Thomas “would love to clean out death row quickly.”¹³⁵ President Reagan was a “remarkable mediocrity: somewhat lazy, amazingly uninformed on most issues, at times even foolish or simple-minded.”¹³⁶

In a book so consistently entertaining and provocative in its arguments, a reviewer hesitates to enter any dissent, but a few seem in order. Contrary to the author’s broad generalization, businessmen did not fight the New Deal’s National Labor Relations Act “bitterly.”¹³⁷ Some businessmen, especially those with high labor costs, welcomed strong unions as another way to level the economic playing field and reduce cutthroat competition.¹³⁸ Others with largely white-collar employees had little to fear from unions and saw them as a source of improved purchasing power in the economy.¹³⁹

With respect to the establishment of workmen’s compensation plans, a subject on which Friedman has written extensively,¹⁴⁰ he argues that “[e]ach side gave something up.”¹⁴¹ But workers may have actually given up more because the abandonment of the tort system increased the power of insurance companies and gave employers greater authority over the

131. *Id.* at 498.

132. *Id.* at 500.

133. *Id.* at 487.

134. *Id.* at 598.

135. *Id.* at 530.

136. *Id.* at 523.

137. *Id.* at 168.

138. See COLIN GORDON, *NEW DEALS: BUSINESS, LABOR, AND POLITICS IN AMERICA, 1920-1935*, at 216 (1994).

139. See *id.* at 217; Thomas Ferguson, *From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy in the Great Depression*, 38 INT’L ORG. 41, 46, 93 (1984).

140. See, e.g., Lawrence M. Friedman & Jack Landinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50 (1967).

141. FRIEDMAN, *supra* note 40, at 354.

organization of work, thereby breaking the remnants of what control workers still retained on the shop floor.¹⁴²

Prior to World War II, contrary to Friedman's claim, at least one important case involving student rights appeared in federal court. In *Hamilton v. Regents of the University of California*,¹⁴³ the United States Supreme Court upheld the suspension of college students who refused, on religious grounds, to participate in military science courses—a prelude to the first flag-salute decision six years later.¹⁴⁴

Friedman correctly observes that most of the tort cases involving the fertility drug diethylstilbestrol (DES) never got to trial on the merits, but at least one in California, *Sindell v. Abbott Laboratories*,¹⁴⁵ reached the state's supreme court and produced a very controversial judgment of market share liability, which one dissenting justice called a “new high water mark in tort law.”¹⁴⁶ The DES plaintiffs suffered painful cases of cervical cancer as a result of their mothers' ingestion of the drug, but they likely would not have been born to bring suit except for the drug companies' product. The companies, in turn, had complied with all clinical trials mandated by the FDA before marketing DES, and they could not have known that their miracle drug would injure the succeeding generation. Friedman might have exploited these cases more fully, especially *Sindell*, as potent examples of the quest for “total justice” in contemporary America.

Because of its overwhelming “redeeming social value,” *American Law in the Twentieth Century* easily passes the *Roth* and *Miller* test,¹⁴⁷ but it remains a very sexy book. In fact, sex discrimination, sex laws, sex offenders, sex perversion, sexual abuse, sexual behavior, sexual harassment, and the sexual revolution occupy more space in *American Law* than interstate commerce (apart from the Mann Act), capitalism, property, and taxation. Still, without further appealing to prurient interests, Friedman might have explored one additional linkage between medical technology, sexual behavior, social movements, and legal change. Cheap, effective contraception and access to abortion promoted economic opportunity for women, but they also underwrote the gay awakening in the 1970s and 1980s. They did so by uncoupling on a broad scale, for the first time in

142. See generally John Fabian Witt, *Toward a New History of American Accident Law: Classical Tort Law and the Cooperative First-Party Insurance Movement*, 114 HARV. L. REV. 690 (2001) (discussing possible alternative accident-law regimes from a historical perspective); John Fabian Witt, *The Transformation of Work and the Law of Workplace Accidents, 1842-1910*, 107 YALE L.J. 1467 (1998) (discussing changes in workers' compensation for accidents during the nineteenth century).

143. 293 U.S. 245 (1934).

144. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

145. 607 P.2d 924 (Cal. 1980).

146. *Id.* at 938 (Richardson, J., dissenting).

147. See *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

American culture, sex from reproduction, a development reinforced by Kinsey, Masters and Johnson, and the wide distribution of erotic and pornographic magazines and movies. In the 1960s and 1970s, American men and women began to redefine sexuality in terms of self-fulfillment and self-gratification, another manifestation of “expressive individualism.” When New York transvestites poured out of the Stonewall Inn to protest police harassment in 1969, they owed as much to Gregory Pincus’s oral contraceptive (1955) and Jack Lippes’s intrauterine device (1961) as they did to the inspiration and example of the civil rights movement, women’s liberation, or anti-Vietnam War demonstrations.

Friedman demonstrates convincingly how American wars of the past century, both hot and cold, generated simultaneously repression and liberation: sedition laws as well as the ACLU; *West Virginia State Board of Education v. Barnette*¹⁴⁸ and *Korematsu v. United States*;¹⁴⁹ Joe McCarthy but also Joe Rauh. But he does not suggest how the Cold War economy, both domestic and foreign, functioned to undermine the New Deal coalition, and with it, the legal and political structures that had created and sustained American liberalism through the 1960s.

Cold War expenditures for national defense, combined with the civil rights movement, transformed the American Sunbelt from California to the Carolinas. Lyndon Johnson was only half right when he predicted that the Voting Rights Act of 1965 would deliver the states of the old Confederacy to the Republican Party for a generation. So did the rising economic prosperity of the region generated by the chain of military installations that stretched from San Diego to Charleston, as well as the flow of defense contracts for ICBMs, the space program, bombers, fighter planes, submarines, and aircraft carriers. The Cold War economy made the South more like the rest of America for the first time in history. And, in turn, America became more like the South in both a political and cultural sense, electing three Southerners as President from 1976 to 2000—Carter, Clinton, and George W. Bush—something not seen in the country since before the Civil War.

The free trade foreign economic policies of the Cold War years also contributed to the collapse of American liberalism by undermining key industrial sectors such as steel and automobiles manufacturing, with devastating consequences for labor unions—such as the United Automobile Workers and the United Steelworkers—that had constituted the backbone of the New Deal coalition and the Democratic Party. American law opened American markets; released the energies of steelmakers and automakers in Japan, West Germany, South Korea, and Taiwan; and kept these Cold War

148. 319 U.S. 624 (1943).

149. 323 U.S. 214 (1944).

allies prosperous.¹⁵⁰ But it brought economic blight to our industrial heartland, eroded the economic security of thousands of men and women, and restricted plural equality by narrowing the employment fortunes of minorities, especially African Americans.

As Friedman notes, one dark era of the Cold War ended with the passing of Joe McCarthy and decisions of the Warren Court that curbed the government's anti-Communist crusade.¹⁵¹ But the triumph of the Sunbelt, hastened by the economic collapse of the Rustbelt and the reapportionment decisions of the Warren Court that shifted political power to the suburbs,¹⁵² made possible the election of Nixon, Reagan, and the first George Bush.¹⁵³ They, in turn, gave the country Rehnquist, O'Connor, Scalia, Kennedy, and Thomas, as well as appointments to the federal circuit courts of appeal and district courts that are as conservative as any since the years of Harding and Coolidge.

Friedman provides cogent analyses of the major doctrinal and institutional changes that have reshaped public and private law in America since 1900, including the rise and fall of substantive due process, the triumph of strict products liability, the end of federal common law, and even the extension of legal rights to cohabiters. But perhaps the most extraordinary legal and political development of the past two decades receives but a single page: the Ethics in Government Act of 1978 that created the so-called special prosecutor. That statute, born of the Nixon scandals and Watergate, authorized the appointment by a special court of an independent counsel, outside the Department of Justice, who would investigate and prosecute offenses committed by high officials of the federal government. Dismissing separation of powers arguments, a majority on the Supreme Court sustained the law in *Morrison v. Olson*.¹⁵⁴

Independent counsels and their platoons of lawyers and investigators became a fifth branch of the federal government, more powerful than any Federal Trade Commission or SEC, each capable of tying up the White House in legal knots. In 1979, President Carter's chief of staff and his campaign manager became the first targets of an independent counsel investigation for alleged cocaine use.¹⁵⁵ No charges were filed in either case. Two of Reagan's cabinet members and two of his White House aides

150. See JUDITH STEIN, *RUNNING STEEL, RUNNING AMERICA: RACE, ECONOMIC POLICY, AND THE DECLINE OF LIBERALISM* 205-08, 278-82 (1998).

151. See, e.g., *Elfbrandt v. Russell*, 384 U.S. 11 (1966); *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965).

152. *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

153. On the rise of the suburbs and national elections, see LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* (2001).

154. 487 U.S. 654, 685-97 (1988).

155. Niles L. Godes & Ty E. Howard, *Independent Counsel Investigations*, 35 AM. CRIM. L. REV. 875, 892 n.157 (1998).

came under scrutiny next,¹⁵⁶ with one, Michael Deaver, pleading guilty to an unrelated charge.¹⁵⁷ The final investigation of the Reagan era—following leaks about a secret plan to sell arms illegally to Iran—almost snared the President himself. That independent counsel, Lawrence Walsh, pursued the Iran-Contra investigation for four years after Reagan left office and finally brought indictments against a former White House staffer, Oliver North, and a former Secretary of Defense, Caspar Weinberger (who was, ironically, known to have vehemently opposed the arms sales to Iran).¹⁵⁸

Like the ghost of Hamlet's father, the independent counsel came clanking back again in the Clinton years. Henry Cisneros, Secretary of Housing and Urban Development, pleaded guilty to lying to the FBI about payments to his former mistress and was fined \$10,000.¹⁵⁹ After four years of investigation and a trial lasting two months, a jury acquitted Mike Espy, the former Secretary of Agriculture, of corruption charges.¹⁶⁰ And finally, in a saga to rival *Les Misérables*, independent counsel Kenneth Starr pursued President Clinton for what Friedman appropriately calls a "white zipper crime," ultimately leading to the President's impeachment.¹⁶¹ The Ethics in Government Act had given rise to a new structure of law enforcement and checks and balances beyond anything imagined by the Framers of the Constitution.

Throughout his book, Friedman casts a skeptical eye on the so-called liability explosion: the claim, usually trumpeted by conservatives, that greedy trial attorneys and their clients have perverted the tort system with frivolous claims that produce huge damage awards. Friedman properly points out that hard evidence to document such an explosion does not exist; many of the recent tales of fantastic jury awards are pure fabrication.¹⁶² On the other hand, Friedman does not explore in much depth one of the most dramatic examples of the quest for "total justice" that flourished in the past two decades: the tide of lawsuits against the tobacco industry by individual smokers and forty-six states, all seeking to recover damages for lung cancer, other fatal maladies, and the public expense of caring for those so afflicted.

156. *Id.*

157. See Donald L. Smaltz, *The Independent Counsel: A View from Inside*, 86 GEO. L.J. 2307, 2324 (1998).

158. See REPORT OF THE CONGRESSIONAL COMMITTEES INVESTIGATING THE IRAN-CONTRA AFFAIR, H.R. REP. NO. 100-433, S. REP. NO. 100-216, at 3-11 (1987); WILLIAM H. CHAFE, *THE UNFINISHED JOURNEY: AMERICA SINCE WORLD WAR II*, at 483-86 (1995).

159. Bill Miller, *Cisneros Counsel Still Digging*, WASH. POST, June 11, 2001, at A17.

160. FRIEDMAN, *supra* note 40, at 225.

161. *Id.* On Kenneth Starr and the Clinton impeachment, see PETER BAKER, *INSIDE THE BREACH: THE IMPEACHMENT AND TRIAL OF WILLIAM JEFFERSON CLINTON* (2000); and JEFFREY TOOBIN, *A VAST CONSPIRACY: THE REAL STORY OF THE SEX SCANDAL THAT NEARLY BROUGHT DOWN A PRESIDENT* (1999).

162. FRIEDMAN, *supra* note 40, at 538-39.

Smokers began suing the tobacco companies in the 1960s, but they lost these suits as juries tended to hold the smokers responsible for their own illnesses under a theory of assumption of risk. After all, the Surgeon General had warned of the health hazards of smoking in a series of annual reports between 1957 and 1964.¹⁶³ In the 1980s, however, the companies suffered a series of setbacks when internal corporate documents suggested that they also knew of these health risks but failed to warn consumers.

In 1988, for the first time, a federal district court in New Jersey found the Liggett Group principally liable for Rose Cipollone's lung cancer and awarded her husband \$400,000 in damages, a decision later overturned on procedural grounds.¹⁶⁴ But within approximately ten years, state attorneys general had forced a financial settlement upon the major companies for Medicaid reimbursement that totaled \$206 billion spread over twenty-five years,¹⁶⁵ a sum greater than previous awards against the manufacturers of breast implants and asbestos combined.¹⁶⁶ In 1997, a San Francisco jury awarded a longtime smoker \$1.5 million in compensatory damages and \$50 million in punitive damages (later reduced to \$25 million) against Philip Morris.¹⁶⁷ Thus, smokers and ex-smokers, given little sympathy by courts and juries thirty years ago, have recovered real money against big tobacco. These recoveries are due in part to the change in legal culture and the expectations of total justice that Friedman has documented so well.

Paula Jones's civil suit against President Clinton also merited some mention from Friedman in the context of the liability explosion and the quest for total justice. During the Nixon-era scandals, most constitutional experts believed that a sitting President could not be subject to criminal or civil process prior to impeachment, conviction, and removal from office. But in *Clinton v. Jones*,¹⁶⁸ the Supreme Court ruled that Clinton could be hauled into court by Jones to face a suit for sexual harassment. Such a civil action, wrote Justice Stevens, would be a trivial inconvenience to the nation's chief executive and the guardian of the free world.¹⁶⁹

In the course of his deposition in *Jones*, Clinton lied about another of his sexual encounters, a lie that gave the independent counsel and the President's other political enemies the grounds for impeachment. As in

163. RICHARD KLUGER, *ASHES TO ASHES: AMERICA'S HUNDRED-YEAR CIGARETTE WAR, THE PUBLIC HEALTH, AND THE UNABASHED TRIUMPH OF PHILIP MORRIS* 200-02, 255-61, 273-75 (1996).

164. *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208 (D.N.J. 1988), *rev'd in part*, 893 F.2d 541 (3d Cir. 1990).

165. Barry Meier, *Remaining States Approve the Pact on Tobacco Suits*, N.Y. TIMES, Nov. 21, 1998, at A1.

166. *Id.*

167. *Henley v. Philip Morris Inc.*, 113 Cal. Rptr. 2d 494 (Ct. App. 2001), *review granted*, 39 P.3d 512 (2002).

168. 520 U.S. 681 (1997).

169. *See id.* at 697-706.

most similar cases, Clinton and Jones reached a settlement, but not before her quest for total justice had nearly nullified a presidential election by putting the President on trial for high crimes and misdemeanors and distracting him from other pressing issues, including the genocide in the former Yugoslavia.

Friedman concluded his research and writing before the extraordinary 2000 presidential election unfolded and before September 11th and its aftermath. How those events might alter his brief forecast about the future of American law in the present century must await his own revised edition of *American Law*. No doubt the Supreme Court's behavior in *Bush v. Gore*,¹⁷⁰ behavior that cut short the constitutional process for electing the President,¹⁷¹ will serve to confirm Friedman's judgment that we continue to live in a world of radical judicial activism—conservative style—protected by what Judge Hand called Platonic guardians.¹⁷²

Moreover, recent Supreme Court decisions invoking the Eleventh Amendment and sovereign immunity suggest a more serious assault on federal authority than Friedman believed possible in the wake of *Lopez v. United States*,¹⁷³ a Commerce Clause decision that now appears quite benign when compared to the evisceration of federalism by five Justices in *Seminole Tribe v. Florida*,¹⁷⁴ *Alden v. Maine*,¹⁷⁵ and *Federal Maritime Commission v. South Carolina State Ports Authority*.¹⁷⁶

The response of the Bush administration to the events of September 11th, including the war in Afghanistan, the authority given to law enforcement personnel in the Patriot Act,¹⁷⁷ and the arrest and detention of citizens without indictment, has raised fears that the American security state has become once again an engine of repression.¹⁷⁸ Many of the energies of government released since September 11th recall the era of Truman-McCarthy, not a happy time for civil liberties, when the darker impulses of our national psyche triumphed over the better angels of our nature.

V. LEGAL HISTORY AND “WHIG” HISTORY

In his short, influential book, *The Whig Interpretation of History*, published more than seventy years ago, the English historian Herbert

170. 531 U.S. 98 (2000).

171. For a powerful indictment of the Court's contempt for democracy, see Laurence H. Tribe, *Erog .v Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170 (2001).

172. LEARNED HAND, THE BILL OF RIGHTS 73 (1958).

173. 514 U.S. 549 (1995).

174. 517 U.S. 44 (1996).

175. 527 U.S. 706 (1999).

176. 535 U.S. 743 (2002).

177. Pub. L. No. 107-56, 115 Stat. 272 (2002).

178. See George P. Fletcher, *War and the Constitution*, AM. PROSPECT, Jan. 1, 2002, at 26.

Butterfield cautioned against three methodological traps set to ensnare all modern investigators of the past. These traps traced their intellectual origins to the interpretations of England's political and constitutional history articulated by leaders of the eighteenth-century Whig party and their later historian chroniclers, notably Thomas Babington Macaulay. The Whigs, who toppled James II during the Glorious Revolution of 1688-1689, perceived England's history as one continuous struggle between the centralizing, absolutist designs of the Crown, beginning with William the Conqueror, and the forces of liberty and restraints upon royal authority represented by Parliament and the common-law courts. In his history of England, published in the middle of the nineteenth century, Macaulay echoed this interpretation when he wrote that "the history of our country during the last hundred and sixty years is eminently the history of physical, of moral, and of intellectual improvement."¹⁷⁹ According to Butterfield, Whig historians like Macaulay generally tended "to emphasise certain principles of progress in the past and to produce a story which is the ratification if not the glorification of the present."¹⁸⁰ They were prone to commit three fatal errors. First, they were prone to anachronisms by reading the past through the lens of their present concerns and values, often equating past historical events with subsequent ones.¹⁸¹ Second, they tended to make assumptions about the direction of historical change and to emphasize, as Macaulay certainly did, the unfolding of political, moral, and intellectual progress.¹⁸² And third, Whig historians tended to pass strong moral judgments upon people and situations in the past.¹⁸³

Legal historians, by the very nature of their subject, often have a strong tendency to write "Whig" history. The temptation to anachronism exists for those Presser placed in the ranks of the so-called "conservative" school with their emphasis upon the rule of law and the continuity of fundamental legal principles. Presser's own legal history textbook, for example, makes the assumption that by studying past cases, such as the Trial of the Seven Bishops, John Peter Zenger, or the writs of assistance controversy, present-day students will be able to discern those enduring values that have shaped American law from the colonial era to the present.¹⁸⁴

179. 1 THOMAS BABINGTON MACAULAY, *THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES II*, at 2 (Boston, Phillips, Sampson & Co. 1852).

180. H. BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY*, at v (1931).

181. *Id.* at 20-25.

182. *Id.* at 36.

183. *Id.* at 73.

184. "Perhaps the greatest legacy of the seventeenth century to Americans," Presser and Zainaldin wrote, "was not so much in the eventual outcome of the struggle—Parliamentary sovereignty—as in the means of its accomplishment: the 'people' had taken into their own hands the right and power to set up a new form of government in accordance with a theory of the state." STEPHEN B. PRESSER & JAMIL S. ZAINALDIN, *LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS* 27 (4th ed. 2000).

Revisionist studies of the Hughes Court and the New Deal that reject the longstanding thesis of a dramatic “constitutional revolution” in response to external political pressures, especially Franklin Roosevelt’s “Court-packing” proposal, offer a subtle variation on the Whig interpretation of history when they argue that no profound doctrinal shifts took place, but rather a slow, steady unfolding of constitutional principles with roots stretching back in some cases to the turn of the century.¹⁸⁵

In Hurst’s *American Law and the Conditions of Freedom* and in the first volume of Horwitz’s *The Transformation of American Law*, both authors advanced an anti-Whig interpretation of history when they posited the sharp departure in legal rules of property, contract, and torts that shifted economic power from “passive” rights holders to more “dynamic” ones. But while Hurst generally endorsed this “release of energy” as consistent with popular attitudes and democratic theory leading to progress, Horwitz deplored it for enthroning possessive individualism and economic inequality through the eventual triumph of Legal Formalism after the Civil War.

In his second volume of *The Transformation of American Law*, Horwitz explored the intellectual collapse of formalism, its legitimacy undermined by sociological jurisprudence, Legal Realism, the Great Depression, and two world wars, all of which subverted the hallowed distinction between law and politics that had sustained corporate domination and economic inequality. But he also affirmed the eventual reestablishment of conservative legality during the pre-Warren Court, Cold War era, as Legal Realism morphed into the oppressive bureaucratic state, and the Legal Process school and law and economics came to dominate legal education.¹⁸⁶

The most consistent anti-Whig legal historian recently has been Michael Klarman, who has constantly voiced the historicist caution against anachronistic backward projection of present categories, and who displays a passion for taking the past largely on its own terms. He has argued, for example, that the *Brown* decision may have immediately retarded racial progress in the South, but by crystallizing white resistance and generating violent confrontations it also led to national intervention.¹⁸⁷ He has questioned the Supreme Court’s role in leading the post-World War II revolution in civil liberties and civil rights,¹⁸⁸ and much of the received wisdom concerning the impact of major decisions by the Marshall Court.¹⁸⁹

185. See, e.g., CUSHMAN, *supra* note 22, at 109-38.

186. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 213-68 (1992).

187. Klarman, *Brown, Racial Change*, *supra* note 37, at 75-77.

188. Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 42-43 (1996).

189. Klarman, *Marshall Court Decisions*, *supra* note 37.

Lawrence Friedman is not simply interested in the past for its own sake—that rallying cry from an earlier generation of scholars, including Butterfield, who deplored what they regarded as the historical relativism and subjectivity of Carl Becker and Charles Beard.¹⁹⁰ Friedman believes that all good history, his included, does have useful lessons to be conveyed to readers in the present. The lesson to be absorbed from *American Law in the Twentieth Century* is that in the great scheme of things, American law and American society are more just, more tolerant, and more humane in 2000 than in 1900; that the struggle to enlarge the sphere of personal liberty and opportunity has been an arduous, hard-fought one; and that the struggle is likely to continue in this fashion.

Judging by Butterfield's criteria, Friedman, writing in the Hurstian tradition, has written a Whig history of the development of American law in the twentieth century, one that does lapse at times into anachronistic interpretations, tends to stress the unfolding of legal and moral progress, and does not hesitate to pass moral judgments.

Friedman's treatment of two opinions by Justice Holmes displays these Whiggish tendencies. Writing for the majority in *United States v. Ju Toy*,¹⁹¹ Holmes rejected the argument that a Chinese man, claiming American citizenship, had the right to a "judicial trial" reviewing de novo the decisions of immigration officers and the Secretary of Commerce that he be deported back to China under the terms of congressional statutes restricting Chinese immigration. The decision strikes Friedman as "tight and unyielding," an example of judicial acquiescence in turn-of-the-century anti-immigration sentiment, and he quotes approvingly from Justice Brewer's dissent.¹⁹² But in addition to Brewer, two other Justices dissented—Rufus Peckham, author of *Lochner v. New York*,¹⁹³ and William Day, author of *Hammer v. Dagenhart*,¹⁹⁴ the decision striking down the first federal child-labor law. All three dissenters, in sharp contrast to Holmes, held imperial views on judicial power, especially as it related to the policy choices of legislatures and administrative agencies. Thus, another reading of *Ju Toy* and similar cases is to regard them as pieces of a larger struggle in the Progressive Era over the scope of judicial review relative to the growing regulatory state's reliance upon administrative findings of fact and decisionmaking.¹⁹⁵

190. For a discussion of the controversy between Becker and Beard and their critics, see the brilliant history of the American historical profession in PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 250-78 (1988).

191. 198 U.S. 253 (1905).

192. FRIEDMAN, *supra* note 40, at 127.

193. 198 U.S. 45 (1905).

194. 247 U.S. 251 (1918).

195. See OWEN M. FISS, *8 HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888-1910*, at 316-22 (Stanley N. Katz ed.,

Likewise, Holmes's opinion in *Buck v. Bell*,¹⁹⁶ which now shocks our consciences in light of the extremes to which eugenical sterilization was subsequently carried out in this country and Nazi Germany, did not strike Brandeis and six other Justices at that time as either legally or morally suspect given the contemporary state of scientific knowledge. They did not know what we and Friedman now know: Neither Carrie Buck, nor her mother and child, were actually retarded. And Justice Butler's lone dissent, without opinion, arose in all probability from his devotion to Catholic doctrines on reproduction rather than from any unusual sensitivity to civil liberties for which he displayed little concern in other cases.¹⁹⁷

Friedman clearly believes that the trajectory of American law in the twentieth century, despite a few twists and turns, has been in a progressive direction, manifested in the development of the security state, the growth of administrative expertise, the expansion of the rights revolution, and the triumph of expressive individualism. And he is not at all adverse to pronouncing judgments, moral and otherwise, against people and particular trends in the law. In this respect, *American Law in the Twentieth Century* shares a basic ideological orientation with Horwitz's second volume of *The Transformation of American Law*, especially in its sympathetic treatment of sociological jurisprudence and Legal Realism, and its negative appraisal of the Legal Process school and other proponents of "neutral principles," such as Herbert Wechsler.¹⁹⁸ From Horwitz's perspective, Wechsler's search in the 1950s for "neutral principles"

was just one more effort to separate law and politics in American culture, one more expression of the persistent yearning to find an olympian position from which to objectively cushion the terrors of social choice . . . [and] to encourage the production of abstract jurisprudential debate divorced from more particular (and inevitably controversial) political and moral visions.¹⁹⁹

In somewhat less jurisprudential language, Friedman notes that Wechsler criticized numerous Supreme Court per curiam decisions striking down segregated beaches and bathhouses "because [the per curiam decisions] did not ground what they did in reasoned argument."²⁰⁰ But the

1993); EDWARD A. PURCELL, JR., BRANDEIS AND THE PROGRESSIVE CONSTITUTION: *ERIE*, THE JUDICIAL POWER, AND THE POLITICS OF THE FEDERAL COURTS IN TWENTIETH-CENTURY AMERICA 39-63 (2000).

196. 274 U.S. 200 (1927).

197. Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on Buck v. Bell*, 60 N.Y.U. L. REV. 30 (1985).

198. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

199. HORWITZ, *supra* note 186, at 271.

200. FRIEDMAN, *supra* note 40, at 294.

Supreme Court, Friedman adds, "knew what it was doing. . . . And the 'principle' was plain enough for anybody with eyes to see: segregation and race discrimination, through law, rule, ordinance, or regulation, was an evil, and was going to be struck down . . . wherever it appeared."²⁰¹

To those who will criticize Friedman for writing Whig history, for reading the past through the lens of his own intellectual and political experience, and for wearing his values on his sleeve, two great historians of rather different temperaments and political beliefs provide a response. First, Charles Beard, writing in 1934:

Does the world move and, if so, in what direction? If he believes that the world does not move, the historian must offer the pessimism of chaos to the inquiring mind of mankind. If it does move, does it move backward toward some old arrangement . . . [o]r does it move forward to some other arrangement which can be only dimly divined—a capitalist dictatorship, a proletarian dictatorship, or a collectivist democracy? The last of these is my own guess, founded on a study of long trends and on a faith in the indomitable spirit of mankind.²⁰²

The second, J.H. Hexter, writing in 1961:

For each historian brings to the rewriting of history the full range of the remembered experience of his own days, that unique array that he alone possesses and is. . . . He would be bold indeed who would insist that all historians should follow one and the same line of experience in their quest, or who would venture to say what this single line is that all should follow. . . . History thrives in measure as the experience of each historian differs from that of his fellows. It is indeed the wide and varied range of experience covered by all the days of all historians that makes the rewriting of history—not in each generation but for each historian—at once necessary and inevitable.²⁰³

201. *Id.*

202. Charles A. Beard, *Written History as an Act of Faith*, 39 AM. HIST. REV. 219, 226-29 (1934).

203. J.H. HEXTER, REAPPRAISALS IN HISTORY: NEW VIEWS ON HISTORY AND SOCIETY IN EARLY MODERN EUROPE 13 (1961).