

# The AMERICAN JOURNAL of LEGAL HISTORY

Volume XLI

January 1997

No. 1

## ARTICLES

	PAGE
Legal Constraints on Slave Masters: The Problem of Social Cost.....	<i>Jenny Bourne Wahl</i> 1
The Terrible Haystack Murder: The Moral Paradox of Hypocrisy, Prudery and Piety in Antebellum America.....	<i>Jan C. Pilarczyk</i> 25
The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750-1850 .....	<i>Stuart Banner</i> 61
Hiland Hall's "Report on Incendiary Publications": A Forgotten Nineteenth Century Defense on the Constitutional Guarantee of the Freedom of the Press.....	<i>Richard R. John</i> 94

## BOOK REVIEWS

Richard C. Cortner, <i>The Kingfish and the Constitution: Huey Long, the First Amendment, and the Emergence of Modern Press Freedom in America</i> .....	John Wertheimer 126
Neil Duxbury, <i>Patterns of American Jurisprudence</i> ...	William P. LaPiana 127
Kenneth M. Murchison, <i>Federal Criminal Law Doctrines: The Forgotten Influence of National Prohibition</i> .....	David T. Courtwright 129
David Thomas Konig, ed., <i>Devising Liberty: Preserving and Creating Freedom in the New American Republic</i> .....	Eric M. Freedman 130
David Bell, <i>Lawyers &amp; Citizens: The Making of a Political Elite in Old Regime France</i> .....	Michael D. Gordon
Joel F. Harrington, <i>Reordering Marriage and Society in Reformation Germany</i> .....	Laurel Carrington 133
Henry Horwitz, <i>Chancery Equity Records and Proceedings 1600-1800</i> .....	Timothy S. Haskett
Corinne Comstock Weston, <i>The House of Lords and Ideological Politics: Lord Salisbury's Referendal Theory and the Conservative Party</i> .....	John Kendle

revisionist. The prevailing view of the era is negative: an entrenched majority of property-rights conservatives struck down such reforms as child-labor laws and price and wage supports, at least until FDR managed (hamfistedly) to secure a working New Deal majority. But Murchison sees in the Taft and Hughes Courts greater complexity and sensitivity to civil liberties than other scholars have acknowledged. It is especially noteworthy that many of the prohibition decisions favoring defendants were authored by Sutherland, Butler, and McReynolds, three of the justices traditionally assigned to the right-wing bloc.

Murchison's thoughts on the larger history of the Court are not developed at length. Most of the book is a thoroughly researched, occasionally repetitious, and generally quite persuasive analysis of the leading prohibition cases from 1920 through 1933. Murchison writes in the legal realist tradition: the main reason for the liberalization of federal criminal law doctrines in the early 1930s was that federal judges, like Americans as a whole, were having second thoughts about prohibition. The most informative chapters of the book deal with the recognition of entrapment as a defense; the erratic expansion of the scope of the Fourth Amendment; and the emergence and legitimation of plea bargaining, a structural necessity without which the federal courts would have collapsed under the weight of cases generated by America's Noble Experiment.

DAVID T. COURTWRIGHT  
*University of North Florida*

DAVID THOMAS KONIG, ed., *Devising Liberty: Preserving and Creating Freedom in the New American Republic*. Stanford, Cal.: Stanford University Press, 1995. xi, 383 pp. \$45.00.

This anthology of nine historical essays on topics centered around the period 1787-1850 should commend itself favorably to teachers, principally on the graduate level. While breaking little new scholarly ground, the collection provides a useful overview of current thinking, and would make a good introduction to themes that a number of the authors have elaborated elsewhere. Because the pieces are generally well-written and well-researched (except for a distressing innocence of the possibility that articles of value might have appeared in law reviews), they teach by example. Moreover, several of the essayists rely upon essentially the same data in support of their individual interpretations, thus providing ample material for classroom discussions of historiography.

Starting the collection strongly, Lance Banning presents a nuanced essay comparing and contrasting the economic policies of Madison and Hamilton in the context of their respective visions of the national future. Although contemporary pressures led them to support similar policies during the period of the adoption of the Constitution, ultimately, Banning suggests, "Hamilton envisioned the creation of a 'modern' state. Madison intended to perpetuate the Revolution" (p. 39).

But, as Peter S. Onuf explicates in portraying the political strains resulting from the country's geographic expansion before 1815, a strong national government might well be indispensable to the preservation of individual citizens' liberties. Without one, the states risked replicating the internecine wars of Europe. Although differently understood by different parties, the American innovation of federalism temporarily succeeded in controlling the dangers presented by numerous sovereign states occupying a continental territory, until the conflict over slav-

ery revealed that “as a solution to the perennial problems of international politics, the federal union was a tragic failure” (p. 80).

Westward expansion is also the subject of Alan Taylor’s convincing essay, a kaleidoscopic narrative of a triangular struggle between Indians, white settlers, and white national leaders. “As warfare between settlers and Indians grew more widespread and uncontrolled during the later 1780’s, the nation’s leaders feared that the western settlers had become *too independent*. . . . To gain control over their own settlers, the nation’s leaders had to take effective command of the war with the Indians” (p. 82). The federal government succeeded in suppressing both rival groups; by 1796, the Indians were militarily spent, and the settlers’ visions of independence “had been rendered tributary to national integration” (p. 107).

In a less focused effort, “The Meaning of Freedom for Waterfront Workers,” Paul A. Gilje proposes that in “the story of how Americans stumbled their way from resistance to rebellion to revolution, the waterfront looms large,” and that the “waterfront remained central to the United States in the early years of the republic” (p. 109). Usefully presenting a much more conventional thesis, Richard D. Brown shows the political, social, religious, and practical importance of the ideal of an informed citizenry in the thinking and practice of the country during its first half century.

The essay by volume editor David Thomas Konig is refreshing in at least two respects: it cites to law review authority, and it advances scholarship. (Readers will have to decide for themselves whether these two characteristics are related). Professor Konig’s subject is the reform of civil law during the early national period. While rebutting the “commonplace of historians that the Revolution had little or no impact on private law” (p. 339, n. 6), he spends relatively little space on specific reform movements, and highlights instead the political philosophy out of which they grew. An appropriately republican jurisprudence would not only preserve liberty by protecting citizens from each other, but, by “fostering the growth and vitality of private institutions,” help “erect barriers that stood between the individual and the state,” and, “by harmonizing discrete interests,” unify society and empower it “as a counterweight against the authority of the state” (p. 7).

Viewing the public and private spheres from a somewhat different perspective, Norma Basch in “From the Bonds of Empire to the Bonds of Matrimony” traces the development of divorce law during the early national years in a descriptive essay that commendably avoids the temptation to frame over-broad generalizations.

Nathan O. Hatch’s contribution sets—and largely achieves—an ambitious agenda. “The Second Great Awakening and the Market Revolution” links the advent of a dynamic American capitalism to the “explosive growth of the Methodist Episcopal Church” (p. 245). He argues that Methodism, “a movement of self-conscious outsiders [that] embraced the virtue of pluralism, of competition, and of marketing,” had a profound influence in making Americans receptive “to the politics of self-professed interest groups and the economics of unabashed enterprise” (p. 264).

In the volume’s final essay, Jan Lewis surveys “The Problem of Slavery in Southern Political Discourse,” and concludes that, from the middle of the eighteenth century to the middle of the nineteenth, supporters of the peculiar institution were never able to defend it in terms consistent with prevailing concepts of freedom.