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LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR

Alexander Tsesis*

G. EDWARD WHITE, *LAW IN AMERICAN HISTORY: FROM THE COLONIAL YEARS THROUGH THE CIVIL WAR* (2012). Pp. 565. Hardcover \$22.05.

Edward White's study of American law from the colonial period through the Civil War is monumental in its scope, breadth, and synthesis.¹ White adopts a broad definition of law that encompasses U.S. and state constitutions, cultural norms that became codified through long practice, regulations, and judicial opinions.² Law, as he understands it, is imbedded into culture, which it both reflects and constructs.³ Through this monograph, White seeks to bring the reader into the world of yesteryear in order to better understand the worries, concerns, and aspirations that sparked the political and cultural imagination of colonists and American citizens.⁴ Like all great legal histories, this retelling of the past speaks to the author's contemporaries and helps us better understand current legal norms.

The trend among American historians is to search beyond domestic issues; or, more precisely, to understand domestic history within the context of global politics, wars, and world events.⁵ White does so in the first chapter by surveying several commercial disputes that led to British expansion on the North American continent.⁶ From the Treaty of Utrecht in 1713⁷ and the Treaty of Paris in 1763,⁸ British ownership expanded further North and West into a vast expanse of tribal lands.⁹ White does not dwell on developments on the European continent; his primary (and almost exclusive) focus is on a period of U.S. internal development — a time when independent colonial commercial policies made them increasingly self-governed.¹⁰

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

2. *Id.* at 3–4.

3. *Id.* at 4.

4. *Id.* at 6–7.

5. See, e.g., *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE* (Thomas Bender ed., 2002).

6. WHITE, *supra* note 1, at 21–28.

7. See generally Treaty of Utrecht, Apr. 11, 1713, 27 Consol. T.S. 477.

8. See generally Treaty of Paris, Feb. 17, 1763, 48 Consol. T.S. 487.

9. WHITE, *supra* note 1, at 43–45.

10. *Id.* at 41–52.

White points out that late eighteenth and early nineteenth century Americans thought themselves to be removed from European conflicts, but he might have given more weighty consideration to the impact of the Napoleonic Wars on the colonies,¹¹ embargoes between France and Britain,¹² the Battle of Trafalgar,¹³ and a variety of other continental conflicts that spilled into North America and affected U.S. domestic affairs. Many events — like the War of 1812,¹⁴ the Louisiana Purchase,¹⁵ and the Treaty of Guadalupe Hidalgo¹⁶ — could have received more detailed explanation of their international frameworks.

The work is of an epic scope, especially considering White's plan to add two more volumes to this study of American legal history, and I do not mean to suggest that he needed to cover all the multiple international topics that intersect the history of U.S. law. That might have made this volume unwieldy. Other survey books of the period have taken different approaches. For instance, in *American Colonies* Alan Taylor did much to show the extent to which North American colonial history began long before British settlements, with Spanish southern and French northern advances.¹⁷ Taylor's exceptional work helped better understand the religious, economic, political, and diplomatic distinctions between the various European approaches to colonialism.¹⁸ But a comprehensive study of how Spanish and French law affected British legal interactions with natives and among themselves remains largely unwritten. White's title suggests that he might cover American legal developments from the time of the Conquistadores, but he confines himself to British colonial and U.S. history.

At the beginning of this volume, White focuses on the relations between early English colonists and their aboriginal neighbors.¹⁹ The initial relations, as he demonstrates, were mostly amicable.²⁰ He makes a special point to demonstrate how, during the seventeenth and early eighteenth centuries, colonial courts integrated portions of the Amerindian customs into common law to further mutually acceptable adjudications.²¹ With the diminution of native populations because of epidemics, enslavement, and skirmishes, it became increasingly easy to impose Anglicized legal standards of ownership, criminality, and international relations onto aboriginal populations.²² As the tribes lost power, which White describes briefly in the context of

11. See generally CHARLES ERSDAILE, *NAPOLEON'S WARS: AN INTERNATIONAL HISTORY, 1803–1815* (Penguin Books 2009) (2007).

12. See generally FREDERICK W. KAGAN, *THE END OF THE OLD ORDER: NAPOLEON AND EUROPE, 1801–1805*, at 143 (2006).

13. See generally ADAM NICOLSON, *SEIZE THE FIRE: HEROISM, DUTY, AND NELSON'S BATTLE OF TRAFALGAR* (Harper Perennial 2006) (2005).

14. See generally A. J. LANGGUTH, *UNION 1812: THE AMERICANS WHO FOUGHT THE SECOND WAR OF INDEPENDENCE* (2007).

15. See generally JON KUKLA, *A WILDERNESS SO IMMENSE: THE LOUISIANA PURCHASE AND THE DESTINY OF AMERICA* (2003).

16. See generally *Treaty of Peace, Friendship, Limits, and Settlement, U.S.-Mex., Feb. 2, 1848*, 9 Stat. 922.

17. ALAN TAYLOR, *AMERICAN COLONIES* (Eric Foner ed., 2001).

18. See *id.*

19. WHITE, *supra* note 1, at 16–41.

20. *Id.*

21. *Id.* at 37–41.

22. *Id.* at 23–54.

Cherokee Nation v. Georgia,²³ states became less willing to negotiate and more tolerant of American incursion onto tribal lands.²⁴ White unfortunately does not stay with this important aspect of American history throughout the book. He rarely returns to the effects on American law of colonial, state, and national interactions with Native Americans.

White's discussion of British-Amerindian relations centers on their differing understandings of property ownership.²⁵ The European understanding of fee simple land and riparian ownership were virtually unknown among aboriginal Atlantic inhabitants, setting off inevitable conflicts that were often resolved through inhabitant attrition or migration from infection, war, and misleading treaties.²⁶ White mentions, but could have done more to explain, how Europeans held to concepts of Christian supremacy that enabled them to justify pillage, conversion, and theft.²⁷

Critical developments in the U.S. displacement of Native Americans, beginning with the Jeffersonian Era, are unfortunately only touched upon or left out of the narrative. This creates a weak spot in the otherwise richly detailed portrayal that the reader will need to fill with books like Anthony F.C. Wallace's *Jefferson and the Indians*.²⁸ But this information need not be relegated to specialty books, which tend to garner smaller general audiences. The interaction between Native Americans and European colonists deserves fuller treatment in a survey book on American law. Federalist implications of Georgian incursions onto Cherokee lands and culture do receive limited treatment,²⁹ but native displacement had profound implications for travel, commerce, foreign relations, and western expansion, all of which might have provided a window into American law and society, which are both central to White's discussion. The Trail of Tears, spurred by the Jacksonian push for the passage of the Indian Removal Act of 1830³⁰ through Congress,³¹ should have also received treatment because it so deeply affected U.S. relations with native tribes and would have been in keeping with White's earlier discussion of Amerindian influences on U.S. law.

The early colonial contact with Native Americans occurred as a large group of unskilled laborers, criminals, persons without property interests, youths, and unmarried people (most of whom were male) arrived to start life anew, often as indentured servants.³² White shows how years of self-rule, acquisition of property, as well as the development of domestic commercial networks, agricultural households, and landed

23. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831).

24. WHITE, *supra* note 1, at 52–54.

25. *Id.* at 28–36.

26. *Id.*

27. *Id.* at 25–26.

28. ANTHONY F.C. WALLACE, *JEFFERSON AND THE INDIANS: THE TRAGIC FATE OF THE FIRST AMERICANS* (1999).

29. WHITE, *supra* note 1, at 250, 409.

30. Indian Removal Act, ch. 148, 4 Stat. 411 (1830).

31. See generally A. J. LANGGUTH, *DRIVEN WEST: ANDREW JACKSON AND THE TRAIL OF TEARS TO THE CIVIL War* (2010).

32. WHITE, *supra* note 1, at 67–68.

estates increased American autonomy in local matters.³³ Beside these social factors, there were the local councils, justices of the peace, legal instruments, and contractual relations that eventually led to colonial demand for Parliamentary representation.³⁴ British taxation policies of the 1760s and 1770s percolated the conflict to the top and made it a part of mainstream discussions and newspaper polemics.³⁵ By refusing to give the colonists a voice in the imposition and collection of external and internal imposts, Parliament inadvertently gave cause for inter-colonial committees of correspondence and, eventually, the First and Second Continental Congresses.³⁶ In all this, as White points out, pamphleteers and partisan journalists of the day played a tremendous role in inflaming the emotions and setting the political basis for independence.³⁷ The sincere belief in the constitutional violation of taxation without representation made republican government the only logical form, especially in a country where hereditary aristocracy had not taken root as it had in England.³⁸

White is at his best when discussing judicial history. He enhances the standard method of approaching legal history by describing the surrounding political, demographic, and commercial developments, as well as those in transportation.³⁹ His treatment of the Marshall Court, for instance, provides a well-constructed description of individual Justices, the shift from seriatim to joint opinions, as well as details and analyses of key decisions.⁴⁰ White enhances his doctrinal coverage by elaborating on the surrounding circumstances that brought cases to the attention of the Supreme Court.⁴¹ He chooses his examples carefully to demonstrate how legal and social factors influence judicial interpretations and outcomes. For instance, the in-depth explanation of transportation and infrastructure developments of the early nineteenth century — with the building of canals, turnpikes, and railroads — helps to better understand the relevance of landmark cases such as *Charles River Bridge v. Warren Bridge*, *Trustees of Dartmouth College v. Woodward*, and *Bank of the United States v. Dandridge*.⁴² The expansion of transportation further explains the change of the corporate form from individual franchising, with shareholder liability for torts or company impropriety, to general incorporation, with the company itself being considered a legal entity whose liability was not the responsibility of ordinary shareholders.⁴³

White also provides a solid survey of Confederate law that will serve well for teaching and reference purposes. He meticulously discusses those features of the

33. *Id.* at 56–108.

34. *Id.* at 80–82.

35. *Id.* at 118–19.

36. *Id.* at 124–25.

37. *Id.* at 156.

38. *Id.* at 157.

39. *Id.* at 9–10.

40. *Id.* at 193–244.

41. *See, e.g., id.* at 208–20 (discussing the circumstances surrounding *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

42. *Id.* at 264–67. *See Charles River Bridge v. Warren Bridge*, 36 U.S. (11 Pet.) 420 (1837); *Bank of the U.S. v. Dandridge* 25 U.S. (12 Wheat.) 64 (1827); *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

43. WHITE, *supra* note 1, at 268–71.

Confederate Constitution that resembled clauses of the U.S. Constitution as it existed prior to the ratification of the Reconstruction Amendments.⁴⁴ The Confederacy retained states' rights features such as sovereign immunity in diversity suits embedded into the Eleventh Amendment and the Tenth Amendment's statement of rights retained by the states.⁴⁵ Despite these comparisons, White is not remiss to show the differences between the U.S. and Confederate constitutionalism.⁴⁶ The explicit protection of the right to slavery was a key difference between the two documents.⁴⁷ But he could have been more expansive in his reflections of the Confederate claim that the ownership of chattel slaves was a natural right. This claim, as abolitionists pointed out, was suspect because it violated the equality principle of the Declaration of Independence, which Confederate President Jefferson Davis often asserted to be a statement of states' rights. White might have balanced the values of liberty and equality and discussed the different Northern and Southern attitudes towards them. Likewise, it would have been helpful to learn more about the abolitionist claim that the Guarantee Clause, securing a republican government for every state, was a limitation on the libertarian right to commit injustices against persons on the basis of positive laws, such as those securing the institution of slavery.⁴⁸

In one of the most informative sections of the book, White describes the difficulty experienced by the Confederacy in establishing courts capable of adjudicating multi-state issues — such as military requisitions, copyrights, and patents — while staying true to the central tenet of Senator John Calhoun's theory of concurrent majorities, which attributed each state with the right to veto central, legislative mandates.⁴⁹ White explores the issue of Confederate Court jurisdiction by looking at “what laws [the] courts applied,” “the relationship between the federal courts in the Confederacy and the existing courts of the seceding states,” and “the status of the Supreme Court of the Confederacy.”⁵⁰ Many questions remain about the functioning of the Confederate system because its government only existed for four years,⁵¹ and White does an elegant job of explaining an otherwise complicated subject.

The task White set for himself is formidable. His profound knowledge of U.S. legal history provides him with the facility to cover a broad subject with wisdom of which few are capable. Periodically, however, White might have scaled down the project for greater structural symmetry. For instance, he almost inexplicably includes a section on the developments of the legal profession during the early nineteenth century in a chapter primarily about transportation and western expansion.⁵² In that section, he discusses the development of legal training from apprenticeship through formal law school.⁵³ But its placement in the chapter on transportation seems to require a more

44. *Id.* at 399–402.

45. *Id.* at 400–01.

46. *Id.* at 399–402.

47. *Id.* at 388–89.

48. *Id.* at 344.

49. *Id.* at 309, 398–413.

50. *Id.* at 402.

51. *Id.* at 398.

52. *Id.* at 279–90.

53. *Id.* at 281–84.

sustained discussion of how lawyers impacted transactional and official forms and practices that had a direct impact on projects involving the expansion of roads, rails, and waterways. At another point in the book, White's discussion of the Missouri Compromise of 1820 is brief, coming in the middle of his assessment of the years immediately preceding the Compromise of 1850.⁵⁴ A more logical place for this subject would have been in his discussion of the congressional debates of 1819, which dealt with slavery in the western territories.⁵⁵ White sometimes tries to do too much with a chosen paradigm. In this regard, his discussion of the Second Bank of the United States is not tied to the section on transportation in which it appears.⁵⁶

One of the few disappointments I had with the book was White's limited use of footnotes. Dense paragraphs often did not warrant so much as a list of resources for readers interested in testing his thesis or researching the subject in greater depth. In some places, such as where White recounts the events of the First and Second Continental Congresses' courses of action or the abolitionist movement of the mid-nineteenth century, he provides the reader with sufficient references to journals, collections of letters, and pamphlets.⁵⁷ But elsewhere most of his cites are to secondary sources, and from a historical synthesis of this nature more primary sources would have helped readers come to their own opinions on the basis of original documents. For instance, White's discussion of colonial ownership, labor, and gender relations⁵⁸ could have benefitted from a discursive analysis of colonial statutes governing those matters. These are readily available⁵⁹ and periodic quotes from them might have embellished the narrative.

The problem with mainly working through secondary sources is that such an approach limits the author's interpretive range. Topics like the Virginia Plan, the ratification of the Bill of Rights, the early developments of judicial review, and the secession become recitation of familiar facts rather than analyses of contemporary texts. Unique research trajectories inevitably yield unique data sets for analysis. Another approach is to cite multiple secondary sources, exposing the author's intellectual path. White achieves some of his strongest moments in the book through the weaving of primary sources, such as when he parses the partisan debates about the merits of *Marbury v. Madison* that followed shortly after Chief Justice John Marshall drafted the opinion.⁶⁰ Likewise his close scrutiny of the Civil War conscription through

54. *Id.* at 332.

55. *Id.* at 319–22.

56. *Id.* at 310–11.

57. *Id.* at 126–57 nn.35–111.

58. *Id.* at 57–58.

59. See, e.g., THE ACTS AND RESOLVES, PUBLIC AND PRIVATE, OF THE PROVINCE OF THE MASSACHUSETTS BAY (Abner C. Goodell, Jr. ed., 1896); ARCHIVES OF MARYLAND: ACTS OF THE GENERAL ASSEMBLY OF MARYLAND HITHERTO UNPRINTED: 1694–1729 (Bernard Christian Steiner ed., 1918); THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619 (William Waller Hening ed., 1823); THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801 (James T. Mitchell & Henry Flanders eds., 1897); THE STATUTES AT LARGE OF SOUTH CAROLINA (Thomas Cooper ed., 1837).

60. WHITE, *supra* note 1, at 216–19.

compilations of Union and Confederate records is a model of lucidity.⁶¹ White sometimes strays from this method, however, providing only a glimpse at his sources. For instance, as many before him, White finds James M. McPherson's exceptional work very helpful for his ninth chapter, citing to *Battle Cry of Freedom* repeatedly during his discussion of secession and for relevant contemporary statements.⁶² And the sustained study of freedom of the press during the Civil War draws heavily on several pages of James Randall's seminal study in *Constitutional Problems Under Lincoln*.⁶³ It would have been nice to have a greater glimpse at the immense learning to which White has been exposed through his lifetime of study.

His preference for secondary resources also limits the discussion of American chattel slavery. He describes the architecture of slavery — from its hereditary nature, exploitation of labor, and racial implications — through the narrative of Frederick Douglass's life.⁶⁴ This format is easy to follow and clearly written. It will no doubt be a great starting point for teachers seeking to get students involved and interested in the subject through personal vignette. But the discussion would have been significantly more illuminating through an abbreviated version of the multi-narrative tradition, like Eugene D. Genovese's *Roll, Jordan, Roll: The World the Slaves Made*.⁶⁵ Using Douglass to describe slavery leaves out the experience of slaves living in the Deep South and only touches on female slaves' experiences from the perspective of Douglass's female relatives.

While White deals with various aspects of slavery throughout *Law in American History*, his most in-depth take on the subject is reserved for the period of 1830 and 1860 in chapter eight.⁶⁶ This chronological decision, I believe, is unfortunate because it gives only passing mention of the formative period of slave laws.⁶⁷ Not only is the statutory development of state slave codes important, but so too is the intellectual history. It would have been useful to learn more detail about the institution's development between the revolution and the "positive good" period of slave apologetics, which became popular roughly in the late 1820s and early 1830s.⁶⁸ Slavery had widespread ramifications on contract, property, civil, criminal, federalism, and many other areas of law.⁶⁹

Colonial enslavement of Native Americans could have also been fleshed out further since, until the early eighteenth century, the number of Native American slaves

61. See, e.g., *id.* at 387–88.

62. *Id.* at 392–98 (citing several times to JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* (1988)).

63. *Id.* at 469–77 (citing several times to JAMES G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1926)).

64. *Id.* at 299–306.

65. EUGENE D. GENOVESE, *ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE* (First Vintage Books 1976) (1974).

66. WHITE, *supra* note 1, at 338–81.

67. *Id.* at 339–41.

68. See ALEXANDER TESIS, *FOR LIBERTY AND EQUALITY: THE LIFE AND TIMES OF THE DECLARATION OF INDEPENDENCE* 115–17 (2012) (describing Calhoun's endorsement of the "positive good" theory).

69. See generally THE LEGAL UNDERSTANDING OF SLAVERY: FROM THE HISTORICAL TO THE CONTEMPORARY (Jean Allain ed., 2012).

was roughly the same and at times even greater than African slaves.⁷⁰ White also makes only marginal mention of aboriginal exploitation and abuse of their own slaves.⁷¹ The multiple experiences of Native American tribes with adoption, temporary bondage, permanent enslavement, murder, and ritualized torture has been well documented but rarely mentioned in studies of American slavery.⁷² A discussion of these subjects within the context of American legal history will need to await another book.

White's *Law in American History* is an excellent survey of U.S. society and the law. It is a pleasure to read and a treasure of knowledge. The discussion is lucid throughout. Anyone interested in American legal history, novice and expert alike, will benefit from this tremendous synthesis of American history from the colonial period through the Civil War.

70. See KENNETH MORGAN, *SLAVERY AND THE BRITISH EMPIRE: FROM AFRICA TO AMERICA* 20 (2007).

71. WHITE, *supra* note 1, at 95.

72. Notable exceptions to this trend are *NATIVE AMERICAN ADOPTION, CAPTIVITY, AND SLAVERY IN CHANGING CONTEXTS* (Max Carocci & Stephanie Pratt eds., 2012) and *ALAN GALLAY, THE INDIAN SLAVE TRADE: THE RISE OF THE ENGLISH EMPIRE IN THE AMERICAN SOUTH 1670-1717* (2002).