



MULTIVARIATE ANALYSIS THROUGH NARRATIVE HISTORY

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Reviewing

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

MUCH LEGAL HISTORY follows one of two approaches. This first focuses on the history of legal doctrine, lawyers' practices, and legal institutions (such as courts and prisons). This is often referred to as internalist history. The second links legal institutions to society, to see how law reflects social values. This looks at such issues as how appellate decisions, legislation, and legal arguments reflect and sometimes shape public attitudes. The former are intellectual and cultural histories of lawyers, law, and legal institutions; the latter are intellectual, cultural, and social histories of "law and society." In each case, the "law" part is central to the story. One example of the for-

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mer is G. Edward White's *Tort Law in America*,¹ though White also links the shifts in doctrine to larger intellectual and economic conditions. An example of the later is Ariela Gross' *Double Character*, which uses cases regarding slaves and prosecutions of slaves to gauge slave-owners' ideas about slaves' character.²

There is emerging a hybrid approach employed perhaps most often by those who write about how people in the streets interpreted law. It shows how legal ideas were wielded by people who had never read a legal treatise or seen the inside of a law school classroom. They might not even have seen the inside of a courtroom. One recent example of this is Tomiko Brown-Nagin's *Courage to Dissent*.³ For Brown-Nagin, law is a part of the surrounding social, economic, and intellectual world, rather than a distinct part. And the actors use the law, as they see it, and respond to it as they perceive it. It is not quite internalist history, but it is more than law and society. This is a three-dimensional approach to legal history. Maybe we should call it three-dimensional legal history – that is, legal history that understands the evolution of legal thought and practices and sees how those ideas and practices interact with surrounding culture.

In the introduction to the first volume of his planned trilogy, *Law in American History*, G. Edward White advocates a related approach that embeds law in the surrounding story. White often interprets law as a gauge of surrounding values and as the dependent variable that is acted upon by the surrounding culture. But for White, law is not just a gauge; law sometimes exerts independent power over the story itself. It frames and governs responses, as well as reacts to social and economic pressure. In this way, White portrays law as intimately embedded in the story of American history, even though it is often a relatively small part of this story. (p. 9) White presents a

¹ G. Edward White, *Tort Law in America: An Intellectual History* (1980).

² Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (2000).

³ Tomiko Brown-Nagin, *Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (2011).

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multivariate analysis that includes law as part of a complex system that facilitates economic growth and works to express and amplify ideology. In this volume, White models how to write about law where it is a partial catalyst and at other times is the dependent variable that helps us gauge cultural and economic evolution. This is what I would call embedded legal history.

Law in American History is an epic work of narrative history, which spans from the first European settlements in the colonies and their encounters with Natives, to wresting the land from the wilds through surveying, registering, and ultimately conversion to agriculture, to the regulation of this growing empire by Great Britain and the growing impulses towards local control, Revolution, and Constitution-making, the growth of a commercial republic in the nineteenth century, the expansion of slavery, the constitutional crisis, and, ultimately, Civil War. If you ask what this book is about, the answer is, it's about America. That is a lot of ground to cover even in 500 pages. For this is really not just legal history, or one might say not even mostly legal history; it is economic, social, and intellectual history with law as a part of the story.

In each chapter, White is interested in how changes in America are related to changes in law – and beyond that, how law causes changes and vice versa. Thus, this is about the complexity of law and the surrounding economic, social, and intellectual conditions. But instead of exploring this through the quantitative methods so much in vogue in modern social science, White relies on narrative history. He's telling a story – many stories, actually – about how law is embedded in American society and how it affects and is affected by that culture. Let me highlight three examples of those relationships.

In the first two chapters White deals with the role of law as a facilitator of colonization. For instance, law facilitated land transactions and the harnessing of labor through indentured servant contracts and slavery. In that model, law served a pretty basic role as a tool of the colonists. For instance, when White says that “conquering space, displacing tribes, buying and cultivating land, and importing slaves were thus the recurrent patterns of American economic life in the first fifty years of the nineteenth century,” (p. 252) he

discloses the fact that law provided important support for the economy. Law provided a framework, for instance, for the distribution of land, and for the organization of capital for building roads and canals, and for their financing, but here law is really a tool.

Contrast, now, that fairly important but basic role of law in the facilitation of economic growth with its role in the origins of the American Revolution. Some historians have credited legal thought as the “generative force of the Revolution.” (p. 110) There may be something to that bold thesis about the role of law in creating Revolution, but White paints a more circumscribed role for law. The third chapter focuses on how economic and demographic reality, ideas about politics, and “perceptions of the uniqueness of America as a civilization,” (p. 109) were translated into legal ideas that formed the structure for governing. Instead of crediting law with creating the Revolutionary ideology, White sees law as adding shape to republican ideas that emerged from the ideology of the colonists and from their environment. For readily available land and the need to hold bound labor were key variables in the development of American values. Where many see slavery as absolutely central to the story of Revolution – and now tell the story of Revolution as though Virginia slavery was all there was to the story – White also looks northward, to ideas about empire and about trade as central to Revolution.

There is a similar question about the role of legal and constitutional ideas in the coming of the Civil War. Again, a key issue is whether constitutional ideas, such as the scope of the Constitution’s protection of slavery, exerted an independent influence on the southern push toward war. That thesis is at least as difficult to test as it is doubtful. More plausibly the constitutional arguments reveal the economic and demographic reality that lay at the core of southern society. The road to secession in White’s narrative lay in the breakdown of a national consensus over slavery’s place in American society. Before 1830, slavery was understood by all as a local institution. As the United States acquired and settled territory, slavery expanded and met forces that wanted it limited. In keeping with this, White locates secession in the failure of national institutions,

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from political parties to the Supreme Court, to hold the country together as those in favor of expansion and those in favor of restriction increasingly clashed.

Perhaps unrealistically, many hoped that law, political parties, churches, and even sentimental attachments to Union would hold us together. Or at least wondered whether they might. For example, in 1852, students at Washington College (now Washington and Lee University) debated the effect of political parties on Union. They debated whether “the existence of two great political parties tend to the perpetuity of the Union?”⁴ The affirmative won by a vote of 10 to one. Yet, the conflicts generated by economics and ideology were too great to be contained by the Supreme Court, political parties, and Congress. As happens so often when one looks back on our nation’s history, it seems that the story of law’s limitations is almost as important as its power.

White, perhaps the finest historian of American law working today, is in an ideal position to assess law’s role in our nation’s history. He is also ideally located to point the field in new directions. Legal history is in particular need of guidance right now, because there are real questions about the field’s future. Is it a method, like law and economics? And if so, what does that method tell us? Should its role be to teach lessons about how to interpret the Constitution and statutes? Does it teach us about jurisprudence? Completely understandably, in law schools there is pressure to have every scholarly inquiry relate to a fairly concrete problem. Yet, much of legal history may seem rather detached from contemporary concerns. Thus, there is growing interest in what one might term “applied legal history.” Certainly originalism and constitutional history seem to hold out the promise of offering some lessons for the present. *Law in American History*, however, is not applied legal history. It is not advocacy based on injustices of the past, though there are certainly pieces of that story here; it does not teach about the incoher-

⁴ Washington Literary Society, Secretaries’ Records, Washington and Lee University Library, Special Collections (setting topic on December 20, 1851 and results of debate on January 10, 1852).

ence of legal doctrine, as critical legal studies once did. This is an elegant reconstruction of the role of law in the multiple regression equation that explains our nation's development.

White is interested in big-picture stories. One question I have is whether other people will write legal history in this mode. It is difficult to do, because many factors come together in this story. For those of us who do not have White's capacious knowledge, it is hard to put together the stories of law with larger changes in American society. That is, it is one thing to write about the evolution of, say, tort law, in the nineteenth century – not easy to do, but doable. It is quite another to understand how the variations in tort law (such as the limitation of liability for the employer of a slave for the slave's torts) are related to ideas about slave character, economic development, and classical liberalism that suffused the south in the decades before the Civil War. And then to write a dozen chapters of similar depth across several centuries. Daunting, to say the least. Yet, this is the kind of legal history we need to write and to read, for it shows us how important the project of law was to the experiment that is our nation.

