Review Essay—The Consumption of History in the Legal Academy: Science and Synthesis, Perils and Prospects

Christopher Tomlins

Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815*. New York: Oxford University Press, 2009, pp. 800, $35.00.

Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848*. New York: Oxford University Press, 2007, pp. 928, $35.00.

Sean Wilentz, *The Rise of American Democracy: Jefferson to Lincoln*. New York: W.W. Norton & Company, Inc., 2005, pp. 1,104, $19.95.

Brian Balogh, *A Government Out of Sight: The Mystery of National Authority in Nineteenth-Century America*. Cambridge: Cambridge University Press, 2010, pp. 428, $25.00.

History is busting out all over the U.S. law school world. More than 513 law teachers in the 2010–11 *AALS Directory of Law Teachers* name legal history as a subject of interest, well above the mean number per subject (381 teachers), and far more than the median (201). Legal history is situated at the 74th percentile of teacher interest, between civil rights (603 teachers) and employment discrimination (457). Measured by expressed teacher interest, it is far and away the most heavily populated "theory and perspective" subject in the contemporary law school curriculum, outpolling law and social science (342 teachers), law and economics (294), law and literature (165), and critical race theory and feminist legal theory (86 and 60 respectively). Indeed, legal history outpolls major substantive law subjects such as criminal justice (429 teachers), labor law (369), antitrust (339), women and the law (287), and immigration law (231).[1]

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1. Calculated from Association of American Law Schools, 2010–2011 Directory of Law Teachers 1495–1832 (Association of American Law Schools 2011).

How times have changed. In 1931, Karl Llewellyn described the field of U.S. legal history as near empty, "substantially unoccupied."[2] Forty years earlier, a sophisticated albeit largely "internal" scholarship (focused primarily on the study of legal doctrine) had flourished in U.S. law schools.[3] But by the 1930s, Willard Hurst would later recall, there were no more than three or four practicing legal historians in the entire country.[4] Nor were many law teachers expressing interest in the subject. The average for the decades of the 1930s and 1940s was 21. Numbers did not move above 40 until the mid-1960s. Marked growth of interest began in the later 1960s. It has continued ever since: The average was 180 for the 1970s, 270 for the 1980s, 384 for the 1990s, and 425 for the most recent decade.[5]

In the article that drew my attention to the AALS subject-of-interest counts, William Novak suggests that law teachers' interest in history has grown in comparison to their engagement with other disciplines because entry is easy.[6] "Though I teach in a law school," he writes, "I would be in trouble if I tried to pass myself off as a lawyer." (So would I.) "Though I dabble a bit in economic history, if I started calling myself an economist, I would certainly be reproached." Both economics and law, like medicine, have managed to create significant restrictions on entry. Careful credentialing created capacities for market control that redefined their disciplinary knowledge as a high cost expertise.[7] In the United States, history began to professionalize in the late 19th century at the same time as other disciplines, and as a result took on something of the same appearance. As Novak notes, "there is a rigorous, heavily-credentialed, and well-established historical profession in the United States."[8] Unlike economics and law, however, the historical profession has not been successful in redefining disciplinary knowledge as professional expertise and thus erecting barriers to entry.

Charitably, Novak spins failure as munificence: "[T]he policing of disciplinary boundaries has not been [the historical profession's] main priority…professional historians are marvelously ecumenical in welcoming

2. Karl N. Llewellyn, Book Review, 31 Colum. L. Rev. 729, 730, 732 (1931).

3. David M. Rabban, The Historiography of The Common Law, 28 Law & Social Inquiry 1161 (2003).

4. Hendrik Hartog, Snakes in Ireland: A Conversation with Willard Hurst, 12 Law & History Rev. 370, 385 (1994).

5. Calculated from Association of American Law Schools, Directory of Law Teachers (Association of American Law Schools 1931-2010).

6. My attention was first drawn to the AALS count by Bill Novak, who alludes to it in his article, "Constitutional Theology: The Revival of Whig History in American Public Law," Michigan State Law Review (forthcoming) (copy on file with author).

7. *See generally* Magali Sarfatti Larson, The Rise of Professionalism: A Sociological Analysis (Univ. of California Press 1977).

8. Novak, *supra* note 6.

others and outsiders to their field of study."[9] I have to differ. In the late 19th and early 20th centuries, historians set about organizing their craft with clear ambitions to create a bounded expertise—and with it disciplinary authority and socio-economic gain. But they failed. The first generation of professional historians attempted to displace the preceding generation of patrician amateurs by constructing a "scientific" empirical history (to go along with legal science, social science, political science, and so on). They led the discipline into an arid landscape of rigid factualism, evolutionist in general perspective but suspicious of any more pointed form of causality. "In the name of history," writes John Higham, "they denied literature, philosophy, and even the certainties associated with the natural sciences."[10] Unfortunately, their attempts to reify history as science, and historical knowledge as an exclusively factualist expertise mostly earned not socio-economic reward but withering contempt. "After a while," noted one patrician amateur (Theodore Roosevelt), "it dawned on me that all of the conscientious, industrious, painstaking little pedants, who would have been useful in a rather small way if they had understood their own limitations, had become because of their conceit distinctly noxious. They solemnly believed that if there were only enough of them, and that if they only collected enough facts of all kinds and sorts, there would cease to be any need hereafter for great writers, great thinkers."[11] Nor did professional historians earn any greater respect from scholars in other disciplines, who found their "science" lacking in any rigorous conception of systematic generalization, hence woefully *un*scientific and *un*professional.[12] Historians' own description of their research practices tended to confirm the suspicion. In 1910, for example, James Franklin Jameson likened himself to an artisan patiently fashioning mounds of knowledge-bricks but "without much idea of how the architects will use them," simply trusting "that the best architect that ever was cannot get along without bricks, and therefore trying to make good ones."[13]

Unlike the third pig's bricks, Jameson's built no barriers to entry. After the turn of the century, however, the professionalizing disciplines on history's porous borders (political science, sociology, economics, law) began to lose interest in evolutionary theories of social development and concentrated their attention on scientization of the present (policy, social process, marginalism, sociological jurisprudence/realism). What little stake the disciplines had in whether history was sufficiently scientific to belong therefore evaporated—no one had enough invested in the outcome to care anymore.[14] History as a

9. *Id.*

10. John Higham, History: Professional Scholarship in America 102 (Harper & Row 1965).

11. Theodore Roosevelt, *quoted in id.* at 7-8.

12. Higham, *supra* note 10, at 106-9.

13. James Franklin Jameson (1910) *quoted in id.* at 25. *See generally*, Peter Novick, That Noble Dream: The "Objectivity Question" and the American Historical Profession 47-60 (Cambridge Univ. Press 1988).

14. Higham, *supra* note 10, at 108-10.

discipline was left lurching uncertainly between the social sciences—the club that would not grant admission—and the humanities—the club that scientific historians had rejected. It was not a position of strength: There is little evidence from the first half of the 20th century that professional history offered much in the way of either academic or socio-economic status. What measures there are show decline.[15] Historians desiring to promote "progressive" relevance to the present fought their own internal battles with conservative factualists, but there was little in either practice that furnished means for effective boundary-keeping. There really was no need. Not many wanted in.[16]

History's eventual salvation as an academic profession and discipline was the great expansion in post-secondary education that began with the G.I. Bill and continued with the baby boom.[17] Rapidly rising general demand for tertiary education created overall scarcity and with it conditions for a sturdier profession. The boom is long gone, of course, but its echo remains; history is a healthier discipline now than it was before World War II. Still, some things don't change. In the academy, history continues to lurch back and forth in the space between the humanities and the social sciences. And, as Novak notes, it still has not discovered how to credential its knowledge as expertise.

History's "expertise" problem is that everyone is their own historian, by dint of personal awareness of the trivia of life circumstance that have produced them as they are, and that everyone also can be some sort of historian in the larger, necessarily collective, sense of associating in acts of remembrance or awareness that evoke the past and speculate about its meaning. As profession, history must live in tension with this broader civic discourse of "history" that, in constantly engaging in invocations of the past, makes its own potent claims to historical awareness and knowledge. In 1968, in the first line of a book on the consciousness and practices of a group of U.S. historians eminent in the early years of the discipline, Richard Hofstadter observed, "Memory is the thread of personal identity, history of public identity."[18] In naming the construction of public identity as the job of historical practice, Hofstadter identified a formative purpose of the profession, but also the context that constantly challenges it. For civic discourse commonly crafts "lessons" of history from among the totality of acts of evocation of the past, which citizens are invited to emulate or warned to ignore at their peril. Compared with this charged construction of public identity, professional history's disciplinary preoccupations often fare poorly, easily caricatured in the same language that Theodore Roosevelt chose to dismiss today's historians' professional forebears: industrious, painstaking

15. *Id.* at 63–65.

16. *Id.* at 63–65, 110–14; Novick, *supra* note 13, at 168–205. The irrelevance of legal history in the 1930s, recalled by Hurst, was of a piece with a larger irrelevance of history as discipline.

17. Higham, *supra* note 10, at 65–67, 82–83, 132–44.

18. Richard Hofstadter, The Progressive Historians: Turner, Beard, Parrington 3 (Vintage Books 1970).

and pedantic; useful, but only "in a rather small way."[19] As Gordon Wood recently noted, academic historians publish more than 1,000 books a year, but for the vast majority of titles, sales outside libraries often number in the dozens. "Most people, it seems, are not interested in reading history, at least not the history written by academic historians."[20] By way of contrast, the romantic narrative history that has become so strong a presence in nonfiction publishing is far more evocative of civic lessons, for romantic narrative presents history as edifying stories of "individual personalities…unique public happenings" appropriated to offer the present homiletic advice.[21] "That's what history is" says a leading practitioner of the genre, David McCullough, according to Wood, "a story."[22]

If the AALS Directory is anything to go by, law teachers have been reading history. What kind of history is available for them to read? How should it be read? Should it be read at all?

The first and likeliest answer is legal history. History's post-World War II flush times had their intellectual counterpart in the law schools, where, beginning in the 1950s, Willard Hurst led a revival of American legal history that looked outward to social history, culminating, symbolically, in the volume *Law in American History*, published in 1971 by Harvard's impeccably establishment Charles Warren Center for Studies in American History, for which Hurst wrote the keynote essay.[23] The influence of Hurst and of the scholars who followed his lead in bridging the disciplinary gap between law and history—Lawrence Friedman, Stanley Kutler, Harry Scheiber—is indisputable.[24] But history's real take-off in law was a creature of the 1970s and 1980s, when Hurst's legal history was first joined and then eclipsed by the work of the gifted lawyer-historians of Critical Legal Studies—Robert Gordon, Morton Horwitz, Mark Tushnet and many others—who directed legal-historical research away from the socio-legal emphases of Hurst, Friedman and Scheiber and back toward legal doctrine.[25] CLS's doctrinal history did not, of course, resemble that of the late 19th century. The objective was to rewrite "legal historiography as the intellectual history of the rise and fall of paradigm structures of thought designed to mediate contradictions."[26] But critical examination of law on its own terms—legal

19. Theodore Roosevelt, *supra* note 11.

20. Gordon Wood, In Defense of Academic History Writing, 48 Perspectives on History 4 (2010), *available at* http://www.historians.org/perspectives/issues/2010/1004/1004art1.cfm.

21. *Id.*

22. *Id.*

23. Donald Fleming & Bernard Bailyn, eds., Law in American History (Little, Brown 1971). *See* Christopher Tomlins, History in the American Juridical Field: Narrative, Justification, and Explanation, 16 Yale J.L. & Human. 323, 375-84 (2004).

24. *Id.* at 381-82, particularly n.286.

25. *Id.* at 384-91.

26. Robert W. Gordon, Critical Legal Histories, 36 Stan. L. Rev. 57, 116 (1984).

history as intellectual history[27]—had greater general resonance in the legal academy than the functionalist social and economic approach of Hurst, et al. Although CLS was in clear decline by the early 1990s, its historical offshoot remained vital. As "critical legal history" relaxed its commitments to doctrinal history, moreover, it began embracing "[v]irtually all history as practiced by modern historians."[28] Virtually any history was critical, the claim went, when brought to bear upon law.

But law teachers' steadily growing interest in history over the last forty years is attributable at least as much to their engagement with history as civic discourse as to their interest in legal history as such. In her *Strange Career of Legal Liberalism*, Laura Kalman tells us that liberal law professors began their turn to history in the 1970s and 1980s in an effort to resolve the deep crisis in liberal understandings of U.S. constitutional law that stemmed from the liberal legal desire to embrace the rights revolution wrought by the Warren Court while somehow avoiding the dangerously slippery slope of counter-majoritarian judicial review that the Warren Court had practiced in order to achieve it.[29] The attempt to represent necessity's expediencies as constitutionally principled consistencies slowly twisted legal liberalism into an ever more elaborate pretzel, trashed relentlessly by critics left and right.[30] Growing incoherence within turned the legal academy outward to other disciplines. By the mid-1980s, history had emerged from the pack as legal liberalism's anointed savior, specifically the history associated with the so-called "republican revival"[31]—the new history of the Founding Era pioneered by Bernard Bailyn and Gordon Wood, and developed to its fullest extent by J.G.A. Pocock.[32] This was, to be sure, academic history. But it was deployed by its law school adherents in much broader civic fashion to inform an alternative originalism to the "strict constructionist" originalism of the Reagan Administration's Justice Department.[33] At a time when liberalism seemed entirely exhausted and conservatives were moving energetically to define American civic discourse—

27. That is, "taking dominant legal ideologies at their own estimation and trying to see how their components are assembled," Robert W. Gordon, The Past as Authority and as Social Critic: Stabilizing and Destabilizing Functions of History in Legal Argument (1990), *in* Terrence J. McDonald, ed., The Historic Turn in the Human Sciences, at 360 (Univ. of Mich. Press 1996).

28. Robert W. Gordon, Foreword: The Arrival of Critical Historicism, 49 Stan. L. Rev. 1023, 1024 (1997).

29. Laura Kalman, The Strange Career of Legal Liberalism 59–131 (Yale Univ. Press 1996).

30. *Id.*

31. *Id.* at 132–63.

32. *See* Bernard Bailyn, The Ideological Origins of the American Revolution (Harvard Univ. Press 1967); Gordon S. Wood, The Creation of the American Republic, 1776–1787 (Univ. of North Carolina Press 1969); J.G.A. Pocock, The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition (Princeton Univ. Press 1975).

33. Kalman, *supra* note 29, at 132–63.

"the ideas that have molded us and the ideals that [have] mattered to us"[34]—on their own terms, the republican revival gave legal liberals a competing civic discourse of their own, grounded on a Founding Era that leading historians (particularly Pocock) told them "bespoke commitment to common interest, civic virtue, responsibility, community values, deliberative democracy, and self-determination."[35] Liberal legal scholars assimilated the revival's participatory civic republicanism to a new communitarian jurisprudence of the perfected public good. They successfully invented a tradition.

The tradition was a contrivance that did not last: The uses that legal scholars made of the republican synthesis (as it became known) were, inevitably, controversial among academic historians, as indeed was the synthesis itself, to a degree that eventually undercut its availability. Nor, in any case, could resort to academic history to create usable traditions be controlled: In the immediate aftermath of the 1994 federal election, Newt Gingrich could be found citing Gordon Wood's new book *The Radicalism of the American Revolution* as authority for the GOP's insurrectionary populism with as much gusto as Frank Michelman and Cass Sunstein had cited *The Creation of the American Republic* in support of their neo-republicanism.[36]

What the experience left behind, however, was a residue of affirmation that interaction between academic history and broad church law had its uses beyond the specifics of "legal history." All sorts of possibilities—joint faculty appointments, joint J.D./Ph.D. degree programs—became possible and have become increasingly popular. The sophistication and breadth of history written on both sides of the intersection between the disciplines of history and law has, correspondingly, grown appreciably. As Novak suggests, the very porous nature of history that frustrates its capacity to create itself as credentialed expertise can generate immense fecundity at its intersections with other fields of study.

Lately, historians have been contemplating a new disciplinary crisis, a crisis of disciplinary consumption. History is a book-driven discipline, but its research monographs, as we have already noted, do not circulate widely. Wood argues that this is a necessary consequence of history's continued commitment to "science"—the historical monograph is analogous to a scientific paper, it assumes familiarity with the knowledge upon which it builds, and it is written for fellow specialists "engaged in an accumulative science."[37] Specialization,

34. National Endowment for the Humanities director Lynne Cheney, *quoted in id.* at 140.

35. *Id.* at 154.

36. *See* Interview by Brian Lamb with Gordon S. Wood, author of "The American Revolution: A History", C-SPAN Booknotes (April 21, 2002), *available at* http://www.booknotes.org/Watch/168964-1/Gordon+Wood.aspx; The Long March of Newt Gingrich: Booklist, *available at* http://www.pbs.org/wgbh/pages/frontline/newt/newtlist.html. Gingrich still cites Wood in support of GOP populism. *See, e.g.*, Newt Gingrich at CPAC: Transcript, Renewing American Leadership (Feb. 20, 2010), *available at* http://www.torenewamerica.com/gingrich-cpac-2010-speech.

37. Wood, *supra* note 20.

however, discourages attempts at comprehensive generalizing narrative. The result is that academic historians "have generally left narrative history writing to the nonacademic historians who unfortunately often write without much concern for or much knowledge of the extensive monographic literature."[38] Wood's response is to urge his colleagues to turn to synthesis—produce academic works that assemble the array of specialized monographic research into "comprehensive narratives."[39]

So far as his own backyard is concerned—19th century American history—Wood's call has been issued somewhat after the fact. The last five years have seen the publication of several very large scale synthetic accounts of the 19th century: Wood's own *Empire of Liberty: A History of the Early Republic, 1789–1815*, in 2009; Daniel Walker Howe's *What Hath God Wrought: The Transformation of America, 1815–1848*, in 2007; Sean Wilentz's *The Rise of American Democracy: Jefferson to Lincoln*, in 2005; and most recently Brian Balogh's *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* in 2010. The books by Wood and Howe are sequential titles in the *Oxford History of the United States*, which has become the embodiment of academically grounded grand narrative history. Those by Wilentz and Balogh are comprehensive stand-alone examinations—very different in character—of 19th century political history. Collectively these books allow one to evaluate the capacity of academic history to fashion a product of use to non-specialist consumers in disciplines such as law while remaining true to its own specialist knowledge base, its continuing claim to be "science." Should the legal consumer be reading these new grand syntheses?

Empire of Liberty

The central themes and much of the substance of *Empire of Liberty* will not surprise anyone familiar with Gordon Wood's earlier work, particularly his *Radicalism of the American Revolution*.[40] The book's subject is the transformation of the "insignificant provinces" of pre-Revolutionary mainland British America, clinging to the edges of the Atlantic and oriented to the east, to Europe, into the westward-facing "single giant continental republic" of 1815. The motor of transformation is rapid expansion—demographic and geographic—and the rapid commercialization of all facets of society that accompanied expansion. "Nowhere in the Western world was business and working for profit more praised and honored." At the heart of transformation lies the decay of the "essentially aristocratic" world of the Founders and its replacement by

38. *Id.*

39. *Id.* Wood has repeated these arguments in recent essays written for the New York Review of Books. *See* Gordon S. Wood, The Real Washington at Last: Review of George Washington's America: A Biography Through His Maps, by Barnet Schecter, and Washington: A Life, by Ron Chernow, 57 N. Y. Rev. Books 19 (2010), *available at* http://www.nybooks.com/articles/archives/2010/dec/09/real-washington-last/; Gordon S. Wood, No Thanks for the Memories: Review of The Whites of Their Eyes: The Tea Party's Revolution and the Battle Over American History, by Jill Lepore, 58 N. Y. Rev. Books 1 (2011), *available at* http://www.nybooks.com/articles/archives/2011/jan/13/no-thanks-memories/.

40. Gordon S. Wood, The Radicalism of the American Revolution (A.A. Knopf 1992).

the bumptious bustling egalitarian democracy of a "popular commercial society." Left behind in the process is the South and its "leisured slaveholding aristocracy"—increasingly "anomalous," increasingly "beleaguered" (Wood 2, 3).

The first part of *Empire of Liberty* is political history. With Wood we work our way through the crucial first decade of the American Republic—the creation of federal institutions, law making, the development of judicial review, and in particular the deepening factional tensions between Hamiltonian Federalists and Jeffersonian Republicans battling over the constitutional order created in 1787. Wood's sympathies are decidedly with the Jeffersonians. Although Hamilton has acquired a historical reputation as "prophet of America's industrial greatness," Wood finds his reputation exaggerated. Hamilton was "so wedded to a hierarchical view of society that he could only imagine industrial investment and development coming from the top down" rather than where it actually did come from, which was "from below, from the ambitions, productivity, and investments of thousands upon thousands of middling artisans and craftsmen who eventually became America's businessmen" (Wood 102–3). It was Jefferson who understood "the developing popular realities of American life" (Wood 276), who led the resistance against the monarchical Federalist republicanism that stood in the way of popular democracy, and who steered "the entire revolutionary venture of two and a half decades to successful completion" in the election of 1800. Jefferson, Wood argues, "personified" the transformation of the American polity. "His ideas about liberty and democracy left such a deep imprint on the future of his country that, despite persistent attempts to discredit his reputation, as long as there is a United States he will remain the supreme spokesman for the nation's noblest ideals and highest aspirations" (Wood 276, 277).

But although personified in Jefferson, revolutionary transformation was driven by population growth and movement, and by commercial expansion. The second part of *Empire of Liberty* dwells on transformation's effects. Population movement overwhelmed the native peoples of the Old Northwest and of the Southwest in wave after wave of "demographic imperialism" (Wood 357). Commercial expansion fueled social and economic change that rotted through "what remained of traditional eighteenth century hierarchy" by challenging traditional subordinations and servitudes (Wood 346–8). For native peoples, white settlement of the West was "a tragedy from beginning to end" (Wood 398); for whites, geographic expansion was central to the creation of an exceptional republic, in that constant westward movement staved off the emergence of social differentiation that stadialist theories of historical progress common in the late 18th and early 19th centuries predicted were the inevitable accompaniment of progress toward refinement and civilization. Republican reform, meanwhile, was pursued with a vengeance. "All aspects of life had to be republicanized—not only the society but literature, arts, law, religion, medicine, and even the family" (Wood 470).[41] Republican sentiments were

41. Wood devotes a separate chapter to each of these aspects.

also manifest in diplomacy, in the attempt to use commerce—incentives and embargoes—to promote peace (Wood 620–58), and in the attempt to fight the war that resulted (the War of 1812) without falling into the trap of fiscal-military state expansion that would jeopardize limited republican government (Wood 659–700).

The greatest of all republican reform movements, Wood argues, was anti-slavery. Anti-slavery was a child of the Revolution, for the Revolution created "for the first time in American history the cultural atmosphere that made African American slavery abhorrent to many Americans" (Wood 508). Before, "most Americans had simply accepted slavery as the lowest and most base status in a hierarchy of legal dependencies" for in Wood's view "[t]he prevalence of hundreds of thousands of bonded white servants tended to blur the conspicuous nature of black slavery. With as much as half of colonial society at any moment legally unfree, the peculiar character of lifetime, hereditary black slavery was not always as obvious as it would become in the years following the Revolution when bonded white servitude virtually disappeared" (Wood 517). After the Revolution ("almost overnight" [Wood 517]), slavery became what before it had not been—conspicuous, and conspicuously anomalous. Revolutionary leaders—indeed, it would seem, almost everyone—deluded themselves into believing that slavery was destined to disappear. But slavery was rescued from oblivion by the same commercial and geographic expansions that were creating the exceptional republic. Mechanization of cotton production and the migration of slaveholders into the fertile lands of the Southwest created a new slave economy and with it a growing sectional divide between an increasingly modern slave-less North that valued labor "as the supreme human activity" and an increasingly traditional slave-holding South that thought of labor as "mean and despicable" and spun new theories of innate racial inferiority to justify its servile labor force. By the turn of the century, racism, if not slavery, had spread in the North too. "Most Americans, both Northerners and Southerners, were coming to think of the United States as 'a white man's country'" (Wood 531, 542). But otherwise, North and South were becoming ever more distinct, the North "dynamic, enterprising, and egalitarian," the South "bewildered and besieged…anxious and defensive" (Wood 734–35). Wood ends with the crisis over admission of Missouri as a slave state, which, he argues "stripped away the illusions that both North and South had entertained about slavery." Northerners realized that slavery would not end naturally, in a whimper; Southerners realized that the North "really cared about ending slavery." It seems, however, that despite its significance, the Missouri crisis was but a station on an unerring line that Wood draws straight from Bunker Hill to Appomattox, the Civil War "the climax of a tragedy that was *preordained* from the time of the Revolution" (Wood 738, emphasis added). Only the end of slavery could allow the republic to begin to live up to the ideals and aspirations of its greatest spokesman, Jefferson.

The strength of Wood's *Empire* lies in the sweep and scope of its perspective, and its facility in blending both with narrative detail. Wood is well-known from

his frequent *New York Review of Books* essays both for plain and straightforward writing that explains current historical scholarship to broad audiences, and for a waspish impatience with "presentism" (locating historical phenomena in the false context of the present for argumentative purposes rather than in their one true context, namely their proper moment located in the past), and *Empire* is both plainly and clearly written, and studded with salutary reminders that the past is a different place (Wood 70).[42] Does it, however, bring "the best scholarship" to that "broadest possible audience" sought by David M. Kennedy, the *Oxford History*'s presiding editor (Wood xvi)? Is it synthesis, by Wood's own criterion—an assemblage of specialized monographic research as comprehensive narrative? In matters of detail, yes: *Empire* captures much of the monographic literature of the last thirty years. But that literature is assembled into a pattern that has been visible in Wood's own work since he wrote the final chapters of *The Creation of the American Republic*: a revolution that undid a hierarchical monarchic society and created a virtuous republic in its place that was itself undone in turn by the explosive energy of individual self-interest and personal freedom. It is all rather predictable. Wood's synthesis creates nothing new; it becomes instead the assemblage of a dutiful supporting cast.

To massage history into the prescribed pattern, Wood has to take certain liberties. Amid the many warnings against presentism there is much chronological pushing and pulling. The historian's cherished allies—the phrases "as early as" and "as late as"—make frequent appearances to marshal temporally inconvenient occurrences into the desired historical-temporal pattern. Rather more problematic, the pivot on which the book swings— the pivot of colonial hierarchy dissolved by post-Revolutionary commerce and expansion into expansive democratic vistas—is deeply unconvincing. Take as an example Wood's claim that the 18th century colonial population included "hundreds of thousands of bonded white servants" (Wood 517). It serves three purposes. First it emphasizes the ubiquity of pre-Revolutionary hierarchy and subordination. Second, it underscores the ordinariness of slavery during the colonial period—simply the bottom rung of the ladder. Third, it stresses the social transformation brought about by the Revolution, leaving slavery behind as the one anomalous exception, destined as such to disappear almost as a matter of developmental logic. Wood has been making the same claims for years.[43] The problem is, it is entirely unclear what basis the claim has in fact.[44] Available scholarship (which Wood ignores) estimates that at the beginning of the 18th century, servants were no more (and probably fewer than) than 10 percent of the mainland population, which then stood at approximately

42. Here, for example, he observes the framers of the Second Amendment to the U.S. Constitution "had little awareness of the distinction drawn today between a collective and an individual right to bear arms, and certainly they had no modern conception of gun control."

43. *See, e.g.*, The Radicalism of the American Revolution, *supra* note 40, at 52–53, 186, where the claim is made in similar language.

44. In Empire of Liberty the "hundreds of thousands" claim is unsourced.

250,000, or in other words, that servants were approximately 25,000 in number; and that by the 1770s servants were 2.3 percent of population, then approximately 2.2 million, or no more than 50,000 in number.[45] During the intervening period, some 350,000 Europeans migrated into the mainland colonies (bonded white servants were overwhelmingly migrants). No more than 50 percent of these were indentured.[46] Throughout the entire 18th century prior to the Revolution, in other words, no more than 175,000 servants entered the colonies—an average of 23,000 per decade. At no point during the 18th century, therefore, can one credibly claim that the colonial population included "hundreds of thousands" of servants. Suddenly, the early American social order looks a lot less hierarchical and the Revolution a lot less revolutionary in social terms. Correspondingly, colonial-era African slavery requires a lot more explanation, and the "preordained" straight line of anti-slavery from Bunker Hill to Appomattox becomes a lot more crooked, particularly when one takes into account the survival of slavery in the "free" North well into the 19th century, a survival that clouds Wood's insistence on confining slavery to the anomalous South (Wood 504–6). If legal consumers want empirical rigor from the history they read, they had best look elsewhere.

What Hath God Wrought

Wood's *Oxford History* colleague, Daniel Walker Howe, takes as his subject the republic from the War of 1812 to the Mexican American War, and in particular the troubled and turbulent history of American democracy during the period. At the close of the book, Howe states that his purpose has been to tell a story, not argue a thesis (Howe 849). Still, certain choices have been made in determining how to tell the story, and Howe's book is structured around three forces that, he argues, made American democracy meaningful after 1815: the growth of a market economy, aided by improvements in transportation, which broadened popular choice in both consumption and vocation; the rapid spread of voluntary association, both religious and secular; and the appearance of mass political parties. Key to all three developments were the "twin revolutions" in communications and transportation (Howe 1–2). Hence Howe's title, *What Hath God Wrought*—the phrase used by Samuel Morse in 1844 to initiate electric telegraphy (Howe 1).

Like Wood, Howe writes of transformation. Most historians, indeed, make transformative change over time their stock in trade, and Howe is no exception.

45. *See* Abbott Emerson Smith, Colonists in Bondage: White Servitude and Convict Labor in America, 1607–1776 336 (Univ. of North Carolina Press 1947) (by the 1670s, throughout the British American colonies, servants about 10 percent of the white population and declining in incidence); Farley Grubb, The End of European Immigrant Servitude in the United States: An Economic Analysis of Market Collapse, 1772–1835, 54 J. of Econ. History 794, 796 n.5 (1994) (servants under 10 percent of the mainland colonial population by 1700); Alice H. Jones, American Colonial Wealth: Documents and Methods III, 1787, Table 4.21 (2d ed., Arno Press 1978) (servants 2.3 percent of the population by 1770s).

46. Christopher Tomlins, Freedom Bound: Law, Labor, and Civic Identity in Colonizing English America, 1580–1865, 21–66, 573–82 (Cambridge Univ. Press 2010).

Transformation, he tells us, results "from a blend of two kinds of decisions: the many private decisions made by innumerable common people in their search for a better future, and the conscious decisions of their leaders in the course of making public policy" (Howe 853). In search of the former he touches on a vast list of topics—changes in work, in family, in economy and society, in religion, religious movements and religious consciousness, in political behavior, in literature and music, in gender roles. But it is transformation wrought by the second kind of decision-making that slowly moves to the fore.

The story begins symbolically with the Battle of New Orleans, which Howe dubs "the defeat of the past" (Howe 8). For Howe as for Wood, the story of the republic is of a past discarded in favor of "'an empire for liberty' stretching to the west…the multiplication of family farms and the extension of American power across continental space" (Howe 18). Occupation of that empire occurs on an immense scale. In three decades, the geographic and demographic expansion that Wood emphasized extends the "imperial reach" of the republic clear across the continent to the Pacific. Unlike Wood, however, who can give the impression that others are bit players whose role it is to be swept aside by a process of expansion that is as inevitable as it is vast, Howe carefully notes that the space of the inland empire is not only vast and diverse, but also "already inhabited" (Howe 19). And it is here, in the manner of taking possession, that conscious decision-making by political leaders comes to occupy more and more of Howe's attention, never more than when he moves to focus on the career of the dominant political figure of the era, Andrew Jackson, and the dominant phenomenon, Jacksonian Democracy.

Jackson, it's fair to say, is not Howe's personal cup of tea; nor is what Jackson stood for. Stern, authoritarian and patriarchal in person, Jackson exemplified "belief in the legitimacy of private violence and the assertion of male honor… trust in natural rather than acquired abilities…impatience with limitations on one's own will," lack of respect for legal authority, populist distrust of elites, and suspicion of government (Howe 330, 331). Above all, however, Jackson stood for white supremacy.

Historians, Howe notes, have tended to treat Jacksonian Democracy as if it were overwhelmingly consensual, so widespread a popular movement, so focused on a transcendental figure, that it enjoys its own "age" ("The Age of Jackson").[47] They have also referenced multiple phenomena in explaining the fundamentals of Jacksonian Democracy—free enterprise, manhood suffrage, the growth of a labor movement, the development of resistance to the market economy's commodification of life.[48] Howe differs on the first count—Jacksonian Democracy was not at all consensual but bitterly divisive. And on the second, although Jacksonian Democracy would intersect with all of

47. *See, e.g.*, Arthur M. Schlesinger, Jr., The Age of Jackson (Little, Brown 1945).

48. For particularly noteworthy interpretations, see Lee Benson, The Concept of Jacksonian Democracy: New York as a Test Case (Princeton Univ. Press 1961); Charles Sellers, The Market Revolution: Jacksonian America, 1815–1846 (Oxford Univ. Press 1994); and Wilentz, The Rise of American Democracy.

these phenomena over its course, in its fundamentals it was not about any of them. "In the first place it was about the extension of white supremacy across the North American continent" in the form of the policy of Indian removal, pursued eagerly and from the earliest moments of Jackson's administration (Howe 356–57). Just as much, it was about the deepening of white supremacy throughout American society in relations between whites and blacks—this too was "an essential component" of the Jacksonian Democratic Party's ideology and practice (Howe 423).

In both respects, Howe counterposes Jackson to John Quincy Adams, to whose memory *What Hath God Wrought* is dedicated, and who becomes the book's anti-Jackson. Adams, to Howe, is a man above reproach, a wise public servant who had already distinguished himself as secretary of state, whose alliance with Henry Clay in the "corrupt bargain" election of 1824 was entirely logical, and whose position in the vicious campaign of 1828 was principled and far-sighted. "Adams stood for a vision of coherent economic progress, of improvement both personal and national, directed by deliberate planning" intended to foster economic diversification and a mature democracy. Jacksonians, in contrast "accepted America the way it was, including its institution of slavery." They rejected improvement and diversification. They rejected government planning, though not the ad hoc distribution of favors to gratify local interests. They rejected public service in favor of "spoils." Their vision of the future was to replicate what already existed by "opening new lands to white settlement, especially if those lands could be exploited with black labor" (Howe 279).

The contest between Jackson and Adams thus counterposes white supremacist Indian removal to internal improvements as "the key to national development" (Howe 347). Jackson's victory in 1828 moves the nation decisively in a direction Howe deeply regrets—toward the geographical expansion and white supremacy that would underpin "America's imperial 'manifest destiny'" for the rest of the century. Here, he concludes, was "the primary driving force" for American history during the period under examination, and the real significance of Jacksonian Democracy: "domination and exploitation of the North American continent by the white people of the United States and their government…preservation and extension of African American slavery… expropriation of Native Americans and Mexicans" (Howe 852). Throughout, Adams continues to stand as Howe's principled foil: increasingly vocal opponent of slavery, battler against the gag rule in Congress, defender of the *Amistad* mutineers, perennial advocate for the internal improvements and diversified economy that could create alternatives to slave-based agriculture, and for the self-improvement—education and moral reform—that would help steer all those private decisions made by common people in the wholesome direction of the greater collective good. And just as Jackson personifies Jacksonian Democracy, so Adams personifies the Whig opposition, its "reverence for the supremacy of the law" and for individual responsibility, its positive conception of liberty and belief in the good society, its trust in

"economic planning and strong government" (Howe 411, 583). All this might finally have been put to good effect following the Whig triumph in 1840, had William Henry Harrison not succumbed to pneumonia within a month of taking office, had his vice-presidential successor, John Tyler, not disastrously splintered the party by his attempts to commandeer it. Regardless of their political fate, Howe insists on claiming the Whigs—"economic modernizers… supporters of strong national government…humanitarians more receptive than their rivals to talent regardless of race and gender"—as the party more in line with America's future than Jackson's Democrats (Howe 612). Howe credits Jacksonian Democracy for its militant egalitarianism among white males, and its tolerance of cultural diversity, but it was the Whigs, he argues, who "facilitated the transformation of the United States from a collection of parochial agricultural communities into a cosmopolitan nation integrated by commerce, industry, information, and voluntary associations as well as by political ties" (Howe 612). Above all, it was the Whig vision of "government-sponsored modernization" that inspired the most famous Whig of all, Abraham Lincoln, "to save the Union, purge it of slavery, and promote both education and economic expansion" (Howe 835, 853).

Howe's story is an epic, and it is written skillfully, often in epic prose. Like Wood, Howe has an extraordinary eye for detail (so much so that on occasion the book becomes almost a sourcebook for *Trivial Pursuit*) and he manages, I think more successfully than Wood, to advance his narrative on simultaneous multiple fronts. It will be clear, however, that for all his denial of arguing a thesis, Howe's narrative—like Wood's—is in fact organized to advance a strongly stated position, which in his case takes issue with much of the empirical literature on the political history of the era—so much so that it has been accused of willful engagement in anti-Jacksonian polemic.[49] Once again, in other words, one encounters a book that is not in fact scientific "synthesis" in the sense of assemblage of the results of specialized monographic research in a broad and coherent narrative but is instead driven by an explicit authorial perspective. That perspective is of course informed by years of research and writing; Howe is author of highly-respected books on 19th century religion, on American self-fashioning, and on American Whig political culture, all of which have informed the themes of *What Hath God Wrought*.[50] The point is, however, that neither of the two most recent books in a series explicitly intended to "bring the best scholarship to the broadest possible audience" treats historical argumentation as the product of engagement in "an accumulative science." Were it so, one might expect more of what another recent commentator on

49. Sean Wilentz, Book Review, 97 Journal of American History 475, 477 (2010).

50. Daniel Walker Howe, The Unitarian Conscience: Harvard Moral Philosophy, 1805–1861 (Harvard Univ. Press, 1970); Daniel Walker Howe, The Political Culture of the American Whigs (Univ. of Chicago Press 1979); Daniel Walker Howe, Making the American Self: Jonathan Edwards to Abraham Lincoln (Harvard Univ. Press 1997).

their efforts has called "interpretive paradox and complexity."[51] Each, rather, relies on the marshaling of considerable volumes of evidence to advance a very specific point of view.

The Rise of American Democracy

Just how specific—in Howe's case—will quickly become apparent to anyone who happens to open Sean Wilentz's equally epic and immense *The Rise of American Democracy*. They will have to open it more or less in the middle, for Wilentz's *Rise* is a chronicle of American democracy from the Revolution to the Civil War. At its center, however, is the Age of Jackson, and a very different Jackson from Howe's. Indian removal is returned to Wood's category of "tragedy"; attempts to treat it otherwise are labeled melodrama. Jackson was "a benevolent, if realistic, paternalist" who believed that Indians would be better off removed from state law and relocated in federal territories. Though he was no "simple-minded Indian hater" (unlike, Wilentz points out, Whig hero Henry Clay), Jackson cannot escape "the basic truths" of anti-removal arguments. He was responsible for setting in motion a deadly policy that would result in great suffering, even though "the worst suffering was inflicted after he left office" (Wilentz 324, 325, 327).[52] Wilentz also notes, carefully, that Indian removal reinforced "those elements within the Jackson Democracy" that embraced white supremacist arguments, but on this matter he has little else to say (Wilentz 327). On both issues the contrast with Howe could not be more pointed.

There is of course far more to *The Rise of American Democracy* than the age of Jackson. The book's subject is "the momentous rupture" that occurred between the time of Jefferson and of Lincoln, creating modern democratic politics. Wilentz pointedly resists defining this rupture by the appearance of a particular form of government or society, or of a particular set of social norms, as the imposition of present categories and standards on past circumstance. Instead he defines democracy as "a historical fact, rooted in a vast array of events and experiences, that comes into being out of changing human relations between governors and the governed" (Wilentz xvii, xviii). Given that, indisputably, relations between governors and governed did change momentously between the Revolution and the Civil War, and in a fashion that for the first time secured for many of those previously excluded—ordinary people—opportunity to participate in selecting their governors and overseeing government, it is entirely appropriate, Wilentz argues, to conclude that democracy "arose." Acknowledging impairments—the exclusion of women

51. John L. Brook, Trouble with Paradox, 67 William and Mary Quarterly 549, 549 (2010).

52. Recent research would suggest there is in fact good reason to believe that the worst suffering was actually inflicted before Jackson entered office. "By the time 'Indian Removal' became the official policy of the national government, much of the work of American expansion had already been accomplished." *See* Paul Frymer, Building an American Empire: Territorial Expansion in the Antebellum Era, 1 U.C. Irvine L. Rev. (forthcoming) (2011), (manuscript on file with author).

and most free black males from the franchise, white supremacy, the spread of slavery and the wholesale transfer westward of native populations—does not alter the historical fact.

Wilentz's chronicle of American democracy is a political chronicle, which is to say that its mode of narrative and explanation emphasizes "the vagaries of politics, high and low" and the significance of "political events, ideas, and leaders" rather than the overweening determinacy of social and economic forces (Wilentz xx). The result is an extraordinarily, obsessively, detailed narrative of U.S. political history that gives relatively little attention to political behavior,[53] somewhat more to the nature of political movements (although little to the institutional dynamics of party organization) and spends the bulk of its time describing the personalities, maneuvers, alliances and betrayals of party politics and partisan conflict. Social and economic circumstance get their due, as contextualizing backdrop, but Wilentz emphasizes that political perceptions framed social and economic change rather than the reverse. "Americans of the early 19th century lived in a different mental universe from ours." Social change was perceived through a political lens; "politics, government, and constitutional order, not economics, were primary to interpreting the world and who ran it" (Wilentz xxi). Over the full course of the book the backdrop wins out. Notwithstanding Wilentz's emphasis on the contingency of the day-to-day, it is "changes barely foreseen" (Wilentz xxi)—the Gemini twins of commercialization and expansion that Wood and Howe have both also stressed—that prove decisive in the long term. They create the commercialized, free labor North and the resurgent slave-based plantation agriculture of the South whose dual emergence "deeply affected how democracy advanced, and retreated, after 1815." They set the scene for the irrepressible conflict that dominates the years after 1840: the clash between "two American democracies… the free-labor democracy of the North and the slaveholders' democracy of the South" that culminates in the 1860 election, secession, and civil war (Wilentz xxii). Still, Wilentz emphasizes that these are still political conflicts, conflicts between different perceptions of what democracy meant.

Political conflict was a constant of the entire antebellum period, and Wilentz's detailed accounting of it occupies most of his energies, and the reader's too. But from the outset, conflict was shaped by the emergence of democracy in two distinct variations: the "country" democracy of the "disparate white rural majority of farmers" and the "city" democracy of skilled artisans and mechanics, and below them the many sorts and grades of plebeian workers stretching to the lowest grade of all, the enslaved, for whom the sense of self was formed in participatory civic activity, whether in trade or place (Wilentz 15, 20–27). The two democracies could be found at different times, in different places, both in alliance and in discord. In no sense fully formed at the outset, they each played distinctive parts in the "explosion" (Wilentz 29) of the Revolution; divided over the Federal Constitution (Wilentz 35–37); slowly united in Democratic-Republican opposition to Hamiltonian Federalism

53. Thus compare Benson, *supra* note 48.

(a unity tempered somewhat by the first appearance of disagreements over slavery) (Wilentz 41-61, 62); and then united more fully behind Jefferson to produce the first great democratic upsurge, the "revolution of 1800"—a fusion of country egalitarian ideology with city electioneering techniques (an "infrastructure" of newspapers and public events) that produced "a national coalition of planters, yeoman [*sic*], and urban workingmen allied against a Federalist monocracy" (Wilentz 98). Though limited in its effects—participation expanded but politics tended to operate firmly from the top down (Wilentz 138-39)—the new Jeffersonian Republican Party would prove to be long-lived. Slavery, however, early emerged as a fissile influence, tending to cleave city and country democrats from the Southern plantocracy, such that by the time of Jefferson's reelection in 1804, Wilentz—like Wood in *Empire of Liberty*—detects in the process of "democratization" the emergence of "growing differences between the somnolent, slaveholding South," where democratization had a tendency to shore up slavery, and "the more agitated North," where democratization, by encouraging the passage of gradual emancipation laws, did the reverse (Wilentz 125, 182). "In the long run these differences would cause the breakdown of the Union," but not in the short (Wilentz 125). Jefferson himself was a study in ambiguity, disowning neither slavery nor antislavery, but holding fast to his empire for liberty as a "white yeoman empire" (Wilentz 136). What Wilentz calls "the hard, looming paradox of American democracy" was that democratization would eventually collide with sectional peace (Wilentz 311). But democracy could continue to "rise" unencumbered by conflicts as long as its sectional contradictions could be contained by supple politics (as in the Missouri Compromise) and westward expansion. "The truly dynamic force in American politics after 1809…was a nationalist Republicanism, promoted by westerners and southerners who rejected the Federalists' political ideas and their Anglophilic economics as inimical to the character of the country" (Wilentz 177).

Supplemented by "surging demands for expanding democracy" (by 1821, twenty-one of twenty-four states had largely rendered the franchise independent of property-holding) (Wilentz 201, 253) this nationalist containment of sectional contradictions through pursuit of Jefferson's white yeoman empire would meet its most artful exponent in Andrew Jackson.

We have already encountered Wilentz's relatively abbreviated views on Jackson's pursuit of the yeoman empire at the expense of its indigenous population. Wilentz has much more to say on the other key controversies of Jackson's administration over the "proper instruments and democratic direction of national development" (Wilentz 178), the bank war and the nullification crisis. Wilentz credits Jackson's stance on both to his democratic vision—the first an expression of egalitarian assault on artificial privilege, the second of principled belief in majority rule (Wilentz 370, 382). More generally, the age of Jackson is, for Wilentz, one of surging, clashing, democracy—"the Working Men, the evangelical moral reformers, the radical abolitionists, and the nullifiers" (Wilentz 389). Jackson's genius, for Wilentz, lies in his capacity

to bend the turbulence of a democratizing society to his own (distinct) democratic agenda of battles against the money power—or where this proved impossible, as in nullification and radical abolition, to defeat or contain the effects. The Jackson Democracy, Wilentz insists, should be understood neither as a western sectional movement or a class movement of eastern labor, as a slaveholder/racist alliance of imperialist white supremacists or an anti-capitalist movement of resistance against the market revolution. It was all of the above and none of them because first and foremost it was a political movement led by a remarkably astute political figure who recreated the presidency in modern form as "the focus of national leadership" (Wilentz 515). Though "a political movement for, and largely supported by, those who considered themselves producers pitted against a nonproducer elite," its cure was, in all grievances, a political cure—majority rule (Wilentz 509, 513-14). Yet it is clear that the pile-up of intractable political conflicts—over Indian removal, over slavery expansion, over radical abolition—was more and more accentuated by the very democratization of politics that was the basis of Jackson's ascendancy. The tightening constraints on the capacity of Democratic "managers" to manage political conflict would become fully apparent during the Van Buren administration, particularly as others—the Whig opposition—began to learn how to accommodate democracy and majority rule in its own distinctive politics of self-improvement and reform. If Jackson "created the first mass democratic national political party in modern history" (Wilentz 516), the Whigs ran him a close second.

The last third of Wilentz's book focuses on the sharpening of conflicts that beset both Whigs and Democrats as slavery proved itself the irrepressible contradiction at the center of American democracy. By destroying the parties' internal intersectional alliances, the fight over slavery brings to full-blown emergence two distinct American democracies, one northern the other southern, one anti-slavery the other "an alternative Master Race democracy" led by slaveholders and "dedicated to the proposition that white men's equality depended on black enslavement" (Wilentz 576). The symbolic moment of emergence is the House vote on the Wilmot Proviso (August 1846) excluding slavery from any territory acquired from Mexico as a result of the Mexican-American War, when both parties split on almost perfect sectional lines. The two democracies receive their final definition in 1859-61, as "pro-slavery Master Race democrats" converge with planter aristocrats in the South, while the forces of anti-slavery coalesce around the Republican Party in the North (Wilentz 745-46). This part of the book is perhaps the most Gothic in style, as the deepening nightmare of the Union brings forth breathless transitions, obsessive denunciations (John Brown is repeatedly lambasted as "an experienced killer," a "crackpot killer and traitor," and a "terrorist" [Wilentz 747, 752]), and more than one "time was running out" (Wilentz 726, 784). Wilentz's account is focused almost entirely on high politics, its maneuvers

and strategies—bargains done and undone, speeches made and answered—with only the occasional gesture toward "Americans at the very bottom of political society" (Wilentz 645, 766). It ends, predictably, at Fort Sumter.

In a brief epilogue, Wilentz revisits his "northern and southern democracies" thesis to link it explicitly to the city and country democracies with which the book began—the northern the heir of the city, the southern of the country. The connection is far-fetched, at least to the extent Wilentz drives it. It makes sense only by representing the northern and southern democracies as utterly distinct and internally solidaristic, the southern enshrining slavery as the basis for equality among white men, the northern denouncing slavery as "a moral abomination that denied the basic humanity of blacks" and its expansion as a threat to white political equality. What, one wonders, does one do with all the others—the rabidly racist northern "butternuts" and "doughfaces" who belonged to the free-labor north but had little regard for the basic humanity of blacks and wanted nothing to do with Wilentz's "revolutionized northern democracy" (Wilentz 746); and the substantial populations of southern Unionists in, for example, West Virginia and East Tennessee who wanted as little to do with slaveholders?[54] While the "city and country democracies" of the early going was a useful organizing device that Wilentz could use to explore ideologies, modes of organization and forms of national coalition-building, his "northern and southern" democracies do not map on to their reputed origins at all neatly. Nor does either city or country democracy ever accommodate the many left outside what Barbara Welke has recently termed "the borders of belonging"—racial others, women, the disabled. Indeed, *The Rise of American Democracy*'s centerpiece—Jacksonian America—is to Welke's way of thinking the moment when "the stakes of gendered, racialized and abled privilege" rose higher than democracy ever did.[55]

Too many loose ends dangle, therefore, from Wilentz's account of American democracy. But as we have seen in discussion of all three of these monster histories, it seems to be endemic in the nature of the exercise to organize mounds of detailed scholarship in pursuit of a thesis or point of view that is relentlessly simplified and overstated. Do these books prove synthesis, on Wood's definition, impossible?

A Government out of Sight

To answer that question we can turn to one more, somewhat distinct, attempt—Brian Balogh's *A Government Out of Sight*. Balogh takes his title from Alexander Hamilton's observation in *Federalist 27* that "A government continually at a distance and out of sight can hardly be expected to interest the sensations of the people" (Balogh 3). Hamilton concluded that the authority of national government and its place in "the affections of the citizens" would

54. On butternuts and southern Unionists, see James McPherson, Battle Cry of Freedom: The Civil War Era 88, 304 (Oxford Univ. Press 1988).

55. Barbara Young Welke, Law and the Borders of Belonging in the Long Nineteenth Century United States, 112 (Cambridge Univ. Press 2010).

both be enhanced by extending its purview to "matters of internal concern" (Balogh 3). Balogh proposes that the opposite conclusion captures more fully the essence of 19th century national state formation: National government was most powerful in shaping public policy when its activities were least observed, out of sight and out of mind. His target is the familiar American historical narrative that contrasts "big government" in the 20th century with a supposedly small, weak, national state in the 19th century. His point is that 19th century government did not govern *less* than it would in the 20th century; it governed *differently* (Balogh 2).

Though by the standards of the conventional scholarly monograph, Balogh's is not a modest book—400 pages that begin in the 18th century and squint toward the 21st—compared with Wood (778 pages), Howe (904) and Wilentz (1,044) it is positively sprightly. It also argues a clear and largely persuasive thesis, which is carefully developed throughout, and it does so precisely by assembling a substantial array of specialized monographic research into a comprehensive narrative. If history is indeed an accumulative science, Balogh's is a model synthesis. This is unsurprising, for a synthesis "draw[ing] on a growing body of historical work and a cluster of theoretical insights" is precisely what Balogh set out to write (Balogh 5). His, however, is historical synthesis with a difference. First, it relies upon major insights from "American Political Development"—the historically-inflected school of political science that arose in reaction to political science's capture by public choice theory. Second, it uses those insights to sieve the "torrent of popular and scholarly interpretation that ignores nineteenth-century national authority" in search of "countercurrents" (Balogh 379).

Balogh's synthesis is resolutely academic. It is framed, nevertheless, in the language of civic purpose. Americans should care about history because "the stories we absorb about the past help frame the way we see ourselves today and influence our vision of the future" (Balogh 1). Where Balogh's academicism departs the romantic narrative that dominates the expression of civic purpose is that it corrodes rather than reinforces homilies received from the past. In particular it corrodes the "myth of the weak state"[56]—the deeply-embedded myth that 19th century America was a land of the free market and laissez-faire government (Balogh 2).[57] The story that Americans should absorb instead, Balogh argues, is of a remarkably effective national state that used public capacities within the boundaries of the Union to foster provision of essential services (for example, communications) and to further the development of private economic initiatives (for example, corporations), while directing

56. On which see William J. Novak, The Myth of the "Weak" American State, 113 American Historical Review 752 (2008), *available at* http://www.history.ucsb.edu/projects/labor/speakers/documents/TheMythoftheWeakAmericanState.pdf.

57. It is worth noting that legal historians have been beating their heads on this myth since at least the middle of the twentieth century. *See, e.g.*, James Willard Hurst, Law and the Conditions of Freedom in the Nineteenth Century United State (Univ. of Wisconsin Press 1956).

explicit state power at targets at or beyond the boundaries of the Union (Indian pacification and removal, westward expansion, wars). The one real period of laissez-faire in American history, the post-Civil War "Gilded Age," was a period of exception, when public officials attempted for the first time to draw a bright line between public and private activity.

Historians have already demonstrated the importance of active government at local and state levels in the 19th century.[58] Balogh does the same for the national level. The 18th century, Balogh argues, bequeathed national state structures to the 19th in which politics—embodying a republican theory of energetic government vigorously scrutinized by a virtuous citizenry—occupied the central place. Thus, the Constitution created the possibility of central government with extensive fiscal-military capacities, but always a government held, politically, in check from too heavy a tread in domestic policy. As "social and economic constructions of human interaction" undercut (Wilentz notwithstanding) the primacy of political ordering, "civil society and a robust sphere of private activity were carved out" of the world of politics (Balogh 19-20). Inheriting a "developmental vision" from their Federalist predecessors, Jeffersonian Republicans insisted on frugality and simplicity in the general government, and Americans "naturalized the market"—but then "turned to federal fiscal and legal policy to promote it" (Balogh 112, 119). Government, in other words, continued to structure a wide spectrum of state-society relations; visions of development (the American System) and territorial expansion both became Republican projects. What had happened was that the basis for energetic government had shifted "from the obligations of citizenship to the aggregate self-interest of individuals who stood to benefit from their collective action" (Balogh 20). Amid constitutional objections, Republican "improvement" made only partial headway. Other public-private hybrids not held hostage to the general welfare clause—disaster relief, the marine hospital system, funding for the American Colonization Society—were more successful. Still, although government did intervene in citizens' lives, it largely operated out of sight, "financing rather than constructing or managing internal improvements, taxing through imposts collected at the nation's ports rather than by an army of functionaries" (Balogh 153). Where government came more fully into its own was outside the domestic policy sphere—"[a]cquiring, exploring, surveying, and ultimately selling land…[p]acifying Indians…[p]rotecting existing borders" and developing military expertise (Balogh 154). When it came to land, trade, and security, the conventional distinction between domestic and foreign policy blurred: Borders were constantly shifting and never contained population flows; domestic commercial fortunes were hostage to international commercial rivalries. When it came to Indians, foreign policy was domestic policy: "American Indian policy never wavered from the fundamental premise that advancing the frontier was the first order of business" (Balogh 206).

58. *See, e.g.*, William J. Novak, The People's Welfare: Law and Regulation in Nineteenth Century America (Univ. of North Carolina Press 1996).

National government action at and beyond the nation's borders was action "out of sight." Certain forms of action within the borders, however, were also out of sight, in the sense that they were taken for granted—"delivering the mail…conducting the census…administering the public domain." In domestic action, the national government consistently chose modes of action that blurred national with local and public with private, harnessing private and local initiative "to achieve public ends," whether in the creation of the post office network or public financing of improvements—roads, canals, railroads (Balogh 220).

Common to all these modes of government action was communication—the provision of information and the facilitation of its flow. Perhaps the prime example of communicative action in Balogh's account, however, is law.

A Government Out of Sight pays considerable attention to law. Indeed, of the four books discussed here, it is by far the most useful to legal academics interested in historical scholarship for their own disciplinary purposes, for it is by far the most successful in synthesizing legal history with general history. This is not to say that law is absent from the others. It is not. *Empire of Liberty* includes chapters on "Law and an Independent Judiciary" and "Chief Justice John Marshall and the Origins of Judicial Review," while *What Hath God Wrought* addresses "Jacksonian Democracy and the Rule of Law." *The Rise of American Democracy* joins both in adverting to the usual scattering of Supreme Court cases and Supreme Court justices. None, however, is particularly original or probing in its account of law.

Wood's chapters fulfill the obligations of coverage demanded by grand narrative. They describe the initial growth in stature of law and the judiciary as Americans of the 1780s soured on state legislatures, the subsequent creation of a federal judiciary and Federalist-Jeffersonian struggles over its composition, controversies over the common law of crimes and judicial discretion, and the eventual emergence of a consensus "that a strong independent judiciary and a flexible common law were crucial…to meeting the needs of an 'improving people'" and to mediating the "the conflicting claims of public authority and the private rights of individuals" (Wood 431, 467). Wood stresses the importance of Marshall's careful leadership to the Supreme Court's enduring authority, to the acceptance of judicial review as the exposition of law rather than an illegitimate intervention in politics, and to the acceptance of the judiciary no less than the other branches as agents of the people. The chapters are careful but unsurprising. They appear for no obvious reason more or less in the middle of the book between chapters on "The Jeffersonian West" and "Republican Reforms."

Howe's chapter on the rule of law is much less of a survey; it has a more pointed reason for being, for it complements Howe's polemical critique of Jacksonian Democracy. Jackson was an autocrat with little respect for the authority of law when it got in his way, as it did, for example, in the matter of Indian removal, the use of the mails to spread anti-slavery literature, and popular mobbing of abolitionists. Jackson's attitude "bore a decided

congruence to the broader relationship of his party to the American legal tradition," for whereas Whigs revered the law, Democrats celebrated the autonomous sovereign people (Howe 411). Roger Taney's nomination to succeed Marshall was "a logical fulfillment of Jacksonianism" in that Taney's embrace of "state sovereignty, white racism, sympathy with commerce, and concern for social order was typical of Jacksonian jurisprudence" (Howe 445).[59] Wilentz, in his turn, defends Jackson, whether from allegations of his contempt for law (Wilentz 428) or from the taint of association with Taney's increasingly obsessive defense of the slave power (Wilentz 711–13), but otherwise has little to say of law. Supreme Court cases and personalities are covered from the perspective of administration politics.

A Government Out of Sight is altogether different. Constitutional and legal history has played a large role in the literature of American Political Development upon which Balogh draws, and constitutional history is fully woven into the account of national state formation that Balogh serves up. But Balogh's particular stress is less on law's institutional substance and doctrinal content, familiar great cases and great justices, and more on law as a technology of communication. Balogh says that federal courts were key players in turning law into "a common denominator" across states and regions, "one of the ways that Americans spoke to each other across the vast expanse that they occupied" (Balogh 235). Law was not doctrinally homogenous—state and regional differences remained profoundly important—but legal discourse was "a powerful source of national cohesion" because it represented "a common approach" to the resolution of certain key issues that "knit a resilient connective web" (Balogh 235–36). As important, law facilitated the operation of government "out of sight" by providing brokering mechanisms (federal courts) between national and local agendas (Balogh 239), and rules (public purpose, public use) that interpreted individual property rights in light of the common developmental good. By favoring the dynamic use of property and by facilitating the creation of mixed public/private mechanisms, notably corporations, to manage the use of property, "the national legal discourse that emerged in the first half of the nineteenth century…laid the foundation for 'self-executing' and 'self-supporting' forms of governance" (Balogh 242). Against this backdrop, the rigid separation of public and private that emerged after the Civil War was indeed anomalous.

National authority in 19th century America was less visible than elsewhere, therefore, but not less effective. The dominant 19th century state form was (like that of its 20th century successor) not bureaucratic but associative (Balogh 379–99). Americans, says Balogh, "preferred to use the language of the law, the courts, trade policy, fiscal subsidies—supported by indirect taxes—

59. That jurisprudence would eventually carry the Union to disaster, Howe tells us, from which only a Whig lawyer "disciplined through the study of Blackstone, Story, and Kent," that is Abraham Lincoln, could save it.

and partnerships with nongovernmental partners instead of more overt, bureaucratic, and visible interventions into the political economy" (Balogh 379). They still do.

Conclusion

The growing numbers of legal scholars interested in history these days are far more sophisticated consumers than those of a quarter century ago who bought so enthusiastically into the republican synthesis. Then it was the normative possibilities suggested by a historical argument that were so attractive to academic lawyers—Pocock's republicanism lived and breathed. Frank Michelman hoped that an identity learned from the past might become the basis upon which to make a case for a better civic future. "Without mining the past," he asked, "where do we go for inspiration?"[60] As Joyce Appleby put it at the time, republicanism had "drawn to it the filings of contemporary discontents with American politics and culture."[61] Today's legal consumer of history is less likely to imagine that normative possibility can be so easily separated from historical context than republicanism's enthusiasts seemed to believe back then. Apart from anything else, today's legal consumer of history is statistically more likely than his predecessor to be a trained historian as well as a trained lawyer—to have a Ph.D. as well as a J.D.—and is hence armored against such assumptions. But even without a Ph.D., today's legal consumer of history is likely to ask different questions of history than Michelman. One such question might be "Is what historians are producing *useful* to me in my work?" Another might be "Is what historians are producing *critical*?"

The first question is suggested by Gordon Wood's own argument for synthesis. Can the legal consumer be expected to master the extraordinary proliferation of monographic scholarship written according to the dictates of a highly refined and specialized division of scholarly labor within the discipline of history? Is this highly specialized literature useful? If not, a persuasive argument for synthesis becomes clear. Yet we have seen here that with one notable exception—Balogh's *A Government Out of Sight*—synthesis does not seem to assist the consumer very much because its exponents too often break their own rules. They assemble and organize vast quantities of information not to inform interpretations and arguments but instead to *support* arguments formulated, often literally, before the fact. Balogh succeeds in large part because his is a book driven far more than the others by the consciousness of the social scientist; he formulates explicitly articulated hypotheses derived from a synthesis of a specific body of theoretically-inclined secondary literature (American Political Development) and employs them to brush a vastly larger body of literature (19th century American history) against the grain. His is not a history driven to describe and summarize and illustrate, but one driven by a research question formulated according to explicit standards of scholarly

60. Kalman, *supra* note 29, at 175 (quoting Frank Michelman). *See also* Frank Michelman, Law's Republic, 97 Yale L.J. 1493 (1988).

61. Kalman, *supra* note 29, at 173 (quoting Joyce Appleby).

inquiry. On the evidence of this examination, the legal consumer should frankly be suspicious of the utility of most of what passes as historical synthesis as a source of knowledge. Notwithstanding its intricacies, one would be better off attempting to master the specialist scholarship for oneself.

The second question emerges from within that branch of legal scholarship that is specifically legal-historical scholarship. It is suggested by Robert Gordon's contention that "virtually all history as practiced by modern historians turns out to be critical to some degree if introduced into legal discourse," where "critical" means the production of disturbance in the legal field—the inversion or scrambling of the field's familiar narratives, the creation of rival perspectives or alternative trajectories.[62] Synthesis is "history as practiced by modern historians;" Gordon Wood thinks there should be much more of it. But it is difficult to see how the grand narrative syntheses examined here (those by Wood, Howe and Wilentz) qualify as "critical" when introduced into legal discourse. Their accounts of law as a phenomenon are quite straightforward, indeed prosaic—largely a standardized parade of great cases, great judges and great issues (judicial review). Once again, Balogh is the exception, although more for his suggestive analogizing (as a technology of communication law is like the post office [Balogh 219]) than his descriptive substance; great cases, great judges, and judicial review all play prominent roles in Balogh's account too (Balogh 233–64). To judge these works "critical" in a more general sense when introduced into legal discourse would require that their authors pay more attention to the mature development of theorized argument and interpretation—the elements of synthesis that, we have seen, are weakest in the major narrative histories written by Wood, Howe and Wilentz.

If, then, our question is "what can historical synthesis offer the legal consumer," the answer seems to be, regretfully, "not much." Legal consumers must do their own work of theory- and argument- and content-construction, using all the resources at their disposal, all the training in one or other or both disciplines.

But why should they bother? To answer this, I am disposed to return to Frank Michelman's somewhat plaintive query from a quarter-century ago to highlight a word that seems worthy of rather more attention than it has been given. "Without mining the past," Michelman asked, "where do we go for inspiration?"[63] The academic historians who responded critically to Michelman put the emphasis on "mining," with all its disagreeable connotations of "ransacking" history to find decontextualized content to support whatever vision of social order one prefers. Let us instead consider Michelman's search for "inspiration." Inspiration lies in the constellation that forms in the encounter between the informed mentalité of the observing scholar and the phenomenon that is observed, the past event or practice or idea that the scholar encounters. Inspiration transcends the temporal cæsura that cuts present observation off from past phenomena. The inspiration that

62. Gordon, *supra* note 28, at 1024.

63. Kalman, *supra* note 29, at 175.

draws us to history is not located in the past at all. It is located in the present, in the conjunction between scholar and observed phenomenon that can only occur in the present.

It is that conjunction—that inspiration—that more and more legal scholars seem to be discovering. If I am right, then they also must be discovering what all producers of specialized monographs have discovered, which is that inspiration requires that one do the hard empirical work for oneself. This is why history is still largely the realm of the individual scholar, and why the successful synthesis is a rare bird. Everyone *must* be their own historian.