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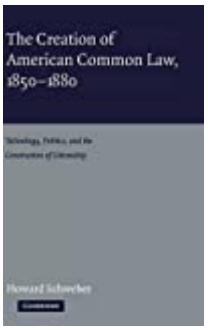

Howard Schweber. *The Creation of American Common Law, 1850-1880: Technology, Politics and the Construction of Citizenship.* New York: Cambridge University Press, 2004. viii + 296 pp. $60.00 (cloth), ISBN 978-0-521-82462-0.

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Appellate Cases North and South: Railroads and Slavery at Intersections

This ambitious book analyzes appellate cases in Illinois and Virginia in the setting of case law in the North of Ohio, Vermont, and New York and the South of Georgia, North Carolina and Kentucky to assess the velocity of common-law modernization. The research question involves the impact of the railroad and/or slavery on the development of law in the mid-nineteenth century.

In the North, particularly in Illinois, an American common law emerged that expressed a new concept of citizenship. Persons in their use of property were not to injure other property owners according to eighteenth-century thinking. The advent of the railroad and the cases that rolled into courts created a conceptual shift to property users having duties to everyone, a legal standard of conduct suiting the needs of railroads. Schweber articulates this new duty as The Duty to Get Out of the Way and the public policy grounding for the duty in the Need For Speed. Railroads simply could not stop at intersections for livestock, children, or carriages, and passengers needed to keep their elbows inside of rolling stock. If rolling stock crushed pigs, cows, horses, and people, then these property users would have to bear the burden of the Need For Speed.

In the South, particularly in Virginia, railroads were not favored in courts, legislatures, or city councils. The slave culture in law and judges favored the preservation of a hierarchical social order. Law reflected this paramount value in differentiated standards of duty based in class. Virginia law protected old conceptions of virtue against the threat of change symbolized by railroads.

Yet both North and South, a political and social construction of citizenship constituted virtue and found measurement in access to common law courts. The political economy of the North or the Need For Speed promised everything to citizens but demanded everything of those citizens. Their duty was to be vigilant to avoid being harmed by the use of property of another. The public good was not the reasonable use of the commons but the Need For Speed. The political economy of the South expressed in law focused only on particular relationships with other private property users. Law was a shield preserving eighteenth-century values against novel ideas about property rights and tort duties. It was not until the

1870s and 1880s that the South adopted northern precedents forged in the railroad cases of the 1850s.

Schweber makes clear that neither railroad development alone nor slavery caused legal change or inertia. Rather the subject matter raised questions that challenged the legitimacy of older principles and legal forms of pleadings. Legal doctrines, socio-political values, and the property interests of the litigants came into play in the cases where courts worked out an American common law.

Schweber also discusses state constitutional conventions to provide context. The Illinois Constitution of 1848 abolished slavery in the state but excluded free blacks from its borders. Only white males with one year of residency could vote. Delegates outlawed state banks, state credit for internal improvements, and state bonds in excess of $50,000. The Supreme Court now had appellate jurisdiction and its members were elected regionally. The Virginia Constitution of 1850 removed the property requirement for the white male franchise, taxes on slaves were fixed at below market value, Supreme Court justices were elected from five geographic districts, and the conservation of property rights prevailed.

In the process of arguing his case, Schweber deals with several prominent historians and their work. He distinguishes his findings from those of Peter Karsten on third party beneficiary contracts. Schweber makes clear that the subsidy theories of James Willard Hurst and Lawrence Friedman, the instrumentalist argument of Gary Schwartz, and ideological approach of Morton Horwitz regarding enterprise liability are outdated. Yet Joseph Schumpter's concept of creative destruction is very much a part of his analysis.

This is a provocative book and should spur some thought. It is a book in black and white: African slaves and white males. This reviewer wonders how the analysis could have proceeded if it was more inclusive. As Kenneth L. Karst observed in 1989, "Indians and slaves were implicitly set apart as not belonging to American society–a view that still impresses itself on a great many blacks and Indians."[1] Indian slavery was very much a part of ante-bellum southern life and a critical part of Georgia history. [2] Lawrence M. Friedman's *Republic of Choice* goes unnoticed and its two chapters "Modernity and the Rise of the Individual" and "Technology and Change" beg for comparative analysis.[3] James Willard Hurst's *Law and the Conditions of Freedom in the Nineteenth-Century United States*(1964) is noted, but his *Law and Economic Growth*(1964) covering much of the same legal and economic issues that reached in Illinois appellate docket is unexplored.[4] Robert Samuel Summers's *Instrumentalism and American Legal Theory* is similarly missing.[5] Constitutional conventions held without railroads confronted similar or the same issues.[6] Earlier studies of the Americanization of the common law similarly need attention.[7] Most curiously, Schweber neglects Randolph Bergstrom's study of tort law in New York City. This is curious because Bergstrom's conclusions clearly collide with Schweber's in important cultural and legal ways.[8]

Clearly, Schweber is part of an emerging group of scholars using railroad cases as a lens. Nan Goodman's *Shifting the Blame* puts law and literature at the intersection of road and railroad track.[9] James W. Ely Jr.'s *Railroad and American Law* takes a comprehensive look at the impact of railroads on legal thinking including slavery and tort law issues.[10] William G. Thomas's *Lawyering for the Railroad* puts the perspective of the practicing bar and the South in litigation and business perspective.[11] Finally, Kathleen Brosnan has demonstrated that Colorado was much like the South without slaves. She found that "the transition to a modern capitalist society in this region was contested, inconsistent, and incomplete. Miners, farmers, and even state court judges regularly turned to traditional legal principles that protected local economic interests and community welfare against outsiders with more dynamic property interests and concentrated capital."[12] Perhaps a historical look beyond the Mississippi might help our analysis of the construction of an American common law.

Notes

[1]. Kenneth L. Karst, *Belonging to America: Equal Citizenship and the Constitution* (New Haven: Yale University Press, 1989), p. 29.

[2]. Alan Galley, *The Indian Slave Trade: The Rise of the English Empire in the American South, 1670-1717* (New Haven: Yale University Press, 2002); James Brooks, *Captives and Cousins: Slavery, Kinship, and Community in the Southwestern Borderlands* (Chapel Hill: University of North Carolina Press, 2002). Since Brooks demonstrates the Mexicans were far more adept than southerners at maintaining slavery well into the late nineteenth century, a glance at territorial decisions in New Mexico and Arizona Territories might be fruitful.

[3]. Lawrence M. Friedman, *The Republic of Choice: Law, Authority, and Culture* (Cambridge: Harvard University Press, 1990); also see Herbert Hovenkamp, *Enter-*

prise and American Law, 1836-1937 (Cambridge: Harvard University Press, 1991), pp. 114-148.

[4]. James Willard Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836-1915* (Cambridge: Harvard University Press, 1964).

[5]. Robert Samuel Summers, *Instrumentalism and American Legal Theory* (Ithaca: Cornell University Press, 1982).

[6]. David Alan Johnson, *Founding the Far West: California, Oregon and Nevada, 1840-1890* (Berkeley: University of California Press, 1992).

[7]. William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760-1830* (Cambridge: Harvard University Press, 1975). Hendrik Hartog, *Public Property and Private Power: The Corporation of the City of New York in American Law, 1730-1870* (Chapel Hill: University of North Carolina Press, 1983).

[8]. Randolph E. Bergstrom, *Courting Danger: Injury and Law in New York City, 1870-1910* (Ithaca: Cornell University Press, 1992).

[9]. Nan Goodman, *Shifting the Blame: Literature, Law, and the Theory of Accidents in Nineteenth-Century America* (Princeton: Princeton University Press, 1998), pp. 133-158.

[10]. James Ely Jr., *Railroads and American Law* (Lawrence: University Press of Kansas, 2001), pp. 117-138.

[11]. William G. Thomas, *Lawyering for the Railroad: Business, Law, and Power in the New South* (Baton Rouge: Louisiana State University Press, 1999); also see Gordon Morris Bakken, *Practicing Law in Frontier California* (Lincoln: University of Nebraska Press, 1991), pp. 83-92.

[12]. Kathleen A. Brosnan, *Unifying Mountain and Plain: Cities, Law, and Environmental Change along the Front Range* (Albuquerque: University of New Mexico Press, 2002), pp. 6-7.

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