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6-2007

## Review of Underwriting: The Poetics of Insurance in America, 1722-1872, by E. Wertheimer

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### Original Citation

Mark T. Tebeau, "Underwriting: The Poetics of Insurance in America, 1722-1872, by E. Wertheimer," *American Historical Review* 112 no. 3 (2007): 844-845.

### Repository Citation

Tebeau, Mark T., "Review of Underwriting: The Poetics of Insurance in America, 1722-1872, by E. Wertheimer" (2007). *History Faculty Publications*. 21.  
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Kahn and Kersch target political science and legal policy studies that explain Supreme Court decisionmaking as the reflection of the judge's behavioral attitudes or party identification.

The essays thus go beyond behaviorist and policy interpretations, explaining and evaluating judicial decision making within a careful and insightful construction of changing historical contexts. Kahn and Kersch's introduction outlines the central debate over the separation between law and politics. The editors distinguish legalists, who contend that law and judicial decisions reflect an autonomous process immune to external interest-group pressures, from behaviorists and policy experts, who contend that judges act merely in accord with preexisting attitudes and policy preferences rooted in personal background and/or party identification. During the 1960s scholars of comparative politics such as Theda Skocpol challenged the behaviorists' policy assumptions, arguing that attention to historical contingency was essential in order to understand how institutions operated. The focus of American political development "is decidedly less presentist and more historical . . . it is less interested in decisions made by individuals (at least as they are said to reflect the individual's autonomous preferences) than on how the institutions structure their choices" (p. 8) over time.

Mark Tushnet considers interactions between the Court and the political parties dominating Congress and the president in the 1930s, and respectively, the Warren Court and Rehnquist Court eras. Howard Gillman studies closely the influence of Kennedy-Johnson administrations on the Warren Court's liberal judicial activism during the 1960s. The other case studies examine more directly the changing treatment of constitutional rights claims from the mid-nineteenth century to the millennium era. Mark A. Graber finds legal autonomy, strategic policy concerns, and personal attitudes interacting to influence the Supreme Court's Jacksonian Democrat and Republican appointees' conflicting decisions in state and federal legal tender cases (1863, 1870–1871), and regarding congressional withdrawal of jurisdiction on behalf of radical Reconstruction in *Ex Parte McCordle* (1868).

A similar interaction among institutional autonomy, policy expectations, and attitudes is at work in Wayne D. Moore's examination of the interest-group and ideological factors shaping the battle over the Fourteenth Amendment's passage compared to the Court's controversial decision in the *Slaughter-House Cases* (1873); Pamela Brandwein's recovery of the forgotten "state neglect" doctrine in cases requiring racially equal access to property and physical security but not "public accommodations" such as theaters, in the Court's invalidation of the Civil Rights Act of 1875 in the *Civil Rights Cases* (1883); Julie Novkov's penetrating analysis of the southern antimiscegenation laws affirmed in *Pace v. Alabama* (1883); Carol Nackenoff's excellent study of reform groups' contrary motivations and outcomes in struggles over Native Americans' citizenship and tribal rights between the 1880s and the Progressive era and

the 1920s–1930s; Kersch's revisionist argument that the Court's switch from opposing to supporting the rights of organized labor resulted in a return to *Lochner* jurisprudence in order to uphold blacks' civil rights; Thomas M. Keck's study of the Court's partial rejection of conservative activists' attack on affirmative action; and Kahn's study of the constitutionalization of gay rights in *Romer v. Evans* (1996) and *Lawrence v. Texas* (2003) compared to women's right to privacy in abortion cases.

Historians undoubtedly can benefit from reading these essays. Nevertheless, this reviewer was left wondering why the authors did not engage the relevant historical literature to a greater extent. The University Press of Kansas deserves commendation for making this book affordable as a paperback.

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ERIC WERTHEIMER. *Underwriting: The Poetics of Insurance in America, 1722–1872*. Stanford, Calif.: Stanford University Press. 2006. Pp. xviii, 187. \$50.00.

Eric Wertheimer explores how capitalism, via understandings of insurance, was written into American literature in the period from 1722 through 1872. Grounded in literary theory, his book challenges readers to rethink the relation between art and commerce in America before the Civil War.

Wertheimer begins with a provocative question: can the world be underwritten? To get at this question, Wertheimer does not explore the history of the insurance industry or business practice. Rather, he examines how several major writers of the period—Benjamin Franklin, Phillis Wheatley, Noah Webster, Herman Melville, and Ralph Waldo Emerson—wrote insurance and commerce into their literature. Focusing on each writer in succession, Wertheimer connects each to insurance, risk, and loss, with the book becoming a series of intellectual meditations that are roughly chronological and place-based.

Wertheimer argues that insurance is a "writing business" that "colonized" economic life. He further asserts that the insurance business "may be viewed as essential to a material, ideological, and aesthetic reckoning with the emergence of American literature" (pp. xii–xiii). Connecting these forms of writing, Wertheimer seeks to reconcile property, text, and cultural discourse. Inventive, as well as sometimes insightful and tendentious, Wertheimer reveals both the importance of insurance to capitalism (and insurance is certainly understudied) and the ways that the language of loss and risk were embedded in the literature and writing of eighteenth and nineteenth-century America.

In his chapter on Franklin, Wertheimer argues that Franklin's disciplined *Autobiography* and *Poor Richard's Almanack* have embedded in them tropes of loss and uncertainty that help us to understand both his scientific experimentation and economic activities. Likewise, in founding a mutual insurance company, the Phil-

adelphia Contributionship, Franklin sought to ameliorate loss and render the world more stable. In so doing, he underscored the logic of capitalism that was so much a part of this colonial era. He also acknowledges in both his writing and action that "anything might be underwritten" and transformed into a commodity (p. 59).

Subsequent chapters on Wheatley, Webster, Melville, and Emerson similarly connect the writing process to commercialism in various guises. Webster, for example, created an early form of workmen's and unemployment insurance, which was an early effort to underwrite loss for social benefit. Yet, he did so within the framework of a money-based capitalism that recognized the sanctity of economic contracts. Melville, meanwhile, struggled to make sense of technology-driven capitalism in his work. At once more skeptical than Webster or Franklin, Melville's work, including *The Confidence-Man*, "Bartleby the Scrivener," and especially "The Lightning-Rod Man," reveals the uncertainty and untrustworthiness of contracts and experience. For Melville, "America was becoming a place averse to acknowledging tragedy, that grim ceremony being cheerfully usurped from art by the profitability of insurance" (p. 117).

By the time Emerson's home burned in 1872, insurance had triumphed completely, at once enslaving and teaching about modernity and the corporate individualism that had become commonplace in American life. This process of pooling risk and rendering the world in terms of monetary value had become normative, and was being woven not just into the fabric of commercial life but also into literary and artistic life. Yet, the triumph of insurance was not without its instability. Indeed, in a particular acute observation made early in the book, Wertheimer observes that insurance itself suggests a vulnerability of capitalism because its attempt to "socialize capital" by pooling risk indicates the business community's recognition that there might be instability underneath a society where everything has become a commodity (p. 11).

At times insightful, the arguments in Wertheimer's study nonetheless are compromised by a lack of historical specificity. The author pays little serious attention to matters so important to history as a disciplinary practice: change over time, context, and concrete historical detail. Although this book primarily has a literary orientation, it nonetheless should have taken more seriously the world of, as well as scholarship on, capitalism and commerce. For example, although Wertheimer seems aware that life, fire, marine, and accident insurance have profoundly different historical vectors, he lumps them together under the single rubric of underwriting. Likewise, the development of the insurance business is not well historicized; it is as if these distinct businesses—and capitalism itself—emerged fully mature at birth.

Indeed, attention to the historical specificity of insurance practice would have led for a more nuanced book. Wertheimer would have discovered, for example,

that in the 1850s many fire insurers and their clients had as much skepticism about underwriting contracts as Melville expressed. And, during much of the nineteenth century, fire insurance in America was a dicey business, one in which profitability was less assured than the landscape.

If this book does not expand our understanding of American commercial activity, we should nonetheless recognize what Wertheimer does well. He offers a close and provocative reading, as well as a contribution to the study of American literature. He provides insight into the writing of American literature and several of its key figures, making a suggestive argument about their connections to nineteenth-century America's growing commercial orientation.

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ROBERT J. MILLER. *Native America, Discovered and Conquered: Thomas Jefferson, Lewis and Clark, and Manifest Destiny*. Foreword by ELIZABETH FURSE. (Native America: Yesterday and Today.) Westport, Conn.: Praeger. 2006. Pp. xix, 214. \$49.95.

Robert J. Miller's book examines the legal history of the "doctrine of discovery," the Lewis and Clark expedition, and U.S. claims to the Pacific Northwest. After a short introduction that defines the doctrine of discovery, he develops his argument in three stages. First, he outlines the history of discovery as articulated in medieval and early modern Europe and in colonial America and the early national United States. Next, he focuses on Thomas Jefferson, marshalling voluminous documentary evidence to detail Jefferson's views of U.S. government authority over Indians and Indian territory; he discusses the contradiction between Jefferson's idealistic vision of Indians and his actions, which promoted aggressive acquisition of Indian lands and removal or outright extermination of Indians. Finally, the author analyzes the Lewis and Clark expedition as a manifestation of discovery and systematically describes how discovery was applied to the Oregon country between 1803 and 1855. At the end of the book, Miller briefly sketches out the subsequent application of the discovery doctrine in U.S. Indian law through 2005 and explains the ramifications of the book's findings.

Miller concludes that Jefferson was an aggressive expansionist who used the doctrine of discovery to justify westward expansion and the seizure of Indian territory. He argues that the doctrine prompted Jefferson to dispatch Meriwether Lewis and William Clark to solidify U.S. ownership of the Northwest, that the explorers' journey played an important role in U.S. expansion through application of the principle of discovery, and that the expedition demonstrates how Jefferson was responsible for putting the idea of Manifest Destiny into motion. The author further asserts that Manifest Destiny emerged naturally out of the concept of discovery. More broadly, Miller says that his book proves "the pervasive presence of Discovery in the past 400 years of