



1975

The Law in America: A History

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Recommended Citation

Samuel Sonenfield, *The Law in America: A History*, 24 Clev. St. L. Rev. 371 (1975)
available at <https://engagedscholarship.csuohio.edu/clevstrev/vol24/iss2/9>

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BOOK REVIEWS

*Reviewed by Samuel Sonenfeld**

THE LAW IN AMERICA: A HISTORY, by Bernard Schwartz,
McGraw-Hill Book Co., 1974. 382 pp. \$12.50.

Anyone who sets out to write a history of the law in America has a formidable task before him. When he essays to do this in a one-volume book containing 311 pages of text he has set himself an almost insuperable task. Professor Schwartz clearly has accomplished with distinction what he set out to do, and is to be thanked for it.

In addition he has given us 8 excellent pages of bibliographical sources and 6 pages of Glossary of the cases cited in his succinctly written text, both of which lists would provide material for reading and thought far beyond their places in the author's history of our law.

Professor Schwartz has not followed the pattern of Holdsworth, Pollock, Maitland or Plucknett in their great works on the History of English Law, and it is no criticism of Schwartz that he did not. His purpose and goal, as set forth on the book's dust jacket, have been to take his reader from the early colonial beginnings to the very recent past. (It is significant that in one of his sections, devoted to contemporary public law, a subchapter is entitled "King for Four Years." Whether Dr. Schwartz wrote that section before or after August of 1974 is not quite clear, but what he says in it is one of the most trenchant of the many thought-provoking topics in the book.)

The author divides his book first into the significant periods in the history of the growth of our law and our legal and political institutions: colonial and revolutionary periods, the formative era, reconstruction and gilded age, the welfare state and contemporary law. Most of these periods he divides into two separate but well-connected sections, public law and private law and institutions.

The method of development may not be unique; it is effective. Professor Schwartz's characterization of the Gilded Age is apt. He refers, of course, to the public and private ethics of two principal characters in Mark Twain's and Charles Dudley Warner's novel of that name, Col. Beriah Sellers and Senator Abner Dilworthy.

The juxtaposition of a chapter on public law with a chapter on the development of judicial/legal attitudes toward private law offers an opportunity (of which Professor Schwartz takes full advantage) to show with clarity, acuity and succinctness how each influenced the

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other. Early judicial and legislative attitudes toward civil rights, the police power and due process, both procedural and substantive, had their counterparts in the same attitudes toward "freedom of contract," property and tort law. A decision that it was beyond the power of a legislature to regulate the hours of work in a bakery¹ and the manufacture of cigars in tenement houses² had their counterparts in the refusal of the courts to recognize the tort of invasion of the right of privacy³ and a long persistent disinclination of American courts to follow *Rylands v. Fletcher*.⁴ It was, indeed, an age when the judicial attitude (and probably also the attitude of a substantial number of the lay population of America) was one of Darwin's "survival of the fittest" (which often meant, "The Devil take the hindmost") and almost limitless dominion by the owner over his private property, — a judicial and social atmosphere in which the concept of use of one's property included the right to abuse it. The attitudes toward public law and private law not only went hand-in-hand, they nourished each other. Professor Schwartz is adept in pointing this out, in a lucid and dispassionate fashion. One is conscious of his feelings about the law in the various periods into which he divides his little book, but one is never overwhelmed by those feelings. To this reviewer that is the mark of a good historian.

The same contrast of public law vis-a-vis private law is found in his development of the other eras of his history, and always with the same effectiveness. The book is, as its dust jacket modestly proclaims, a stimulative and interpretive one for both specialist and general reader.

The author of this review taught a short survey-type course in Legal History shortly after Professor Schwartz's book became available, and assigned several chapters of the book as background material for the American colonial and post-Revolutionary development of our legal institutions and attitudes, particularly our fluctuating and sometimes hesitant reception of the English Common Law, our written constitutions, our tri-partite governmental structure and our attitudes toward the legal profession.

Law students are often an acutely critical group in their attitudes toward case-books, hornbooks and surveys. Their consensus on *The Law in America* was quite favorable. To this reviewer that is a good recommendation.

¹ *Lochner v. New York*, 198 U.S. 45 (1905).

² *In re Jacobs* (Tenement House Cigar Case), 98 N.Y. 98 (1885).

³ *Roberson v. Rochester Folding Box Co.*, 171 N.Y. 538, 64 N.E. 442 (1902).

⁴ 1 R. 3 H.L. 330 (1868).

There inevitably will be written in the future other histories of the law in America and, one may hope, there will never be an end to any historical development. It is fair to say that the now unknown authors of such efforts will owe much to Professor Schwartz.

A separate edition has been published simultaneously, but with some variations of text and with other differences, by The American Heritage Publishing Company as *The American Heritage History of the Law in America*.

