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### Advances and Altered Perspectives in English Legal History

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## BOOK REVIEW

### ADVANCES AND ALTERED PERSPECTIVES IN ENGLISH LEGAL HISTORY

ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE. Edited by Morris S. Arnold,<sup>1</sup> Thomas A. Green,<sup>2</sup> Sally A. Scully,<sup>3</sup> and Stephen D. White.<sup>4</sup> Chapel Hill: University of North Carolina Press. 1981. Pp. xx, 426. \$25.00.

*Reviewed by R.H. Helmholz*<sup>5</sup>

The appearance of a volume of essays dedicated to Professor Thorne makes something of an event. Surprisingly, it is the first *Festschrift* for a historian of English law to have appeared on either side of the Atlantic. Miscellaneous collections of essays have appeared before, but neither Maitland, Holdsworth, nor Plucknett had enough disciples or colleagues to produce a *Festschrift*. Now come these fourteen essays, written by some of the most prominent and promising of contemporary legal historians and carefully edited by four of Thorne's recent students. The volume testifies to a flourishing interest in legal history and to the personal affection and esteem felt for Professor Thorne by his colleagues.

If one looks for a precedent, perhaps the closest is the *Festschrift* published nearly fifty years ago by the pupils and friends of the constitutional historian Charles H. McIlwain.<sup>6</sup> Besides acknowledged preeminence, Professors McIlwain and Thorne share several characteristics. Both have concentrated on the history of English institutions, with occasional excursions beyond that subject. Both have devoted parts of their careers to editing scholarly texts.<sup>7</sup> Both have focused much of their work on the intersection of law and government.<sup>8</sup> And

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<sup>6</sup> ESSAYS IN HISTORY AND POLITICAL THEORY IN HONOR OF CHARLES HOWARD MCILWAIN (1936) [hereinafter cited as MCILWAIN ESSAYS].

<sup>7</sup> See, e.g., T. EGERTON, A DISCOURSE UPON THE EXPOSITION & UNDERSTANDING OF STATUTES (S. Thorne ed. 1942); C. MCILWAIN, THE POLITICAL WORKS OF JAMES I (1918).

<sup>8</sup> See, e.g., C. MCILWAIN, *Magna Carta and Common Law*, in CONSTITUTIONALISM AND THE CHANGING WORLD 127-77 (1939); Thorne, *What Magna Carta Was*,

both were reaching the end of teaching careers at Harvard University when the essays in their honor were published.<sup>9</sup>

The essays in the Thorne and McIlwain volumes may themselves be profitably compared. In the manner traditional to *Festschriften*, the essays deal with disparate subjects, but many in the recent volume cover legal and constitutional problems also considered in the earlier one. The overlap is not complete; Thorne's greater concentration on legal problems and McIlwain's work on political theory are mirrored in their respective collections. Donald Sutherland's instructive study of fourteenth century pleading in the Thorne essays,<sup>10</sup> and Paul Palmer's essay on the role of public opinion in political theory in McIlwain's,<sup>11</sup> would each look very much out of place in the other volume. Even so, it is remarkable how closely related are many of the subjects the essays treat. This reflects the continuing close connection between the legal and the constitutional history of England. That affinity has persisted, perhaps even intensified, because legal records have increasingly been used to cast new light on old constitutional doctrines.

Once the similarities in subject matter have been noted, however, the differences in the detail, approach, and general conclusion of most of the essays are striking. Absent from the recent essays are what Charles Gray describes as "the large ways of taking hold" of the great problems and currents of constitutional government (p. 195).<sup>12</sup> Where the essayists of the older volume saw the conscious unfolding of principles of constitutional government, the newer essayists see self-interest and happenstance at work. They have an aversion to seeing the present in the past. Moreover, a much greater reliance upon manuscript evidence, particularly that provided by court records, has carried legal historians into the study of courts and issues that occupied only the periphery of the field fifty

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in S. THORNE, W. DUNHAM, P. KURLAND & I. JENNINGS, *THE GREAT CHARTER: FOUR ESSAYS ON MAGNA CARTA AND THE HISTORY OF OUR LIBERTY* 3, 3-19 (1965).

<sup>9</sup> It is noteworthy that Professor Thorne helped to compile a bibliography for McIlwain when called upon to do so by Italian editors. See *Bibliografia degli scritti di Charles Howard McIlwain*, in C. McILWAIN, *LA RIVOLUZIONE AMERICANA: UNA INTERPRETAZIONE COSTITUZIONALE* at cxlvi, cxlvi-cl (N. Matteucci trans. 1965) (Italian translation of C. McILWAIN, *THE AMERICAN REVOLUTION: A CONSTITUTIONAL INTERPRETATION* (1923)).

<sup>10</sup> Sutherland, *Legal Reasoning in the Fourteenth Century: The Invention of "Color" in Pleading*, in *ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF SAMUEL E. THORNE 182, 182-94* (1981) [hereinafter cited as *THORNE ESSAYS*].

<sup>11</sup> Palmer, *The Concept of Public Opinion in Political Theory*, in McILWAIN *ESSAYS*, *supra* note 6, at 230.

<sup>12</sup> See *infra* pp. 733-34.

years ago. English legal history is now a broader and more detailed field of study than it was at the time of the McIlwain *Festschrift*.

## I.

The reluctance of recent scholars to see the unfolding of legal principles in legal events is well illustrated by the comparison of two essays, one from the present volume and the other from the McIlwain collection, that both deal with criminal trial procedure: Paul R. Hyams' study of the reasons trial by ordeal disappeared from the royal courts<sup>13</sup> and Samuel Rezneck's earlier account of developments in treason prosecutions under the Tudors.<sup>14</sup> Although both are concerned with "modernization" of the law and both emphasize methods of judicial proof as the key to understanding the process, their explanations of the sources of change are dramatically different.

Rezneck notes that the Tudor period witnessed considerable activity in the law of treason.<sup>15</sup> Sixty-eight statutes touched on the subject between 1485 and 1603,<sup>16</sup> an astonishing figure for an age less enamored with legislation than our own. The number of treason trials was also large. Two countervailing currents are reflected in these statutes and in the surviving trial records. The Tudors expanded the range of actions and words that might subject one to the terrible penalties of the treason statutes. At the same time, there was pressure to protect the accused by restricting prosecution based on hearsay evidence. The "two witness" rule gradually worked its way into English law. Rezneck moves through this story briskly and confidently. He sees these developments as realizations of great themes — the rise of the modern state, the eternal conflict of conscience between duty to God and duty to earthly sovereign, and the role of mobilized and liberal public opinion in forcing change on a reluctant legal profession. The State Trials furnish his focus; the "requirements of a modern state,"<sup>17</sup> along with the government's "sensitiveness

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<sup>13</sup> Hyams, *Trial by Ordeal: The Key to Proof in the Early Common Law*, in THORNE ESSAYS, *supra* note 10, at 90, 90-126.

<sup>14</sup> Rezneck, *The Trial of Treason in Tudor England*, in MCILWAIN ESSAYS, *supra* note 6, at 258.

<sup>15</sup> The subject is ample enough to have warranted a recent monograph. J. BEL-LAMY, *THE TUDOR LAW OF TREASON* (1979).

<sup>16</sup> Rezneck, *supra* note 14, at 262.

<sup>17</sup> *Id.* at 288.

to public opinion,"<sup>18</sup> spurred the development of the modern treason trial. Rezneck is well aware of tragic inequities suffered in specific trials, but he sees this darker side as merely a temporary delay before the modern ideal could be fully realized near the close of the seventeenth century.

In Hyams' essay on the disappearance of the ordeal, this assurance and this thematic development are gone. The approach to problems and the explanation of developments are vastly different. Hyams denies that the demise of the ordeal in the thirteenth century resulted from royal or ecclesiastical policy. Nor did public opinion (if this existed at all) play any role in the process. Instead, Hyams finds explanations in the immediate practical advantages to the community and the self-interest of those involved in trial litigation.

The traditional account, ably restated in a recent article,<sup>19</sup> credits the Fourth Lateran Council (1215) with revolutionizing the law of proof by forbidding the clergy to participate in ordeals. This clerical ban forced litigants to turn to more rational forms of proof, of which the jury is the shining example. Theologians and canon lawyers, having concluded that ordeals were theologically and practically unsound, forced the change through. According to this account, the Council's decree reflected a deliberate policy change and was ultimately the work of intellectuals caught up in the great Renaissance of the High Middle Ages.

It is a stirring theme. But Hyams tells us that we cannot believe it. His skeptical scrutiny of many routine cases and careful parsing of official pronouncements lead him to conclude that by 1215 the ordeal had long since been discredited in ordinary practice. Too often, it had been employed unscrupulously, to influence local opinion or blacken an opponent's reputation. Its continued use was restricted to cases of serious crimes, in which it served as "a deterrent or quasi punishment" (p. 100). The Fourth Lateran Council's decree was largely irrelevant, the product of intellectuals tardily recognizing that reality had outrun them. "Men's mundane needs, and not the belated, banal pronouncements of leaders of church and state, explain English development." (P. 125). Where Rezneck saw grand themes in his account of the evolution of legal procedure, Hyams sees only the gradual evolution dictated by practical necessity.

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<sup>18</sup> *Id.* at 282.

<sup>19</sup> Baldwin, *The Intellectual Preparation for the Canon of 1215 against Ordeals*, 36 *SPECULUM* 613 (1961).

The same desire to shun all modern preconceptions about the nature of legal change emerges from other essays in the Thorne *Festschrift*. Eric Ives, for example, contributes a fresh analysis of the history of the law of sanctuary, a means for felons to avoid prosecution by taking refuge within certain church precincts. He demonstrates from two sixteenth century cases that complex family history and the King's immediate need to put down one family's local "power-base" along the River Severn were responsible for decisions that historians previously had regarded as "a timely vindication of national interest over a now outmoded privilege" (p. 320).<sup>20</sup> In place of that simple account of modernization, Ives provides an "untidy, complicated, multifaceted piece of human experience" (p. 320). The same may be said of Harold Garrett-Goodyear's investigation of the Tudor revival of quo warranto proceedings, which required local men to account for the rights they exercised in the King's name.<sup>21</sup> Although these proceedings may ultimately have worked to enhance the power of the Crown, at the time they were primarily contests between local rivals, who sought to use royal position to further immediate ends. Generalizations about the emergence of the modern state out of medieval particularism, so prevalent in the essays of the McIlwain *Festschrift*, have all but disappeared from the newer essays.

In the same way, clear foreshadowings of modern doctrine cease to predominate in J.L. Barton's learned account of contingent interests in sixteenth century land law.<sup>22</sup> Read without modern preconceptions, the early cases look much different from the propositions for which they are cited in property law hornbooks. The sixteenth century cases show not clear exposition of black letter rules but rather inconsistency, hesitant change, frequent disagreement among the judges, concern for the fiscal needs of the Crown, and even the influence of the lawyers' own interests. The picture is not a simple one.

S.F.C. Milsom's essay on inheritance by women may be singled out as a particularly convincing demonstration of what the cases suggest when read carefully without anachronism.<sup>23</sup>

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<sup>20</sup> Ives, *Crime, Sanctuary, and Royal Authority under Henry VIII: The Exemplary Sufferings of the Savage Family*, in THORNE ESSAYS, *supra* note 10, at 296, 296-320. Ives contrasts his views with those expressed on the same subject in a *Festschrift* for A.F. Pollard published 10 years before the McIlwain volume. See Thornley, *The Destruction of Sanctuary*, in TUDOR STUDIES 182 (R. Seton-Watson ed. 1924).

<sup>21</sup> Garrett-Goodyear, *The Tudor Revival of Quo Warranto and Local Contributions to State Building*, in THORNE ESSAYS, *supra* note 10, at 231, 231-95.

<sup>22</sup> Barton, *Future Interests and Royal Revenues in the Sixteenth Century*, in THORNE ESSAYS, *supra* note 10, at 321, 321-35.

<sup>23</sup> Milsom, *Inheritance by Women in the Twelfth and Early Thirteenth Centuries*, in THORNE ESSAYS, *supra* note 10, at 60, 60-89.

Milsom asks why the English common law rules regulating inheritance rights of women took the form they did. His answer — that the common law rules grew from the hardening of repeated private choices and of perceived moral obligations into the force of law — reinforces the point made in his Maitland Lectures<sup>24</sup> that, where a later age would see ownership and inheritance of land, men in the twelfth century saw possibilities for choice among claimants offering personal loyalty. The essay is not about royal or judicial decisions. Still less is it about any precursor of women's rights (or lack of rights). It is about the way in which customary arrangements imperceptibly attain legal status. In a sense, this may be a great theme. Certainly it is an important one. But it does not depend on the orderly progression towards an ideal of constitutional or judicial rights so prevalent in the McIlwain essays. There is too much chance, too much accident, for such an explanation.

## II.

The second development in English legal history that is evident in the essays of the newer volume is the broadening ambit and increasing specialization of the subject, extending to topics that once seemed mere background to the course of legal and constitutional growth. Nothing has been more important in bringing about this development than the exploration of record sources. Painstaking reading of manuscript court records is gaining new devotees and producing important findings on traditional questions as well as in new areas of inquiry. The contrast of old and new approaches can be seen clearly in another pair of essays from the two volumes, both involving the canon law of the medieval Church: Charles Donahue on proof by witnesses in the Church courts<sup>25</sup> and Mary Hume Maguire on the ex officio oath administered in those tribunals.<sup>26</sup> Both essays deal with the procedure used in the Church courts. Both authors begin by setting out the formal rules found in the canon law texts and elaborated by canonists and English church councils. Thereafter, the essays are vastly different.

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<sup>24</sup> S. MILSOM, *THE LEGAL FRAMEWORK OF ENGLISH FEUDALISM* (1976).

<sup>25</sup> Donahue, *Proof by Witnesses in the Church Courts of Medieval England: An Imperfect Reception of the Learned Law*, in THORNE ESSAYS, *supra* note 10, at 127, 127-58.

<sup>26</sup> Maguire, *Attack of the Common Lawyers on the Oath ex Officio as Administered in the Ecclesiastical Courts in England*, in MCILWAIN ESSAYS, *supra* note 6, at 199.

In the McIlwain collection, Maguire's essay seeks to trace the antecedents of the modern privilege against self-incrimination. Persons involved in ecclesiastical trials, civil or criminal, customarily swore the oath *de veritate dicenda* at the start of litigation. (The phrase "ex officio oath" has no canonical warrant.) During the seventeenth century, this oath came under attack from some lawyers in the common law courts, ostensibly because it forced men to promise in advance to answer truthfully questions that might subject them to punishment. The oath might be required even before they knew the precise charges against them. Particularly when this canonical procedure was coupled with secular penalties, as it was in the newly created Court of High Commission, the oath could be made to appear sinister and could thus provide a pretext for attacking ecclesiastical institutions that were hated for other reasons. In tracing the history of the oath, Maguire finds some evidence that its use had occasioned bitterness long before the constitutional conflicts of the seventeenth century. However, Maguire treats the canonists' oath principally as background to the establishment of the common law privilege against self-incrimination. Without examining ecclesiastical court records to see how the oath was actually used, she concludes that the oath's real importance lay in its disrepute during the seventeenth century. Thereby it helped to secure the privilege against self-incrimination, "this important contribution to the liberties of England."<sup>27</sup>

Donahue's essay in the Thorne *Festschrift* deals with the canonical procedure in its own right, and unlike Maguire, he has examined the records of the Church courts in detail. Where connections with the history of English common law can be seen, Donahue effectively points them out. But he brings the ecclesiastical practice to the forefront. Donahue sets out to discover how strictly the Church courts observed the formal canon law. He begins with the canonical texts and academic pronouncements on the qualifications of witnesses. Against the backdrop of these rules he sets the evidence of the court records in order to study the broader question of the "reception" of legal rules in everyday practice.<sup>28</sup> Donahue presents three findings. First, in the face of explicit rules to the contrary, the ecclesiastical courts routinely considered tes-

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<sup>27</sup> *Id.* at 229.

<sup>28</sup> Donahue's use of the term "reception" may be slightly misleading, for it normally denotes incorporation of a foreign system of law, whereas the ecclesiastical courts were intended to be regulated directly by the canonical texts.

timony of unqualified witnesses, such as serfs, criminals, and paupers. Second, the evidence of *testes de auditu*, that is, persons who were not eyewitnesses, was heard and could sometimes determine the outcome of litigation, despite canonical rules to the contrary. Third, the ecclesiastical judges exercised greater discretion in the evaluation of testimony than the canon law texts allowed them. The academic canonists strove to narrow the scope of judicial discretion, yet, Donahue concludes, court records show that judges in fact enlarged it.

Perhaps Donahue has slightly exaggerated the rigidity of the academic canonists' treatment of witness testimony in order to make his point, but there is no denying the range or the force of the evidence he has presented. His conclusion is that legal receptions do in fact occur but that their effects are subtly modified by existing practice and outside pressures.<sup>29</sup> One need not accept this idea or even the precise arguments advanced in its support (although this reviewer does) to come away with admiration for the essay. It opens up new source material, it widens our range of interest to include new subjects, and it asks important questions. Although Donahue's essay cannot end with the ringing assertion of Maguire's — that an important liberty had been secured — it presents a far deeper and more convincing picture of a topic that had been undeservedly slighted by past scholarship.

Expansion of interest to once esoteric courts and themes through greater use of record evidence characterizes several other essays in the Thorne *Festschrift*. John Beckerman provides a much needed analysis of local court records in his study of the role of affronts to personal honor in the early history of trespass.<sup>30</sup> He makes a persuasive argument that thirteenth century Englishmen considered monetary recovery for dishonor or shame an open possibility. His explanation of the reason that these grounds of damages failed to take hold in the royal courts — that recovery for intangible losses was left to local and ecclesiastical courts — cannot be a complete answer. Study of later local court records shows that recovery for dishonor and shame ceased to be awarded, or even sought, during the course of the fourteenth century.<sup>31</sup> However, this objection does not impair the value of the evidence Beckerman

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<sup>29</sup> See especially the recent treatment that has sparked interest in many aspects of the subject. A. WATSON, *LEGAL TRANSPLANTS* (1974).

<sup>30</sup> Beckerman, *Adding Insult to Iniuria: Affronts to Honor and the Origins of Trespass*, in THORNE ESSAYS, *supra* note 10, at 159, 159–81.

<sup>31</sup> The evidence supporting this statement will be given in detail in the reviewer's forthcoming Selden Society volume, *Cases on Defamation*. See also the characterization of defamation in Y.B. Trin. 12 Hen. 7, f. 22a, 24b, pl. 2 (1497).

presents. In particular, the influence of the civil law at the local level, seen in the use of forms and ideas drawn from the *actio iniuriarum* in the supposedly lowly local courts, puts those courts in a new light.

Thomas G. Barnes similarly uses manuscript reports of the Court of Star Chamber in a subtle and persuasive exploration of the challenges to the court's power raised by *Brereton's Case*.<sup>32</sup> Barnes links his discussion to the traditional attacks on the Star Chamber, but in his hands the court becomes more than the unconstitutional bogeyman it has been to earlier historians. Because it brings to light the court's own internal development and positive accomplishments, his account is ultimately more interesting and more believable than the old version.

Exploration of record evidence has also brought positive results in more traditional subjects of interest, as in J.H. Baker's essay on the origins of the doctrine of consideration.<sup>33</sup> The problem has long been debated.<sup>34</sup> Was consideration a new idea in the sixteenth century or did it grow out of an older notion of *quid pro quo* used in actions of debt? Was it a doctrine imported from civil law or one developed indigenously? Baker explores the plea rolls and unprinted case reports to answer both of these questions. His immediate quest is to discover how consideration first made its appearance in *assumpsit* pleadings between 1535 and 1585. The results are impressive. The first use of the phrase "in consideration of" comes from 1539, but this by itself had no great importance. The rolls reveal a long period of experimentation by the lawyers who drew up the pleadings and needed a connecting link between the recited bargain and the promise to pay money in actions of *assumpsit*. Various formulas were tried. Some caught on; others did not. The "doctrine" evolved gradually. There was therefore no *one* source, and contemporary lawyers themselves did not say that they were using anything more explicit than the moral principles of reciprocity and reliance. In the sense that these principles were also part of earlier English law, the doctrine of consideration was old. In the

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<sup>32</sup> Barnes, *A Chesire Seductress, Precedent, and a "Sore Blow" to Star Chamber*, in THORNE ESSAYS, *supra* note 10, at 359, 359-82.

<sup>33</sup> Baker, *Origins of the "Doctrine" of Consideration, 1535-1585*, in THORNE ESSAYS, *supra* note 10, at 336, 336-58.

<sup>34</sup> See, e.g., C. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 395-443 (1949); A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 316-488 (1975); Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1 (1888); Barton, *The Early History of Consideration*, 85 LAW Q. REV. 372 (1969); Salmond, *The History of Contract*, 3 LAW Q. REV. 166, 171-79 (1887).

sense that these principles were newly molded into a regular, more formal shape, the doctrine was new.

Baker's treatment of the question of consideration's indigenous or foreign origin is more definite. In his view, the doctrine is decidedly English. He rejects the notion that the civil law played any role in shaping the growth of the common law doctrine. Surely there is room for a more open mind here. Common law practitioners repeatedly used civil law terminology. Baker writes this off as "borrowing language, not legal doctrine" (p. 351). But why should they have thought the language useful? And did they really know nothing of contemporary developments in the law of the civilians? The essay by D.E.C. Yale on the authority of Bracton in the common law courts shows the willingness of lawyers to rely upon that treatise, although they well knew that it contained Roman law.<sup>35</sup> This suggests at least the possibility that lawyers were open to ideas drawn from outside the confines of the Year Books and plea rolls.<sup>36</sup> Carrying the question further requires study of continental developments, but the results may be as complex and rewarding as is Baker's demonstration of the way consideration was used in its earliest appearances on the plea rolls.

### III.

Practitioners of legal history will have room to disagree about some of the conclusions found in the essays of the Thorne *Festschrift*. Perhaps Professor Thorne himself would take exception to some of the interpretations advanced. The more intensive use of record sources, the expansion of inquiry to once esoteric subjects, and the distrust of broad ideas as motivations for men's actions have not led to consensus. On the whole, however, the results have been good. So far, dis-

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<sup>35</sup> Yale, "Of No Mean Authority": *Some Later Uses of Bracton*, in THORNE ESSAYS, *supra* note 10, at 383, 383-96.

<sup>36</sup> There is additional evidence pointing in the same direction, suggesting greater receptivity toward outside influences among early common law practitioners than their modern counterparts are willing to acknowledge. See, e.g., J. BARTON, *ROMAN LAW IN ENGLAND 30-32 (Ius Romanum Medii Aevi, Pars V, 13a, 1971)*; Coquillette, *Legal Ideology and Incorporation I: The English Civilian Writers, 1523-1607*, 61 B.U.L. REV. 1 (1981); Helmholz, *The Roman Law of Guardianship in England, 1300-1600*, 52 TUL. L. REV. 223 (1978); Levack, *The Proposed Union of English Law and Scots Law in the Seventeenth Century*, 1975 JURID. REV. 97; Nörr, *Das Streitprogramm: Eine Historisch-vergleichende Skizze*, in Festschrift für Fritz Baur 537 (W. Grunsky, R. Stürner, G. Walter & M. Wolf eds. 1981); Sherman, *The Romanization of English Law*, 23 YALE L.J. 318 (1914); Donahue, Book Review, 84 YALE L.J. 167, 178 (1974) (reviewing B. LEVACK, *THE CIVIL LAWYERS IN ENGLAND, 1603-1641* (1973)).

agreement has not degenerated into squabbling. And the advances in deepening our understanding of the past have been undeniable.

The new approach to explaining the reasons for legal change is the most debatable modern feature shown in these essays. Have we really benefited from a perspective that sees in litigation not the settling of legal principles and the growth of constitutional doctrine but only the clash of self-interest by actors who have no thought beyond immediate advantage? Does the discovery that litigants want most of all to win their lawsuits mean that matters of larger policy count for nothing? Put that way, it appears that we are in danger of seeing only trees and missing the undoubted existence of forests. The danger is real, at least if the arguments are pushed to extremes. On the whole, however, the larger issues have not been completely ignored. Constitutional principles may have lost their primacy, but the best of the modern work continues to illuminate them. Only those historians unwilling to master the lawyer's approach to problems have written off principles and issues of law as entirely irrelevant to the settlement of disputes.<sup>37</sup>

In able hands, the newer perspective has served principally as a safeguard against anachronism. Charles Gray's essay on fifteenth century litigation over royal exemptions from parliamentary taxation furnishes a good example.<sup>38</sup> He shows that, although it is too simple to imagine that there was any such thing as a peculiarly "Lancastrian constitution,"<sup>39</sup> the constitutional issues raised in litigation made sense in the context of the times. The lawyers who argued the Year Book cases were using the language most appropriate to settle the issues at hand. Constitutional questions were present — indeed, we can see them in clearer focus thanks to Gray's patient explanation of the legal intricacies — but those issues were raised in exactly the way constitutional questions then presented themselves: in terms of royal grants of special privileges.

In contrast to this approach is a comparable essay in the McIlwain volume, Max Adams Shepard's study of fifteenth

<sup>37</sup> See, e.g., J. MADDICOTT, *LAW AND LORDSHIP: ROYAL JUSTICES AS RETAINERS IN THIRTEENTH- AND FOURTEENTH-CENTURY ENGLAND* (1978).

<sup>38</sup> Gray, *Plucknett's "Lancastrian Constitution,"* in *THORNE ESSAYS*, *supra* note 10, at 195, 195-230.

<sup>39</sup> The phrase has a long history and was the subject of an earlier critical essay. See Plucknett, *The Lancastrian Constitution*, in *TUDOR STUDIES*, *supra* note 20, at 161. The question now is precisely how the idea of a specially Lancastrian constitutionalism is anachronistic, and here Gray has the better of the argument.

century political theory in the works of Fortescue.<sup>40</sup> Shepard deals with large questions: nationalism, separation of powers, the inalienable rights of Englishmen. He scarcely mentions a narrow question of law or assesses the strength of a legal argument. And he ends (this was 1935) by asserting that the lessons of the fifteenth century demanded judicial approval of Roosevelt's New Deal legislation.<sup>41</sup> Surely any loss in breadth of vision in the recent essays is more than compensated for by their greater clarity of insight.

The gain to legal history from the expansion of interest to new record sources and new subjects of investigation has been even more impressive. We have undeniably gained better perspective on the past. The work of Professor Thorne, whose labor over and translation of the text known as Bracton<sup>42</sup> constitutes his magnum opus, shows the advantages to be won from patient concentration on texts. The essays of the *Festschrift* rightly honor his career as well as his person.

In only one respect do the newer essays suffer by comparison: they will not appeal immediately to most lawyers. The McIlwain *Festschrift* is appealing in its easy handling of great themes. The essays of the Thorne volume are written primarily for specialists in legal history. Only A.W.B. Simpson's graceful essay on the first known Anglo-Saxon laws escapes the weight of specialization, and that essay was originally written for a public occasion.<sup>43</sup> It is hard to imagine many people, even among those generally interested in history, who could read Emily Zack Tabuteau's contribution on the evolution of the knight's fee in eleventh century Normandy with more than a distant sort of respect.<sup>44</sup> The essay does in fact deserve respect, and its conclusion is important to the history of feudalism, but it has none of the stirring appeal to general principles that enlivens the earlier volume. Legal historians — at least historians of English law — are now talking mainly to each other. It is a tribute to the influence of Professor Thorne that there are now enough of them to ensure that there will be listeners.

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<sup>40</sup> Shepard, *The Political and Constitutional Theory of Sir John Fortescue*, in MCLLWAIN ESSAYS, *supra* note 6, at 289.

<sup>41</sup> *Id.* at 318-19.

<sup>42</sup> BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (S. Thorne trans. 1968-1977) (four volumes).

<sup>43</sup> Simpson, *The Laws of Ethelbert*, in THORNE ESSAYS, *supra* note 10, at 3, 3-17.

<sup>44</sup> Tabuteau, *Definitions of Feudal Military Obligations in Eleventh-Century Normandy*, in THORNE ESSAYS, *supra* note 10, at 18, 18-59.