> with the Legislative, they have substituted Executive decree for legislative enactment and are operating on the basis of the executive decree, to wit, Circular A-47.[15]

The key point is that there is all too little data available to substantiate or refute the proposition that the Bureau of the Budget is in fact significantly altering the political status quo by extending its coordinating power in the budgetary process. Professor Wildavsky has made a major contribution toward focusing research on the budgetary process and on how it actually operates within the political process. Imaginative conceptualizing and systematic collection and analysis of data could lead to the development for the first time of meaningful theory in this field. Professor Wildavsky's book is a beginning, and a highly successful one. One would hope that many more studies widening and deepening the analysis will follow. Finally, the data presented constitute a powerful argument for pushing the reform effort into the background until more — much more — is known about how the budgetary process actually works.

JOHN M. DE GROVE†

LEGAL HISTORY: LAW AND SOCIAL CHANGE. By Frederick G. Kempin, Jr.* Englewood Cliffs, New Jersey: Prentice-Hall, Inc. Pp. viii, 117. Paperbound, $1.75.

Legal History: Law and Social Change is one of a series of new paperbacks, subtitled "Foundations of Law in a Business Society." The aim of the series is to make available a group of "short, convenient, inexpensive and authoritative books written by scholars in their respective fields, systematically covering the subjects of primary interest to all nonprofessional students of the law." Professor Kempin begins by asserting that his book is "about the history of Anglo-American law." The statement is courageous. There are 109 pages of text; to say anything meaningful about "the history of Anglo-American law" in that space would be a minor miracle, especially since Professor Kempin aims at telling no less than "a continued story of the development of the institutions of the law — its courts, juries, judges, and lawyers," while also tracing "the beginnings and development of selected legal concepts."[1]

In many ways, the author does very well, despite the enormous obstacles that face such a venture. He has succeeded in imposing a kind of order on the chaos of his data. The writing is clean and dignified; the story is told

15. *Joint Hearings Before the Senate Committee on Interior and Insular Affairs and Subcommittee on Flood Control, Rivers and Harbors of the Senate Committee on Public Works*, 85th Cong., 1st Sess. at 13 (1957).

†Chairman, Department of Government and Politics, Florida Atlantic University.

*Associate Professor of Business Law and Vice-Dean, Wharton School of Finance and Commerce, University of Pennsylvania.

1. Preface vii.

without bombast or obscurity. What is wrong lies deeper than brevity. The sins of the book are not the author's sins, but the sins of those who — largely inadvertently — have given shape to the "field" of legal history. It may even be bad manners to bring them up in reviewing a book of this nature. Professor Kempin is not responsible for the deficiencies of legal history; indeed, his text shows some awareness that he knows what is wrong. The title itself is a promise (though an unfulfilled one) to rescue legal history from its narrowness and relate it to a more general phenomenon (social change). However, despite a few nods in the direction of this broader kind of study, the book remains basically true to convention. Since its modest price and attractive style may earn the book a respectable readership, it is not out of place for a dissenter to make a few remarks, not so much by way of criticism, but rather to place the book and the "field" it exemplifies, in context.

History books are usually written from a near-sighted perspective, *i.e.*, they are very dim about what happened in the early stages of their subject, and devote most of their pages and effort to the more recent past. As many years elapsed from Jamestown to the American Revolution as from the Revolution to the depression of the '30's; but the standard American history text spends two, three, or four times as much space on the latter as on the former period. This deserves to be true, because (other things being equal) recent history is more relevant than older history to the student and to modern life. More is known about modern history, and most historians tend to work in fields of high interest and rich data.

Anglo-American legal history has quite the opposite tendency. Its perspective is distinctly far-sighted (in the nasty sense of the word). There is a fuzzy period (up to 1066), but the historians devote most of their attention to the span of time between William the Conqueror and the Statute of Uses. The 400-odd years from then till now are as much the dark ages of legal history as the period of Ine, King of the West Saxons. Certainly there is a great deal known and knowable about this modern period, but somehow the historians have not found it worth the telling. Plucknett's *Concise History of the Common Law,* which has run through five editions — an altogether admirable work in many ways — is concerned almost entirely with the older law. The book is concise only in comparison with Holdsworth; the fifth edition is 746 pages long. I have not made an accurate count, but I doubt if fifty pages all told are devoted to the last three centuries of English history. For example, in the section on real property, eighty-three pages are devoted to a discussion of the period ending with the Statute of Uses. The next chapter is called "The Later Law of Real Property," but nothing later than 1715 is mentioned. There follows a chapter on mortgages, which largely exhausts itself by the 16th century. The final chapter in this section, on conveyances, is equally antiquarian. Nothing later than the 17th century is mentioned until the last two pages. Here half a page is devoted to the 18th century; an act of 1833 is cited, and, in the very last sentence, the Settled Land Act of 1882.

English land law, apparently, had been reduced by then to the merest trickle; in 1882, the stream dried up.

Plucknett does not purport to cover American legal history; Professor Kempin does. But he retains an essentially Medieval and Renaissance bias. Even where modern events are treated, there is a tendency to accentuate English developments over American ones. In the chapter on torts, there are four paragraphs about *Heaven v. Pender*,[2] an English case decided in 1883; no American case — not *MacPherson v. Buick Motor Co.*, or the *Palsgraf* case — gets so much as a word. The chapter on contracts more or less peters out when *Slade's Case* is reached (1602). Professor Kempin seems most at home in the chapters on commercial law; but these too suffer from this misbalanced emphasis. The Illinois Business Corporation Act of 1933 is referred to; but the English Bubble Act (1720) gets far more attention.

To what can we attribute this reversal of the expected? First of all, there is the fact—perhaps accidental—that many of the great English legal historians were medievalists — Holdsworth, Maitland, Pollock. These men set the tone for the historical study of law, and others have followed in their footsteps. Perhaps, however, one may ask why the great English legal historians have been medievalists, why so little attention has been given later times. And an American of the 1960's need not rely solely on the work of these English scholars. American legal history is relatively neglected, but there are a number of first-rate American legal historians — Mark de Wolfe Howe, Jr., George Haskins, and Willard Hurst, to mention only three. Howe and Haskins are acknowledged by name in the book, though I see little, if any, trace of their work; Hurst is totally ignored.

It can be argued that the study of the living law pays adequate attention to the immediate past, so that legal history, as a discrete field, should concern itself with more remote antecedents. Of course, what passes for "history" in most law courses is usually only a crude counterfeit. Nor do the particular courses deal with patterns of change throughout the legal system. That is a task for the legal historian. It is certainly odd to ignore the study of those patterns at precisely the point in time when they become most relevant to an understanding of our legal system and its place in our social order.

The legal historian is perhaps a prisoner of the legal tradition; and the deficiencies of legal history may be ascribable to elements of that tradition. By training and temperament, the Anglo-American lawyer is oriented toward courts, decisions, and the common law; it is case law which is pre-eminent, not statute, and somehow case law makes true law, while statutes are nothing but temporary or expedient interruptions. This attitude has lost some of its former vitality, but it lives on as a sentiment of more or less power; and its influence is particularly pervasive in the law schools. These are the places, after all, which mother our legal historians. Thus one might take as the task of the history of "law" to describe the golden age of common law — that is, the

2. P. 74.

somewhat distant past. Something of this attitude is implicit in Professor Kempin's book. In particular, he is not very comfortable with legislation. True, he calls legislation the "most potent means for changing law," since case law "tends, by its nature, to lag behind the times." But statute law has serious limitations: "where matters political, social, or religious are involved, legislation is not highly successful."[3] There is much here to quarrel with. Far too many people have repeated the cliché, that case law lags behind the times, without articulating what they mean. In one sense, nothing can lag behind the times and survive. One might say that the amoeba lags behind the times for not evolving into a sponge; and a sponge for not becoming a jellyfish, and so on. What is true is that courts can perform certain functions, and cannot perform certain other functions. They deal with will contests and tort actions, but they cannot pass social security laws or regulate the butter-fat content of milk. Only if one begins with the assumption that courts (really only appellate courts) are or ever were vested with the whole task of social control over conduct, and that this control is or was exercised by deciding concrete cases and laying down general propositions, can one readily come to the conclusion that courts "lag behind the times." The norms which courts apply and the standards which govern judicial behavior come from a limited number of sources. They depend, for example, on the kinds of cases judges hear; but this is not a matter within the control of courts. Changes in social needs may call for the application of new norms which courts are unable (for one reason or another) to apply. The society then tends to impose solutions, either on the courts or (more usually) by creating or modifying other agencies of control to do the new work. But this does not mean that the courts were lagging "behind the times." Surgery passed from the barbers to the medical men, but not because the barbers were behind the times. Nor did the barbers stop cutting hair.

It is also hard to tell what sense we are to make of the statement that legislation is "not highly successful" in "matters political, social, or religious." Apparently, Professor Kempin is harking back to the notion that the common law is the distillate of human reason; the product of the experience of the ages. To tamper lightly with the common law is therefore no laughing matter; he who does so is tampering with the mores. It does not seem to have occurred to Professor Kempin that case-law is also "not highly successful" in imposing rules to govern human conduct in a wide array of situations; or that there are as many foolish decisions as there are hasty statutes; or that processes exist for correcting and modifying bad statute law in the light of experience, as good as or better than the processes whereby the common law corrects itself. He does not see these things because he ranks the importance of the courts too highly. He sees them doing jobs they have never really done. Thus, Professor Kempin thinks the courts bear or have borne the main burden of preserving stability in the social order, while allowing for necessary changes.

3. P. 44.

"From time to time" the judges "have needed legislative prodding,"[4] presumably because of that tendency to "lag behind the times," but this is, in context, a grudging concession to all other legal agencies.

The fault further lies in Professor Kempin's conception of legal history. By legal history, he says, "we mean the development of the concepts, doctrines, and rules which have been created and used to keep order in our society."[5] This view is, no doubt, responsible for much of the imbalance in the field. It is not unique to our author. Such a view also ties in with the author's excessive attention to decisional law. It is case-law which evolves (in his sense) "concepts, doctrines, and rules." By these he refers to those malleable, fundamental propositions which the courts have used as tools in deciding cases. Langdell was thinking of the same kind of "concepts, doctrines, and rules" when he put together his first case-book, carefully excluding all statutory matter and designing his materials so as to tease out of the student a grasp of those few, fundamental evolutionary notions that the courts, apparently unaided by outside forces, had unwrapped from the dense integuments of time. Of course, in this sense no statute has ever given rise to a "concept," not even to a "doctrine" and rarely even to a "rule." Certainly the Homestead Act and the Fugitive Slave Law, the Food and Drug Act, the immigration and naturalization laws, the Internal Revenue Code, tariff acts and Social Security Acts, have none of them given rise to a "concept" as beautifully dialectic as "unjust enrichment" or "consideration" or tort law's "negligence." But legal history defined to eliminate the statutes listed above (not one of them is mentioned by Professor Kempin) is seriously lop-sided; and a book written in accordance with this definition, whatever its virtues, is *not* a history of our law, in any meaningful sense of law. Rather, such a book usually (almost necessarily) degenerates into an antiquarian search for origins; history loses itself in the quest for the name of the inventor of the toothpick or the first case to use the word "misfeasance." Only the very greatest of historians can infuse life into a history of "concepts," since it is so easy to treat concepts as if they were brittle little sticks, isolated from the web of culture. The legal historian runs a particular risk of falling into antiquarianism. The danger is greatest when he traces "concepts," since this invites him to trace his data the way a lawyer traces precedents, hopping backward from case to case until he can hop no more; and then, at this earliest point, beginning to write his brief.

Antiquarian legal history obviously cannot *explain* the law of any particular period; nor can it illuminate the forces which make the law move from point A to point B. But a study of "law and social change" promises to do these very things, to examine the thousand and one invisible wires which run from legal institutions to non-legal institutions and back again. The task is enormously difficult. It calls for techniques of research and analysis

4. Preface vii.
5. P. 5.

not now within the general armory of skills of most legal historians. Yet eventually these techniques must be acquired.

The classical English legal historians — Maitland is the proudest example — were not guilty of the antiquarian sin; within their periods of specialization, they searched for a total grasp of at least so much of the social order as was relevant to their researches in law. That modern law deserves the same treatment is generally conceded; but Professor Kempin does not go beyond a few platitudes. "The development of tort law is the story of an accommodation to the fact that more people and more machines result in more accidents,"[6] he points out; but we want to cry out for specifics. True, he has no space to tell a fuller story; nor can he fall back on a sufficient number of monographic studies to establish his propositions. But this means we can expect nothing higher than hypotheses from our author; we do not even get that. The result is a curious form of history in which things happen without explanation; dead sticks and stones move the world. The law seems impersonal; human forces and institutions in society are ignored, and abstractions personified. We read that the "accumulated mass of decisions appeared to cry for simplification"[7] (of commercial law); or that the jury "has stood firm for seven hundred years."[8] Or we read that in the 19th century "the doctrine of negligence emerged fully from its cocoon."[9] Or that scutage "disappeared" after 1384, as if nothing human was responsible. But legal institutions are not water; they do not evaporate. "The modern trend," we read on, "is to enlarge the role of statutes."[10] Nothing is said to indicate who or what is doing the enlarging. Historical writing in general (including no doubt my own) is filled with these robots; in part, personification is merely a stylistic device, but often it acts as a substitute for a real explanation. In case-law oriented, concept-tracing legal history, these anthropomorphisms are particularly liable to occur. The practitioners of the historical art pay inadequate attention to the culture surrounding their field of interest; consequently, the course of history seems full of mysterious randomness. "The law often is fashioned by accident," because "the facts of future cases are beyond the control of the courts."[11] Consider the application of this dictum to (say) *Dred Scott* or the *School Segregation Cases!* We *know* that the living law is a product of our current constellation of social forces, acting upon the data of the past; we can see it, feel it, grasp it. If we could only project this insight backwards into history, how much richer this would make the study of our immediate legal tradition.

LAWRENCE M. FRIEDMAN†

6. P. 75.
7. P. 98.
8. P. 24.
9. P. 73.
10. P. 9.
11. P. 80.

†Associate Professor of Law, University of Wisconsin.