Review Essay

A New Lincoln Legal History:
The First Generation

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In 2000 fourteen years of collecting and editing the Lincoln Legal Papers culminated in the publication of The Law Practice of Abraham Lincoln: Complete Documentary Edition. The effort opened a window on Lincoln’s previously obscure legal practice and on the history of antebellum American law, scattering literal and figurative cobwebs.

The Lincoln Legal Papers staff scoured courthouses in Illinois and in neighboring states, as well as museums and private collections, to find and digitally archive every available scrap relating to Lincoln’s twenty-five-year law career, including the work of his partners, judges, and opposing counsel. On DVD and recently made available online, The Law Practice of Abraham Lincoln presents more than 96,000 documents from over 5,100 cases and 500 other legal matters. These documents and cases are made keyword searchable in a number of ways, greatly facilitating research. In 2008 the Lincoln Legal Papers project published The Papers of Abraham Lincoln: Legal Documents and Cases in four volumes, presenting documents from 64 selected cases interspersed with scholarly commentary and three topical chapters to help readers find their bearings in the rather arcane world of antebellum law.

As Daniel Stowell, director and editor of the Papers of Abraham Lincoln wrote, “Not only do these cases add to our understanding of Abraham Lincoln’s life and career; they open new vistas on antebellum America, with all of its optimism and selfishness, all of its oppor-
tunity and inequality, all of its expansiveness and litigiousness.” Not surprisingly then, there are two intertwined but nonetheless distinct threads of interpretation in the first generation of books to come out of the Lincoln legal project. Some authors have been interested in what Lincoln’s legal career has to tell us about Abraham Lincoln, others explore what these cases reveal about American law and society in the antebellum period.

Complicating matters, the first books on Lincoln’s legal career to exploit the newly available sources come at a time when the legal history of nineteenth-century America is undergoing profound revision. Previous legal historians celebrated or condemned a “formative period” in American law when a “transformation of American law” made possible a shift from pre-modern, household economy toward modern corporate capitalism and all the good or evil that entailed. But recent historians, most notably Peter Karsten and William Novak, have raised crushing challenges to this picture of legal transformation in the period, instead stressing continuities in legal doctrine and regulatory regimes across the nineteenth century. Since describing Lincoln’s legal practice entails a description of American law in the period, the new Lincoln literature reflects some of the conceptual confusion in American legal history.

The Lincoln Legal Papers will likely contribute to social history as much as legal history. In 2006 the staff of the Lincoln Legal Papers published *In Tender Consideration: Women, Families, and Law in Abraham Lincoln’s America*, which explored the implementation and practice of law as it related to women, children, and the family in antebellum America. *In Tender Consideration* avoids the conceptual confusion of the books under review here by directly engaging recent trends in social and legal history, especially addressing the insights of Karsten’s *Heart versus Head: Judge-Made Law in Nineteenth-Century America*. *In Tender Consideration* follows Karsten’s lead to reveal the legal paternalism Lincoln imbibed as an elite member of the Victorian bar. While *In Tender Consideration* is not primarily about Lincoln, it will nevertheless affect our understanding of matters as diverse as Lincoln’s attitudes toward economic development, the women and children in his life, and blacks and Native Americans. In the meantime, three scholars have rushed in to explore the new Lincoln documents as they relate to Lincoln himself.

The Lincoln Legal Papers were stimulating a new literature about Lincoln even as they were being assembled. In 2002 Allen Spiegel’s *A. Lincoln, Esquire: A Shrewd, Sophisticated Lawyer in his Time* appeared, and as the title suggests, the book says something about Lincoln and
his times. A professor of preventive medicine and community health, Spiegel focused primarily, though not exclusively, on cases involving medicine and public health law. This is fair enough as long as one does not draw the conclusion that Lincoln was primarily an ambulance-chasing malpractice attorney. In fact medicine-related cases were just a tiny percentage of Lincoln’s overall practice. Only 39 cases appear under the main search subject heading *medicine*, many of which have only incidental medical dimensions.

Spiegel’s own introductory chapter lacks any attention to the historiography of either Lincoln or American law and can safely be skipped, but he also included a second introductory chapter on “the evolution of a lawyer” by John Lupton, then assistant director and an assistant editor with the Lincoln Legal Papers. Lupton’s chapter provides a short, accessible, nuts-and-bolts overview of Lincoln’s overall legal practice that anyone new to the Lincoln legal literature will find helpful. As Lupton sums up, [Lincoln] “was not a folksy, down-home kind of guy. Instead he was a shrewd, sophisticated, tough and aggressive litigator with a staggering caseload who cared about making money and signed legal papers as . . . *A. Lincoln.*” Assembling very brief descriptions of selected cases as well as reminiscence material, Lupton covers the development of Lincoln’s practice through its three successive partnerships, noting that while more than half of Lincoln’s practice consisted of small debt cases, he handled a wide variety of civil actions. (Only about 5 percent of his cases were criminal.) Lupton indicates that Lincoln’s caseload mirrored antebellum Illinois society and allows Spiegel to make that case in the rest of the book.

Stemming from his background in public health issues, Spiegel’s focus is entirely idiosyncratic; he wants to tell us what Lincoln knew about the medical profession of his day. Along the way Spiegel shows us that even these few cases reveal a lot about medical law in Lincoln’s time. The book is useful both for Spiegel’s ability to put these few cases into the context of the history of American medicine, as well as for his analysis of individual cases. For instance, he concludes chapter 3 by telling us that “Lincoln was keenly aware of the differences in medical education, and biases in everyday medical practice and in the contradictory testimony engendered by the animosity between orthodox and irregular doctors” (62). While discussing one case, Spiegel frequently digresses to explore other cases that Lincoln was involved in at the same time. Assuming Spiegel was not consciously attempting the post-modern narrative style of Salman Rushdie, this is probably the chief flaw of the book. Important aspects of Lincoln’s work are scattered haphazardly throughout Spiegel’s chapters, and the book
sometimes becomes chatty rather than analytical. On the other hand, the task of organizing such a sprawling set of stories might overwhelm any writer, and general readers may well find this style enjoyable. Whether intentional or not, Spiegel’s constant digressions have the effect of allowing the reader to picture Lincoln’s daily life as a lawyer, managing multiple cases and myriad issues at the same time.

In addition to medical cases, Spiegel examines many of Lincoln’s most important cases, showing Lincoln to be a real hustler at the law, generally angling for the best fee he could get. This is helpful. And Spiegel’s most important contribution may well be chapter 6, “Victorian Lawyers, Improperly Healed Fractures, and America’s First Medical Malpractice Crisis, 1835–1865.” Malpractice crisis. Who knew? This is where having scholars of other specialties look into Lincoln becomes most helpful. General readers will be surprised to learn how closely modern medical malpractice law resembles cases that Lincoln was intimately involved in, and this serves to dispel the common misperception of a golden age when government and law played smaller roles in the lives of Americans. Lincoln’s was no golden age, or conversely, we are not so degenerate after all. Spiegel walks us through cases and appeals in a way that makes them seem very familiar indeed, revealing an antebellum America at least as litigious as our own time.

Much of the last part of the book is dedicated to the law of insanity, as well as to Lincoln’s behind-the-scenes power broking on behalf of client Illinois Governor William H. Bissell. This shows the lawyer Lincoln to be a leading political force, even as he lost elections. However incomplete and even random, A. Lincoln Esquire does a marvelous job of showing us the mature Lincoln at the top of his game.

Perhaps most intriguing of all, in chapter 13—“Lincoln Politically Selects the Medical Expert on Insanity”—Spiegel uncovers the story of Lincoln and the execution of Dr. David Wright in 1863. Wright, a Norfolk, Virginia, civilian, was convicted by a military commission of killing the white officer of black troops. A military commission was used even though civilian courts were open because, by hard experience, Lincoln had concluded that civil courts were powerless against Confederate insurrectionary activity; civilian juries in the South would not convict. (Lincoln’s own appointee to the Supreme Court, David Davis, would later overrule Lincoln in Ex Parte Milligan, holding that civilians could not be tried by military tribunal when courts were open.) Unfortunately, military commissions were often biased the other way and were more likely to use the death penalty. In this case the commission refused to admit evidence that the defendant acted
in self-defense. Under pressure to show more concern for the safety of black troops and their white officers, Lincoln remarked that “an example would prove a great benefit to the cause” (255) and allowed the commission trial to stand. When further motions for clemency based on insanity arose, he chose a medical expert who he knew to be skeptical.

The case clearly pits two anti-Lincoln traditions against one another. If Lincoln went too far in stifling civil liberties, as Thomas DiLorenz and others have argued, here he did so to uphold the safety and dignity of black troops and their officers facing insurgency, contrary to the assertion of Lerone Bennett and others that he was indifferent to the plight of African Americans. And as the chapter title, “Lincoln Politically Selects the Medical Expert on Insanity,” suggests, the case also reveals a rather more nuanced relationship between politics and the law than some Lincoln interpreters have allowed. Focusing instead on medical dimensions of the case, Spiegel remains silent about its implications for Lincoln interpretation, race, or civil liberties, which, given current preoccupations, seems quaint. Nevertheless he has given us fresh eyes. A. Lincoln Esquire succeeds far beyond its rather modest pretentions and deserves a wider readership.

In An Honest Calling: The Law Practice of Abraham Lincoln, Mark Steiner has assembled a number of very useful chapters. The research is impressive, and the footnotes will guide scholars into the literature for a long time to come. The first chapter, “Lawyer Lincoln in American Memory,” provides an excellent summary of the historiography prior to the appearance of the Lincoln Legal Papers. Steiner thus puts a helpful punctuation mark in the literature, terminating one era of scholarship and inaugurating a second. Steiner finds that the literature has been flawed by cultural stereotypes both about Lincoln and lawyers. Although as Lincoln’s law partner William Herndon was well-positioned to know better, he wanted to promote Lincoln as the product of frontier forces and therefore wrote that Lincoln “knew nothing of the rules of evidence, pleading, or practice” (8). As the Lincoln Legal Papers make abundantly clear, this was simply incorrect. Steiner tells us that “the best book” (23) of the earlier Lincoln legal literature was John J. Duff’s A. Lincoln, Prairie Lawyer (1960), with John P. Frank’s Lincoln as a Lawyer (1961) running a close second. Duff and Frank were aware that Lincoln would indeed press legal technicalities in order to achieve a positive outcome, even for a seemingly unworthy client. But, says Steiner, “Duff’s work nonetheless [was] marred by his lack of depth and ignorance of legal history” (23), and both Duff and Frank
“sometimes failed to appreciate nineteenth century legal culture” (24). Since they also did not have access to the newly collected sources, Steiner has amply set the stage for a reexamination.

In the “The Education of a Whig Lawyer,” Steiner details the books Lincoln read and the treatises he relied on. Steiner notes that like any lawyer in the period, Lincoln relied on precedents from other states and from England, as well as an array of treatises and guides to those precedents, and he provides two tables of treatises and legal digests cited by Lincoln. While acknowledging that Lincoln’s legal study was largely self-directed, Steiner nevertheless stresses the role of John T. Stuart in Lincoln’s rise, thus quietly challenging current misunderstandings of what was then meant by a “self-made man.” Lincoln’s was a “sponsored mobility” (39), and he owed much to his connections with his future in-laws. When recounting the way Lincoln himself portrayed his rise, Steiner takes him to task for failing “to inform his aspiring students that his friendship with John T Stuart was critical to his success” (53). Steiner admirably demonstrates that sponsored mobility was standard practice in the antebellum legal profession, and that dovetails nicely with the work of Kenneth Winkle and others, who have also detected a broad cultural and economic pattern in these self-made men.

In chapter three, “A Whig in the Courthouse,” Steiner takes up the thesis first articulated in the introduction. Steiner claims that Lincoln developed “a distinctive Whiggish attitude toward law and the role of law in American Society” (3). Unfortunately, it is not quite clear what Steiner means by a “Whig lawyer.” “Whigs were modernizing conservatives,” says Steiner, “who favored internal improvements such as railroads to foster economic growth. Whigs also believed that the rule of law provided a neutral means to resolve disputes. Lincoln was a Whig lawyer who embodied the Whig reverence for law and order. Lincoln’s essentially political conception of a lawyer’s role defined what an ‘honest lawyer’ would do in his practice: represent clients faithfully. . . . But Whig lawyers like Lincoln were more than mere legal technicians; they also stressed the importance of lawyers serving as guardians of community values. Lincoln was as interested in mediating and settling cases as he was in trying them” (3–4). “Modernizing conservative” is of course a self-conscious oxymoron; the problem is that Steiner does not flesh out how this tension or contradiction was reconciled. Steiner is not the first historian who has struggled to come to terms with the Whigs; the party remains largely oxymoronic for many, which helps explain why the Whigs have been so forgotten. Nevertheless he does owe us some explanation of the relationship
between their Gesellschaft and their Gemeinschaft, between their efforts to “foster economic growth” and their desire to preserve “community values.” For the most part, Steiner seizes one horn of his dilemma, choosing to emphasize the more conservative, community-oriented side of Whig lawyering, and confining the “modernizing” role to their overt political efforts outside of the legal arena. To do this, he places undue stress on Lincoln’s slander practice, which was a comparatively small part of Lincoln’s overall caseload. He slights Lincoln’s debt practice—some 62 percent of Lincoln’s legal work—as well as Lincoln’s railroad work in the 1850s. That helps obscure the impact of economic forces on Lincoln’s practice and allows Steiner to emphasize the maintenance of seemingly pre-modern communal relationships.

Similar tensions lie in the contrasts between “neutral legal order,” “guardians of community values,” and an “essentially political conception of a lawyer’s role.” If we assume that by “political conception of a lawyer’s role,” Steiner means that lawyer Lincoln saw himself as the political agent of a moral community, it is not quite clear just how that squares with lawyer Lincoln as an agent of a neutral (read liberal) legal order. Steiner does suggest that Lincoln’s willingness to be neutral, to subordinate his personal beliefs “shows the moral failure of Whig lawyering” (4). Apparently then, Whig lawyers were guardians of communal moral values, except when they were not . . . which was a failing. In addition, labeling Lincoln’s willingness to take any side of any case as a “moral failure” will not sit well with the Alan Dershowitzes out there who believe that in an adversarial system even the vilest client deserves the best defense possible. Perhaps growing out of his extensive write up of the Matson case, Steiner here tips his hand and expresses his preference for thinking about community in moral terms as opposed to the supposed neutrality of legal liberalism. Unfortunately, just where Lincoln fits in all of this remains unclear.

That is not to say that Steiner is not on to something. His erudition is formidable, and he is well aware of the literature surrounding the rise of the liberal state. But he might better have explained if not fully resolved these tensions for us. For instance, he might have adopted Karsten’s concept of judicial paternalism as did the editors of In Tender Consideration. These self-made men paternalistically sought to create a world in which others, too, would enjoy the right to rise. They were moralistic about this, and this was a community value. As part of this paternalistic moral vision about promoting the right to rise by taking active public policy steps to make social mobility a reality, they also sought to expand the reach of the market economy. Thus what now seems modern—their belief in using the government (and the law!) to
help expand the market economy and help people take advantage of it—was connected with their apparent conservatism regarding such things as slander, reputation, and chastity. In a debt-driven economy before credit-rating agencies, reputation remained economically crucial. After all, Lincoln was downright pharisaical about his own personal debts and the lengths he would go to repay them, and he was equally tender about his honorable conduct regarding women. Such a Victorian interpretation might have helped Steiner reconcile the forward-leaning, pro-development policies of Lincoln and the Whigs with their seemingly pre-modern moral concerns.

Or Steiner might have invoked Novak’s three-part division of American legal history. For Novak, the middle period of American history had elements of both pre-modern, community-oriented jurisprudence, as well as of an impersonal legal order. While the common law was relatively impersonal, and in a sense neutral when compared to the face-to-face mediation of the pre-modern household economy, it nevertheless embodied the morals of the communities it oversaw and was not yet the morally neutral liberal legal order of the twentieth century. Furthermore, the shift Steiner detects toward a more thoroughly impersonal rule of law may indicate an ongoing evolution. As Steiner argues, early in his career Lincoln may well have done more personal mediation in slander suits than he was able to do later when working either side of a railroad case or collecting debts for a distant retailer. If this is indeed Steiner’s argument, it offers a compelling tragedy: small-town Victorian paternalism carried within it the seeds of its own destruction as those connections to the world economy morphed into hugely impersonal business corporations during the Gilded Age. But Steiner does not quite make that argument.

Steiner’s core thesis is less tragic in the technical sense of the term: Lincoln the pre-modern man finds himself caught in the matrix of a corporate world not of his making. Steiner argues that Lincoln “represented the quickened pace and impersonal style of lawyering that his corporate clients demanded, and he disliked the loss of autonomy that came with the increased supervision by his corporate clients” (4). Returning to this argument in his last chapter, Steiner uncovers important conflicts between Lincoln and some of his clients.

Unfortunately, the evidence is by no means convincing. Steiner’s own arguments in the last chapter could easily lead one to conclude not that Lincoln was uncomfortable with corporate law as Steiner asserts, but rather that he preferred passing the more mundane aspects of corporate practice to less experienced junior partners (163). The mature Lincoln had outgrown debt collections; he did not need it as much in
his practice and no longer wished to do it. Far from having difficulties with “the hurried pace and the impersonal nature of these cases” (167), in working for the Alton & Sangamon Railroad, Lincoln was at pains getting his corporate client William Martin to keep pace with him, at one point referring to those suing the railroad as “his victims.” And in Hurd v. Rock Island Bridge, he seems to have had little difficulty mustering up enthusiasm for railroads, bridges, and progress. In railroad and debt cases we see less evidence of communalism, which Steiner detects in the slander cases. Finally outside of the law, Lincoln’s enthusiasm for progress, though not entirely uncritical, never seems to have really wavered. Steiner’s contention would present us with the problem of a somewhat schizophrenic Lincoln, another “American Sphinx.”

The use of the term Whig is also unfortunate. Nowhere does Steiner substantiate a difference between Whig and Democratic lawyering in this period, a thesis which would have been difficult to sustain. Often Lincoln was co-counsel with Democrats, and most of the judges who oversaw the legal order in Illinois were Democrats. Without evidence to the contrary, one has to assume that Democratic lawyers, no less than Whigs, sought to mediate slander disputes, to take cases generally as they came, and to uphold the rule of law. (They also handled debt cases for entrepreneurs, including the relatively modern federal bankruptcy practice of the early 1840s, as well as cases for the new, largely impersonal business corporations, including railroad and telegraphs companies.) Perhaps sensing this problem, Steiner sometimes drops the term Whig and instead uses “antebellum lawyers” (58), “Illinois lawyers” (98), or “western lawyers” (158). Thus one is forced to conclude that Steiner has written an exhaustively researched and carefully noted book, which succeeds in spite of its somewhat confusing and ultimately unsuccessful thesis.

Some of the confusion is owing to Steiner’s desire to challenge Morton Horwitz’s contention that judges and, to a lesser extent lawyers, used the law as an instrument or tool, changing the law to effect public policy purposes, in particular, to enrich the already wealthy and powerful.

“Lincoln’s law practice does not provide any support for a theory about a lawyer-capitalist alliance bent on changing legal rules to accommodate capitalism or to exploit the working class. Lincoln’s legal career instead exhibited a Whig concern for order and orderly law instead of an instrumentalist concern for the promotion of industry and the development of the economy. Whig politicians favored a developmental economic agenda, but Whig lawyers did not necessarily carry this agenda into the courtroom. . . . The scramble for business meant that
these lawyers were ready to represent any client” (55–56). Much of this is surely correct: Lincoln took cases both for and against railroads in roughly equal numbers. And Karsten has largely demolished Horwitz point for point. If and when the common law was changed, which was rare, it was generally changed in the direction of Victorian paternalism rather than in the direction of unbridled capitalism. Karsten called this form of legal instrumentalism “the jurisprudence of the heart.”

Throughout the book, Steiner conflates legal instrumentalism, which is the notion that judges changed the law for public policy reasons, with legal activism, which is something lawyers engaged in to pressure the courts, most notably “cause lawyers” like Salmon Chase or Thurgood Marshall. Here Steiner is correct: Lincoln was almost never a legal activist.

But convincing as Karsten’s revision (and Steiner’s) is on these points, nevertheless there remained circumscribed areas of law in which judges did help foster the development of the business corporation, albeit not because they wanted to exploit the weak, but because they thought such corporations actually served the public interest. That said, the conflicts of interest tolerated by antebellum courts can be staggering by today’s standards. Justice Caton, for instance, ruled serenely on the nascent law of corporations even as he used those laws to assemble his own telegraph conglomerate. And Lincoln argued before judges who were sometimes open to legal instrumentalist arguments. In the stock subscription cases in which Lincoln referred to the plaintiffs as “his victims,” judges—none of them Whigs—did help establish rules of corporate governance that allowed management to make decisions without unanimous shareholder agreement. Judges adopted these rules in large part out of a public policy concern that the contrary ruling would make corporations unworkable. It is true that Lincoln soon enough found himself arguing for plaintiffs against the railroads and in the teeth of his own precedents. But that does not mean that the court was not in part motivated by instrumentalist concerns. Steiner himself shows this happening in Chicago, Burlington, and Quincy R. R. v. Wilson, in which Lincoln argued against granting the railroad permanent eminent domain authority, but in which Justice Caton ruled for the railroad on at least partially instrumentalist grounds (64).

Steiner does not show us Lincoln making instrumentalist arguments on behalf of his clients, but Lincoln was happy to adopt such arguments
if he knew the judge to be sympathetic. In *Hurd v. Rock Island Bridge*, Justice McLean took the bait and engaged in legal instrumentalism in allowing testimony regarding the relative utility of the bridge versus steamboats to be heard by the jury, even though it was technically irrelevant from a formalist perspective. Even if Lincoln himself took cases not because he wanted the railroad to win but because he wanted the highest fee, at the very least he operated in a legal environment that was sometimes instrumentalist when it came to the nascent law of business corporations; and as a lawyer, he was perfectly capable of couching his arguments accordingly. Given the sectional politics of *Hurd v. Rock Island*, there can also be little doubt about which side Lincoln wanted to win. Finally, Lincoln and his co-counsel invested in property in Council Bluffs, Iowa, that would be directly affected by the ruling in the case. All of which is to say that the question of legal instrumentalism is a bit murkier than Steiner would have us believe.

Finally in *The State of Illinois v. Illinois Central Railroad*, Lincoln successfully lobbied the legislature to give the Illinois Supreme Court original jurisdiction in a tax assessment dispute where he knew the court would be friendly to the railroad. This pulled the Illinois Central from the brink of bankruptcy in the wake of the panic of 1857. On a bipartisan basis, the leadership of Illinois apparently deemed the railroad too big to fail. (In his ruling, arch-instrumentalist and Young American Justice Breese remained typically ecstatic about “the future.”) This was precisely the kind of collusion that Horwitz painted in nefarious and conspiratorial tones. And Lincoln was in the thick of it!

Lincoln operated in an environment in which the modern business corporation was being created in law, and the Illinois Central retained him in part because of his political connections. As in the *Hurd* case, *The State of Illinois v. Illinois Central Railroad*, and in his work for Governor Bissell, for instance, Lincoln’s legal and political lives did, on rare but crucial occasions, merge. Citing an Illinois Central internal memo, Steiner himself notes that “the railroad did not just respect Lincoln’s skill as a lawyer; it also realized that Lincoln was ‘not only the most prominent of his political party, but the acknowledged special adviser of the Bissell administration’” (155).

Nevertheless, Steiner demonstrates characteristically careful scholarship to show that lawyers were under competitive pressures to take cases as they came, and his basic contention that Lincoln “never adopted an instrumentalist agenda” is mostly correct. In general Lincoln did take cases as they came and was willing to argue any side of a question.

In chapter four, “Law on the Prairie,” Steiner is on his home field in his examination of the law of slander. Steiner provides useful discus-
sions of many important cases, setting them in the context of legal change. Here his findings parallel the work of Karsten’s *Heart versus Head* and *In Tender Consideration*. Steiner finds that the law of slander was changed in Illinois to make actionable “falsely stating that any person had been guilty of adultery or fornication or had sworn falsely” (86–87). Not surprisingly, Steiner notes “that men sued but once over slander involving fornication or adultery and women sued twelve times over adultery or fornication suggests the existence of a double standard where a man’s reputation was not damaged by gossip about adultery and fornication. The existence of a double standard is best shown in the willingness of men to implicate themselves in the very sexual misconduct that they used to defame women” (90). Even while noting its recent origins in statute, Steiner sees this as evidence of persistent communalism rather than as an aspect of Victorian “separate spheres” thinking that accompanied the waning of the household economy in favor of market relations.

Steiner stresses the degree to which Lincoln acted as a peacemaker and that so many of these suits were either dismissed or the damages partially remitted, indicating that the reputation rather than the damage award was what the plaintiffs really wanted. Not surprisingly given the demands of his thesis, Steiner spends only two-and-one-half pages in this chapter on debt litigation, which again, was the majority of Lincoln’s practice.

In chapter six, “Working for the Railroad,” Steiner summarizes Lincoln’s involvement in each area of railroad law in which he worked, providing exhaustively researched, up-to-date write ups of some of the most important cases. In his discussion of *Illinois Central Railroad Company v. Morrison & Crabtree*, he notes that “in Illinois, as in most American jurisdictions, free-market ideology triumphed over the prior strict liability rule” (149). Steiner then deflects the imputation that Lincoln here was implicated in legal instrumentalism by noting at the end of the chapter that Lincoln took cases both for and against railroads. But here again, legal decision-making involved legal instrumentalism, and Lincoln was a part of it. Lincoln used his knowledge of the justices in an instrumentalist process whereby common law constraints were struck down on behalf of modern business corporations. Arguing before Justice Sidney Breese, Lincoln successfully set what at the time was regarded as a very important precedent in favor of the railroads. In his opinion, Breese showed himself to be characteristically eager to create new rules in order “to protect the ‘magnificent and costly enterprises’” (149). Earlier, Steiner demonstrated that Lincoln’s connections to the Bissell administration were
precisely why the Illinois Central hired him, but here he is forced to argue that Lincoln was not hired for his “negotiating skills or for [his] ‘local knowledge’ of courts and governmental bodies” (158). Steiner concludes that “The Illinois Central hired Lincoln to represent it because he was well known to, and trusted by, rural juries. But this fame and trust were founded on the perception that Lincoln stood for something besides the self-interest of any particular client. The railroad wanted Lincoln to represent its own narrow interests, not to act as a mediator for the community’s interests” (159). Here Steiner’s conclusion does not seem to be supported by the chapter. Lincoln did do jury trial work for the Illinois Central, and he was good at it. But in the cases under discussion, Lincoln was not involved at the trial level and did not argue before a jury. As well as anyone in the state, Lincoln knew when an instrumentalist argument was likely to prevail with these particular justices—and when not. In addition to his jury work and his formidable legal acumen, it was his knowledge of the justices and his political connections that made Lincoln & Herndon indispensible to the Illinois Central Railroad.

Steiner makes some of his most important contributions with his fifth chapter, “In the Matter of Jane, A Woman of Color.” As a contribution to the Lincoln literature, this chapter alone is worth the price of the book. The chapter title signals the depth of Steiner’s reimagining here: Traditionally, the case has been called “The Matson Case,” and the entire affair has been described in terms of its white participants. African Americans have been present merely as the bone of contention, as the football in a white man’s game. Through Steiner’s impressive research, the humanity and the agency of Jane and her family are restored and the dark tragedy of this case revealed for the first time.

One hesitates to spoil the story here by recounting the details, and there are many. (My notes on this chapter alone run to seven typewritten pages plus a three-page chronology.) Steiner has done remarkable work in the sources to uncover the character of the slave owner Matson, the plastic character of slave law north of slavery, the racist character of Lincoln’s co-counsel, the high profile of the judges, and the ironic fact that the abolitionists, who one might be tempted to see as having worn the white hats throughout this process, encouraged their clients to emigrate to Liberia, where their lives became nasty, brutish, and short. (If nothing else, this goes to show just how late even activist abolitionists toyed with ideas of colonization.) So complex are the ironic twists of this case—including a nasty counter suit involving the charge of fornication against Matson for setting up a farm with his mistress—that it was difficult to follow them all. The
case could easily become a book in itself, one that would provide an excellent window on a very important and neglected part of our racial past, North, South, on the border, and even internationally. Steiner has earned the right to author such a book.

Steiner’s careful scholarship in this chapter and throughout the book makes *An Honest Calling* far and away the best book on Lincoln’s legal life. It was written at a moment when the sands of historical scholarship of antebellum law were shifting, leaving Steiner’s contention that Lincoln saw himself as a communal peacemaker unconvincing. But that does not diminish the achievement of Steiner’s work in the archives. Even those who revise his findings will do well to start with his footnotes.

In *Lincoln the Lawyer*, Brian Dirck says he is interested not in American legal or social history but in “what the law did both to and for [Lincoln]” (x). He wants to root “Lincoln’s sense of community firmly in his legal career” (xii). But in characterizing antebellum law Dirck cannot avoid legal history, and the “sense of community” that Dirck uncovers seems to be the lack thereof. Thus he actually sets sail counter to Steiner’s communitarian interpretation. Like Steiner, Dirck rejects Horwitz’s view that antebellum lawyers were the “shock troops of capitalism.” But here the similarities end. Contrary to Steiner, Dirck stresses that Lincoln *was* an outspoken advocate of commercial development. Dirck however escapes Horwitz’s charge of legal collusion with big capital by stressing that there was “no clearly identifiable line separating a ‘creditor’ from a ‘debtor.’” Many people were both at the same time, borrowing and lending money in the same breath. Lincoln sometimes represented the same client as debtor and as creditor in different cases” (61).

“To [Lincoln],” writes Dirck, “economic growth was not really about rights talk, or weighing carefully the social costs involved in developing industries like railroads. What he saw instead was energy. . . . He was there to minimize their risks and to fix what got broken when [the energy men] pressed matters too far” (98). The use of the word *energy* here comes not from Lincoln’s world, but from Willard Hurst, who in the 1950s invoked the “release of energy” (a space age analogy to the science of physics) to square irrefutable legal-historical evidence of activist government with the Cold War need for an American past that emphasized individual initiative and a minimal state. Government was indeed active, but those activities were neutral, even passive morally and socioeconomically speaking. Thus rather than moving forward in the historiography to get past Horwitz, Dirck retreats wholeheartedly to the liberal consensus view of a relatively classless
America accompanied by a liberal or neutral legal order in which, ir-
respective of class position, “one American’s economic development
could be another American’s threat” (95). Consistent with this view,
Dirck’s Lincoln took from his legal career a corresponding tendency
to maintain an “emotional distance” from the community he served.
As a lawyer, Lincoln and the law were just the neutral “grease” in
the wheels of liberal market capitalism. (And note well, lubrication
generally becomes noticeable only when it fails to work properly; it
is not supposed to shape the process.)

In this, Dirck resembles another consensus historian, David Donald,
who similarly avoided dealing with Lincoln’s Whig commitment to the
positive moral power of the state by somehow finding in the workaholic
Lincoln a “passive personality.” Acknowledging Lincoln’s commitment
to interventionist government and moral community is particularly
difficult for historians committed to a view of the Civil War as a clash
between a pre-modern, communal South, and a modern, commercial
North. In his book on Lincoln and Jefferson Davis, Dirck pressed pre-
cisely this kind of interpretation: Davis saw America as a “community
of sentiment,” while Lincoln supposedly saw America as a “community
of strangers.” But among others, James Oakes has shown that there was
a lot more “Gesellschaft” in the South than we once supposed. And
Daniel Walker Howe has demonstrated the persistence of “Gemein-
schaft” in the North, noting that most lives remained disciplined by
“the cultural constraints of a small community.” In a wild and perhaps
unconscious anachronism, Dirck nevertheless treats us to a version of
the old “liberal consensus” view of a laissez faire North.

To a remarkable extent, antebellum law was indeed an impersonal,
rule-based realm of dispute resolution. Yet the impersonal business
corporation arose only very late in Lincoln’s career, and thus he lived
almost entirely in a world of very small towns, very personal relation-
ships, and stringent moral and economic regulation. This prompted
Novak to push back the rise of a modern “liberal” legal order to the
early twentieth century and to carve out a third intermediate stage
of legal history—“the well-regulated society”—a period in which a
professional bar did indeed dispense relatively dispassionate and
impersonal justice, but also a period in which the morals and cultural
constraints of a small-town world remained operative. The Lincoln
Legal Papers represent the detritus of this legal order. Unfortunately,
Dirck cites neither Novak nor Karsten, two of the most important
recent voices on the character of antebellum American law.

In making his case for an essentially neutral Lincoln, Dirck unfor-
fortunately relies on frequent speculations, some of them quite lengthy.
For instance, he writes that Lincoln “knew, or tried to find out, as little about these people as possible. His life as a lawyer dictated distance: from his clients, his colleagues, witnesses and other courtroom participants, and often from the social and economic consequences of the cases he litigated” (7). Dirck backs up this conclusion with no notes, reminiscences, or comparisons to Lincoln’s colleagues on the circuit. Rather for two pages he imagines how Lincoln’s initial interview with a client might have looked (70–71). A similarly speculative passage from page 108 to 111 supposedly demonstrates Lincoln’s “emotional distance.” With such a wealth of actual historical material from which to write, including both older reminiscence material as well as the new wealth of legal documents, this choice seems inexplicable. Was Lincoln cold? As Dirck tells us, some of his colleagues thought so, chiefly Leonard Swett (52). But why were his colleagues not similarly affected by their practice of law? And was Lincoln really so distant? It seems just as likely that Lincoln felt deeply indeed, but that he was also compensating for a painfully sensitive streak. He was, after all, a notorious raconteur who clearly found in humorous storytelling an artistic way to assimilate and deflect some of the drama and the agonies of such an extensive practice. Dirck’s Lincoln was a loner and a drudge who used his charisma and storytelling instrumentally, and “who got up every morning, went to work, and learned—in ways quiet yet profound—about how people interacted with one another in a community, about the realities of their conflicts and abrasions, and about what he should and should not expect from the bumptious sea of humanity that crossed his path” (7).

In his first two chapters, Dirck attempts to show us how and why Lincoln became a lawyer, suggesting that beyond being honest and not “vexing” (stirring up unnecessary litigation in order to make money), Lincoln “gave no indication that he felt it was his duty to nurture the moral lights in a courtroom” (12). Dirck merely asserts that Lincoln “lacked the family connections that sometimes guided a beginning attorney” (14), which further emphasizes Dirck’s portrait of Lincoln as a man essentially divorced from communal and moral commitments. Dirck follows Herndon to a large extent in these chapters, breaking little new ground and barely touching the Lincoln Legal Papers as a source. The result is a relatively familiar and traditional Lincoln narrative, but one inconsistent with what we have learned since. Oddly, Dirck does not follow Winkle in exploring the social and economic trends that led so many young men to become self-made in this period, nor does he explore Lincoln’s peculiar, almost brotherly relationship with the Todd family, who after all set him up in legal practice, to
say nothing of his house, his marriage, and his political career. In this, Steiner’s account does more to explain Lincoln’s nevertheless remarkable rise.

To his credit, Dirck wants to show us Lincoln at work in the drudgery of the law and, not surprisingly, he does more than the other authors with Lincoln’s huge debt practice, which, as he tells us, accounted for more than 62 percent of his cases in some twenty-five years of practice, literally thousands of “utterly un-interesting” cases (5). Here some of his speculations are more useful: “By the mid-1850’s [Lincoln] had enough lucrative cases in other areas that he could probably have foregone the smaller promissory note cases that were vital in his early days as a lawyer. But small-scale debt litigation remained, all the way to the end of his law career, so that one wonders whether it is indicative of some deep insecurities in Lincoln, an unwillingness to let go of five-dollar debt cases because, small though they were, they represented steadiness for a man who grew up poor and experienced his share of instability (74).” Since he was also notorious for undercharging these same clients, it is possible that Lincoln took these cases out of a sense of professional responsibility. But either speculation works, and Dirck’s emphasis on this core of Lincoln’s legal practice is a necessary corrective to Spiegel, who concentrates on more spectacular but less representative cases, and to Steiner, who bases his interpretation disproportionately on Lincoln’s slander cases.

In chapter four, “The Energy Men,” Dirck begins to pursue his thesis in earnest. Dirck is especially good when he uncovers the story behind particular Lincoln cases. A series of debt-related cases involving Frazier Reed, for instance, takes him into the economic context of Springfield in the 1840s, and from there he gives us a vivid picture of a bustling community of men on the make. There were enough of the energy men “and their deals scattered throughout Lincoln’s practice to suggest a business culture that encouraged risky, wheels-turning-inside-of wheels dealings. In many ways, Lincoln’s role in this culture was about negatives” (82). In Dirck’s view, Lincoln’s position as a lawyer put him largely above the fray, with the exception that Lincoln favored entrepreneurs and business development. Qualifying this somewhat, Dirck continues, “representing [energy men] was about more than acting as their legal janitor; sometimes their cases concerned positives as well as negatives, embodying the principles of economic development and entrepreneurial spirit that he admired and wished to cultivate” (83). Dirck then qualifies his qualification by noting that Lincoln “could not afford to pick and choose cases based on which
forms of litigation best advanced his economic agenda” (84), leaving us again with a neutral Lincoln in an essentially neutral legal order committed to Hurst’s release of entrepreneurial energy.

As Lupton has Herndon tell us, “not even Judge David Davis or any or his other intimates felt sufficiently free and easy to call him Abe or slap him on the shoulder” (29). Thus Lincoln did manifest Olympian qualities on occasion. But Dirck’s passively neutral Lincoln is difficult to square with his lifetime of moral civic engagement. While Dirck reluctantly acknowledges there “may have been” some paternalism in Lincoln regarding women, he generally overlooks Lincoln’s connections to his community and ultimately rejects the paternalism detected by the Lincoln Legal Papers staff (136–37). Instead Dirck tacks back to the older school of legal history associated with Willard Hurst or even Richard Posner, who saw the role of law in this period negatively, as releasing entrepreneurial energy, rather than as the tool of big capital to aggrandize itself at the expense of the masses (Horwitz), or as a positive force, shaping economic development to positive moral ends historically bounded by the legal ideal of a “well-regulated society,” Victorian ideals, or the self-made ethos (Novak, Karsten, or Daniel Walker Howe, respectively).

Dirck leaves unchallenged the older historiography of Hurst, but the sheer size and scope of the Lincoln Legal Papers ought to forestall this interpretation by alerting us to the positive role of law in shaping antebellum economic activity. In the development of modern capitalism, Dirck leaves the role of positive law (and of men like Lincoln) unexpressed, inadvertently endorsing the myth of a “stateless,” morally neutral, almost libertarian American past, and obscuring the intensely regulated economy revealed by such recent legal historians as Novak. More intense legal-historical scrutiny of debt and currency cases of the kind the Lincoln Legals directed toward women and family law, as well as more attention to Lincoln’s appellate practice in corporate and railroad cases, would help dispel the myth of “free” markets and a stateless America. A stable yet flexible money supply does not, it turns out, drop from trees. The legal framework for America’s vital rail network was not built by an invisible hand or a neutral legal order: If we pull back the curtain a little, in Lincoln’s bankruptcy and railroad cases we see hands quite visibly at work.

Dirck does an excellent job of showing just how Lincoln’s legal experience with controversies involving “county roads, bridges, and the like” informed his speech on internal improvements with a cautious approach (86). In his speech, Lincoln referenced precisely the kinds of cases that arose in his practice in response to internal improvement
projects in Illinois. Thus, concludes Dirck, “his law practice tempered and educated his politics” regarding internal improvements (87). But Dirck might have found a similar pattern with debt and promissory note cases, and here Lincoln’s law practice did not temper his commitment to positive government intervention in the economy, it promoted it! Lincoln’s Democratic opponents had a lot to do with the currency disorders of the 1830s. Federal bankruptcy statutes passed by the Whigs after Harrison’s victory not only provided Logan and Lincoln a professional windfall, they helped relieve many of those same debtors Lincoln had to face every day either as collector or as counsel. The prospect for federal bankruptcy law was one reason Lincoln worked so hard to build up the Whig Party and to get Harrison elected in 1840. Similarly, Lincoln’s political positions on banking and the currency would have eliminated the incredible muddle of personal promissory and unstable bank notes that helped form the mainstay of his practice but which had fueled a speculative bubble and, after the collapse of 1837, clogged the arteries of commerce. Analogous to this country’s current mortgage crisis, this currency and debt crisis had left many in desperate straights. While as a lawyer Lincoln took cases as they came, as a Whig, he strove to make an opportunity economy work for more people, and in this his politics were informed by his legal experience. Just to be clear: Lincoln believed in the positive role of government, among other things, to expand the economic opportunity so that anyone might become self-made. This was part of a broader set of middle class, Victorian moral commitments. His experience at law reinforced rather than chastened these beliefs.

No doubt Lincoln’s law practice sometimes made Lincoln a prudent man, but in Dirck’s liberal consensus interpretation, Lincoln’s dedication to active moral government virtually disappears. Dirck’s passive and neutral Lincoln entirely misses the way that his legal work exposed him firsthand to the full range of public policy and how that in turn contributed to his political vision far beyond merely providing him with “networking and general people skills” (152). In combination with Lincoln’s leadership experience in the state legislature, a congressional term, and a founding role in not one but two political parties dedicated to positive moral government, the Lincoln Legal Papers reveal how his law practice gave our most successful president an unparalleled public policy expertise. The successful financing of the Civil War was just one of dozens of ways the country benefited from Lincoln’s legal experience. Lincoln would need no tutorial from Chase. Thus Dirck’s liberal consensus interpretation mischaracterizes Lincoln on the most fundamental level: Lincoln understood the need
for positive government because he had long experienced government and policy literally from the ground up.

Oddly, Dirck maintains that Lincoln “was in reality a pretty ordinary attorney” (142). Dirck concedes that Lincoln “was occasionally a part of litigation that made its way to the U.S. Supreme Court” and that “this was a richer professional life than many have supposed,” but adds that “it hardly floated in the rarefied air of John Marshall” (144). Dirck claims that Lincoln’s legal reputation stemmed primarily from the exaggerations of his colleagues after the war. But then he himself relies on Seward’s jealous remark that Lincoln was “a ‘little Illinois lawyer’” (143) and Linder’s reminiscence of Lincoln as a newly minted lawyer in 1835: “He did not make a very marked impression upon me, or any other member of the bar” (145). Absent deeper investigation, one set of reminiscences should be as good as another, and in any case, these latter reminiscences are clearly problematic.

Dirck notes that “even on those rare occasions when a case touched upon a sensitive or important area of American life—railroad liability in the Rock Island bridge case, for example—Lincoln’s arguments rode the crest of the larger currents in American law. He created no new waves himself” (144). If by “rare” one means relative to Lincoln’s huge caseload, this may be true. On the other hand, Dirck ignores Lincoln’s appellate practice almost entirely. As legal counsel, Lincoln was involved in setting some important precedents. In his much-neglected *The Power that Governs*, Keith R. Schlesinger uncovered an important controversy between Democrats and Whig/Republicans over the nature of the business corporation, which did play out in the courts. Just to be clear, while federal, Logan County, McLean County, and Sangamon County files were destroyed by fire or otherwise, we have records of over 5,000 cases. Of the existing case files, Lincoln and his partners handled some 411 cases before the Illinois Supreme Court and 345 federal court cases, one of which reached the Supreme Court of the United States, where he was also attorney of record in four other cases. Lincoln was a “lawyer’s lawyer” routinely called in by other lawyers to handle difficult cases as well as appeals. He was the privileged legal counsel to a sitting governor in deep trouble and an impeached Illinois Supreme Court justice, both of whom, one can only assume, knew how to pick an attorney. He was on retainer for the Illinois Central and handled some very important cases for them. And while by 1860 political fame had something to do with it, he was offered $10,000 per year by Erastus Corning to become general counsel for the New York Central. If, as Dirck asserts, “Lincoln
was not by any reasonable measure a legal superstar” (143), who was? Taney? Stanton? Linder? Here again, Lupton’s straightforward introduction is far more convincing.

Of the three books under review, *Lincoln the Lawyer* is the least helpful. While Dirck has successfully organized this unruly body of material into by far the most *readable* account of Lincoln’s legal practice in a generation, unfortunately he has done so by pressing a rather dubious thesis and by indulging in frequent speculations. And *Lincoln the Lawyer* lacks the in-depth treatment of individual cases that help make the other two books so valuable even where the overall argument falters.

Taken together these three books provide an excellent overview of Lincoln’s legal practice. Thus we probably do not need another treatment of Lincoln’s overall legal practice at the moment. Nevertheless, we are hardly finished digesting the implications of the Lincoln Legal Papers. There is a middle course to be charted between the paranoid interpretations of Horwitz on the left and libertarian fantasies of American exceptionalism on the right. The origins of the modern business corporation lay not in the invisible hand but in the positive actions of the state and *as a form of economic regulation*. This is clearly visible in Lincoln’s legal practice. As a lawyer for the Illinois Central, Lincoln also acted as a lobbyist; the two jobs hardly being distinct even today. In the aftermath of the Panic of 1857, Lincoln successfully lobbied to reduce the railroad’s tax assessment so that the road could survive the economic downturn. As we now say, the railroad was too big to fail. Understanding of the essentially public rather than private origins of our modern economic and legal order could hardly be more relevant today. None of these three fine books quite capture that important story. And there are doubtless other stories as well. We are now beginning to see books on individual trials, such as *Moonlight: Abraham Lincoln and the Almanac Trial* and *The Case of Abraham Lincoln*, and we will doubtless see more. As a result of the Lincoln Legal Papers, hopefully we can look forward to works both on Lincoln’s involvement in various areas of legal history such as railroad law, corporate law, and race law, as well as new interpretations of antebellum law that have little to with Lincoln one way or another. There is a wealth of social history in the Lincoln Legal Papers, easily exploitable and waiting for interpretation.