## THE OXFORD HISTORY OF THE LAWS OF ENGLAND: VOLUME II, 871-1216

BY JOHN HUDSON

*Oxford University Press, Oxford, U.K., 2012. 956 pages, $300.00.*

**Reviewed by Jon Blue**

This is the latest volume in what will ultimately be a 12-volume series entitled *The Oxford History of the Laws of England*. The *Oxford History* series may be compared to our own *Oliver Wendell Holmes Devise History of the Supreme Court of the United States*, and not just because of its historical sweep and agonizing lack of completion. Like the *Holmes Devise*, it aspires to be comprehensive and will consist of numerous volumes written by different authors over many years. But, also like the *Holmes Devise*, its handsome volumes are stratospherically priced, placing them out of reach of many students and practitioners who might otherwise purchase them and learn something of the history of the legal profession. I hope that publishers will eventually print affordable editions of both series to reach wider audiences.

Like its predecessors in the *Oxford History* series, the present volume bears the hallmarks of a strong general editor. It is usefully organized, clearly written, and shows admirable familiarity with unpublished materials. Its organization merits particular praise. Although it is possible to read the volume from cover to cover, it is plainly intended to be a research tool. A reader wishing to track the development of a particular field, such as land law, criminal law, or family law, at any stage in the three-century span of the volume, need consult only the table of contents to find the field and time period in question. If the reader wishes to go beyond the author's conclusions to the primary sources behind them, the volume's copious footnotes and useful appendix on sources will be of enormous assistance, although unpublished sources, by definition, remain difficult to access.

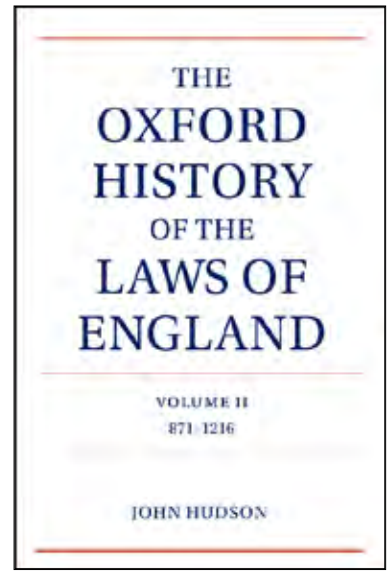
The vast time period covered presents challenges not confronting other volumes in the series. During the three centuries under review, the political identity of England was twice transformed. Anglo-Saxon England, from the rise of King Alfred to the Norman Conquest, had little of the infrastructure of a modern state. Although a king nominally ruled much of the island, local authorities retained considerable control. Moreover, Danish invaders periodically seized much of the kingdom.

All of this came to an end in 1066. The victorious Normans became an army of occupation, dominating an oppressed Saxon population with a new language and tight political control.

Norman hegemony itself came to an end with the 1154 accession of the Angevin king, Henry II. Unlike the fictional England-obsessed monarch immortalized in the 1966 play and 1968 film, *Lion in Winter*, the actual Henry II was the French ruler of a considerable continental empire, of which England was but a small part. His son, the crusading Richard I, spent only six months of his 10-year reign in England. When Henry's younger son, the ill-remembered John, paid increased attention to England following his loss of Normandy in 1204, that royal attention was unappreciated by the feudal barons who controlled the island. The result, in 1215, was the Magna Carta, the final major event that the present volume discusses.

The overarching question governing this period is to what extent the substance and procedure of English law were altered by these political events. Traditionally, these events have been considered cataclysmic, resulting in three separate eras of legal history. Nineteenth-century British jurist and historian F.W. Maitland considered the Norman Conquest to be a "catastrophe" that destroyed the Anglo-Saxon kingdom. Later, Maitland opined, the common law appeared with "marvelous suddenness" in the reign of Henry II.

More recent scholars, notably Patrick Wormald, have doubted this easy taxonomy. Rather, Wormald argued, English law is distinctive precisely because it is "as old as the English kingdom." In his view, the




lawmaking powers of Henry II were made possible by a kingdom-wide system of royal justice established in Anglo-Saxon times.

John Hudson, the author of the present volume, takes a nuanced view of the controversy. Hudson argues that, "to the development of English law, the Anglo-Saxon period contributed ... a powerful machinery of royal government, significant aspects of a long-lasting court structure, and important elements of law relating to theft and violence." The Norman conquerors added new aspects of land law, which were to influence the common law for centuries. In addition, under the Angevins, a "more routine royal administration of justice" developed.

Hudson skillfully tracks the development of the substance and procedure of the law occurring in this period. From a modern point of view, three changes stand out.

One development was the beginning of a professional judiciary. Through most of the period in question, royal judges were royal servants, with a primary duty to the king. Only in the reign of Richard I did Simon of Pattishall become what Hudson calls "a career judicial specialist." Simon did not find the path of judicial independence easy. King John, unhappy with one of his decisions, ordered Simon's lands seized and his chattels sold.

A second, concurrent, development was that of a professional bar. Prior to the

13th century, persons acting as "attorneys" tended to be family members, such as the fathers and husbands of litigants, or other persons with ties to the litigants. In John's reign, we begin to see attorneys with professional training who serve numerous clients. At about the same time, we begin to see a professional class of pleaders (later called sergeants) speaking in court on behalf of litigants. One of the first pleaders was John Bucuinte. Although Bucuinte's surname meant "oily mouth," his supporters considered him "a wise man in worldly things"—an indication of the mixed reputation of the legal profession since its beginning.

The third major development, this one occurring at the very end of our period, is the demise of the trial by ordeal and its eventual replacement by the trial by jury. Trial by ordeal was an important method of proof throughout the early Middle Ages, with the outcome of the procedure thought to reflect the judgment of God. When priests were finally prohibited from participating in the ordeal by the Fourth Lateran Council in 1215 (coincidentally the year of Magna Carta), its perceived legitimacy ended.

Trial by jury stepped into the breach. The jury was already an ancient institution in which bodies of local residents were recruited to swear on the basis of personal knowledge as to facts concerning issues such as land rights and suspected crimes. In 1166, the Assize of Clarendon adopted this procedure on a more routinized basis. But this was what we would now call a pretrial procedure. If a jury found supporting evidence, a person accused of a crime went to the ordeal. Civil cases could be decided by trial by battle or by jury findings on specified issues. Following the abolition of the ordeal in 1215, the jury was eventually transformed into the verdict-rendering entity that we recognize today.

Readers of the present volume will learn that cumbersome procedures and attendant delays of the law are nothing new. Hudson's chapter on procedure in land cases in Angevin England provides an excellent illustration. A would-be litigant claiming title to land in Henry II's reign would first have to obtain a writ to start the case. Some writs were boilerplate and required only a small payment to a scribe. Others were complex and expensive. Precision was essential. If a name was incorrect, a new writ would have to be obtained. A summoner (recall Chaucer's "The Summoner's Tale") would have to be found to serve the summons. Summoned parties would use "essoins," which were formal excuses for not appearing in court. Essoins—based on reasons such as illness, royal service, or religious pilgrimage—were themselves the subject of an extensive body of law, and much time could be spent litigating them, while tenants continued to enjoy disputed lands. Once everyone was finally in court, the demandant would set out his claim in a set form of words. A formal denial, followed by further pleading, would follow. Exceptions might lead to a jury's finding on specific issues of fact. Alternatively, the matter could be decided by trial by battle. A litigant could either fight himself or (more prudently) hire a champion. At least one attorney, Simon Tyrel, offered his clients a full service law firm by additionally appearing as a champion.

The frustrations of the period are exemplified by the *Antsey* case, litigated from 1158 to 1163. Richard of Antsey claimed an inheritance from his uncle, William de Sackville. William had a daughter named Mabel, but Richard claimed that William's marriage had been annulled and Mabel was illegitimate. Richard was compelled to present his case to both lay and ecclesiastical authorities, including Henry II, the Archbishop of Canterbury, the Pope, papal judges delegate, and the royal court. To begin the case, he had to send a man to Normandy to obtain the King's writ. Once obtained, the writ was sent to Salisbury to obtain the Queen's seal. The suit was then transferred to the court of the Archbishop of Canterbury, and Italian legal scholars had to be hired to correct a writ of appeal from the Archbishop to the Pope. Numerous horses died galloping back and forth across Europe with messages relating to the case. Eventually, Richard had to attend the King at Woodstock for eight days before receiving judgment. The costs were staggering.

You can practice law successfully and not know any of this, just as you can win the Daytona 500 without knowing the history of the internal combustion engine. But ours is an intellectual profession, and knowing the history of legal doctrine helps us understand its richness and texture. Knowledge of the evolution of legal institutions helps us to appreciate that they continue to evolve in our own time. As every practitioner knows, the jury trial, conceptually the centerpiece of our legal system, is now going the way of trial by battle. Some future historian of our own time will chronicle the rise of plea bargaining and alternative dispute resolution in much the same way that we now chronicle the long-ago rise of the jury.

Reading Hudson's volume certainly persuades us that change can be for the good. No one reading this work would wish to return to the days of essoins, champions, and the ordeal. But Hudson has meticulously compiled an invaluable and fascinating reference work that, if eventually made affordable, will be useful for students and practitioners. ⊙

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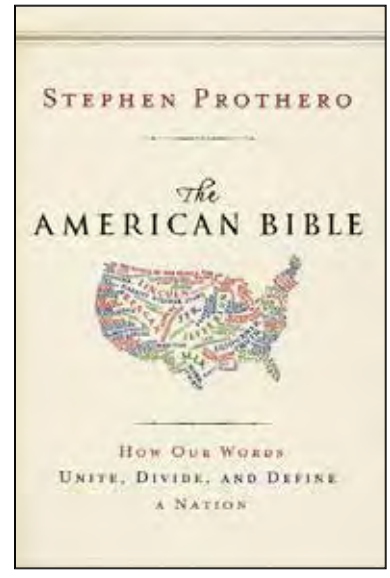
## THE AMERICAN BIBLE: HOW OUR WORDS UNITE, DIVIDE, AND DEFINE A NATION

BY STEPHEN PROTHERO

*HarperCollins Publishers, New York, NY, 2012. 533 pages, $29.99.*

**Reviewed by John C. Holmes**

In *The American Bible*, Stephen Prothero, chair of the religion department at Boston University, presents a multifaceted view of the United States, its history, and ideals, by examining 38 famous documents and utterances that he claims collectively constitute the American "bible." He categorizes these 38 items as if they were sections of the Bible. Under "Genesis," for example, he includes, among other documents, Thomas Paine's *Common Sense* and the Declaration of Independence;



under "Law," he discusses *Brown v Board of Education* and *Roe v. Wade;* under "Chronicles," he places *Uncle Tom's Cabin* and *Adventures of Huckleberry Finn*; under "Psalms," he includes Irving Berlin's "God Bless America" and Woody Guthrie's response to it, "This Land is Your Land"; under "Proverbs," he lists Lincoln's "With malice toward none; with charity for all" and Coolidge's "The business of America is business"; under "Prophets," he examines speeches or writings of Henry David Thoreau, Dwight Eisenhower, Martin Luther King Jr., and Malcolm X; and, under "Gospels," he looks at the inaugural addresses of Thomas Jefferson and Franklin Delano Roosevelt, and at Ronald Reagan's speech nominating Barry Goldwater for President in 1964. He categorizes still other items under "Lamentations," "Acts," and "Epistles."

Perceptively and without bias, Prothero introduces us to the time, place, context, and meaning of each item that he considers. He examines all sides of the subject in question, including criticisms of it. "Words matter," he writes, and "if you ask enough Americans you will see that the nation rests not on agreement about its core ideas and values, but on a willingness to continue to debate them."

Born in Norfolk County, England, Thomas Pain (the "e" came later), was an abject failure in his attempts at employment before he wrote the pamphlet *Common Sense*. His first wife died in childbirth, and he and his second wife separated. In 1774, in his late 30s, he was broke, out of work, and alone, when he met Benjamin Franklin in London, who gave him a letter of introduction to use in seeking success in the colonies. Paine obtained a job editing a sleepy Pennsylvania newspaper, and, on Jan. 9, 1776, he anonymously published *Common Sense*. Prothero quotes historian Bernard Bailyn: "The dominant tone of *Common Sense* is that of rage. The aim of almost every other notable pamphlet of the Revolution probe difficult, urgent, and controversial questions and make appropriate recommendations. The aim of *Common Sense* was to tear the world apart."

Unfortunately, Paine's venom carried over into verbal assaults on Christianity and—what really ruined Paine—on George Washington, whom he labeled "treacherous in private friendship ... and a hypocrite in publick life." Paine became "'the best-hated man in America.' He spent most of his last years alone, and when he died in poverty in Manhattan in 1809 only a handful of people attended his burial."

Although Prothero acknowledges the "soaring rhetoric" of the Declaration of Independence, he also notes the severe criticism that has been made of the implementation of its assertion that "all men are created equal." Such criticism has come from, among others, former slave Frederick Douglass, the Seneca Falls Convention women's rights proclamation of 1848, and socialist author W.A. Corey, who, in 1902, offered a declaration of independence for the working class. Abraham Lincoln quoted the phrase in his Gettysburg Address, thereby elevating the Declaration of Independence over the Constitution, which included compromises over slavery.

Most remembered from President Franklin D. Roosevelt's inaugural address is the phrase "the only thing we have to fear is fear itself," but this speech also introduced ideas that foreshadowed the creation of the "alphabet soup agencies," such as the Securities and Exchange Commission, the National Labor Relations Board, and the Federal Communications Commission, which permanently altered our system of government.

*The American Bible* has a purpose beyond its unique presentation of historical events, riveting as it is. Prothero writes:

> American politics is broken. As the culture wars drag on and on, Americans have forgotten how to talk to one another. Our national conversation about our common life has devolved into a shouting match, with our various technologies—radio, television, and the internet—only turning up the volume (and the heat). ... Here in the United States we used to argue on behalf of the nation. Today we argue for the sake of our parties. The first objective of *The American Bible* is to commend a better way.

How can it do that? Prothero explains:

> Many of the books in *The American Bible* are more revered than read. ... So I hope that this book will inspire readers to go back to these sources themselves—to tune out for a moment what party leaders are telling them and to tune in to what prior Americans have said about their nation and its people. Why allow John Boehner or Nancy Pelosi to dominate your book group when Jefferson, Lincoln, and King are in the room? ⊙

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## COSMIC CONSTITUTIONAL THEORY: WHY AMERICANS ARE LOSING THEIR INALIENABLE RIGHT TO SELF-GOVERNANCE

BY J. HARVIE WILKINSON III

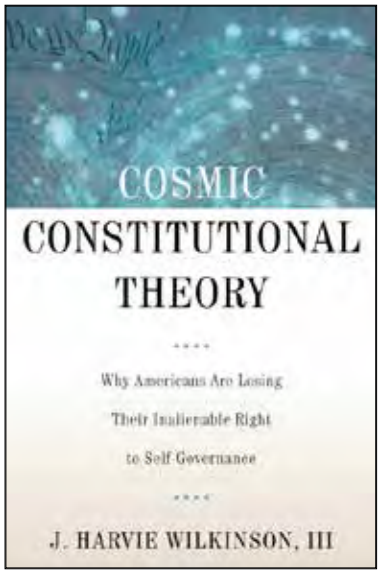
*Oxford University Press, New York, NY, 2012. 161 pages, $21.95.*

**Reviewed by Louis Fisher**

Over the past half-century, judges and scholars have developed a number of theories to help courts interpret the Constitution. They include the Living Constitution (Justice William Brennan), Moral Reading (Ronald Dworkin), Textualism (Justice Hugo Black), Originalism (Judge Robert Bork, Justice Antonin Scalia, among others), Political Process (John Hart Ely), Cost-Benefit Pragmatism (Judge Richard Posner), and Minimalism (Cass Sunstein). Many of these schools of thought promised to restrain judicial power.

In this stimulating and thoughtful book, J. Harvie Wilkinson III, a judge on the U.S. Court of Appeals for the Fourth Circuit, concludes that these "cosmic" theories have had the opposite effect. They invite greater recourse to judicial activism. He analyzes the issues with commendable clarity, fairness, brevity, and an engaging writing style. In 114 pages of text, he states that the various theories "are taking us down the road to judicial hegemony where the self-governance at the heart of our political order cannot thrive." Whether the legal doctrines are liberal or conservative, they promote judicial power and do "real damage to the rule of law."

Wilkinson asks why these efforts at constitutional theory are less reliable than the-




ories about natural science. He answers: "a document as complex as the Constitution" cannot "be bottled and pasteurized." In some cases, the theorists "have paid little more than lip service to the notion that judges should refrain from promoting their personal views of what is right and good." A common fault among the theories is that they "are so stacked against self-governance that the temptations for judicial misadventures will only increase in years to come." What is lacking "is not theory but the virtue of simple modesty that no longer beckons courts."

The book describes the Living Constitution as "activism unleashed." Justice Brennan and his colleagues, after using that theory to expand the rights of free speech and assistance of counsel, moved "deep into the thickets of abortion, capital punishment, and habeas corpus." The Supreme Court encouraged trial courts to exercise broad authority over local school administration, including school busing to further desegregation. Brennan's supreme constitutional ideal, "human dignity," gave courts broad authority to pursue their policies. Wilkinson rejects that orientation: "For all their drawbacks, democratic institutions are still ours in a way that courts are not." The Constitution "is not the courts' exclusive property."

Wilkinson examines Moral Reading in his chapter on living constitutionalism. David Strauss has written that moral "judgments of fairness and policy are appropriate" whenever text and precedent are "weak, equivocal, or unsettled." To Wilkinson, any "minimally inventive judge" is able to massage text and precedent to reach what he thinks is "a morally acceptable conclusion." Ronald Dworkin claims that abstract "moral principles about political decency and justice" must guide judges, but Wilkinson says that Dworkin "cannot give a satisfying answer to such questions as: whose morality? whose decency? whose fairness? whose justice?"

As for Originalism, Wilkinson agrees it "has an important role to play in constitutional adjudication" but is not a check on judicial activism. He turns first to Justice Hugo Black, who, Wilkinson says, "had a marked righteous streak." Black's "pure textualism ultimately came up short." Although "text can limit judges," it is also true that many constitutional provisions are "extremely open-textured." The Due Process Clause of the Fourteenth Amendment says that due process is required, but "it does not say how much." The Equal Protection Clause requires equal treatment under law "but provides no specific definition of equality."

Recognizing that text alone was insufficient, Robert Bork began a search for a different method of interpretation. In part he turned to Herbert Wechsler, who urged judges to decide cases on the basis of neutral principles to be applied regardless of the judges' personal preferences. Wilkinson points out that "a crafty judge could derive and define these principles in a politically motivated manner, resulting in political decisions despite neutral application." Bork thought that Originalism could check that impulse. The original public understanding of the Constitution would serve as the only legitimate source of constitutional interpretation. The founding generation would govern, not the contemporary judge.

Wilkinson sees the virtues of Originalism as real, and as including rekindling interest in the nation's founding period. Justice Scalia supports Originalism because the main danger in constitutional interpretation is that "judges will mistake their own predilections for the law." But all judges, including Justice Brennan, accept the need for some originalist analysis. The problem is that judges will pick through the same historical evidence and reach different results. In the federalism case of *Alden v. Maine* (1999), five members of the majority and four dissenters cited identical historical materials but came away with entirely different interpretations.

As Wilkinson explains, trained historians spend a lifetime at their task. Judges "are neither trained nor equipped to conduct this kind of inquiry." History professors are supported by research assistants trained in the tools of historical research. Judges have only their law clerks, and "although these newly minted lawyers are intelligent and capable, they are typically unversed in the historian's methods." Justice Scalia, with his commitment to Originalism, recognizes the incompatibility of historical analysis and the judiciary system, which does not present "the ideal environment for entirely accurate historical inquiry" nor does it "employ the ideal personnel." In the Second Amendment cases of *District of Columbia v. Heller* (2008) and *McDonald v. City of Chicago* (2010), nine justices did their historical homework and each time the Court split 5 to 4.

John Hart Ely advised judges to stop scrutinizing substantive outcomes of the legislative process. Instead, as Wilkinson describes Ely's Political Process theory, the focus should be on invalidating laws "that clog the arteries of political change or discriminate against minorities without enough political clout to make their voices heard." The promised benefit: a "modest role for judges; so long as the process functions smoothly, their work is done." Wilkinson agrees with Ely that "process matters" and appreciates that underlying Ely's work "is a fierce faith in democratic governance." Ely believes that representative government "can generally be trusted," and Wilkinson finds this belief "a breath of fresh air." Yet Ely's promise of judges who act as "referees" reminds one of the confirmation hearing of John Roberts to be chief justice, where he compared judges to baseball umpires calling balls and strikes. Once on the Court, Roberts joined a 5-4 decision in *Citizens United* to strike down a congressional statute that limited independent expenditures by corporations and labor unions: an example of judicial activism by anyone's measure. Calling balls and strikes did not unite the Court. Wilkinson asks: Did the Court in *Citizens United* "befriend free speech or smother small voices?" In his judgment, empowering judges to make "process" judgments "does not make judicial review any more democratic; it simply moves the ball between the shells."

To Judge Posner, the "pragmatic judge" does not impose personal policy preferences and does not feel "duty-bound to follow text, precedent, or tradition." Pragmatism seeks to avoid the rigidity of Originalism

and the pretension that judges decide on the basis of some supposedly neutral theoretical model. Yet Pragmatism turns judges away from the duty of restraint and toward "the role of aggressive junior varsity legislator." The pragmatic judge "must embark on the essentially legislative task of creating a desirable solution." As Posner concedes, there "is almost no legal outcome that a really skillful legal analyst cannot cover with a professional varnish." Pragmatic judges are "forward-looking" and "future-oriented." "In a very real sense," Wilkinson observes, "these attributes mean pragmatists aren't really judges after all."

Wilkinson views Cass Sunstein's Minimalism as a form of pragmatism. Judges should strive to issue "the narrowest rulings possible" and to avoid "broad, ambitious judicial rulings." Their objective should be to reach decisions that will gain widespread public consensus and to leave many potentially divisive issues undecided. This method of interpretation appears to encourage caution and restraint, but Wilkinson regards Minimalism as "no barrier at all to judicial activism." Sunstein hailed *Griswold v. Connecticut* (1965) and *Heller v. District of Columbia* as minimalist because they took "small steps" and were "narrowly focused on the particular provision[s] at issue." To Wilkinson, however, *Griswold* "was in many ways a warm-up exercise for *Roe v. Wade*, and *Heller* was anything but the short step Sunstein would have us believe."

In a concluding chapter, Wilkinson directly confronts the Court-centered orientation of contemporary constitutional law. He emphasizes that Article III "cannot be read in isolation." When one compares "its sparse nature" with the "copious" grants of authority to Congress and the President in Articles I and II, "a sense of proportion must quickly take hold." Article III is not only shorter than the other two articles but it "follows them." It would take "an extreme blindness not to discern that judicial restraint is a bedrock principle of America's founding and that the faith of the framers lay at the end of the day with the organs of government more proximate to the people." In a democracy, courts should not be the primary agents of social change: "It is the people at the ballot box who should decide, not the people wearing black robes—the many, not the few."

At times, Wilkinson seems to support judicial supremacy. He regards judicial restraint as important because the American system of governance "gives judges both life tenure and virtually the last word on a document that is at once supremely important and maddeningly inexact." However, given his obvious judgment that the Supreme Court has gone off the rails only to be brought up short by the elected branches and the general public, he probably does not consider Court decisions on constitutional matters as final in any legal, political, or historical sense. Twice the Court struck down congressional efforts to regulate child labor. Two decades later, in *United States v. Darby* (1941), not only did the Court unanimously uphold federal legislation that regulated child labor, but it apologized for the legal shortcomings of its earlier rulings. The 1940 flag-salute decision, even with its commanding 8-1 majority, came under immediate fire from experts and the public, prompting the Court three years later to reverse itself. The trimester framework of *Roe v. Wade* (1973), criticized by liberals and conservatives alike, was jettisoned by the Court in 1992. The judiciary's school busing policy encountered strong opposition from Congress and the public, leading to its eventual abandonment. The Court's 1986 decision upholding sodomy statutes (*Bowers v. Hardwick*) attracted little support and was sent packing in 2003 in *Lawrence v. Texas*.

Given Wilkinson's respect for self-government and democracy, there is no reason to place him anywhere near the judicial supremacy school. He notes that judicial review "may" give courts the "final constitutional word." For those who defend judicial supremacy to control shortcomings in democratic governance, he advises: "The imperfections of democracy are the imperfections of the human condition, which, by the way, have not passed the judicial branch by." An endnote adds that, "once judges have declared the scope of a right, neither the elected officials nor the states may define that right more narrowly." Of course that opens the door to the elected branches defining rights more generously, as Congress did in protecting religious freedom in the military after the Court in the yarmulke case of *Goldman v. Weinberger* (1986) declined to do so.

Is it true that once judges declare the scope of a right, the elected branches and the states may not define that right more narrowly? In *Buckley v. Valeo* (1976) and *Citizens United*, the Court struck down legislative limits on expenditures and protected the "speech" of corporations and labor unions. The Court provided zero evidence to support its assertion that unlimited expenditures in political campaigns do not create corruption or even the appearance of corruption. Congress has every right (and duty) to hold hearings to collect evidence on the effects of unlimited expenditures in elections. If the results demonstrate damage to democracy and the trust of citizens in the electoral process, Congress should pass legislation to restrain spending. The Court could declare the statute invalid under *Buckley* and *Citizens United*, but it would be institutionally foolish to strike down the statute merely because it is incompatible with evidence-free Court rulings. A wise Court would announce: "Congress has assembled evidence that was not available us when we decided *Buckley* and *Citizens United*. We now, after due consideration, defer to the legislative judgment and overrule our decisions." ⊙

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## TIME TO START THINKING: AMERICA IN THE AGE OF DESCENT

BY EDWARD LUCE

*Atlantic Monthly Press, New York, NY, 2012. 320 pages, $26.00.*

## BETTER, STRONGER, FASTER: THE MYTH OF AMERICAN DECLINE ... AND THE RISE OF A NEW ECONOMY

BY DANIEL GROSS

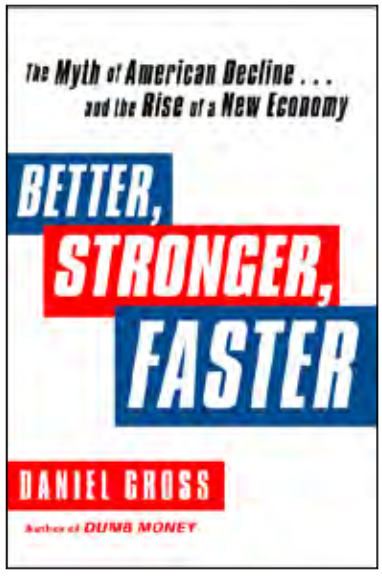
*Free Press, New York, NY, 2012. 272 pages, $26.00.*

**Reviewed by John C. Holmes**

Edward Luce, a British-born American citizen, was a speech writer for President Obama's Treasury secretary Lawrence

Summers and is now the Washington bureau chief of the British *Financial Times*. As such, he brings the perspective of both an insider and an outsider to *Time To Start Thinking: America in the Age of Descent*. Luce believes that more government stimulus in infrastructure, education, and job creation can ameliorate the United States' economic problems, but he is extremely pessimistic about America's future. Although he praises the United States' influence in world affairs since the early 1900s, he suggests that our future will parallel Britain's fall from world leadership.

Luce demonstrates the many weaknesses in U.S. society, which he sees as caused by the extreme conflict in political agendas, the bureaucratic failure to resolve problems efficiently, and the greed that allows CEOs to receive outrageous compensation while employees are shortchanged and outsourced. Luce also traces America's decline in education, product innovation, and ability to govern. Politicians pontificate on the declining prospects of the middle class, yet seem incapable of taking action that might improve the situation.


*Time To Start Thinking* benefits from Luce's interviews with many experts as well as ordinary people in a wide variety of fields, including business, politics, and education. Although he articulately presents both sides of the many issues he considers, his conclusions too often spring from speculations and overly cursory analyses. For example, Luce concludes that it is nearly inevitable that China will overtake the United States as a world power, citing the fact that its gross domestic product is close to overtaking ours. However, he ignores that China's per capita income is only about one-fifth that of ours, and that the income disparity among its population is even greater than that among ours.

In *Better, Stronger, Faster: The Myth of American Decline ... and the Rise of a New Economy*, Daniel Gross, editor of global finance for *The Daily Beast*, discusses many of the same issues that Luce does, but in nearly every instance he comes to the opposite conclusion. For example, although he agrees with Luce that China's GDP will overtake that of the United States in the near future, he emphasizes that the low income of the average worker in China will cause problems that, coupled with shoddy business practices, may make economic progress unsustainable. Furthermore, the United States has a history of meeting the challenges of other nations—such as the Soviet Union during the Cold War and Japan in the decades after World War II—that seemed capable of overtaking us in world influence. Gross notes that the claim that the United States is at present in a dire situation is exactly what was said by many during Franklin Roosevelt's first administration. We pulled through then, and Gross predicts that we will do so again.

Gross means for the title of his book—*Better, Stronger, Faster*—to refer to the method in which America has in the past and continues today to meet not only economic problems, but social and political ones. Declining to list his own specific solutions he refers the reader to such books as Matthew Miller's *The Two Percent Solution* and Bill Clinton's *Back to Work*. He suggests we "aim high," "hope for transformation, but settle for improvement," "light a candle; don't curse the darkness," and engage more in the global economy.

Although Luce's outlook is pessimistic and Gross's is optimistic, the two authors not only share a similar left-of-center political outlook, but both demonstrate a wide-ranging curiosity and an analytical approach to large problems. Gross's book, however, shows a sense of humor that is missing in Luce's. ⊙

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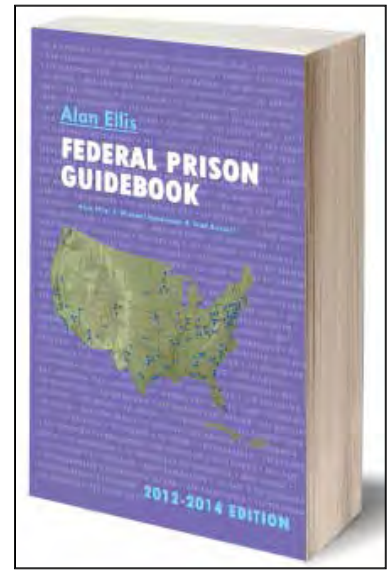
## FEDERAL PRISON GUIDEBOOK, 2012-2014 EDITION

BY ALAN ELLIS, J. MICHAEL HENDERSON, AND TODD BUSSERT

*The Law Offices of Alan Ellis, San Rafael, CA, 2012. 614 pages, $79.00.*

**Reviewed by Elizabeth Kelley**

Alan Ellis and his co-authors have been publishing a new edition of the *Federal Prison Guidebook* every couple of years since 1998. In *The Federal Lawyer* (July 2006 and October 2009), I gave glowing reviews to two earlier editions, and the new 2012–2014 edition remains as indispensable as those were to criminal defense lawyers, judges, U.S. attorneys, probation officers,



and anyone (along with their families) facing federal time.

Like the previous editions, the 2012–2014 edition of the *Federal Prison Guidebook* is divided into two sections. The first section, of approximately 200 pages, is an introduction to the Bureau of Prisons (BOP) and the seemingly labyrinthine world of federal sentencing. The second section is a guide to every federal prison, including privately managed facilities, organized by region of the country. The information in this section is easier to read than that found at the BOP's website, which I find difficult to navigate. This section of the book also has useful information such as nearby lodging and accommodations for families and visitors.

If you have a previous edition of the *Guidebook*, you might legitimately ask why you need to buy a new one. (I know a superb criminal defense lawyer who joked that his edition was so old that he was committing malpractice.) You should invest in the new edition for three reasons: (1) we owe it to our clients and those we serve to provide the most up-to-date information possible (just as we would never cite case law that has been overturned); (2) the field of federal sentencing law is continually changing, and (3) the new sections of the *Guidebook*, particularly in the areas of sentencing for those convicted of child pornography and white collar offenses, are at once scholarly and practical.

"Scholarly" and "practical" happily coexist in the *Federal Prison Guidebook*. On the one hand, the book defines potentially difficult terms like "departures" and "variances" and explains the purpose and strategies behind Section 2255 and 2241 motions. On the other hand, the *Guidebook* contains highly practical information such as a model character letter to submit on behalf of a person about to be sentenced, a list of prison commissary products available for purchase (including harmonicas, Fig Newtons, and wheat germ), and an explanation of the

Trust Fund Limited Inmate Computer System (TRULINCS), a program that provides inmates with limited computer access, including the capability to send and receive email. Indeed, the chapter titled "How to Do Time" should be given to anyone about to enter the federal prison system. All would be wise to heed these words:

> [T]he offender would be well-advised to keep important personal information about themselves and their families confidential, period! This does not mean being so secretive as to arouse the suspicions of other inmates. But it should be painfully obvious that there are real criminals in federal prisons, and becoming vulnerable to these criminals will only complicate life for the well-meaning inmates who truly wish to serve their sentences with as little hassle as possible. Well-meaning inmates can be conned, their family's privacy and well-being compromised, and life seriously disrupted, if they are too friendly with the wrong inmates.

Make no mistake: the *Federal Prison Guidebook* is written from a particular perspective. Ellis is unabashedly a criminal defense lawyer. Indeed, he is the former president of the National Association of Criminal Defense Lawyers and heads an office that specializes in sentencing and post-conviction matters. Ellis and his colleagues advocate for the rights of those awaiting sentencing and those who are incarcerated. Still, the bulk of the information in the *Guidebook* is objective and heavily footnoted, which is why it is useful to all relevant parties in the federal system. ⊙

*Elizabeth Kelley is a criminal defense lawyer based in Spokane, Wash. She has a special commitment to representing individuals with mental illness and developmental or intellectual disabilities who are accused of crimes. She has served two terms on the board of the National Association of Criminal Defense Lawyers, has served as the chair of the Mental Health and Corrections Committees, and is currently the chair of the Membership Committee. She hosts two radio shows, Celebrity Court and Celebrity Court: Author Chats. Her interview with Alan Ellis is available at tobtr.com/s/3797925. She can be contacted at ZealousAdvocacy@aol.com.*