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## Book Reviews: Milestones! 200 Years of American Law: Milestones in Our Legal History

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## BOOK REVIEW

MILESTONES! 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY. By Jethro K. Lieberman.\* West Publishing Company, St. Paul, Minnesota. 1976. Pp. 395. \$19.95. Reviewed by Eugene J. Davidson.†

The celebration of the Nation's bicentennial provided the public with hoopla and nostalgia. It also awakened renewed interest in how and why the United States of America could become the world's leading nation and still retain the political power in the people themselves. Much time and attention was devoted to telling the public about our political beginnings and subsequent development. Little was done, however, to inform the public of the role of law in this development. Few would be so bold as to gainsay the claim that our legal system is largely responsible for what we are and that but for those jurists who sat in solemn judgment during these past two hundred years, the United States might be vastly different from what it is. Many know the names of the cases which are significant in the history of our constitutional law. But how many of those who are familiar with the names of the cases really know about the cases or the stories behind them? Yet these stories are well worth telling and retelling. They are just as much a part of Americana as Bunker Hill, Valley Forge and Gettysburg. Only by understanding both the decision and the behind-the-case story can one understand why the United States of America is still a land of the people, by the people and for the people.

Jethro K. Lieberman's *Milestones!* provides this insight into twenty of the leading events of American jurisprudence.<sup>1</sup> These milestones are the Declaration of Independence, the Constitution, *Marbury v. Madison*,<sup>2</sup> Warren and the Warren Court, *United States v. Nixon*,<sup>3</sup> *Miranda v. Arizona*,<sup>4</sup> *Brown v. Board of Education*,<sup>5</sup> *Dred*

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1. These milestones were selected in 1974 in balloting by members of the American Bar Association, who were informed of the intent to publish a book tentatively entitled *Two Hundred Years of American Law: Milestones in Our Legal History*. Readers of the American Bar Association Journal were invited to vote on the milestones to be included in that book. Since the eminence of the Declaration of Independence and the Constitution was not questioned, voters were not to include them on their ballots. The other eighteen milestones listed above are in the order of the number of votes received.

2. 5 U.S. (1 Cranch) 137 (1803).

3. 418 U.S. 683 (1974).

4. 384 U.S. 436 (1966).

5. 347 U.S. 483 (1954).

*Scott v. Sandford*,<sup>6</sup> the Social Security Act, *Trustees of Dartmouth College v. Woodward*,<sup>7</sup> *In re Gault*,<sup>8</sup> *Schechter Poultry Corp. v. United States*,<sup>9</sup> *Baker v. Carr*,<sup>10</sup> Marshall and the Marshall Court, *Gideon v. Wainwright*,<sup>11</sup> the Fourteenth Amendment, *Erie R.R. v. Thompkins*,<sup>12</sup> *Mapp v. Ohio*,<sup>13</sup> *McCulloch v. Maryland*<sup>14</sup> and *Roe v. Wade*.<sup>15</sup> Lieberman's narrative not only makes the now mundane legal principles expounded by these milestones seem more real, but it also brings into focus the philosophical concepts embodied by them.

It may surprise many readers to learn that on occasion situations are contrived for the very purpose of causing litigation which would change the established order. Illustrative of this is the *Dred Scott* case. Contrary to popular conception, this case did not result from an effort to subjugate a former slave. As Lieberman points out:

Scott was the central figure in his own case only in name . . . . The *Dred Scott* case was a manufactured cause; his owners, who sincerely wanted him to be free, did not emancipate him at once, an act which was in their power. Instead they cooked up a lawsuit to test the burning constitutional question: Could slavery be extended into the vast territory of the West?<sup>16</sup>

Another case which may have been contrived was *Helvering v. Davis*,<sup>17</sup> in which the Supreme Court sustained the use of the federal taxing power to create the social security system. That suit was not brought by the corporation which was being taxed. The corporation "was prepared to pay the tax . . . unless enjoined by the court."<sup>18</sup> It was a stockholder who instituted the suit. Lieberman calls attention to the fact that four of the Justices were of the opinion that the plaintiff stockholder did not have standing to sue,<sup>19</sup> but the majority

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6. 60 U.S. (19 How.) 398 (1857).

7. 17 U.S. (4 Wheat.) 518 (1819).

8. 387 U.S. 1 (1967).

9. 295 U.S. 495 (1935).

10. 369 U.S. 186 (1962).

11. 372 U.S. 335 (1963).

12. 304 U.S. 64 (1938).

13. 367 U.S. 643 (1961).

14. 17 U.S. (4 Wheat.) 316 (1819).

15. 410 U.S. 113 (1973).

16. P. 142. The "cooking up" was Scott's suit for damages for assault brought against Sandford in federal court based on diversity of citizenship, Scott alleging Missouri citizenship and Sandford New York citizenship. The reason for this suit was that Scott's earlier unsuccessful suit in the Missouri courts to gain his freedom was not appealable to the United States Supreme Court since slavery was not a federal question. Thus it became necessary to create a legal fiction of diversity.

17. 301 U.S. 619 (1937).

18. P. 213.

19. Paradoxically, one of these four, Mr. Justice Cardozo, wrote the Court's opinion.

of the Court (and the government attorneys) thought otherwise. One may speculate whether this really was a truly adversary case or a "friendly suit."

*Milestones!* contains other bits of information which are not generally known. For example, the famous *Swift v. Tyson*<sup>20</sup> ruling may have been due in part to the fact that Mr. Justice Story was anxious to demonstrate his legal acumen in commercial matters as a judge rather than as a legal commentator. If the federal courts were to be bound by state law in diversity matters, the opportunity for such demonstrations would be severely circumscribed.

In discussing *Brown v. Board of Education*,<sup>21</sup> Lieberman goes back to *Plessy v. Ferguson*,<sup>22</sup> in which the issue was railroad car segregation and not school segregation. Plessy was only one-eighth black — seven of his great-grandparents had been white — yet the Louisiana law decreed that he was black. Lieberman asks, with tongue in cheek no doubt, "[c]ould a law be valid constitutionally if it defined a person of one-eighth African blood as 'colored' but did not also define a person with one-eighth Caucasian blood as white?"<sup>23</sup> The *Plessy* case is also interesting because it appears to have been a contrived situation which backfired. Lieberman relates that in 1891, a year before Plessy was denied the right to sit in a white-only railroad car, a group of black citizens formed the Citizens' Committee to Test the Constitutionality of the Separate Car Law. Plessy's actions were part of "an elaborately plotted scenario designed to bring a case on the constitutional question to the Supreme Court."<sup>24</sup> He could have passed as white and it was by pre-arrangement that he was asked to move to the colored car.

In a similar fashion *Brown* was the result of a series of well planned and skillfully executed moves under the direction of Thurgood Marshall, then general counsel for the NAACP Legal Defense and Education Fund. The description of how Mr. Marshall cracked the separate but equal facade makes heady reading. Lieberman's discussion of *Brown* is interesting for numerous other reasons, including an explanation of the development of racial segregation. He notes that the lead case which resulted in the 1875 Civil Rights Act being declared unconstitutional did not originate in a Southern or border state — it resulted from the refusal of the Grand Opera House in New York to admit a black couple.

As this review has endeavored to suggest, *Milestones!* is not a law book or even a book about law. Instead, it is the story of two hundred years of constitutional history. Lieberman quotes Alexis de Tocqueville who said, "There is hardly a political question in the

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20. 41 U.S. (16 Pet.) 1 (1842).

21. 347 U.S. 483 (1954).

22. 163 U.S. 539 (1896).

23. P. 261.

24. *Id.*

United States which does not sooner or later turn into a judicial one."<sup>25</sup> *Milestones!* proves de Tocqueville's prescience. Reading the book is a distinct treat. It should not be left to grow musty and molder on a bookshelf as many of the bicentennial objects will. The book belongs in the hands of every secondary and college student so he or she may more fully understand American history. Those no longer in school will also find *Milestones!* educationally fulfilling and, as an added bonus, interestingly written.