This volume is an anthology of some of my writings on Construction Law composed over a 50-year period. It is an honor to be anthologized. Yet, as in any such enterprise, making the selections raised questions and required choices. Just as a retrospective exhibition cannot include more works than the museum or gallery can show, the page limits of the projected book restricted what could be included. Some writings I would have liked to include had to be omitted; and some were included that I had had reservations about when they first appeared. But I think the selections present a good picture of my work.

But looking at those chosen and thinking about those left out reminded me that my writings are like members of my family. In writing there is a period of gestation, of birth, and of growing up. You become very attached to your writings. You may ask for critique from time to time, but you don’t take criticism easily. They are your “babies.” They are part of you. You worked hard on them. You poured a lot of yourself into them.

Writing is hard for me. I am not one of those rare gifted writers who just sits down and the words just pour out. I face a number of hurdles that I must overcome. What I am going to write about? Who is my audience? And then comes the excruciatingly painful process of preparing drafts, reviewing them, and redoing drafts until there is a final product. The work in process generates much sweat, and, not uncommonly, despair. What am I trying to accomplish? Have I created a two-yolk paper? (I have a weakness for twin-concept papers.) Have I thought out this paper well enough? I read the draft again and see that changes must be made. If I am lucky, after hours of agony and about five drafts, I think I finally have it. It is a tough process. It does resemble giving birth and raising a child.

I have always tried to write for my readers. I try to use clear and understandable language. I know I am writing for different audiences. The style and content that works for lawyers is not the same as for nonlawyers such as contractors and design professionals. If I use a term that may not be clear to my audience, I define it and, if space permits, give examples. I have never used end-of-the book glossaries—they are too inconvenient and are rarely consulted.

Now and then I write for fun, especially in the “A View from the Tower” columns for The Construction Lawyer, which are collected here for the first
time. There has to be some room for irony, satire, and the like. But in my seri-
ous pieces I write in classic English as best I can. I hate sloppy slang. This can
lead to an unexpected result.

Once I gave a lecture about something or other. A woman came up to me
after the lecture and told me how my writings influenced her career. But then
came the crusher. She looked at me and said “When I read your articles and
books, I thought you would be older.”

“Why?” I asked.

“You write old.”

I didn’t know whether I should feel proud or hurt. But being an optimist
I took it as praise. I am no Melville or Tolstoy, but I want my writing to be
elevated enough so that my thoughts are taken seriously and my style contin-
ues, in a small way, a great literary tradition.

I had great fun when I wrote the article for the Ian Wallace tribute (“Liter-
ary Find of the Century”). In it I tried to write in the style of William Shake-
peare. There’s no chance I would be mistaken for him, but it was a welcome
break from my usual Construction Law style.

I am proud of my writings. I worked hard, and I think the outcome in most
cases shows it was worth the effort. Of course, the finished product could
have been better. But writing requires that at some point (usually after five or
so drafts) you say that this is the best I can do at this time. That’s why dead-
lines, painful as they can be, are good.

Many times in my 50-year career I have been asked how I got into Con-
struction Law. I discuss this in some detail in my paper “From the Tower
Redux: My Two Strands,” published here for the first time in its present form.
But let me note briefly the string of events that got me there.

When I left the Army Judge Advocate General’s Corps in 1957, I joined
a law firm. One of my first assignments was to research what I was later to
discover was a typical construction defect dispute. Our client, the owner, was
suing the architect and the contractor. Each defendant blamed the other for
the defective work.

After a year of practice I was invited to join the faculty at the University of
California School of Law, Berkeley (then known as Boalt Hall). Law schools
now give a new teacher more time, but in those days we were expected to
crank out a piece of publishable work in the first year as well as teach a regular
load. Desperately I looked for a research topic, and grabbed on to the work
I did in that construction case. After extensive research, I completed my first
published article, “Owner-Architect-Contractor: Another Eternal Triangle,”

One of my students read it and contacted an attorney friend who repre-
sented an architectural firm. That lawyer contacted me and asked me to give
a talk at one of the monthly meetings of the local AIA chapter, which I did.

A member in the audience was a local practicing architect who taught a
course in professional practice at Berkeley’s Department of Architecture. He
asked me to give a few lectures to his class on legal topics he hated: liens, bonds, and indemnity. I did that too, and it went well. He asked me to give a semester’s course in legal topics important to the practice of architecture, and I received permission from the law school to work quarter-time on this for the Architecture Department.

The next move really cemented my connection to Construction Law. I had to pick a text for the course. There wasn’t much out there. One was a text called *Engineering Law*, by Professor Larry Simpson of New York University Law School. I had met him a few years before at a seminar at NYU for young Contract Law teachers. He was the paradigm of the crusty old-style law professor. He thought he knew everything and didn’t like to be challenged. When I asked him to reconcile something he had written with some recent California cases, he brushed my remark aside—those decisions could be ignored because they were from California.

Larry’s book simply assembled cases that involved construction contracts, organized them in a classic Contract Law fashion, and that was all there was to it. To put it mildly, it was not a challenging text. So I did what teachers have done from time immemorial. If no existing book does the trick, you create your own.

About the same time (1966), I received my annual visit from the late Roger Noreen of West Publishing Company. At those yearly visits, Roger, great salesman that he was, tried to talk me into using a West book in my course. He was also sniffing around for possible West authors. When I told him I was teaching in the Architecture School next door, he said West was looking for someone to do a successor to Simpson’s book. When he mentioned that the book had made Simpson a millionaire, I was hooked. I do not know what it did for Larry, but it did not by any means make me a millionaire. But the book had a steady market and is still going today. The eighth edition was published last year.

I switched my Architecture School seminar to the Law School in 1977. The only changes from the class I had given to architects were that the students were mainly law students, with a few engineering graduates, and I used guests as part of the seminar. The best thing was that I learned something in every class session, from my students and from visitors.

In any event, the die was cast. I devoted most of the rest of my career to Construction Law, teaching and writing in the field and seeking to advance Construction Law as a distinct and honorable part of law.

What has changed in the past 50 years? There is now a greater recognition of Construction Law as an academic subject. Now some 30 schools give courses in it. Also there are now many texts available. I could name some good ones, but I do not want to take a chance of leaving out deserving titles. But I must mention *Bruner & O’Connor on Construction Law*, a fine multi-volume set by Phil Bruner and Pat O’Connor that has become a leading force in the development of Construction Law.
The expansion of Construction Law as a subject, and the volume of cases, is also shown by the number of texts devoted to one jurisdiction. The leading cases and, increasingly, new statutes, are collected in a fine newsletter, the Construction Litigation Reporter (also from West). It is edited by my co-author of Legal Aspects of Architecture, Engineering and the Construction Process, Marc Schneier. We also see a lot of newsletters published by law firms. The development of the field is reflected in the 6,000-member ABA Forum for the Construction Industry and in the institutions of the federal procurement bar. Many more lawyers now call themselves construction lawyers. They handle transactions and disputes relating to Construction Law, both public and private.

While many construction cases still pour out of the courts, my sense is that the volume is diminishing a bit. I think many more disputes are negotiated now, often with the help of mediators. It costs too much to go to court or even arbitrate.

Also, we are looking more at the Construction Law of other countries. Journals that cover international construction law, such as the International Construction Law Review edited by Humphrey Lloyd, can be found in the libraries of many American construction lawyers.

I hope that my own writings, many of which are reprinted in this anthology, have helped the development and improvement of Construction Law. The field has certainly come a long way since I first entered it 50 years ago.

This collection would not have seen the light of day without the efforts of Deborah Ballati, David F. Phillips, and Kathy Small, all from the San Francisco firm of Farella Braun + Martel. Deborah piloted the anthology past the many obstacles that needed to be overcome before it could be published by the Forum. She stuck to this project when it seemed it would never go forward. Deborah has contributed a perceptive foreword to this book.

I cannot say enough for the efforts of David F. Phillips. He put the whole thing together. He did it with unfailing good humor as well as skill beyond anything I or a half-dozen others could have mustered. I did not realize how complicated it would be to “stage” such an anthology. I cannot thank him enough.

I also want to thank the past Forum chairs who wrote introductory essays to the individual chapters. Their efforts made an immense contribution to this book.

Finally, Sarah Forbes Orwig and Richard G. Paszkt of ABA Publishing, and Terry L. Brookie and Adrian Bastianelli of the ABA Forum, helped get this book published. They deserve our thanks.

I am proud that in 1997 my book Sweet on Construction Law launched the publishing activities of the Forum. Since then it has published a variety of outstanding publications that have benefited the construction bar as well as the industry. I owe much to the Forum for taking a chance on this unconventional retrospective work.

Justin Sweet
John H. Boalt Professor of Law Emeritus
University of California School of Law, Berkeley

February 2009