

1988

Clio As Hostage: The United States Supreme Court and the Uses of History

William M. Wiecek

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Wiecek, William M. (1988) "Clio As Hostage: The United States Supreme Court and the Uses of History," *California Western Law Review*: Vol. 24 : No. 2 , Article 2.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol24/iss2/2>

This Article is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

Clio As Hostage: The United States Supreme Court and the Uses of History

WILLIAM M. WIECEK*

INTRODUCTION

The historian** who considers the uses to which the United States Supreme Court has subjected the past comes to think that history ought to be brought within the coverage of FIFRA¹, treated as if it were an insecticide toxic to humans, and required to bear this warning label: "Caution: Inept or improper use of this product may be dangerous to your civic health."

This, of course, is an old complaint. For the past half-century, historians, judges, and lawyers have bemoaned the ways that the Court has misunderstood, misapplied, or otherwise abused the past on its way to formulating doctrines for the present. But this trite topic is still worth a fresh look, not for purposes of flogging once again the dead horse of bad judicial history, but rather to understand the consequences of applied history, good or bad, in the evolution of doctrine. For when we trace out these consequences, we will be astonished to see the extent to which history—that is the judges' understanding of the past, right or wrong, correct or confused—has shaped doctrine and has affected society. Even the constitutional historian, who has worked with these materials throughout a professional lifetime, is surprised to discover how pervasive have been the effects of history in the evolution of doctrine.

On reflection, though, this should not come as a surprise. The United States Supreme Court is the only institution in human experience that has the power to *declare* history: that is, to articulate some understanding of the past and then compel the rest of

* Chester Adgate Congdon Professor of Public Law and Legislation, Syracuse University, College of Law. Ph.D, University of Wisconsin; LL.B, Harvard Law School, A.B., Catholic University.

** I benefitted from the opportunity of exploring some of the ideas of this paper, and of refining them on the basis of auditors' comments, in presentations to the Institute of United States Studies, the University of London, June 1987, and to the Association of American Law Schools' Conference on Teaching Constitutional Law, October 1987. For this opportunity, I am grateful to the organizers, particularly Professors Peter J. Parish and John E. Nowak, respectively. I also wish to thank Colleen Grzeskowiak for research assistance.

1. Federal Insecticide, Fungicide, and Rodenticide Act § 7, U.S.C. § 136 (1982).

society to conform its behavior to that understanding. No Ministry of State Security, no Thought Police, has ever succeeded in establishing such authority. This power exists irrespective of the degree to which that judicial perception of the past conforms to reality. Even where the Court's history is at odds with the actual past, that judicial history, as absorbed into a decision, and then a doctrine, becomes the progenitor of a rule of law. So without belaboring once more Justice Robert H. Jackson's concession that "judges often are not thorough or objective historians,"² it is worth our effort to review the impact of judicial history on the evolution of doctrine and on the consequences of that doctrine when applied as a rule for the governance of people.

I. A CONCEPTUAL SURVEY OF THE SUPREME COURT'S USE OF HISTORY

It might be useful to begin with a theoretical framework, in order to provide a map of terrain unfamiliar to non-historians and to give some sense of where the inquiry can lead. Many scholars in the past three decades have studied the uses of history in Supreme Court adjudication,³ but for present purposes the most useful theoretical survey was that of the lawyer-historian Alfred H. Kelly: *Clio and the Court: An Illicit Love Affair*, published in 1966.⁴ Kelly there identified four modes in which the Court uses history. Two are routine, relatively non-controversial, and of lesser interest for our immediate purposes. They are, first, the place of historical inquiry in the methodology of judicial process in a common-law system, where the role of precedent and the principle of *stare decisis* are crucial.⁵ Second, when construing statutes, American courts regularly investigate statutory history and seek evidence of legislative intent.⁶

2. Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 6 (1945).

3. Including A. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); HURST, *THE ROLE OF HISTORY, SUPREME COURT AND SUPREME LAW* 55-58 (Cahn, ed. 1954); Wofford, *The Blinding Light: The Uses of History In Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964); Klinkhamer, *The Use of History in the Supreme Court, 1789-1835*, 36 U. DET. L.J. 553 (1959); DALY, *THE USE OF HISTORY IN THE DECISIONS OF THE SUPREME COURT, 1900-1930* (1954); M. HOWE, *THE GARDEN AND THE WILDERNESS: THE RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY* (1965).

4. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

5. To say that the problem of precedent and *stare decisis* is uninteresting for our purposes is not to say that it is unimportant. On the contrary, those problems have seen the subject of probing and contentious analysis. See B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921); Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949); Boudin, *The Problem of Stare Decisis in our Constitutional Theory*, 8 N.Y.U. L. REV. 589 (1931).

6. Again, the present lack of importance for this inquiry does not mean that the topic is trivial or undebated. See, as one example of how this problem has burned brightly

Kelly was moved to write his critical article by two other and more germane uses of history. He called the first, history by “judicial fiat” or history by “authoritative revelation.”⁷ The cases he chose as illustrative are well-known. For example, in the *Slaughterhouse Cases* (1873), Justice Samuel Miller, writing for the majority, introduced his construction of the meaning of the thirteenth and fourteenth amendments with this bit of historical judicial fiat:

The most cursory glance at these articles discloses a unity of purpose, when taken in connection with the history of the times, which cannot fail to have an important bearing on any question of doubt concerning their true meaning. Nor can such doubts, when any reasonably exist, be safely and rationally solved without a reference to that history. . . . Fortunately that history is fresh within the memory of us all, and its leading features, as they bear on the matter before us, free from doubt. . . . Undoubtedly the overshadowing and efficient cause [of the war of the rebellion] was African slavery.⁸

I will return later to the consequences of this particular historical *ipse dixit*;⁹ for now, it serves to illustrate history by authoritative revelation. Kelly’s second example of this technique is drawn from Justice Henry B. Brown’s majority opinion in *Plessy v. Ferguson* (1896):

The objective of the [Fourteenth] Amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.¹⁰

I will return to this case, too.¹¹

Chief Justice John Marshall was a master of the judicial-fiat technique, not only in his use of history, but in his entire judicial style. Almost all his great opinions contain at least one example of history-by-fiat. The most important was *Marbury v. Madison* (1803), where he surveyed the export-tax, Bill of Attainder, and

in judicial-academic debates, Crosskey, *Charles Fairman, ‘Legislative History,’ and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1954) and Fairman’s response, Fairman, *A Reply to Professor Crosskey*, 22 U. CHI. L. REV. 144 (1954). The closely-related problem of legislative motivation is the subject of considerable modern interest: see Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978); Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970).

7. See Kelly, *supra* note 4, at 122-25.

8. 83 U.S. (16 Wall.) 36, 67-68 (1873).

9. See *infra* notes 194-220 and accompanying text.

10. 163 U.S. 537, 544 (1896).

11. See *infra* notes 232-236 and accompanying text.

Treason clauses of the Constitution¹² as a way of reaching this sweeping conclusion: "From these and many other selections which might be made, it is apparent, that the Framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature."¹³ Marshall drew on a similarly-reconstructed Framers' intent to interpret the contracts clause in *Fletcher v. Peck* (1810)¹⁴ and *Sturges v. Crowninshield* (1819);¹⁵ to develop an expansive reading of the commerce clause in *Gibbons v. Ogden* (1824);¹⁶ and to ground the Constitution in an historic act of popular sovereignty in *McCulloch v. Maryland* (1819).¹⁷

It was the fourth category that most troubled Kelly. He referred to it as "law-office history," a selective technique transferred from brief writing, where it is arguably appropriate, to opinion writing, where it often is disastrous, weakening rather than strengthening the force of the point the author is trying to make. Usually associated with some form of judicial activism, law-office history appeals to judges as a "precedent-breaking device" that enables the judge to pass through or around inconvenient precedents inimical to a desired result, and to discover some presumed original intent more congenial to that result.¹⁸ Kelly's principal illustrative cases, both of which had to be reversed by constitutional amendment, were *Dred Scott* (1857) and the *Income Tax Cases* (1895). In *Scott v. Sandford*,¹⁹ Chief Justice Roger B. Taney drafted law-office history with a reckless opportunism to avoid the precedent of *American Insurance Co. v. Canter* (1825).²⁰ Chief Justice Melville W. Fuller resorted to similar tactics in his opinions in *Pollock v. Farmers Loan and Trust Co.* (1895)²¹ to evade two precedents, *Hylton v. United States* (1796)²² and *Springer v. United States* (1881),²³ that would have supported the constitutionality of a federal tax on incomes.

Kelly's catalogue did not exhaust the uses made of history by the United States Supreme Court. At least three others may be

12. 5 U.S. (1 Cranch) 137 (1803). Respectively: U.S. CONST. art. I, § 9, cl. 5; art. I, § 9, cl. 4; art. III, § 3.

13. 5 U.S. (1 Cranch) 137, 179-80 (1803).

14. 10 U.S. (6 Cranch) 87, 138 (1810).

15. 17 U.S. (4 Wheat) 122, 206 (1819).

16. 22 U.S. (9 Wheat.) 1, 190 (1824).

17. 17 U.S. (4 Wheat.) 316, 403 (1819).

18. Kelly, *supra* note 4, at 125-28.

19. 60 U.S. (19 How.) 393 (1856).

20. 26 U.S. (1 Pet.) 511 (1825) (supporting broad congressional power to regulate the territories, a position Taney was determined to reject in the latter half of his opinion).

21. 157 U.S. 429 (1895) and 158 U.S. 601 (1895).

22. 3 U.S. (3 Dall.) 171 (1796).

23. 102 U.S. 586 (1881).

identified. First, history serves as a lode of values that the Court mines in giving content to the generalities of the Constitution.²⁴ On this use, Justice Felix Frankfurter's "two-clause theory" of judicial interpretation is instructive. In his concurring opinion in *United States v. Lovett* (1946),²⁵ Frankfurter drew a distinction, which he reiterated and amplified later,²⁶ between those clauses of the Constitution that are specific and whose meaning therefore must be specifically defined by the understanding of the Framers (Frankfurter's example: the Bill of Attainder clauses²⁷), and those which are vaguely worded (his example again: the due process, equal protection and just compensation clauses of the fifth and fourteenth amendments), and thus can be given content only by judicial interpretation of those "broad standards of fairness written into the Constitution."²⁸

The role of history was radically different for each of these types of clauses, in Frankfurter's view. For the specific clauses, history disclosed a single correct result. Judges were obliged to discover that correct reading, and then to follow it undeviatingly. J. Willard Hurst later refined Frankfurter's notion: "if the idea of a document of superior legal authority is to have meaning, terms which have a precise, history-filled content to those who drafted and adopted the document must be held to that precise meaning."²⁹ For the open-ended clauses, however, history's function was to serve as a repository of human experience and societal values derived from that experience. Judges could draw on those historically-illuminated values, and were not as straitly constrained in their interpretation as they were with respect to the specific-clause values. For the latter, the Framers' intent was controlling and conclusive; but for open-ended-clause values, the historical experience of the American people after the drafting of the clause became relevant.

Next, some justices have used history to refute interpretations or results reached by their brethren. The most spectacular example of this in the Court's two centuries was the Frankfurter-Black debate that began with the 1947 decision in *Adamson v. California*³⁰ over total versus selective incorporation of the Bill of Rights

24. Wyzanski, *History and Law*, 26 U. CHI. L. REV. 237 (1959).

25. 328 U.S. 303, 321 (1946).

26. *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); *Rochin v. California*, 342 U.S. 165 (1952); *Ullman v. United States*, 350 U.S. 422 (1956).

27. U.S. CONST., art. I, §§ 9, 10.

28. *United States v. Lovett*, 328 U.S. 303, 321 (1946).

29. HURST, *supra* note 3, at 57. Hurst specified that he was referring only to "particular legal agencies" and "particular legal procedures," not general grants of power or standards of conduct.

30. 332 U.S. 46 (1947).

by the fourteenth amendment. Justice Hugo Black there rejected the selective-incorporation tradition that had been suggested in *Twining v. New Jersey* (1908)³¹ and eloquently affirmed by Justice Benjamin N. Cardozo in *Palko v. Connecticut* (1937),³² defending his total-incorporation alternative in a twenty-four-page dissent supplemented by a thirty-one-page purely historical appendix.³³ Frankfurter, in his *Adamson* concurrence, rejected Black's historical reconstruction invoking his own interpretation of "the heritage of the past" to refute Black's.³⁴ The debate continued on the Court for a decade and a half, while commentators off the Court ranged on one side or the other.³⁵

Other conspicuous recent examples of Justices using history to refute doctrine include Justice John M. Harlan's futile dissent in *Baker v. Carr* (1962) demonstrating that the egalitarian assumptions of Justice William J. Brennan's majority opinion flew in the face of American historical experience.³⁶ Somewhat more successful, though not yet triumphant as of this writing, have been the efforts by Chief Justice Warren Burger and Justice William H. Rehnquist to dethrone Thomas Jefferson's wall of separation metaphor in establishment clause cases as it was adopted by Justice Black in *Everson v. Board of Education* (1947).³⁷

A third use of history beyond those noted by Kelly lies in its value as a medium of a liberal education. The nineteenth-century lawyer and treatise-writer Theodore Sedgwick glimpsed this possibility in his treatise on statutory construction: "What is required [in construing constitutions and statutes is] that thorough intellectual training, that complete education of the mind, which lead it to a correct result, wholly independent of rules, and indeed, almost

31. 211 U.S. 78 (1908).

32. 302 U.S. 319 (1937).

33. *Adamson*, 332 U.S. at 68-123.

34. *Id.* at 65. See generally W. MENDELSON, JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT (1961).

35. Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Crosskey, *Charles Fairman, 'Legislative History' and the Constitutional Limitations on State Authority*, 22 U. CHI. L. REV. 1 (1959). Justice Black conceded nothing to what most commentators viewed as a devastating critique by Prof. Fairman of his views. See his concurring opinion in *Duncan v. Louisiana*, 391 U.S. 145, 165-67 (1968).

36. 369 U.S. 186, 330-49 (1962).

37. 330 U.S. 1 (1947). See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982) (Burger, C.J.: the metaphor is only a "useful signpost," not a doctrine); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (Burger, C.J.: "the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.") See generally Van Alstyne, *Trends in the Supreme Court: Mr. Jefferson's Crumbling Wall — A Comment on Lynch v. Donnelly*, 1984 DUKE L.J. 770-87 (1984).

unconscious of the process by which the end is attained.”³⁸ Judge Learned Hand developed this theme, specifying the content of this liberal education:

It is as important to a judge called upon to pass on a question of constitutional law, to have at least a bowing acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant, as with books which have been specifically written on this subject. For in such matters everything turns upon the spirit in which he approaches the question before him.³⁹

When utilized in this mode, history never has a direct application to a specific problem. Rather, it broadens a judge’s outlook, enlarges his or her experience vicariously, suggests that the present is not inevitable, and displays humanity in its infinite heterogeneity. John G. Wofford expressed this function nicely: “history does not provide the answers to the problems of today; it merely helps to frame the questions.”⁴⁰ History-as-liberal-education is stubbornly anti-instrumental: it kicks the traces and will not permit itself to be used for any purpose other than deepening a judge’s wisdom.

Such an anti-instrumentalist conception of history confronts a challenge issued by Paul Murphy, one of the premier constitutional historians at work in the United States today. In *Time to Reclaim: The Current Challenge of American Constitutional History*,⁴¹ Murphy chided his fellow-historians for abandoning constitutional history to the lawyers, and suggested that if professional historians reclaimed the field, they might banish the perverted uses of the subject, such as law-office history, by feeding good history to the judges. Better that history be done right, he urged, than that it be left to amateurish advocates who would prostitute Clio to their needs of the moment. Yet in spite of the great amount of excellent work done in the field of constitutional history in the past quarter-century, Murphy’s call has gone unheeded. There are many reasons for this: for one, judges, the intended consumers and beneficiaries of this instrumentalist professional history, have been largely indifferent to the opportunity. But there is also the sense, shared by both judge-consumer and historian-purveyor, that history can seldom be put to instrumentalist uses. The

38. 2 T. SEDGWICK, A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND COMMON LAW 192 (1874).

39. Hand, *Sources of Tolerance*, 79 U. PA. L. REV. 1, 13 (1930).

40. Wofford, *supra* note 3, at 533.

41. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64-79 (1963).

occasions for construing Frankfurter's specific, historically-defined clauses seldom arise in the United States Supreme Court, and when they do, the certainty that Frankfurter expected historical research to provide proves illusory.

An illustration, provided fittingly enough by Frankfurter himself, demonstrates the deceptive quality of his dichotomy. It might seem obvious to common sense that when the Framers used the word "State" in the Constitution, it had a specific meaning—New Hampshire, New York, *et al.*—and thus excluded other polities, such as the District of Columbia.⁴² That is the way that Frankfurter himself thus read it, at least for purposes of construing Article III's grant of diversity jurisdiction.⁴³ Yet two of his colleagues explicitly disagreed with him there, and the District is a "State" for such purposes as conferring United States citizenship upon persons born there, defining interstate commerce, and innumerable other statutory objectives of Congress.⁴⁴ In any event, Clio is no one's unthinking servant. When invoked with a sensitivity to the integrity of the past—Judge Benjamin N. Cardozo being the exemplar here⁴⁵—history can shed light over an entire legal landscape. But such an opportunity seldom presents itself to a judge, and Clio's role is usually much less in the foreground.

Finally, there are times when both judge and historian should recognize that history is simply beside the point. The historical data that is available is either insufficient, or is hopelessly ambiguous, or simply cannot be made germane to our purposes. Justice Jackson forthrightly captured this sense of futility and ambivalence in his *Steel Seizure Case* concurrence:

Just what our forefathers did envision, or would have envisioned had they foreseen modern conditions, must be divined from materials almost as enigmatic as the dreams Joseph was called upon to interpret for Pharaoh. A century and a half of partisan debate and scholarly speculation yields no net result but only supplies more or less apt quotations from respected sources on each side of any question. They largely cancel each other.⁴⁶

In such a case, the judge must transcend history, as the Su-

42. John Marshall thus construed it in the case of first impression on this issue: *Hepburn and Dundas v. Ellzey*, 6 U.S. (2 Cranch) 445 (1805).

43. *National Mut. Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 653 (1959) (Frankfurter, J., dissenting).

44. U.S. CONST. AMEND. XIV, § 1; art. I, § 8, clause 3. On the unique status of the District as a "State" in a qualified sense, see *Metropolitan R.R. v. District of Columbia*, 132 U.S. 1 (1889). *But see* *Palmore v. United States*, 411 U.S. 389 (1973) (District of Columbia not a "State" as the term is used in 28 U.S.C. § 1257(2), the modern codification of § 25 of the 1789 Judiciary Act); *District of Columbia v. Carter*, 409 U.S. 418 (1973) (District of Columbia not a "state" as the term is used in 42 U.S.C. § 1983).

45. *E.g.*, *Beers v. Hotchkiss*, 256 N.Y. 41 (Ct. App. 1931).

46. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634-35 (1952).

preme Court did in *Brown v. Board of Education* (1954).⁴⁷ After initial argument, the Court ordered reargument directed specifically at historical questions: the intentions and understanding of the Framers. Despite exhaustive efforts on both sides, Chief Justice Earl Warren concluded that, although historical “sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive.”⁴⁸ *Brown* is a much stronger opinion for this forthright admission than it would have been if the Court had tried to tease or torture some meaning from the vast but conflicting historical data.

With this conceptual survey of the way that the Court has used history in mind, let us turn to see what actually happens when the Court invokes Clio. This inquiry will lead us along two different paths. The first will review an unrelated assortment of cases, almost all of them decided in the twentieth century, that deal with three constitutional issues: the freedom of political expression, federal common law, and the right of intimate association. For these, no single theme emerges; rather, we have a sampling of the Court’s uses of history, instructive principally about the innumerable possibilities and consequences of the historical approach. The second path displays a topical unity: cases, all of them from the nineteenth century, dealing with status and rights of black people in slavery, crypto-servitude, and quasi-freedom. These cases convey a single lesson: how far reaching and catastrophic the misuse of history can be in judicial opinions.

II. SPECIFIC USES OF HISTORY BY THE COURT

A. *Freedom of Political Expression Cases*

Let us begin with a topic that presents an *embarras de richesse* of history-in-the-service-of-law: those involving freedom of political expression, a subject besotted with history. At the onset of the first Red Scare, the United States Supreme Court had available to it two inconsistent sources of precedent, each deeply rooted in history, to guide its response to government efforts to suppress political speech during World War I. The first derived from William Blackstone’s complacent endorsement of the doctrine of seditious libel⁴⁹; the second, from Americans’ rejection of the position ex-

47. 347 U.S. 483 (1954).

48. *Id.* at 489.

49. COMMENTARIES ON THE LAWS OF ENGLAND (1765), IV, 151. This position enjoyed eminent support on this side of the Atlantic: W. RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1825), 119-120; J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1293-1294, 1880-1892 (1835).

tollled by Blackstone.⁵⁰ The Court's earliest decisions on this subject were almost without exception contra-libertarian, attributing slight or no worth to first amendment values. In the judgment of the leading scholar who has investigated this subject, "a general hostility to the value of free expression permeated the judicial system,"⁵¹ both state and federal, before 1917. These decisions subsumed both the incitement and the bad-tendency tests usually associated with a later era.⁵² Justice Henry B. Brown drew a peculiar lesson from the English past in *Robertson v. Baldwin* (1897): the Bill of Rights was not meant by its Framers "to lay down any novel principles of government," but rather to embed certain English "guaranties and immunities" into the Constitution. These however, were, and continued to be "subject to certain well-recognized exceptions arising from the necessities of the case. In incorporating these principles into the fundamental law there was no intention of disregarding the exceptions, which continued to be recognized as if they had been formally expressed."⁵³ These *dicta* constituted an exception ready to swallow up the rule. Thus it was in keeping with established American traditions when the World War I era freedom of speech cases moved toward adoption of a repressive bad tendency test, affirming convictions under the Espionage Act of 1917 and its 1918 amendment popularly known as the Sedition Act.⁵⁴

Justice Oliver Wendell Holmes, Jr. played a pivotal role in these developments. He was, of course, the author of the clear-and-present-danger test⁵⁵ that for half a century was the bedrock of first amendment law. Holmes was a superb, if unreliable, legal historian, and history played an important role in shaping his thought. But his attitudes toward history were curiously ambivalent. Holmes often insisted that law should emerge out of the his-

50. See the arguments of Andrew Hamilton, counsel for John Peter Zenger, in the latter's celebrated 1735 trial for seditious libel, in J. ALEXANDER, A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER 23-26 (Katz, ed. 1963); St. George Tucker, ed., *Blackstone's Commentaries . . .* (1803), vol. I, part 2, appendix note G, "Of the Right of Conscience, and of the Freedom of Speech and of the Press," pp. 11-30; T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 429 (1868).

51. Rabban, *The First Amendment in Its Forgotten Years*, 90 YALE L.J. 514, 557 (1981). But see Anderson, *The Formative Period of First Amendment Theory, 1870-1915*, 24 AM. J. LEGAL HIST. 56 (1980).

52. E.g., *Turner v. Williams*, 194 U.S. 279 (1904).

53. 165 U.S. 275, 281 (1897).

54. Espionage Act of 1917, ch. 30, 40 Stat. 217; Sedition Act of 1918, ch. 75, 40 Stat. 553; *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919); *Abrams v. United States*, 250 U.S. 616 (1919); *Schaefer v. United States*, 251 U.S. 466 (1920); *Pierce v. United States*, 252 U.S. 239 (1920).

55. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

torical experience of the people: “upon this point a page of history is worth a volume of logic,” he once wrote.⁵⁶ He maintained that the “rational study of law is still to a large extent the study of history”, and extolled historical knowledge as “the first step toward an enlightened skepticism.”⁵⁷ Yet he also cautioned that “we must beware of the pitfall of antiquarianism.” “It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”⁵⁸ Thus while respecting the momentum of historical development behind the bad tendency test,⁵⁹ Holmes was capable of viewing that historical growth at arms-length.

Holmes was nudged away from his implicit endorsement of bad-tendency in *Schenck* by a number of pressures. These included: the ferocity and malice displayed by the prosecution in one of the later speech cases, *Abrams v. United States*,⁶⁰; friendly criticism from Zechariah Chafee,⁶¹ Ernst Freund,⁶² and Learned Hand,⁶³ then a federal District Judge in New York’s Southern District, who had provided his own alternative test for testing freedom of expression against statutory restraint.⁶⁴ Holmes responded by articulating a more speech-sensitive standard in his *Abrams* dissent, in a famous passage that began the tradition of kicking the corpse of the 1798 Sedition Act:

I wholly disagree with the argument of the Government that the first amendment left the common law as to seditious libel in force. History seems to me against this notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798, by repaying fines that it imposed.⁶⁵

56. *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

57. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

58. *Id.* at 474, 469.

59. On the anti-libertarian emphases of Holmes’ earlier (i.e., pre-1919) opinions, see Rogat and O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion — The Speech Cases*, 36 STAN. L. REV. 1349 (1984).

60. 250 U.S. 616 (1919). On these non-doctrinal aspects of this case, see R. POLENBERG, *FIGHTING FAITHS: THE ABRAMS CASE, THE SUPREME COURT AND FREE SPEECH* (1987).

61. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year, 1919*, 58 JOURNAL OF AMERICAN HISTORY, 24-45 (1971).

62. Kalven and Ginsburg, *Ernst Freund and the First Amendment Tradition*, 40 U. CHI. L. REV. 235 (1973).

63. Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

64. *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

65. *Abrams*, 250 U.S. at 630.

Professor Zechariah Chafee of the Harvard Law School later propagated the notion that Holmes' original formulation of the clear-and-present-danger test in *Schenck v. United States* was a libertarian doctrine⁶⁶, and his contemporary criticisms, delivered in print and *vis-a-vis*, probably contributed to Holmes' reconsideration of his original views in the *Abrams* dissent.

While Holmes had spoken on both sides of the issue, his brethren decisively opted for the speech-suppressive, Blackstonian tradition, and would continue to adhere to it for another generation.⁶⁷ This provoked Justice Louis D. Brandeis into what is surely the most eloquent piece of history by judicial fiat in all the volumes of the *United States Reports*, his stirring call to civic courage in the *Whitney* concurrence.⁶⁸ "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears." His elaboration of this point is too well known to bear repeating here; what must be stressed in the present context, however, is that the core of Brandeis' argument was derived wholly from his recreation of the Framers' intent (some⁶⁹ would say his fabrication of that intent):

They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.⁷⁰

Brandeis' recreation of history, in its turn, became the basis of the Court's gradual rejection of the anti-libertarian tradition. His history-by-judicial-fiat took on a life of its own, eroding the Blackstonian heritage. Chief Justice Charles Evans Hughes found in the first amendment's press clause implicit guaranties of freedom that went beyond the narrow confines of the English tradition: "the criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions."⁷¹ In the same spirit, he turned the English tradition against Blackstone, arguing

66. Z. CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 86 (1941).

67. The foremost example of this endorsement, without historical argumentation, was *Gitlow v. New York*, 268 U.S. 652 (1925).

68. *Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

69. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1 (1971).

70. 274 U.S. at 375.

71. *Near v. Minnesota*, 283 U.S. 697, 714-15 (1931). See also *Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936).

from its libertarian components, such as John Milton's *Aeropagitica*, that "the struggle for the freedom of the press was primarily directed against the power of the licenser."⁷² On the eve of America's entry into World War II, Justice Black carried this idea further, interpreting American historical experience to demonstrate that the purpose of the first amendment was to reject English common law concerning press and speech entirely, substituting for it a much more libertarian outlook, freedom of "the broadest scope that could be countenanced in an orderly society."⁷³

After World War II and the demise of the second Red Scare, the Brandeisian reading of history gradually emerged as the core meaning of the speech and press clauses of the first amendment.⁷⁴ Even in the *Dennis* case of 1951, where Chief Justice Fred Vinson adopted Learned Hand's retrograde bad-tendency reformulation of the Holmes clear-and-present-danger test, the plurality conceded that since *Whitney*, "subsequent opinions have inclined toward the Holmes-Brandeis rationale."⁷⁵ Justice William Brennan rode *Whitney*'s momentum to extend the now-established absolute hostility to seditious libel in the American tradition to private libel, first in the context of a civil suit seeking damages against a newspaper,⁷⁶ then to a criminal prosecution for defamation.⁷⁷ In the former case, *New York Times v. Sullivan*, he made the odd pronouncement that "the court of history" had declared the 1798 Sedition Act unconstitutional.⁷⁸ The complete triumph of Brandeis came in *Brandenburg v. Ohio* (1969),⁷⁹ a *per curiam* opinion that virtually overruled *Whitney*.

But by one of history's perverse ironies, while judicial history was marching in one direction in the United States Supreme Court, professional history and the uses made of history by non-historians were going off in other and inconsistent directions, thus undercutting the Court's history. In 1960, Leonard Levy, one of

72. *Lovell v. Griffin*, 303 U.S. 444, 451 (1938).

73. *Bridges v. California*, 314 U.S. 252, 264 (1941).

74. Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191-222 (1964).

75. *Dennis v. United States*, 341 U.S. 494, 507 (1951). Justice Frankfurter, concurring, made an altogether different use of the past, declaring "History teaches that the independence of the judiciary is jeopardized when courts become embroiled in the passions of the day and assume primary responsibility in choosing between competing political, economic and social pressures." *Id.* at 525. This lesson of history affirmed for him the wisdom of two cardinal tenets of his juridical philosophy: judicial restraint and the application of balancing tests in first amendment cases.

76. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

77. *Garrison v. Louisiana*, 379 U.S. 64 (1964).

78. *Sullivan*, 376 U.S. at 276.

79. 395 U.S. 444 (1979).

America's foremost constitutional historians, published *Legacy of Suppression*, an almost-polemical historical study, arguing that "the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics."⁸⁰ He maintained, *contra* to the Chafee-libertarian interpretation, that the founding generation embraced a Blackstonian view. Understandably, such a conclusion dismayed advocates of broad first amendment freedom like Justice Black, who directed one of his law clerks to conduct research, eventually occupying an entire summer, that might prove Levy's thesis wrong. (The effort was unsuccessful, though that did not change Justice Black's views. It merely led him to refuse to read Levy's next book—a wise decision, since Black regarded himself as an ardent Jeffersonian.⁸¹) Yet by an absurd twist that suggests that Clio can be a lady of a whimsical turn of mind, Justice Brennan, a leading architect of recent libertarian first amendment interpretation, turned to *Legacy of Suppression* to support, not refute, the basic postulate of *New York Times v. Sullivan*!⁸²

The other development moved in a direction opposite that of Levy's scholarship, and may yet prove to be something of a self-fulfilling prophecy. Robert H. Bork, at the time a Professor at the Yale Law School, delivered a lecture at the Indiana University Law School in 1971 in which he explicitly attacked the triumph of Brandeisian principles in *Brandenburg*.⁸³ Arguing from the premises of Herbert Wechsler's 1959 call for judicial adherence to neutral principles,⁸⁴ Bork concluded the first amendment protects only political speech and that "there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law."⁸⁵

80. L. LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* vii (1960).

81. L. LEVY, *EMERGENCE OF A FREE PRESS* xvii-xviii (1985). This volume is a reconsideration and revision of *Legacy*; with characteristic zest and wit, Levy c. 1985 corrects Levy c. 1960. The book referred to in text is LEVY'S *JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE* (1963), a study that fluttered the dovescotes of Charlottesville and other locales of Jeffersonian adulation.

82. 376 U.S. at 273: "This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, 1 Stat. 586, which first crystallized a national awareness of the central meaning of the first amendment." See L. LEVY, *LEGACY OF SUPPRESSION* *supra* note 80 at 258.

83. Bork, *supra* note 69.

84. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

85. Bork, *supra* note 69, at 20.

B. Federal Common Law Cases

Our next case study presents an altogether different picture of the interplay between law and history, demonstrating the Court not so much using history as being used by it. The landmark case of *Erie Railroad v. Tompkins* (1938)⁸⁶ represents a confluence of several streams of legal development: the political struggles over the jurisdiction of federal courts; Justice Holmes' long struggle against legal Platonism; the intellectual influence of America's premier legal historian, Charles Warren; and the complex, fascinating story of federal common law.

The tale begins with the apparently inexhaustible ambiguity of *Swift v. Tyson* (1842),⁸⁷ where Justice Joseph Story held that section 34 of the 1789 Judiciary Act,⁸⁸ the Rules of Decision Act, "is strictly limited to local statutes and local usages . . . , and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence."⁸⁹ If the ambiguity of this holding is limitless, there would seem to be no theoretical limit to the commentary and controversy it might engender. After the Civil War, those possibilities were fully realized.⁹⁰

Scholars have suggested that *Swift* was dictated by Story's "attempt to impose a pro commercial national legal order on unwilling state courts"⁹¹ or as an effort to expand the scope of judge-made common law, particularly that made by federal judges, in the teeth of popular codification movement of the time.⁹² Whatever Story's motivation, the *Swift* doctrine expanded beyond the reaches of commercial law to such areas as torts,⁹³ title to real property (despite *Swift's* explicit exclusion of this subject),⁹⁴ and, most importantly, public bonds. This category, too, would seem to have been excluded by *Swift* and the Rules of Decision Act, de-

86. 304 U.S. 64 (1938).

87. 41 U.S. (16 Pet.) 1 (1842).

88. Judiciary Act of 1789, ch. 20 § 34, 1 Stat. 73, 92.

89. 41 U.S. (16 Pet.) 1, 19 (1842).

90. Two excellent surveys are T. FREYER, FORUMS OF ORDER: THE FEDERAL COURTS AND BUSINESS IN AMERICAN HISTORY (1979) and T. FREYER, HARMONY & DISSONANCE: THE SWIFT & ERIE CASES IN AMERICAN FEDERALISM (1981).

91. M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 250 (1977).

92. Note *Swift v. Tyson Exhumed*, 79 YALE L.J. 284 (1969).

93. *Baltimore & Ohio R.R. v. Baugh*, 149 U.S. 368 (1893).

94. *Galpin v. Page*, 9 Fed. Cas. 1113 (C.C.D.Cal. 1870)(No. 5205) (disapproving of state supreme court decision upholding constructive service of process by publication on a non-resident as the basis of state court jurisdiction in adjudication relating to title to real property.)

pending as it did on construction of state constitutions and statutes, not common law. But that did not deter a Court roused to indignation by debt repudiation undertaken by public authorities. As Justice Noah Swayne intoned in the leading case of this genre, *Gelpcke v. Dubuque* (1864):⁹⁵ “we shall never immolate truth, justice, and the law because a state tribunal has erected the altar and decreed the sacrifice.”

Swift was not controversial before the Civil War, but its extension to politically-sensitive decisions during and after the war, such as *Gelpcke*, swept its doctrine into the stream of controversy over federal jurisdiction. As the federal courts took on expanded jurisdiction during Reconstruction⁹⁶, they came to play an ever more significant role in the functioning of the national economy, in such things as supervising railroad receiverships. While their role became more important, it also became more controversial, particularly after the concurrent emergence of judicial activism and the doctrine of substantive due process.

Swift's aggrandizement in the twentieth century provoked powerful resistance, led by Holmes and Brandeis. Holmes had expressed skepticism about a neo-Platonic conception of law at least since his cutting review of Christopher C. Langdell's Contracts casebook in 1880, with its often-quoted aphorism, “the life of the law has not been logic; it has been experience.”⁹⁷ When in 1910 the Supreme Court brought the topic of mineral leases and state property law within *Swift*'s ambit, Holmes countered Story's vision of law as derived from “general principles” with his own positivistic notion of law as a product of discrete law-givers, in this case, the state courts.⁹⁸ Holmes' view was primarily jurisprudential, but he was also influenced by a view of history, articulated for this topic by John Chipman Gray, the first in a line of prominent Harvard Law School critics of *Swift*.⁹⁹ In his lectures on jurisprudence, published as *The Nature and Sources of the Law*, Gray patronizingly dismissed Story's work in *Swift*: “he was a man of great learning, and of reputation for learning greater even than the learning itself; he was occupied at the time in writing a book on bills of exchange, which would, of itself, lead him to dogmatize on the subject; . . . he was fond of glittering generalities;

95. 68 U.S. (1 Wall.) 175, 206-07 (1864).

96. Wiecek, *The Reconstruction of Federal Judicial Power, 1863-1876*, 13 AM. J. LEGAL HIST. 333 (1969); S. KUTLER, *JUDICIAL POWER AND RECONSTRUCTION POLITICS* 143-160 (1968).

97. Book Review, 14 AM. L. REV. 233-35 (1880).

98. *Kuhn v. Fairmount Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting).

99. This line of succession went from Gray through James B. Thayer, through Joseph H. Beale, to Felix Frankfurter, with Charles Warren associated peripherally.

and he was possessed by a restless vanity."¹⁰⁰ *Southern Pacific Co. v. Jensen* (1917), voiding a state workmen's compensation statute on the grounds of its supposed conflict with the "general principles" of admiralty law (and thus with grant of admiralty jurisdiction to the federal courts) elicited Holmes' sneer that "the common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign."¹⁰¹ The newly-appointed Justice Brandeis joined him in dissent.

Brandeis' hostility to *Swift* came as no surprise, but he reached that position by a different route of historical interpretation than had Holmes. He was the namesake of his uncle, Lewis N. Dembitz, a practicing attorney from Louisville, Kentucky who had published a learned historical survey of the law of his state, *Kentucky Jurisprudence*.¹⁰² This book was tinged with a sense that early Kentuckians were suspicious of federal courts because they feared that out-of-state creditors, investors, and speculators would use them to override Kentuckians' control of their own political economic destinies. Brandeis was deeply influenced by his uncle and his writings.¹⁰³ He saw in his own times a mirror of Kentucky's early statehood epoch, as federal courts became the refuge of out-of-state economic interests who forum-shopped their way out of state courts, state law, and state economic policy.

Brandeis' suspicions of the role of federal courts, widely shared by his Progressive contemporaries, were amply confirmed in the notorious *Taxicab Case* of 1928.¹⁰⁴ Kentucky statutory law prohibited corporations chartered by the state from entering into monopolistic contracts. Appellant, a Kentucky corporation, dissolved itself and obtained a new charter in Tennessee, a state having no such antimonopolistic statute, and then promptly entered into a monopoly arrangement with a railroad whose Kentucky station it served. It candidly admitted in its brief that it secured out-of-state incorporation specifically to get diversity-of-citizenship status in the inevitable litigation challenging its monopoly, so as to escape Kentucky courts and laws for the friendlier climes of federal courts, where it expected (and got) an application of "general principles" of commercial law under *Swift* that would sustain its monopoly contract and override the forum state's economic policy.

Holmes and Brandeis dissented, the former denouncing *Swift* on the basis of a remarkable bit of research performed by the pre-

100. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 253 (2d. ed. 1921).

101. 244 U.S. 205, 222 (1917).

102. L. DEMBITZ, *KENTUCKY JURISPRUDENCE* (1890).

103. P. STRUM, *LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE* 230 (1984).

104. *Black and White Taxicab and Transfer Co. v. Brown and Yellow Taxicab and Transfer Co.*, 276 U.S. 518 (1928).

eminent constitutional historian of the twentieth century, Charles Warren. In a 1923 law review article,¹⁰⁵ Warren disclosed that the original drafts of the Rules of Decision Act among the papers of the First Congress included the phrase “their unwritten and common law now in use,” contrary to Story’s interpretation of congressional intent in *Swift*. Seldom has legal research had such a dramatic impact: within a decade, *Swift* would be overruled, partly on the basis of Warren’s archival labor.

But of course it takes more than a bit of historical research to change a legal doctrine of almost a century’s standing. The twentieth-century erosion of *Swift*, and its dramatic demise in *Erie*, reflected numerous, more powerful strands of economic, social, and jurisprudential policy, so much so that *Erie* was little more than a piece of flotsam on the tide of history. The oldest of these strands was hostility to the jurisdiction of the federal courts, extending back to the furor aroused by *Chisholm v. Georgia* (1793),¹⁰⁶ resulting in ratification of the eleventh amendment, the only amendment dealing with the jurisdiction of federal courts. Throughout most of the nineteenth century, this hostility focused on section 25 of the Judiciary Act of 1789,¹⁰⁷ reflecting state antagonism to doctrinal developments that threatened local autonomy (including the Kentucky resentments noted earlier.)¹⁰⁸ In the 1890s, this hostility continued unabated, but its target became diversity, rather than federal-question, jurisdiction. This derived partly from a generalized public resentment at the influence of substantive due process doctrines in such important decisions as the *Income Tax Cases* of 1895¹⁰⁹ and *Lochner v. New York* (1905).¹¹⁰ In a more narrow sense, the old sectional hostility of West and South against eastern economic interests focused on diversity jurisdiction. Large corporations and eastern investors or creditors, through their attorneys, regarded diversity jurisdiction as almost a panacea that enabled them to evade or thwart state social and economic policies that favored Populist, Progressive, and Reformist programs in the western and southern states. Chief Justice William Howard Taft spoke for these eastern interests: “no single element in our governmental system has done so much

105. Warren, *New Light on the Judiciary Act of 1789*, 36 HARV. L. REV. 49 (1923).

106. 2 U.S. (2 Dall.) 419 (1793).

107. Judiciary Act of 1789, ch. 20, § 25, 1 Stat. 73, 85-87.

108. Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1, 161-89 (1913); Wiecek, *The ‘Imperial Judiciary’ in Historical Perspective*, YEARBOOK 1984 OF THE SUPREME COURT HISTORICAL SOCIETY, 61-89.

109. *Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429 (1895) and 158 U.S. 601 (1895).

110. 198 U.S. 45 (1905).

to secure capital for the legitimate development of enterprises throughout the West and South as the existence of federal courts there, with a jurisdiction to hear diverse citizenship cases."¹¹¹

The notorious hostility of federal judges to labor organizations, as well as their often conservative social, political, and ideological orientation, produced several notable congressional initiatives to trim federal jurisdiction, including the prohibition of labor injunctions in the Clayton Act of 1914,¹¹² the provisions restricting labor injunctions and prohibiting enforcement of yellow-dog contracts in the Norris-LaGuardia Act of 1932,¹¹³ the Johnson Act of 1934 forbidding injunctions against rate-setting orders made by state public utilities commissions,¹¹⁴ and the Tax Injunction Act of 1937.¹¹⁵ While these jurisdiction-limiting measures were counterbalanced by other statutes of the period that had the effect of expanding the power and jurisdiction of federal courts,¹¹⁶ the American political process was sending a distinct message of resistance to judicial activism.

Western insurgent senators, led by Nebraska Republican George W. Norris, California Republican Hiram Johnson, and Montana Democrat Thomas J. Walsh, introduced bills to strip federal courts of diversity jurisdiction.¹¹⁷ These opponents stressed a series of evils that had developed under the sheltering wing of *Swift*: forum shopping, inconsistency of the substantive law within the same jurisdiction, the power of large corporations to harass individual litigants by removal to federal courts, business hostility to court systems staffed by an elective judiciary who reflected the political sentiments dominant in a state, and the ability of corporations and other economic interests to evade or gut state regulatory policy. Such complaints struck sympathetic chords among reform-minded heirs of the Progressive tradition. The Taft Court of the 1920s had handed down several prominently reactionary decisions, among them *Truax v. Corrigan* (1921),¹¹⁸ *Bailey v. Drexel*

111. Taft, *Possible and Needed Reforms in the Administration of Justice in the Federal Courts*, 45 REP. AM. B.A. 250, 259 (1922). See also Parker, *Federal Jurisdiction*, 18 AM. B. A. J. 433-39, 479 (1932).

112. Clayton Act of 1914, ch. 323, § 20, 38 Stat. 730, 738.

113. Tax Injunction Act of 1937, ch. 726, 50 Stat. 738.

114. Johnson Act of 1934, ch. 283, 48 Stat. 775.

115. Norris-LaGuardia Act of 1932, ch. 90, §§ 3, 4, 47 Stat. 70.

116. See, e.g., the Judiciary Act of 1915, ch. 22, 38 Stat. 805; the "Judges Bill" of 1925, the Judiciary Act of 1925, ch. 229, 43 Stat. 936; the Rules Enabling Act of 1934, ch. 651, 48 Stat. 1064; and the Declaratory Judgment Act of 1934, ch. 512, 48 Stat. 955.

117. Noted briefly in T. FREYER, HARMONY AND DISSONANCE *supra* note 90, at 109, 177.

118. 257 U.S. 312 (1921) (voiding state statute prohibiting issuance of injunctions against picketing in labor disputes.)

Furniture (1922),¹¹⁹ *Adkins v. Children's Hospital* (1923)¹²⁰ and *Wolff Packing Co. v. Court of Industrial Relations* (1923).¹²¹ To Progressives, the *Taxicab Case* of 1928 seemed to ensconce federal courts in their role of providing a refuge from state laws.

Thus *Erie Railroad v. Tompkins* was a decision in which the result was virtually determined by historical forces. Edward A. Purcell, Jr. maintains in a forthcoming study of *Erie* that Justice Brandeis, writing for the majority, was determined to realize Progressive ideals by removing the jurisdictional basis for federal courts' anti-reform activism. Brandeis' opinion for the majority realized his "localist" ideals. Early in his career, he formulated his localist vision thus: "Local customs, traditions and the peculiar habits of mind of its [Massachusetts'] people, have resulted in a spirit which is its own. This is manifested partly in its statutes but even more in what may be termed its common law."¹²²

In one of his most eloquent dissents, he developed the theme:

It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has power to prevent an experiment [as a violation of the Fourteenth Amendment's due process clause]. . . . But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.¹²³

He insisted that "the present tendency towards centralization must be arrested, if we are to attain the American ideals, and that for it must be substituted intense development of life through activities in the several states and localities."¹²⁴

His *Erie* opinion was divided into three principal sections, each of them exploring a different historical avenue but all of them pointing to the destruction of *Swift* and the body of federal law that had grown up under its authority. In his first part, he sketched the criticisms of *Swift's* understanding of the Rules of Decision Act, culminating in Warren's 1923 article and the cloudburst of criticism that fell on the *Taxicab Cases*. In his sec-

119. 259 U.S. 20 (1922) (voiding federal tax on products of child labor).

120. 261 U.S. 525 (1923) (striking down state minimum wage law for women).

121. 262 U.S. 522 (1923) (restricting categories of business affected with a public interest).

122. Brandeis to Charles W. Eliot, 25 April 1893, in LETTERS OF LOUIS D. BRANDEIS: VOLUME I (1870-1907): URBAN REFORMER 113-116 at 114 (M. Urofsky and D. Levy eds. 1971).

123. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting).

124. Quoted in T. FREYER HARMONY AND DISSONANCE, *supra* note 90, at 120.

ond part, he surveyed recent complaints against the consequences of *Swift*, emphasizing forum shopping and discrimination by non-citizens against citizens of a state. Finally, in his third part, he reached the extraordinary and unique conclusion that the ruling in *Swift* was unconstitutional—the only time in its history that the Court has so held.

Brandeis was no enemy of a federal common law as such. On the same day that he handed down the *Erie* opinion, he spoke for the Court in the *Hinderlider* case¹²⁵ in holding that “whether the water of an interstate stream must be apportioned between the two States is a question of ‘federal common law’ upon which neither the statutes nor the decisions of either State can be conclusive.” Thus he was not trying to destroy the narrow consequences of *Swift*, but rather its historical excrescences and, beyond that, entire lines of historical development, especially substantive due process and the federal courts’ antipathy to labor organization. Seen in this light, *Erie* was the “procedural” complement to the dismantling of substantive-due-process precedent that began in *West Coast Hotel v. Parrish* (1937).¹²⁶ Brandeis and the other members of the *Erie* majority did not “use” history in the same sense that, say, Black did in *Adamson*, but the momentous result they reached was determined by decades-old historical developments. The *Erie* result was ordained by Brandeis’ ideology, and that in turn was a product of his understanding of America’s past.

C. Individual Rights Cases

A third case study in the use of history by the Supreme Court may be found in modern cases dealing with the rights of privacy and intimate association, together with related rights such as individual autonomy and self-realization. Throughout these cases in the modern era, history-by-judicial-fiat dominated the development of doctrine. But doctrines that live by the sword of concocted history can perish in the same way, and the current vulnerability of privacy and intimate association doctrine suggests that while good history cannot secure a doctrine, unsupported history can weaken it.

The doctrinal roots of modern privacy-autonomy-association ideas trace back to the seminal thought of Brandeis, who virtually invented the concept of a constitutionally-secured privacy right in

125. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). On the general subject of a federal common law, see Field, *Sources of Law: The Scope of Federal Common Law*, 98 HARV. L. REV. 881 (1986).

126. 300 U.S. 379 (1937).

a 1890 law review article.¹²⁷ Once on the Court, he attempted to ground such a right in the Constitution through a reinterpretation of the Framers' intent. In *Olmstead v. United States* (1928),¹²⁸ he insisted that the purpose of the Bill of Rights was the protection of individual privacy and dignity: "the makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men." The right to be let alone was kin to a related concept that Brandeis concurrently expressed, something that today we would call self-actualization. In his *Whitney* concurrence, Brandeis maintained that "those who won our independence believed that the final end of the State was to make men free to develop their faculties. . . ." ¹²⁹

Brandeis was joined in the exploration and development of this right by a most unlikely colleague, James C. McReynolds,¹³⁰ who articulated kindred rights of intimate association and self-realization in the only substantive due process cases of the old era that have survived 1937. In *Meyer v. Nebraska* (1923), a decision striking down a Nebraska statute prohibiting the teaching of any language but English in the schools of the state, McReynolds identified a fourteenth amendment right of individuals "to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of their own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."¹³¹ (McReynolds' approach was not unusual in his era. All rights that we subsume today under the rubric "civil liberties" were thought of in the 1920s as protected by the due process clauses, not primarily the first amendment.) Two years later, he spoke for a unanimous Court in voiding an Oregon statute requiring all children to be educated in public schools: "The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations."¹³²

While Brandeis was attempting to establish a constitutionally

127. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). The right of privacy identified here demonstrates the interesting phenomenon of the passage of an idea from private law (torts) to public law.

128. 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

129. *Whitney v. California*, 274 U.S. 357, 375 (1927).

130. The association of Brandeis and McReynolds in *anything*, much less the protection of civil liberties, is almost unimaginable, given McReynolds' flagrant and coarse anti-Semitism, which often found expression in deliberate snubs of Brandeis.

131. 262 U.S. 390, 399 (1923). Holmes dissented, in keeping with his belief that a legislature should be free to enact folly into law if it wished to do so.

132. *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

recognized right of privacy and *McReynolds* was providing a substantive due process grounding for it, Justices Holmes and Cardozo were laying the foundation for a third doctrinal tradition that would blend with the former two. They both sought in their differing ways to resolve an old conundrum, which, stated in terms of current constitutional controversy, is this: if a judge believes that the text of the Constitution and the available evidence of the Framers' intent are insufficient to the resolution of a problem, where does he turn for guidance in formulating a rule that will solve the problem within some conception of a rule of law? Both men rejected the notion propounded by Chief Justice Roger B. Taney in the *Dred Scott Case* that the meaning of the Constitution is immutable.¹³³ (Most commentators had assumed that this idea was buried with Taney in the Civil War. It has been exhumed, however, by some judges and academics in recent times).¹³⁴ They therefore had to locate a source of values outside the text that might serve as a rule of interpretation for judges. Holmes found it in the historical experience of the American people. He began with a rejection of formalism:

[t]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth.¹³⁵

He amplified on this theme later:

When we are dealing with words that are also a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation. The case before us must be considered in the light of our whole experience and not merely in that of what was said a hundred years ago.¹³⁶

Justice Cardozo, Holmes' successor on the Court, developed the idea further in what was to be his most influential opinion written for the United States Supreme Court, *Palko v. Connecticut*

133. *Scott v. Sandford*, 19 U.S. (19 How.) 393, (1857). ("[W]hile [the Constitution] remains unaltered, it must be construed now as it was understood at the time of its adoption. It is not only the same in words, but the same in meaning.") *Id.* at 426.

134. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 24 (1985).

135. *Gompers v. United States*, 233 U.S. 604, 610 (1914).

136. *Missouri v. Holland*, 252 U.S. 416, 433 (1920).

(1937).¹³⁷ Drawing upon his own formulation in an earlier case,¹³⁸ he wrote of “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹³⁹ From this historical notion of principles of justice derived from the traditions of the American people, Cardozo, in almost poetic language, referred to “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,”¹⁴⁰ principles “of the very essence of a scheme of ordered liberty” and so essential “that neither liberty nor justice would exist if they were sacrificed.”¹⁴¹

From this tradition, Frankfurter (who was Cardozo’s successor on the Court), drew inspiration for his formulation of the principle of due process in the *Adamson* case: “those canons of decency and fairness which express the notions of justice of English-speaking peoples.”¹⁴² Frankfurter insisted that he was merely interpreting “the political and legal history of the concept of due process,” and he rejected the possibility of any sort of formulaic approach: “these standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia.”¹⁴³

The Black-Frankfurter debate mirrored a juridical conflict that went back to the earliest years of the republic, and that was explicitly argued out between Justices Samuel Chase and James Iredell in the 1798 case of *Calder v. Bull*.¹⁴⁴ Chase there contended for supra-textual “vital principles in our free Republican governments.” Rejecting this “natural law” formulation, Iredell insisted that the Supreme Court “cannot pronounce [a statute] to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard: the ablest and the purest men have differed upon the subject”¹⁴⁵ To comparable objections raised by Black a century-and-a-half later, Frankfurter responded (as Chase had not):

The faculties of the Due Process Clause may be indefinite and vague, but the mode of ascertainment is not self-willed [by the judges]. In each case “due process of law” requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on

137. 302 U.S. 319 (1937).

138. *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

139. *Palko*, 302 U.S. at 325.

140. *Id.* at 328 (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)).

141. *Palko*, 302 U.S. at 326.

142. *Adamson v. California*, 332 U.S. 46, 67 (1947) (Frankfurter, J., concurring).

143. *Id.* at 68.

144. 3 U.S. (3 Dall.) 386 (1798).

145. *Id.* at 399.

the detached consideration of conflicting claims, on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and change in a progressive society.¹⁴⁶

The Black-Frankfurter debate dragged on inconclusively even beyond Frankfurter's retirement and death, with Justice John M. Harlan carrying on the tradition espoused by Frankfurter of balancing and a reliance on principles developed and derived from the historical experience of the American people.¹⁴⁷ This set the stage for the modern conflict on the Court, now almost a quarter-century old, over the existence of rights of intimate association. Harlan returned to the Holmes-Cardozo-Frankfurter formulations in his dissent in one of the earliest of the birth-control cases, *Poe v. Ullman* (1961).¹⁴⁸ Defending a right of marital privacy, Harlan drew on the Chase formulas of *Calder* to affirm the role of judges in assessing a balance between the rights of individual liberty and the power of the state to regulate, a "balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. The tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound." The anomalous problem of state inhibitions on birth control, plus the Harlan invitation to identify historically-defined traditions, induced Justices William O. Douglas and Arthur J. Goldberg to turn to the ninth amendment four years later to affirm the value of intimate association.

In *Griswold v. Connecticut* (1965),¹⁴⁹ where the Supreme Court finally came to grips with the substantive issues presented by birth-control regulation, the ninth amendment made its sudden, dramatic debut in constitutional discourse. While this forgotten amendment was cited by Justice Douglas in his majority opinion as one of six different textual sources proving the existence of "a right of privacy older than the Bill of Rights,"¹⁵⁰ it was Justice Goldberg, concurring, who grounded the privacy right historically, as Harlan had insisted it must be. Goldberg read the amendment as indicating that "the Framers believed that there are additional fundamental rights, protected from governmental infringement,

146. *Rochin v. California*, 342 U.S. 165, 172 (1952).

147. See, e.g., the opposing positions of Harlan, J., writing for the majority, and Blackmun, J., writing a dissent in which Black joined, in *Cohen v. California*, 403 U.S. 15 (1971).

148. 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

149. 381 U.S. 479 (1965).

150. *Id.* at 486. The other sources are the first, third, fourth (search-and-seizure), fifth (self-incrimination), and fourteenth (due process) amendments.

which exist alongside those fundamental rights specifically mentioned in the first eight constitutional amendments.”¹⁵¹ Like Holmes, Cardozo, and Frankfurter before him, Goldberg relied on the *Palko* standards of the historical traditions of the American people as validation for this newly-minted right.

The right of privacy and intimate association thus identified in *Griswold* soon demonstrated its protean character. It quickly expanded to individuals as well to as married couples;¹⁵² and to rights of family association, a right defined by Justice Lewis Powell in *Moore v. East Cleveland* (1977)¹⁵³ as “deeply rooted in this Nation’s history and tradition.” *Moore* was remarkable for its dialogue between the majority, speaking through Justice Powell, and Justice Byron White in dissent on the meaning and role of history in Supreme Court adjudication. Powell used history in two ways: to discriminate between discredited versions of substantive due process such as that represented by *Lochner*,¹⁵⁴ and the valid modern sort (e.g., *Griswold*); and in the form of social history, to demonstrate the continued vitality of the extended family. White in dissent warned the majority that it was coming close to *Lochner*izing, insisting that the *Palko* tradition did not encompass questions of family composition. “What the deeply rooted traditions of the country are is arguable; which of them deserves the protection of the Due Process Clause is even more debatable.”¹⁵⁵ To this Powell replied that “an approach grounded in history imposes limits on the judiciary that are more meaningful than any based on the abstract formula taken from *Palko*.”¹⁵⁶

But of course the foci of the modern substantive due process rights of privacy and association are the abortion cases, the progeny of *Roe v. Wade* (1973).¹⁵⁷ In *Roe*, Justice Harry Blackmun for the majority reaffirmed the *Palko* tradition as the source of ninth and fourteenth amendment protected rights of privacy from state intrusion on decisions affecting the most intimate relationships of human existence, above all, maternity. Throughout his opinion, Blackmun resorted to brief historical arguments to establish such elements of his position as the legal non-personhood of fetuses and the development of theological and philosophical doctrines concerning abortion and human personality. Countering this, Justice Rehnquist in dissent made a similar use of history to

151. *Id.* at 488.

152. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

153. 431 U.S. at 503.

154. *Lochner v. New York*, 198 U.S. 45 (1905).

155. 431 U.S. at 549.

156. *Id.* at 504 n.12.

157. 410 U.S. 113 (1973).

demonstrate that abortion was not a right historically located in the *Palko* tradition, from which he drew the conclusion that the Court was Lochnerizing, rendering a decision that “partakes more of judicial legislation than it does of a determination of the intent of the drafters of the fourteenth amendment.”¹⁵⁸

Justice Harlan’s prediction in *Poe v. Ullman* is being validated by the subsequent course of development of the privacy/intimate association doctrine. *Roe* itself, controversial from the day it was announced,¹⁵⁹ has come under massive attack as has no other single decision since *Dred Scott*. The political arm of this attack has thus far not succeeded in overturning the decision by constitutional amendment or legislation, but the critique of Justice Blackmun’s reasoning coming from within the Court itself¹⁶⁰ has eroded its intellectual foundations. An indication of how far those foundations have been undercut was Justice White’s terse majority opinion in *Bowers v. Hardwick* (1986),¹⁶¹ the Georgia sodomy case. White and Chief Justice Warren Burger concurred, and went out of their way to demonstrate that the traditions of the nation (White) or western civilization (Burger) are hostile to homosexual activity. It was futile for the minority, speaking through Justice Blackmun, to argue that the four members of the court joining White’s opinion had missed the point of what the case was about; after *Bowers*, a generalized right of sexual intimacy stands outside the historically-defined parameters of the fourteenth amendment’s scope.

Moreover, *Bowers* is not the end of the bad news for those who would find in history a validation of the rights of privacy and intimate association (whatever may be the fate of *Roe* after Justice Powell’s retirement). All constitutional doctrine is a double-edged sword or, to vary the historical metaphor from military to naval, potentially a loose cannon. Doctrine can be used to undercut as well as to affirm a right, and that potential has always existed in the privacy/association/autonomy area. Herbert Wechsler anticipated this development in his 1959 Holmes lectures, reprinted as *Toward Neutral Principles of Constitutional Law*.¹⁶² Criticizing the *Brown* Court for, he claimed, arbitrarily preferring the right

158. *Id.* at 174.

159. See, e.g., for critical contemporary commentary, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159-186 (1973).

160. *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416 (1983) (O’Connor, J., dissenting); *Thornburgh v. American College of Obstetricians and Gynecologists*, 106 S. Ct. 2169 (1986) (White, J., dissenting).

161. 106 S. Ct. 2841 (1986).

162. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Reprinted in *SELECTED ESSAYS ON CONSTITUTIONAL LAW* (1963).

of blacks to associate with whites by attending desegregated schools, Wechsler argued that this deprived whites of their right to choose their associations. Conceivably, such a notion might be put to unimaginable uses by conservative jurists hostile to the egalitarian and anti-discrimination ideals defended by the Warren and Burger Courts. In 1963, then-Professor Robert Bork opposed what was to become the Civil Rights Act of 1964,¹⁶³ on the grounds that it would deprive a segregationist minority of freedom (to segregate). He considered a “coerced scale of preferences . . . rooted in a moral order”—i.e., hostility to discrimination—a value subordinate to individual liberty.¹⁶⁴

The Court did in fact find an associational right to exclude outsiders powerful enough to receive fourteenth amendment protection in *Roberts v. United States Jaycees* (1984),¹⁶⁵ at least where the group was small, intimate, selective, non-commercial, and a vehicle for transmitting values. Families are the modal type of such groups; religious enterprises are another.¹⁶⁶ While no one would quarrel with the idea that families must be permitted to “discriminate,” if that is the word, by refusing to admit outsiders, constitutional doctrines have a way of expanding beyond the boundaries of their reasonable limits and extending to situations not foreseen when they were formulated. Who can tell what inroads may be gouged out of the scope of equal protection by the concession of a right to exclude?

III. THE HISTORICAL APPROACH IN DEALING WITH THE RIGHTS OF BLACK AMERICANS

In contrast to the disparate directions that judicial uses of history have taken in recent times, the Court’s resort to history in nineteenth century cases dealing with the rights of black people tended uniformly to one general consequence: The degradation of blacks in slavery, crypto-servitude, and nominal freedom. In company with the rest of white American society, the Supreme Court diminished constitutional and legal securities for the rights of blacks, abetting legal, extra-legal, and illegal movements to subordinate them. Throughout this process, the abuse of history was an instrument in devaluing the constitutional position of blacks.

In retrospect, it appears as if the Court could not touch a

163. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

164. Bork, *Civil Rights — A Challenge*, NEW REPUBLIC 20 (Aug. 31, 1963).

165. 468 U.S. 609 (1984).

166. *Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 107 S. Ct. 2862 (1987).

landmark case before 1900 that involved the rights of blacks without distorting history. Justice Story began the tradition in *Prigg v. Pennsylvania* (1842)¹⁶⁷ with a piece of egregious history-by-judicial-fiat that was meant to sustain his holding that the Fugitive Slave Act of 1793¹⁶⁸ was constitutional:

Historically, it is well known that the object of [the fugitive slave] clause ¹⁶⁹ was to secure to the citizens of the slaveholding States the complete right and title of ownership in their slaves, as property, in every State in the Union [The clause] was so vital to the preservation of their domestic interests and institutions, that it cannot be doubted that it constituted a fundamental article, without the adoption of which the Union could not have been formed¹⁷⁰

Story was adept at using history to refashion or create law,¹⁷¹ but here his historical *ipse dixit* was grossly erroneous. A strong argument could be made that the three-fifths and slave importation clauses were the South's price for union at the Philadelphia Convention,¹⁷² but the fugitive slave clause was a last-minute afterthought, opportunistically secured by the South Carolina delegates late in the convention.¹⁷³

Bad as Story's history was, Chief Justice Taney's was worse. Story's error was probably inadvertent, and at worst wishful thinking; Taney's several misstatements displayed what the modern libel test labels "actual malice—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."¹⁷⁴ His *Dred Scott* opinion rested on three gross misstatements of historical fact; two of these served to suppress blacks into a degraded status outside constitutional protection; the third supported Taney's strained and implausible attempt to deny Congress power to regulate the territories and admit new states. It was the dictum was that the Missouri Compromise of 1820 was unconstitutional because Congress lacked power to exclude slavery from the territories.¹⁷⁵

167. 41 U.S. (16 Pet.) 539 (1842).

168. Act of Feb. 12, 1793, ch. 7, 1 Stat. 302.

169. U.S. CONST., art IV, § 2, cl. 3.

170. 41 U.S. (16 Pet.) 539, 611 (1842).

171. See, e.g., Story's opinion in *De Lovio v. Boit*, 7 Fed. Cas. 418 (C.C.D.Mass.) (No. 3776).

172. Such an argument was made in W. WIECEK, *THE SOURCES OF ANTISLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848* 65-76 (1977).

173. P. FINKELMAN, *AN IMPERFECT UNION: SLAVERY, FEDERALISM, AND COMITY* 26-27 (1981); W. WIECEK, *supra* note 172, at 79.

174. *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964).

175. See generally two critiques of Taney's reasoning in *Dred Scott*: D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 335-88 (1978); H. HYMAN & W. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT, 1835-1875* 172-90 (1982).

Taney had to demonstrate that blacks could not be “Citizens” for diversity purposes¹⁷⁶ in order to deny them access to federal courts in freedom suits. (To digress on this important point for a moment: one of the several reasons why Taney believed it essential to establish this point was that if slaves were permitted access to federal courts under diversity, they could not be denied jury trial under the seventh amendment: freedom suits were usually fictive assault and battery or false imprisonment litigation, and therefore “[S]uits at common law” and the amount in controversy would almost always exceed the constitutionally-specified minimum of “twenty dollars,” because the average price of a male slave in 1850 between the ages of one and seventy years old was well over fifty dollars.¹⁷⁷ This in turn would override the denial of jury trial in the Fugitive Slave Act of 1850,¹⁷⁸ and cast a shadow on the constitutionality of that statute. Scott’s counsel at trial were aware of this possibility,¹⁷⁹ though abolitionists invariably missed its astonishing implications. By flawed reasoning, Taney attempted to demonstrate that blacks could not be “Citizens” for Article III purposes because they were not “Citizens” for Article IV¹⁸⁰ purposes. To establish this point, he inferred the Framers’ intent from public opinion in 1787: Blacks then “had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect”¹⁸¹ Taney’s assertion was doubly wrong: Blacks were not so debased in the 1780s¹⁸² and their legal status in the northern states had improved considerably in the years since.¹⁸³ But the false present reality he created by manipulation of history was an integral part of his constitutional vision.

Taney’s second use of history was of a piece with the first. Usually law-office history has to circumvent precedent. But for Taney, the precedent with which he had to work, the Declaration of Independence, could not be dealt with in such a fashion; rather, it had to be explained away. If he had been addressing only a slave state

176. U.S. CONST., art. III, § 2.

177. R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 76, fig. 18 (1974).

178. Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

179. Roswell M. Field to Montgomery Blair, 7 January 1855, typescript transcript of letter in Dred Scott Collection, Missouri Historical Society, St. Louis.

180. U.S. CONST., art. IV, § 2, cl. 1.

181. 60 U.S. (19 How.) 426 (1856).

182. D. FEHRENBACHER, *supra* note 175, at 349.

183. Finkelman, *Prelude to the Fourteenth Amendment: Black Legal Rights in the Antebellum North*, 17 *RUTGERS L.J.* 415 (1986).

audience, that would have been no problem because the public law of the slave states since Independence had construed blacks to be outside the scope of the phrase "all men are created equal."¹⁸⁴ But his opinion was addressed principally to the people of the free states, and so he had to educate his audience about how to read the Declaration:

It is too clear for dispute, that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration; for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly inconsistent with the principles they asserted¹⁸⁵

If we today are to make sense of what Taney was saying here, we must remember that context is all important. His idea, though a concocted recreation of the past, made sense within the legal system in which slave state jurists operated. The problem posed by Taney's words just quoted is that they constituted part of his effort to impose the legal order of the slave states on the free states. The slave-state legal order was premised on what has come to be called in modern times the "dual state."¹⁸⁶ As described by Judith Shklar,¹⁸⁷ such a legal order has:

a perfectly fair and principled private law system, and also a harsh, erratic criminal control system, but it is a "dual State" because some of its population is simply declared to be subhuman, and a public danger, and as such excluded from the legal order entirely Such was the government of the United States until the Civil War and in some ways thereafter. Such also was Nazi Germany and such is South Africa today.

The southern legal order explicitly adopted dual-state premises (without using the terminology, of course) in the landmark 1829 case of *State v. Mann*.¹⁸⁸ The peculiar tensions that distinguished it derived from its contorted efforts to exclude blacks from it for certain purposes and to include them for others.¹⁸⁹ All this was obvious to a southern attorney, but Taney correctly perceived that

184. For Virginia, to cite a typical example, see the discussion in A. HOWARD, I, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 64 (1974).

185. 60 U.S. (19 How.) 410 (1856).

186. This concept was first propounded, to my knowledge, by E. FRAENKEL, THE DUAL STATE, (E.A. Shils trans. 1941) (analysis of the legal order of the Third Reich).

187. J. SHKLAR, POLITICAL THEORY AND THE RULE OF LAW, A. HUTCHINSON AND P. MONAHAN, EDS., THE RULE OF LAW: IDEAL OR IDEOLOGY 2 (1987). Her characterization differs substantively, in my opinion, from Fraenkel's dichotomy between what he called the "Prerogative State" and the "Normative State." For present purposes, I find her description more pertinent to American conditions.

188. 2 Dev. 263 (N.C. 1829).

189. Cf. M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860: CONSIDERATIONS OF HUMANITY AND INTEREST (1981).

the North needed to be schooled on the matter.

Taney's third use of history was designed to deny Congress power to exclude slavery from the territories. (This in turn was a necessary prelude to imposing the premises of John C. Calhoun's constitutional theory on the American constitutional system, under which the federal government was obliged to protect slavery everywhere, including the territories.) Here Taney confronted not only an embarrassing precedent, *American Insurance Co. v. Canter*,¹⁹⁰ which implied plenary congressional power over the territories, but also the text of the Constitution itself, which in Article IV, section 3 provided that "[t]he Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." His solution was historical, ingenious and implausible. Law office history as a precedent-busting device was called for, and Taney produced it, declaring on the strength of nothing more than an *ipse dixit* that the territories clause was irrelevant because it applied only to territories owned by the federal government in 1787 and not to after-acquired lands. (It goes without saying that there was no historical basis for such a reading.)

With the Territories Clause thus disposed of, Taney then laid a foundation for the rest of his opinion on the New States Clause of Article IV, section 3.¹⁹¹ He went on to hold that the clause implied that Congress could not impose conditions on the admission of new states, such as a prohibition of slavery, because that would deny such a state equality of status with other states. This busted two precedents, the Northwest Ordinance (which had been reaffirmed by statute by the First Congress¹⁹²—a fact that a lesser jurist than Taney might have taken to be conclusive on the constitutionality of congressional power to exclude slavery) and *Permoli v. New Orleans* (1845),¹⁹³ holding that Congress could impose conditions on admission of new states. Bad history was not the worst vice of *Dred Scott*, but it augmented Taney's *a priori* pro-slavery positions so powerfully that nothing less than a constitutional amendment could undo the baneful effects of Taney's tortured reasoning.

Even if we dismiss *Dred Scott* as a singular opinion, unique in its malevolent effects, judicial history served blacks badly in later landmark nineteenth-century precedents. The *Slaughterhouse*

190. 1 Pet. (26 U.S.) 511 (1828).

191. U.S. CONST., art. IV, § 3, cl. 1: "New States may be admitted by the Congress into this Union; . . ."

192. Act of August 7, 1789, ch. 8, 1 Stat. 50.

193. 44 U.S. (3 How.) 589 (1845).

*Cases*¹⁹⁴ of 1873 were a *tour de force* of historical reasoning, not only in Justice Samuel F. Miller's majority opinion, but in the dissents of Justices Stephen J. Field and Joseph P. Bradley as well.

Justice Miller used historical reasoning of various kinds to establish no less than five major points of his opinion. First, he confirmed the doctrine of the police power, a constitutional concept of surprisingly recent origin, dating from Chief Justice Lemuel Shaw's 1851 opinion in *Commonwealth v. Alger*.¹⁹⁵ He actually used the term—itself an innovation—and declared that it “has been, up to the present period in the constitutional history of this country, always conceded to belong to the States.”¹⁹⁶ This, in turn, provided a doctrinal basis for the Court's ratification of state regulatory power several years later in *Munn v. Illinois*,¹⁹⁷ and later for the Court's holding in *Plessy v. Ferguson* (1896).¹⁹⁸

Miller next turned to what he considered the key to the meaning of the new amendments to the Constitution: recent history. “The history of the times . . . fresh within the memory of us all” disclosed that “the one pervading purpose” of the amendments was “the freedom of the slave race . . . and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him.”¹⁹⁹ At first glance, this emphasis seemed to augur well for the freed people, suggesting an attitude among federal judges that would construe the amendments liberally to attain the objectives so sweepingly stated. Like Marshall before him, Miller seemed to be using this benign form of history-by-judicial-fiat, contemporary history as remembered by a participant, to justify an expansion of federal power.

But unlike Marshall, Miller was hobbled by a timid conservatism when confronted with revolutionary change. He could not bring himself to accept the sweeping implications of the amendments, which “would constitute this court a perpetual censor upon all legislation of the States.” When the consequences of a liberal construction of federal power “are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions” and when the proffered interpretation “radically

194. 83 U.S. (16 Wall.) 36 (1873).

195. 7 Cush. 61 Mass. 53.

196. 83 U.S. (16 Wall.) 62 (1873).

197. 94 U.S. 113 (1877). Cf. Scheiber, *The Road to Munn: Eminent Domain and the Concept of Public Purpose in the State Courts*, in *LAW IN AMERICAN HISTORY* (vol. V of *PERSPECTIVES IN AMERICAN HISTORY*) 329-402 (D. Fleming and B. Bailyn, eds., 1971).

198. 163 U.S. 537 (1896).

199. 83 U.S. (16 Wall.) 71 (1873).

changes the whole theory of the relations of the State and Federal governments to each other,"²⁰⁰ Miller balked. His reluctant attitude would have the most far-reaching doctrinal consequences for three of the four substantive rights conferred by section one of the fourteenth amendment, and would shunt the thirteenth amendment to the sidelines as a guarantor of the rights of blacks.

Continuing with the same deceptive process of a broad reading leading to a narrow result, Miller construed the privileges and immunities clauses of article IV and the fourteenth amendment in the comprehensive sense originally outlined by Justice Bushrod Washington in his 1823 Circuit Court opinion, *Corfield v. Coryell*.²⁰¹ But he immediately qualified this promising beginning by drawing a distinction between federal and state privileges, holding that only the former were protected by the fourteenth amendment. Miller enumerated five federal privileges, of which only two might be of any relevance to most black people: *habeas corpus* and the rights of assembly and petition. For all others within Washington's description ("protection by government . . . the right to acquire and possess property of every kind," etc.) blacks were remitted to the states, both for the substantive definition of the content of the rights, and for the protection of those rights. At the time Miller wrote, negrophobic Redeemer governments had swept to power in most of the southern states, and would take over the rest before the end of the decade. Hence his assurances had an ominously hollow ring to blacks.

Only the privileges-and-immunities part of Miller's reasoning has survived doctrinally into our own times. Every other aspect of his opinion has been repudiated. As Justice William H. Moody observed in 1908, "criticism of this case has never entirely ceased, nor has it ever received universal assent by members of this Court."²⁰² The Court expressed second thoughts about the privileges-and-immunities clause holding only once, in 1935,²⁰³ and that opinion did not long withstand Justice Harlan Fiske Stone's privately-expressed criticism that it treated principles "not better than an excursion ticket, good for this day and trip only."²⁰⁴ The case was overruled only five years later,²⁰⁵ restoring Miller's reading of the privileges and immunities clause, which remains dominant today.

200. *Id.* at 78.

201. 6 Fed. Cas. 546 (C.C.E.D. Pa. 1823)(No. 3230).

202. *Twining v. New Jersey*, 211 U.S. 78, 96 (1908).

203. *Colgate v. Harvey*, 296 U.S. 404 (1935).

204. Stone to Felix Frankfurter, February 17, 1936, quoted in A. MASON, *THE SUPREME COURT: VEHICLE OF REVEALED TRUTH OR POWER GROUP, 1930-1937* 41 (1953).

205. *Madden v. Kentucky*, 309 U.S. 83 (1940).

The same conservative approach guided Miller's treatment of the due process and equal protection clauses. Alluding unspecifically to both federal and state precedents construing the due process and law-of-the-land clauses of the federal and state constitutions, he wrote that "under no construction of that provision that we have ever seen, or any that we deem admissible," could the Louisiana monopoly deprive the aggrieved butchers of due process.²⁰⁶ That statement was, to say the least, a curious bit of history-by-fiat. To make it, Miller had to shut his eyes to the considerable body of precedent in the state courts linking the clauses to higher-law doctrines,²⁰⁷ as well as to three significant United States Supreme Court opinions: *Murray's Lessee v. Hoboken Land and Improvement Co.* (1856),²⁰⁸ in which Justice Benjamin R. Curtis anticipated postbellum substantive due process doctrinal developments; Chief Justice Taney's opinion in *Dred Scott*, in which he explicitly (though briefly and offhandedly) articulated the doctrine;²⁰⁹ and Chief Justice Salmon P. Chase's more extensive use of the doctrine in the first Legal Tender Case (1870).²¹⁰

Miller's approach to the equal protection clause was different. Referring once again to his general reading of the history of the War and its immediate aftermath he concluded that "we do not see in those amendments any purpose to destroy the main features of the general [federal] system."²¹¹ Thus he confined the scope of equal protection to blacks: "we doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or an account of their race, will ever be held to come within the purview of this provision."²¹² This proved to be an empty boon to blacks, for with only rare and occasional exceptions,²¹³ the equal protection clause slipped off into a profoundly dormant condition for eighty years.

The future belonged to the dissenters, Justices Field and Bradley, who also used history, not to confine the federal system in familiar molds as Miller had done, but to explode doctrinal confines and create a new body of law—substantive due process and liberty of contract—for the new age. Field relied on the four-

206. 83 U.S. (16 Wall.) 81 (1873).

207. See *Wynehamer v. New York*, 13 N.Y. 378 (1856).

208. 59 U.S. (18 How.) 272 (1856).

209. 60 U.S. (19 How.) 450 (1857).

210. *Hepburn v. Griswold*, 75 U.S. (8 Wall.) 603 (1870).

211. 83 U.S. (16 Wall.) 82 (1873).

212. *Id.* at 81.

213. E.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (equal protection clause violated by invidious administration of municipal ordinance.) But for most of the clause's history, its comatose state justified Justice Holmes' sneering dismissal as "the usual last resort of constitutional arguments": *Buck v. Bell*, 274 U.S. 200, 208 (1927).

teenth amendment's privileges and immunities clause, but transformed its meaning with the aid of history. He construed it in terms of Judge Washington's sweeping *dicta* in *Corfield*, as well as of higher-law concepts enunciated by Justice Samuel Chase in *Calder v. Bull* (1798).²¹⁴ He emphasized that this was the construction favored by the sponsors of the Civil Rights Act of 1866,²¹⁵ which the fourteenth amendment was intended in part to ratify. Then, in a brilliant fusion of historically heterogeneous ideas, he tied the *Cornfield/Calder* vision of natural rights with the centuries-old common law antipathy to monopoly privilege: "this equality of right, with exemption from all disparaging and partial enactments, in the lawful pursuits of life, throughout the whole country, is the distinguishing privilege of citizens of the United States."²¹⁶

While Field's performance was intellectually impressive, it was Bradley who identified the more powerful juridical concept. His argument was equally historical, beginning with the old idea, established in debates on the reception of the common law in the late eighteenth and early nineteenth centuries, that "the people of this country brought with them to its shores the rights of Englishmen," including the law-of-the-land provision of Magna Carta's celebrated chapter thirty-nine.²¹⁷ From thence, he leapt to a substantive conception of due process: "Life, liberty, and property . . . are the fundamental rights which can only be taken away by due process of law."²¹⁸ Included within this broad concept was the embryonic idea of liberty of contract: A law inhibiting persons from pursuing a legal trade "does deprive them of liberty as well as property, without due process of law . . . their occupation is their property."²¹⁹ Bradley concluded his dissent with a historical interpretation that transformed the fourteenth amendment, abandoning the freed people and shifting its protection to economic interests:

It is futile to argue that none but persons of the African race are intended to be benefited by this amendment. They may have been the primary cause of the amendment, but its language is general, embracing all citizens. . . . The mischief to be remedied was not merely slavery and its incidents and consequences; but that spirit of insubordination and disloyalty to the National government which had troubled the country for so many years in

214. 3 U.S. (3. Dall.) 386 (1798) (Chase, J., seriatim opinion).

215. Civil Rights Act of 1866, ch. 200, 14 Stat. 173.

216. 83 U.S. (16 Wall.) at 109-10.

217. *Id.* at 114.

218. *Id.* at 116.

219. *Id.* at 122.

some of the States.²²⁰

In this passage, Bradley used history-by-fiat to reinterpret the origins of section one of the fourteenth amendment. He subsumed into Republican concern for the fate of blacks and their hostility to state sovereignty ideas a more contemporary conservative hostility to debt repudiation, reflected first in *Gelpcke* and kindred cases, and then in judicial antagonism to what the southern states euphemistically termed “readjustment”: The process of debt repudiation by the Democratic “Redeemer” regimes coming to power after the ouster of Republican governments in the southern states.

The *Slaughterhouse* majority had effectively abandoned blacks as an object of special constitutional concern, relegating them to the hollow security of state protection for their rights. At the same time, the dissents created a new paradigm of law, one that was to dominate American law for the next two generations. Both these momentous developments were achieved by historical reasoning; indeed, the results on both sides would have been insupportable without some form of historical justification, specious or inventive as it may have been.

History similarly informed both the majority and the dissenting opinions in the next major case affecting the rights of black people, the *Civil Rights Cases* (1883).²²¹ For a decade after *Slaughterhouse*, all three branches of the federal government receded from their post-war commitment to protecting the rights of former slaves. Thus when the constitutionality of the Civil Rights Act of 1875²²² was contested in this case, it came as little surprise that the statute was overturned. What is striking a century later, however, is how historically-determined that result was.

Justice Bradley for the majority began with an interpretation of congressional intent at the time of the enactment of the 1866 Civil Rights Act, holding that under the thirteenth amendment, “[c]ongress did not assume . . . to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship.”²²³ He thus posited a fundamental distinction between the various legal rights specified in the 1866 Act and the social relationships between the races. The former, he implied, were subject to legal regulation of some sort; the latter were not. (This distinction would bear its poisoned fruit thirteen years later in *Plessy*.) Then, after concocting the state-action doctrine

220. *Id.* at 123.

221. 109 U.S. 3 (1883).

222. Civil Rights Act of 1875, ch. 114, 18 Stat. 335.

223. 109 U.S. at 22.

as an interpretation of the Framers' intent in ratifying the fourteenth amendment, Bradley denied that Congress could reach private racial discrimination under its thirteenth amendment powers (the state-action doctrine standing as a barrier to use of the fourteenth amendment.) The effect of these doctrines was that the public accommodations section of the 1875 Civil Rights Act was held unconstitutional.

Bradley concluded with a rhetorical flourish. Rebutting Justice John M. Harlan in dissent, he denied that racial discrimination constituted a "badge of slavery" that Congress could reach under the legislative powers conferred by section two of the thirteenth amendment. "When a man has emerged from slavery," he intoned, there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws."²²⁴ Bradley's restrictive reading of the thirteenth amendment was rejected by the Court eighty-five years later in *Jones v. Alfred Mayer Co.*,²²⁵ where Justice Potter Stewart held that racial discrimination, in the form of a refusal to sell real property to persons on account of race, did constitute a badge of slavery that Congress could prohibit under its thirteenth amendment powers.

The first Justice John M. Harlan, dissenting in the *Civil Rights Cases*,²²⁶ rejected Bradley's conclusion. Drawing on his own unusual personal experience—he had been a Kentucky slaveowner yet an officer in the Kentucky Union forces during the War—he insisted that in a slave society, universal race discrimination was one of the "burdens and disabilities which constitute badges of slavery."²²⁷ In an idea vindicated in our own time,²²⁸ Harlan maintained:

that since slavery was the moving or principal cause of the adoption of [the Thirteenth] Amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from, and protection against all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races.²²⁹

Then, turning to the history of the common law, Harlan main-

224. *Id.* at 25.

225. 392 U.S. 409 (1968).

226. By an historical irony, his grandson and namesake, the second Justice Harlan, dissented in *Jones v. Alfred Mayer Co.*, rejecting his grandfather's expansive reading of congressional power under the thirteenth amendment.

227. 109 U.S. at 35. Accord Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421-430 (1960).

228. *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968).

229. 109 U.S. at 36.

tained that railroads are “public highways” and inns “quasi-public” franchises, and as such subject to public regulatory power. “A license from the public to establish a place of public amusement, imports, in law, equality of right, at such places. . . .” He drew from that conclusion that Congress under its thirteenth amendment powers could prohibit discrimination in such places exercising “public or quasi public functions” because such discrimination was a badge of slavery.²³⁰ This argument, adapted to suggest that such quasi-public functions could be reached under congressional power derived from section five of the fourteenth amendment, has been rejected in our time.²³¹

The first Harlan found himself on the losing side of historical argumentation again in the decision that validated Jim Crow, *Plessy v. Ferguson* (1896).²³² Justice Henry B. Brown’s majority opinion has been belabored so often that reviewing or condemning its premises yet again would be supererogatory. But it is useful to be reminded of how historical his approach was. He relied heavily on *Roberts v. Boston*,²³³ Lemuel Shaw’s 1849 decision holding that the Boston school board had authority to segregate the races in public schools. Brown made much of the fact that Boston was a center of abolitionist thought. The most recent student of *Plessy* has concluded that Brown’s “vision of social reality . . . did not lack substantial support in contemporary expert opinion; nor was his history jarringly inaccurate.”²³⁴ Brown’s ideas were commonplace, at least among whites of the time. The history of segregation and discrimination in America blended smoothly with contemporary racist thought, both crude and learned, into an integrated view of the place of blacks in America—and that place was in the Jim Crow car.

Justice Harlan dissented again, largely plowing over ground he had furrowed in the *Civil Rights Cases*. Speaking as a southerner having the intimate acquaintance with southern mores and attitudes that Justice Brown, a native of Massachusetts and lifelong resident of the North, lacked, Harlan wrote that every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches “. . . assigned to white persons . . .” as a deliberate means of caste degrada-

230. 109 U.S. at 43.

231. *Moose Lodge v. Irvis*, 407 U.S. 163 (1972).

232. 163 U.S. 537 (1896).

233. 5 Cush. (59 Mass.) 198 (1849).

234. C. LOFGREN, *THE PLESSY CASE: A LEGAL-HISTORICAL INTERPRETATION* 198 (1987).

tion.²³⁵ He predicted that *Plessy* would be in time as “pernicious” as *Dred Scott*, and so indeed it has become. Even a lawyer as unsympathetic to civil rights issues as United States Attorney General Edwin Meese has endorsed Philip Kurland’s judgment condemning the two decisions together as “derelicts of constitutional law.”²³⁶

The effect of the Court’s landmark slavery and civil rights cases of the nineteenth century was to ratify the actions of southern society casting blacks into an obscure netherworld of quasi-freedom, where they were legitimately subject to segregation and discrimination, deprived of the ballot and effective access to courts, kept in economic subjugation as a landless peasantry and unskilled labor pool, terrorized by illegal violence for which they could secure no protection or redress. History served throughout as handmaiden to this effort, validating racial prejudice and blighting the promise of the Reconstruction Amendments.

CONCLUSION

Every person will draw their own lessons from these historical explorations, and I would not attempt to intrude with mine. But an historian writing for lawyers may be permitted to comment on some assumptions about the nature of history that non-historians commonly make. For purposes of illustration, let me begin with United States Attorney General Edwin Meese’s call for “a Jurisprudence of Original Intention.” In pursuit of this, Meese has promised that his department “will endeavor to resurrect the original meaning of constitutional provisions.” “It is our belief that only ‘the sense in which the Constitution was accepted and ratified by the nation’ . . . provide[s] a solid foundation for adjudication.”²³⁷ This is obviously an historical enterprise, depending on an understanding of history that Meese shares with other non-historians. Let me identify their assumptions.

First, the non-historian assumes that historical facts are objectively knowable, “out there,” so to speak, and that they will disclose themselves to anyone who seeks diligently. The person holding this belief does not distinguish among historical fact, inference, and interpretation. Facts speak for themselves, and, when properly selected and arranged, provide the basis for a cor-

235. 163 U.S. at 552.

236. Speech of October 21, 1986, reported in N.Y. Times, October 23, 1986; the quoted phrase appears in an excerpt of the speech reprinted in F. SCHAUER, 1987 SUPPLEMENT TO GERALD GUNTHER, CONSTITUTIONAL LAW, 2 (1987).

237. Speech to American Bar Association, July 9, 1985, reprinted in THE GREAT DEBATE: INTERPRETING OUR WRITTEN CONSTITUTION 9-10 (Washington, n.d.).

rect interpretation of the past. False interpretations come about by an incomplete or distorted ordering of the facts. The “true” past is the sum of historical facts honestly marshalled. David H. Fischer describes this attitude thus: the historian “is supposed to go a-wandering in the dark forest of the past, gathering facts like nuts and berries, until he has enough to make a general truth. Then he is to store up his general truths until he has the whole truth.”²³⁸ Historical truth is therefore a function of facts. It is found and evaluated on the basis of facts.

Second, the past—the actual, “real” past, out there—does not change. “A fact is a fact,” the common expression has it. The past, as the totality of facts, is forever set by its very pastness. It cannot be changed. It can, of course, be interpreted or narrated falsely, but the real past exists independently of the way it is interpreted.

Third, the application of the past to the present is essentially a matter of getting the facts straight. The principal danger in accomplishing this is that our arrangement of facts might be distorted, either because of the incompleteness of our collection, or because the arrangement is passed through the distorting filter of our ideology, which skews an arrangement that would otherwise speak for itself if organized on some elementary principle such as chronological sequence.

This assumption is to history what “mechanical jurisprudence” (to use Roscoe Pound’s phrase²³⁹) was to adjudication. Justice Owen Roberts expressed this attitude with naive candor: “When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the Government has only one duty—to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.”²⁴⁰ Similarly when using history; the judge or lawyer need only lay the interpretation next to the historical facts and see if it squares.

A first-year graduate student in History learns the fallacy of these assumptions in the first few weeks of the methods seminar. Historical facts are inert and in themselves meaningless. They take on meaning only through interpretation. Interpretation in turn is not an automatic process; it begins with the way the historian asks questions, and at all stages is influenced by the historian’s own biases (including ideology). History is not made or

238. D. FISCHER, *HISTORIANS’ FALLACIES: TOWARD A LOGIC OF HISTORICAL THOUGHT* 4 (1970).

239. Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

240. *United States v. Butler*, 297 U.S. 1, 62 (1936).

given by God; it is the product of human minds and therefore liable to error, either of verification or interpretation. There is better and worse history, and certainly false history, but there is no history that is not free of human fallibility.

As a corrective to these lay assumptions, it is useful to return to another matter that comes up early in the methods seminar. The neophyte historian is soon introduced to the famous *dictum* of the nineteenth century historian Leopold von Ranke, who stated that his *History of the Roman and German Peoples* would present the past “*wie es eigentlich gewesen [ist]*”: “as it really happened.”²⁴¹ Adherents of the jurisprudence of original intent apparently think that they have the key to an understanding of the past as it really was. This is a dangerous delusion, as any historian could tell them. Our knowledge even of the facts of the past is imperfect at best,²⁴² and when we try to divine so intangible a thing as motivation and intent, we provoke the gods if we boast of certainty.

Yet if the Ranke *dictum* is a caution against unfounded and misplaced confidence in our knowledge of the past, it also has a positive message for us. The past *can* be known, and it has an integrity that must be respected. Though these two basic propositions are often abused by being treated simplistically, they are true, and stand as our assurance against the unprincipled relativism that produces law-office history.

A final comment: the earliest scholarly survey of the subject of this paper was Jacobus tenBroek’s dissertation, published serially in the 1938-39 *California Law Review* as “Use by the United States Supreme Court of Extrinsic Aids in Constitutional Construction.”²⁴³ While his contribution was valuable and has served as the foundation for later studies, our more matured view a half century later enables us to see that he erred in a basic assumption, namely, that history is an *extrinsic* aid. I hope that the sampling in this paper of the uses of history has demonstrated that history is often intrinsic to constitutional adjudication, providing the initial assumptions, the thought structure, the terms of discourse, the backdrop of human experience, or all of these, for many instances of constitutional adjudication. Its consequences have not always been beneficent, but its influence is pervasive.

241. L. VON RANKE, GESCHICHTEN DER ROMANISCHEN UND GERMANISCHEN VÖLKER VON 1492 BIS 1535, vii (2nd ed. 1874).

242. See, e.g., on the technical difficulties with the documentary record of the Philadelphia convention, Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986).

243. 26 CALIF. L. REV. 287-308, 437-454, 664-681 (1938); 27 CALIF. L. REV. 157-421 (1939) (title varies).