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The Promise of American History in Law

GORDON MORRIS BAKKEN*

Professor Wiecek's optimistic view that America's history can be known and that it has an integrity that must be respected by the bench and bar requires both a great degree of notice and a healthy degree of skepticism. The notice comes from the fact that social scientists and those in the legal profession know that his conclusions are on point. The healthy degree of skepticism comes from the same constituencies knowing the origins of the history that courts use in making decisions. First, history is the product of historians out of whom a relatively small number of professional historians put most of the words that we call history into print. They refine these words in the mills and retorts of the profession: the professional conferences, the exchange of drafts, the outside readers, the book reviews, and the historiographical essay. Second, lawyers create history to suit the needs of their client's cases. They use expert witnesses who have come to call themselves public historians or they assign an associate to visit the library. Third, judges create history from their memory, their library, or their clerk's visit to the library.

The question that is not completely answered by Professor Wiecek is where did the justices get their history? We do know that some was of personal memory, some was created in the justice's mind, and some like *Brown v. Board of Education (Brown II)*, was offered by professional historians. What seems to be missing is an analysis of the second kind of history, the "law office" history that is cooked up by associates from inclusions in briefs or offered at trial by expert witnesses. How much and what kind of history offered at trial filters its way to our highest court and is it of any merit from the profession's point of view?

One aspect of the use of history in appellate courts that also deserves attention is the role of history in general education and in the education of lawyers. As Alfred Kelley quite correctly pointed out, the 19th century had a deep and abiding faith in liberal education. Theodore Sedgwick's observation that statutory and constitutional construction could be had wholly independent of the rules of construction from an almost unconscious process derived from the complete education of the mind was the faith of the early

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nineteenth century. Learned Hand recognized a similar importance for the judge of the twentieth century. Classical learning had a significant role in the legal mind. But this was a twentieth century statement of an eighteenth century faith that slowly died in the nineteenth century.

The eighteenth century bar was a “company of men of letters” schooled in general learning, not case law, statutes, and treatises.¹ In the generation of lawyers and judges from Hamilton to Webster, general learning and rhetorical ability rather than technical expertise distinguished the lawyer from the other professions. On May 10, 1819 John Quincy Adams wrote in his diary that “to live without having a Cicero and a Tacitus at hand seems to me as if it was a privation of one of my limbs.”² (In eighteen years of teaching pre-law students at the university level, I have yet to hear such a confession.) The rhetorical abilities of lawyers like Daniel Webster were legendary to the extent that they could overcome legal technicalities and send a man to the gallows. In 1830 Webster made an eight hour summation to a jury describing a bloody crime in detail and reminding the jurors that “though he take the wings of the morning and fly to the uttermost part of the seas, human murder to human vision will be known. A thousand eyes, a thousand ears are marking and listening, and thousand of excited beings are watching his bloodstained step.”³ The jury like Webster saw those steps leading to hemp despite substantial technical error. But in 1830 “moral justice was done.”⁴ The nineteenth century attorney was a true gentleman of the bar, learned in letters, defending cultural ideals.⁵

This eighteenth century ideal living in the nineteenth century mind died hard. David Dudley Field railed against the “mere practicing lawyer” of the late nineteenth century and saw the ideal lawyer as a scholar: “He must have comprehended the greatness of the whole, the harmony of its parts, and the infinite diversity of its particulars,” he wrote.⁶ But legal education had shifted from letters to law schools and legal learning had shifted from the grand philosophy to legal positivism. Oliver Wendell Holmes, Jr. told his generation that they had to forget the traditional “rag-bag full of general principles” in which abstractions emerged “like a swarm of little bodiless cherubs fluttering at the top” of a six-

1. R. FERGUSON, LAW AND LETTERS IN AMERICAN CULTURE 66-72 (1984).

2. *Id.* at 73.

3. M. BAXTER, ONE AND INSEPARABLE: DANIEL WEBSTER AND THE UNION 160-61 (1984).

4. *Id.* at 161.

5. R. FERGUSON, *supra* note 1, at 69.

6. *Id.* at 285.

teenth century painting. Rather the whole legal system had to be restated with a microscopic intensity that would complement panoramic scope and reveal the "precise contours" and "innermost meanings" of each doctrine.⁷ New generations of lawyers began their training using this new closer vision until legal realism became fashionable. Then as the 1946 Yale Curriculum Committee announced, a new credo needed emphasis: "We take it to be self-evident that the law is one of the social studies, and that the study of law will be most fruitful and critical when the skills and perspective of history, economics, statistics, psychology, political science, sociology and psychiatry are fully and effectively used in the work of law schools."⁸ Today we have trained social scientists on law school faculties and a diversity of social science courses in the curriculum of some of our nation's law schools. But who listens on the appellate bench?

The nineteenth century justice was conditioned to listen to the voice of history. It was part of learning and part of the faith of the times. Joseph Story more than any other figure of the century embodied this faith as a scholar and as a justice of the United States Supreme Court. Story's *Commentaries on the Constitution*, started in 1829 and completed in 1833, provided generations of lawyers with a section by section, clause by clause analysis of the Constitution and constitutional materials. In a real sense constitutional history became constitutional law, for again it was the decisions of the Court that became the foundation of interpretation.⁹ With the reception of these volumes by the profession and in the society, the lawyers' monopoly of American constitutional law and the constitutional history announced by that Court began.

In the twentieth century the uses of history by the United States Supreme Court as well as the nature of history was questioned. The rise of functionalism in social science caused basic changes in the discipline of history as well as in law. Functionalism in social science was likely to be nonautonomous, empirical, objective, relativistic, and presentist.¹⁰ In history the generation that followed Charles Beard attempted to be both particularistic and empirical, objective yet relativistic. In law, the realists emerged from the more general intellectual movement. The realists preached that law should be studied as part of society; they concentrated their attention on facts rather than concepts; they

7. *Id.* at 288.

8. L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960* 150 (1986).

9. R. NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC* 192 (1985).

10. R. KALMAN, *supra* note 8, at 36.

spent their time studying law's operations and showing that judges made law rather than formulating ethical legal rules or arguing that a higher law guided judges that believed in objectivity and sometimes in reform as well; and they all sought to make the subject of their work relevant to contemporary practitioners.¹¹

This realist perspective is important to the subject because this school of thought viewed history much differently. One of its leading proponents, Walton Hamilton, thought that history used by courts provided a key to an analysis of judicial ingenuousness in the fields of public and private law. To Walton, history was a smoke screen of respect cloaked in a murky past. Charles E. Clark and Thurman Arnold saw history in judicial opinions as evidence of excessive deference to the past in a present so distant from the past that the past became irrelevant. For them, history was useless.¹² The impact of this criticism was substantial. In the late 1920s and 1930s, constitutional scholars were "unable to see that the idea of a government of laws and not of men had ever worked in America." As a result, "[t]hey ceased to define the constitution as a legal code the main purpose of which was to limit governmental action. The word 'constitutional' lost its normative content and became merely descriptive: . . ."¹³ Even more certainly, as John Phillip Reid has written, the "propagandists for governmental beneficence have removed us from the legal mentality of the nineteenth century." Today the word "right" is easily applied to solve difficulties they thought of as private and now people can persuade themselves they are "entitled" to what once they would have said they did "not own."¹⁴

If history is irrelevant in a presentist, relativistic legal world in which words of the nineteenth century no longer have normative content, what hope should we have for history in law? Professor James Boyd White proposes some directions in a chapter entitled "Constituting a Culture of Argument: The Possibilities of American Law."¹⁵ In the life of the law, White argues, is an important place for argument with the lawyer playing the critical role speaking for the culture. "The law is less a branch of the social sciences than of the humanities in that it seeks not to be a closed system but an open one. It learns from the past and seeks new terms for the expression of motives, new forms for the establishment of rela-

11. *Id.* at 285.

12. *Id.* at 288.

13. *Id.* at 39.

14. J. REID, LAW FOR THE ELEPHANT: PROPERTY AND SOCIAL BEHAVIOR ON THE OVERLAND TRAIL 293 (1980).

15. J. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTION OF LANGUAGE, CHARACTER AND COMMUNITY 231-74 (1984).

tions; it is a method of learning and teaching; and its central concern is with the kind of relations that we establish with our inherited culture and with each other when we speak its language.”¹⁶ White found the promise of this argument being worked out in “our early law,” in the period of John Marshall and Joseph Story, in the period of general learning and rhetorical flare.

Is that part of our culture of law gone or can history in law help to constitute a public law faithful to our dynamic culture? Can we, as Paul Murphy suggested, feed “good history to the Judges?” Professor Wiecek’s example of Justice Hugo Black’s rejection of Leonard Levy’s conclusions and sending a law clerk off to disprove them to no avail is perhaps instructive. Although that clerk searched diligently for historical evidence to the contrary, he was unable to defeat Levy for Black. The Justice did not like the answer of history. It did not fit his predisposition. Of course, as Professor Wiecek points out in a footnote, Levy revised Levy. In 1985, Levy wrote “I was wrong in asserting that the American experience with freedom of political expression was as slight as the conceptual and legal understanding was narrow.” Further, he acknowledged that the Supreme Court was right in *Grosjean v. American Press Co.* (1936). The book *Legacy of Suppression* (1960) that grew out of “an opportunity . . . to write for money” and after years of subsequent research became *The Emergence of a Free Press* (1985).¹⁷ Good history must look, as Levy asserts, beyond law and theory to practice in the social setting of the times. Perhaps Black’s law clerk did not know enough of historical research methods to find what Levy later found after the original reasons for the publication of the book had long since past.

Southern Pacific Company v. Jensen, cited by Professor Wiecek in his discussion, of *Swift* deserves some amplification in the context of history and language. *Jensen* was a companion case to three cases questioning the constitutionality of state worker compensation statutes.¹⁸ The Supreme Court upheld the state statutes, but in *Jensen*, the Court, 5-4, declared unconstitutional the application of the New York statute to longshoremen. The majority found that a stevedore, injured while on shipboard while performing maritime work under a maritime contract was within admiralty jurisdiction; that the admiralty clause of the Constitution granting jurisdiction to the federal courts required a uniform na-

16. *Id.* at 273.

17. L. LEVY, *EMERGENCE OF A FREE PRESS* vii-xi (1985).

18. 244 U.S. 205 (1917); The other cases were *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917); *Hawkins v. Bleakly*, 243 U.S. 188 (1917); *Mountain Timber Co. v. State of Washington*, 243 U.S. 219 (1917).

tional law; that only Congress could modify maritime law and it had not done so; that the "saving to suitors" clause applied only to common law remedies; that a scheme of workers compensation was wholly unknown to the common law; and that the compensation remedy was inconsistent with congressional policy as declared in the Limitation of Liability Act of 1851. The central proposition of the majority that national uniformity was constitutionally required was attacked by the dissenters as having no precedent. Holmes attacked the proposition that maritime law was a corpus juris. He also maintained that state law, not admiralty law, prevailed in state court cases involving maritime questions.

Although the interplay of state and federal jurisdictions over maritime matters was longstanding,¹⁹ neither the majority nor the minority wasted substantial ink on the subject. Rather, language would resolve the situation. Congress acted to remedy the wrong by statute, but the Court found the tinkering constitutionally defective.²⁰ The Congress tried another statutory tack, but against the gale of majority opinion it could not prevail.²¹ Finally, the minority that wanted to avoid the common law of employers and common law remedies found a way that the majority would accept: language. In 1926, the Court found that a longshoreman stowing cargo who had been injured by the negligence of a fellow servant was covered by the Jones Act because a longshoreman was a seaman. Holmes wrote for a unanimous court that "it is true that for most purposes, as the word is commonly used, stevedores are not 'seaman'. But words are flexible."²² Words worked in the Court perhaps because Congress had failed to amend the Jones Act to include longshoremen. But Congress did respond immediately to pass a Longshoremen's and Harbor Workers' Compensation Act, perhaps to restore the meaning of language or the continuity of maritime legal history.

With this skeptical view of history in law and words fading from their historical context, where is the future for history in law. First, litigation will continue to create a demand for history in law. The Indian Claims Commission Act of 1946 created a need for historian experts on subject matter ranging from the value of land at the time of a treaty to ancient fishing practices.²³ The work on litigation has, in turn, generated a new historical

19. Bakken, *Admiralty Law in Nineteenth Century California*, 58 S. CAL. Q. 499-514 (1976).

20. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

21. *Washington v. W.C. Dawson & Co.*, 264 U.S. 219 (1924).

22. *International Stevedoring Co. v. Haverly*, 272 U.S. 50 (1926).

23. 2 F. PRUCHA, *THE GREAT FATHER, THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS* 1017-21, 1171-90 (1984).

literature, books done for lawyers for litigation or the historical work of experts converted into historical monographs.²⁴ Second, judges will continue to send their clerks to libraries to find the history they want to create. Third, the growing interest in American legal and constitutional history within the profession of history and in law schools will generate an increasingly sophisticated literature. Hopefully, it will be from this third source that lawyers and judges will look to when pondering the import of history in law. Fourth, the debate on the original intent of the Founding Fathers will continue to produce all sorts of history.

The fact that we are in a bicentennial year and had the nomination of Robert Bork to the United States Supreme Court before us, provided a rich popular literature on history in law. The popular literature centered upon Attorney General Meese's call for the Court to adhere to the original intent of the Founding Fathers in constitutional interpretation, Judge Bork's writings and testimony on original intent interpretation, and the chorus of opposing views. The public has been treated to more history in law than it probably can digest. The *Los Angeles Times* told its readers on August 16, 1987 that Judge Bork's "view of the Constitution's 'original intent' [was] at [the] heart of [the] controversy."²⁵ The article characterized Bork's position as requiring courts to focus on each specific provision of the Constitution rather than upon generalized values and not to create rights not contemplated by the Founding Fathers. The creation of such new rights as well as the regulation of certain areas of behavior such as abortion and homosexuality belonged to the legislative branch of government, particularly the state legislatures. The story counterpoised that position with Stanford historian Jack Racove's, who debated James Madison's view of original intent with the judge finding exactly the opposite constitutional vision. Justice William Brennan, Jr. took a similar view from the Supreme Court bench in 1985, arguing that Bork's view that the Court could not stray beyond those individual rights explicitly contemplated by the Founders was wrong. "This is a choice no less political than any other. It expresses antipathy of claims of minority rights against the majority," Brennan said.

The public also has been treated to a debate over the meaning of the ninth amendment. Because of Bork's references to that amendment and Harvard Law Professor Laurence H. Tribe's tes-

24. The claims to water have generated several books. For example, see C. DUMARS, M. O'LEARY, AND A. UTTON, PUEBLO INDIAN WATER RIGHTS: STRUGGLE FOR A PRECIOUS RESOURCE (1984); M. MEYERS, WATER IN THE HISPANIC SOUTHWEST: A SOCIAL AND LEGAL HISTORY 1550-1850 (1984). On fishing rights see F. COHEN, TREATIES ON TRIAL: THE CONTINUING CONTROVERSY OVER NORTHWEST INDIAN FISHING RIGHTS (1986).

25. L.A. Times, August 16, 1987.

timony on Bork's views, the letters to the editor column of *The Wall Street Journal* contained more than the usual. Tribe wrote the editor on October 5, 1987 that "the real dispute is between Judge Bork and those who read the word 'liberty' as extending beyond the specific liberties that the Framers enumerated. My point is that, on this basic issue, Judge Bork is very much the odd-man-out." Tribe continued assailing Bork's view of the ninth amendment "as a mere 'inkblot' on the Constitution."²⁶ A *Journal* editorial of that date received another letter from Tribe two days later. Tribe lashed back that he did not have a pet project of using the ninth amendment as carte blanche for judges to create whatever new constitutional rights [that] fit their fancy." That was wrong, Tribe pointed out, because "the ninth amendment's recognition of unenumerated rights is hardly a pet project of mine; if anything, it was James Madison's 'pet project.'" "The Constitution's history," Tribe continued, "as Judge Bork recognized in a 1968 article he wrote as Professor Bork, makes it clear that James Madison introduced the ninth amendment precisely to prevent the enumeration of specific rights in a Bill of Rights from being construed to defeat or belittle rights excluded from the enumeration."²⁷ Both Tribe and Bork seemed to be creating some history on Madison's original intent.²⁸ Tribe did not reach the question in his reply to the editor of whether it properly belonged to the states or the federal government or their respective appellate courts to create these rights.

What all of this public history-making may imply is that history for law professors is very much the same stuff it is for lawyers and judges. David A.J. Richards, however, has suggested that history may have a role larger than window dressing for mannequins of current liberal constitutional demands. Drawing upon the work of John Rawls and Ronald Dworkin, Richards points out that "rights-based and right-sensitive theories" of jurisprudence force lawyers and judges "to take account . . . of the historically intended premises of constitutionalism."²⁹ The federal bench has produced equally but opposite ink. Irving R. Kaufman, Circuit Court of Appeals Judge for the second circuit has stated that "I regard reliance on original intent—a technique whose popularity

26. Wall St. J., Oct. 5, 1987.

27. Wall St. J., Oct. 7, 1987.

28. For another form of current history on Madison see *James Madison and the Constitution*, 30 PAC. HISTORIAN 5-17 (1986).

29. D. RICHARDS, *TOLERATION AND THE CONSTITUTION* 14 (1986). For a discussion of some of the literature on original intent and constitutional policy see Bakken, *California Constitutionalism: Politics, the Press and the Death of Fundamental Law*, 30 PAC. HISTORIAN 5-17 (1986).

has recently surged—to be a largely specious mode of interpretation.”³⁰ Associate Justice William Brennan’s conception of the “role of original intent in constitution interpretation repudiates history.”³¹ He stated in 1985 that “the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs.” The “[c]onstitutional fundamentals” of the Founders cannot be the “fundamentals” of today, according to Brennan.³²

New York University Law Professor John Phillip Reid has evaluated the debate in broader terms than history in law. “The essence of original-intent jurisprudence,” Reid argued, “is not a respect for constitutional meaning discovered through the discipline of history. It is better seen as a rejection in the name of elective democracy of unbridled judicial activism.”³³ Reid concluded that most lawyers would embrace the doctrine of the positivism of history and the theory of the neutrality of historical construction, but reminded his audience that historians would ask whose intention? Where do you find it? How can it be called objective?³⁴

Leonard Levy, speaking as an historian, told *The Wall Street Journal* that advocates of original intent “know very little about history.”³⁵ Levy, like Wiecek, deplors the uses of history by the Supreme Court leading to disastrous ends.

Perhaps Professor Wiecek’s work, the debate over original intent, and the bicentennial celebration will generate that good history. Professor Reid’s monumental *Constitutional History of the American Revolution* first two volumes are now in print from the University of Wisconsin Press.³⁶ The first volume, subtitled “the authority of rights,” should be required reading for all who have an interest in our Constitution. But the interest in our Constitution is part of our culture and will continue to flourish far beyond 1991. As University of Wisconsin Law Professor Gordon B. Baldwin has written “at the first sound of a new argument over the United States Constitution and its interpretation, the hearts of Americans leap with a fearful joy. The blood stirs powerfully in their veins and a new lustre brightens their eyes. Like King

30. John Phillip Reid, *Originalism and Subjectivism in the Bicentennial Year*, Spring 1987, typescript, p.3.

31. *Id.* at 16-17.

32. *Id.* at 17.

33. *Id.* at 24.

34. *Id.* at 25.

35. Wermiel, *Meaning of First Amendment Clauses on Religion Sparks Emotional Debate, Few Clear Answers*, *Wall St. J.*, Aug. 24, 1987.

36. J. REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* (1986).

Harry's men before Harfleur, they stand like greyhounds in the slips, straining upon the start."³⁷ I can only hope that the history that is generated is of the high quality exhibited by Professors Wiecek and Reid, and that the legal community will choose that history and reject the "concocted history" of our judicial past.

37. Baldwin, *The Constitution: The Virtues of its Vices, and Vice Versa*, 88 *Wis. ALUMNUS* No. 5, p. 8 (1987).