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FRANCIS STITES*

"History is among the most essential departments of knowledge," John Marshall wrote in 1834, and "to an American, the histories of England and of the United States are most instructive. Every man ought to be intimately acquainted with the history of his own country."[1] There is no hostage Clio here. Marshall was not speaking as an historian or a judge—although he was both of these—but as a grandfather exhorting his grandson to a proper and fruitful study. He is renowned for his "judicial-fiat" history and famous, although less so, for his *Life of Washington*;[2] but I want to examine the context of this warm epistolary embrace of history and, like Professor Wiecek, address the nature of the history.

Wiecek raises important points: that there is no fixed body of material called history; that context is essential in evaluating judicial uses of history; that judicial decisions often need some history supporting them; and that history sometimes is "simply beside the point."[3] Yet, an ambiguity about the term "history" percolates through his discussion. Consider poor Clio, for example. She appears as "hostage," as "handmaiden," as "no one's unthinking servant," and as "a lady of whimsical turn of mind."[4] These contradictory images raise my points: that history and the past are not synonymous; and that "history" has a history. Because the meaning of the word or discipline has changed over time, it also has a context. So, part of evaluating the judicial use of history is asking what history meant at the time the justices used it. Historians must evaluate judicial history by the standards of the time. We forget this as we identify types of judicial history and then examine a string of historical examples of the type. Two examples, widely separated in time, may have only the label in common.

Let me return to John Marshall. Alfred Kelly noted in 1965 that Marshall's many judicial fiats showed "little if any inquiry

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* Professor of History, San Diego State University.

1. THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL 55-57 (J.E. Oster. ed. 1914 (John Marshall to his Grandson, November 7, 1834).

2. J. MARSHALL, THE LIFE OF GEORGE WASHINGTON (2 vols., Philadelphia 1836).

3. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W.L. REV. 227 (1988).

4. *Id.*

into actual history."[5] Wiecek makes essentially the same point. But what is "actual history?" More important, what was Marshall's view of history, what were the standards of his time? What was the context? How different was it from our own? These are the crucial questions.

An answer emerges later in the letter when Marshall said that David Hume was "generally thought the best Historian of England," and noted that others had continued his narrative to a later period.[6] Now for Hume in the seventeenth century and those others in the eighteenth century there was no substantial difference between the past and the present.[7] The past, for him and for Marshall, was an undifferentiated mass of information about the human experience from which one deduced general principles. A bewildering variety of specific differences could all point to the same general principles. So, the attribute of history we count so important, fidelity to the record, counted for little to those men. The important thing was to transcend the details, to deduce and declare the guiding principle, and to teach every man the history of his country, as it ought to have been. One of the principles that Hume had declared, as had Sir Edward Coke before him, was that Anglo-Saxons had always been freedom loving and had struggled to achieve it in their legal and political institutions, especially the common law.[8] Over time we have seen new definitions of history, but that principle surely still guides our examination of the details.

Marshall, like other early nineteenth-century historians, did not see the alteration of small details in the record as a betrayal of the historian's canons. Quite the contrary! Such alterations in his *Washington*, in his view, merely demonstrated his skill in teaching the principles that the details of Washington's life revealed about the American descendants of the ancient Anglo-Saxons. In that biography, as in his opinion in *McCulloch v. Maryland*, for example, Marshall was saying that we must never forget that it is principles we are expounding. Kelly's note that this line read "like a

5. A. Kelly, *Clio and the Court: An Illicit Love Affair*, SUP. CT. REV. 119, 123 (1965).

6. THE POLITICAL AND ECONOMIC DOCTRINES OF JOHN MARSHALL, *supra* note 1, at 54-55.

7. "Mankind are all so much the same, in all times and places, that history informs us of nothing new or strong in this particular, [and] . . . Its chief use is only to discover the constant and universal principles of human nature." ENQUIRY CONCERNING HUMAN UNDERSTANDING § 8, pt. I, 4:68 (1748); cited in D. LOWENTHAL, THE PAST IS A FOREIGN COUNTRY, 47 (1985).

8. On Coke, *see* R. HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM 13-15 (1981); on Marshall, *see* Foran, *John Marshall as a Plagiarist*, AMERICAN HISTORICAL REVIEW 51-64 XLIII (Oct. 1937).

plea for an awareness of historical dynamics" is accurate if we remember that the context for dynamics in 1819 was not the same as in 1965.[9] If we adjust Marshall's *McCulloch* comment about ends and means to reflect accurately that period's different, didactic approach to the past, it would read: If the principle be legitimate, then all details "which are plainly adapted to that end," are appropriate.[10] It is not entirely historical to refer to such judicial fiats simply as concoctions. In Marshall's time they were also good history.

Approach to the past, not history, is the proper term, and this is no small point. If we keep the history and the past separate and if we remember that justices, especially when acting as such, are not historians, then we might begin to see that it is the past and not Clio that is hostage. Justices might use history in their constitutional adjudication, but more often they use the past, and in the ways Wiecek has so ably shown us with Holmes, Brandeis, Cardozo, Frankfurter, Jackson and Warren. Historians can also misuse the past by writing law-clerk history, and when they do, they prostitute Clio. The two professions have different goals that they bring to the use of the past and different standards to govern that use. Justices focus on the present and its policy questions; historians focus on the past and probe things having no necessary connection to the present—the original intent of the Framers, for example. We need more comments like those of Justice Jackson and Professor Wiecek that Court opinions may be "much stronger" for their "forthright admission" that history is not pertinent. That luxury is forbidden to the historian in a modern context.[11]

From this vantage Clio appears less a hostage than a coquette (or whimsical lady) that each generation eagerly pursues for the instruction she can provide in the proper rituals of courtship and the rewards she offers. Kelly saw her as a lover, although even he felt constrained to add "illicit." Like the coquette, she changes her appearance to entice different suitors. What she offers the justices is not the recreation of a portion of a lost time but what Wiecek calls the "lode of values," what Marshall in *Marbury v. Madison* or Cardozo in *Palko v. Connecticut* called "fundamental principles."[12] These have a life of their own which has taken them into expressions widely at variance with their Framers' intentions.

Justices ought to have what Leonard Levy has called an "historical spirit" that keeps the principles in mind but allows creative

9. *See* A. Kelly, *supra* note 5, at 124.
10. 4 (Wheat.) 421 (1819).
11. Wiecek, *supra* note 3.
12. *Id.*

new application subject always to the merciless criticism of their peers, the public, and, among others, historians.[13] Context determines the criticism, and policy, not simply historical accuracy, is the guide. We condemn *Dred Scott v. Sanford*, more as bad policy than as bad history. Wiecek admits that in the context of the legal system in which slave state jurists operated it "made sense."[14] Taney's was a failure of accuracy and a failure of the historical spirit that would have recognized that the society had moved beyond the original intent but not the principles of the Framers. Wiecek's examination of the Court's work offers refreshing illustrations that, despite such lapses as *Dred Scott*, practice in the United States has often enlarged the meaning of principles. Decisions like *Brown v. Board of Education, Griswold v. Connecticut, Miranda v. Arizona, New York Times v. Sullivan, Roe v. Wade*, and others are devoid of "actual history" but filled with historical spirit. Historians should note that.

As we think about the relation between the historian and the justice we ought to stay alert to the dangers of getting caught between simple-minded arguments beginning either with "History teaches us" or with "History is bunk." We need warnings like Wiecek's especially during bicentennial orgies, lest we forever continue to read the past backwards from the present to find, in Harold Bloom's delightful phrase, our ancestors imitating us.[15] I am one of those anti-instrumentalists Wiecek discussed, so my conclusion that Clio can never be a teacher will come as no surprise.

13. L. Levy, *History and Judicial History: The Case of the Fifth Amendment*, in L.W. LEVY, CONSTITUTIONAL OPINIONS: ASPECTS OF THE BILL OF RIGHTS 208 (1986).

14. Wiecek, *supra* note 3.

15. H. BLOOM, THE ANXIETY OF INFLUENCE 141-44 (1975), cited in D. LOWENTHAL, *supra* note 7, at 71.