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## Bicentennial Constitutional and Legal History Symposium

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# CALIFORNIA WESTERN LAW REVIEW

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## BICENTENNIAL CONSTITUTIONAL AND LEGAL HISTORY SYMPOSIUM

### Introduction

MICHAL R. BELKNAP\*

The noted constitutional historian Alfred Kelly once observed, “[t]here is a fairly close relationship between the day-to-day methodology of the judicial process and that of historical scholarship.”<sup>1</sup> When a court determines a rule of law to be applied in a case “through an examination of a stream of judicial precedent . . . it plays the role of historian.”<sup>2</sup> Noting that “[t]he Constitution itself is a product of the nation’s past,” Charles A. Miller adds that “the Supreme Court, as the accepted interpreter of the Constitution, has become a public interpreter of American political history.”<sup>3</sup> Constitutional law scholar Mark Tushnet is well aware of what the Court has done. Yet Tushnet, a man with historical training,<sup>4</sup> and who has written history himself,<sup>5</sup> recently denounced “efforts to ground today’s decisions in historians history,” criticizing these as “fundamentally misguided because they misunderstand the historical enterprise.”<sup>6</sup>

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1. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 121.

2. *Id.* at 121.

3. C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 6 (1969).

4. He holds an M.A. in history from Yale.

5. See, e.g., THE AMERICAN LAW OF SLAVERY 1810-1860 (1981); THE NAACP’S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); DuBois and Houston, *The Politics of Equality in Constitutional Law: The Equal Protection Clause*, 74 J. AM. HIST. (1987).

6. Tushnet, *Should Historians Accept the Supreme Court’s Invitation*, 15 ORGANIZATION AM. HISTORIANS NEWSL. 12 (1987). *Contra*, Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 659-61 (1987).

As the comments of Tushnet, Miller, and Kelly reveal, there is a close relationship between law and history. As they also suggest, the nature of that relationship is debatable and the issue of what it ought to be is a matter of considerable controversy. That is why the *California Western Law Review* sponsored a symposium on this subject<sup>7</sup> and is publishing in this issue the papers and comments presented there.

Two recent events make this examination of the relationship between law and history particularly timely. The first of these is the 1987 Bicentennial of the United States Constitution. The Bicentennial inspired "an abundance of new historical scholarship on legal and constitutional themes, an academic complement to the less cerebral festivals, marches, and celebrations . . . throughout the nation."<sup>8</sup> The Bicentennial prompted lawyers and legal academics to join with professional historians in exploring the meaning of the Constitution and the impact it has had on life in the United States during the two hundred years since the Philadelphia Convention of 1787.<sup>9</sup> During 1987, it often seemed as if everyone was talking and writing about the Constitution.<sup>10</sup> One important consequence of the flood of scholarship and discussion unleashed by the Bicentennial is "greater public consciousness of constitutional issues and legal process, including the historical dimensions of both."<sup>11</sup>

Like the Constitution's two hundredth birthday, the provocative remarks of the Attorney General of the United States, Edwin Meese III, have served to focus attention on the relationship between law and history. In a controversial 1985 speech to the American Bar Association, Meese called for what he characterized as a "jurisprudence of original intent."<sup>12</sup> Since then the Attorney General has taken the position that by failing to adhere strictly to the words of the Constitution and the intentions of those who drafted its various articles and amendments, the Supreme

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7. The symposium was held at the California Western School of Law on November 21, 1987.

8. Scheiber, *Introduction: The Bicentennial and the Rediscovery of Constitutional History*, 74 J. AM. HIST. 667 (1987).

9. Of the seventeen contributors to the JOURNAL OF AMERICAN HISTORY's special Bicentennial symposium issue, THE CONSTITUTION AND AMERICAN LIFE, one (Staughton Lynd of Northern Ohio Legal Services) is a practicing attorney and four (Mark Tushnet of Georgetown, Martha Minow of Harvard, Hendrik Haertog of Wisconsin, and Harry N. Scheiber of the University of California at Berkeley) are law school professors.

10. See *Introduction: The Judicial Power and the Constitution*, 71 JUDICATURE 64 (1987).

11. Scheiber, *supra* note 8, at 671.

12. Address by Attorney General Edwin Meese III before the American Bar Association, Washington, D.C. (July 9, 1985).

Court has exceeded its lawful authority.<sup>13</sup> Law professor H. Jefferson Powell insists that the Framers never intended for the history of the writing and ratification of the Constitution to control interpretation of the document,<sup>14</sup> and historian Harry Scheiber has dismissed Meese's doctrine of original intent as nothing more than "Reagan era neo-conservatism . . . formulated in terms designed to wrap policies of minimalism for the civilian sector of government in the mantle of constitutional imperatives."<sup>15</sup>

The Attorney General's views are, however, in line with those expressed earlier by another noted legal historian, Raoul Berger.<sup>16</sup> They also accord with the position taken by former United States Court of Appeals Judge Robert Bork,<sup>17</sup> whose unsuccessful nomination to the Supreme Court during the bicentennial summer intensified interest in the controversy over original intent. "Whatever the merits of that doctrine, the debate over the federal courts proper role has given a sharp new edge to public sensitivity on matters relating to constitutional law and history."<sup>18</sup>

Yet, as Professor Powell has observed, "[c]ontemporary discussion of the theory and methodology of constitutional interpretation exhibits no general agreement on the proper role of history. . . ."<sup>19</sup> Over the years, in interpreting the Constitution, the Supreme Court has exploited the muse of history in various ways and for a variety of purposes. In the pages that follow, William Wiecek surveys these in "Clio as Hostage: The United States Supreme Court and the Uses of History."<sup>20</sup> Gordon Morris Bakken, Charles A. Lofgren, and Francis N. Stites offer additional perspectives on that subject in a series of spirited critiques of Wiecek's lead article.<sup>21</sup>

C.M.A. McCauliff explores the Supreme Court's use of history in her "Constitutional Jurisprudence and Natural Law: Comple-

13. Shaman, *Interpreting the Constitution: The Supreme Court's Proper and Historic Function*, 71 JUDICATURE 80 (1987).

14. Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

15. Scheiber, *supra* note 8, at 671.

16. See R. BERGER, *GOVERNMENT BY JUDICIARY* 363-64 (1977).

17. For an expression of former Judge Bork's views, see Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 1-20 (1971). For an expression of similar views by another conservative Republican jurist, see Wallace, *Interpreting the Constitution: The Case for Judicial Restraint*, 71 JUDICATURE 81 (1987). For a perceptive analysis of the merits and demerits of the "interpretivist" approach to constitutional adjudication, see Nelson, *History and Neutrality in Constitutional Adjudication* 72 VA. L. REV. 1237 (1986).

18. Scheiber, *supra* note 8, at 670.

19. Powell, *supra* note 14, at 885.

20. See pages 227-268 *infra*.

21. See pages 269-286 *infra*.

mentary or Rival Modes of Discourse?"<sup>22</sup>, a penetrating comparative analysis of the jurisprudence of two justices who based their opinions on history and two who grounded theirs in natural law. McCauliff demonstrates that neither approach is inherently either liberal nor conservative. History, she concludes, can be employed to support legal conclusions that accord with any political point of view.

That conclusion is perhaps not surprising, for as historian Paul Murphy pointed out a number of years ago, "[h]istory to the legal profession . . . has a peculiarly functional quality as an aspect of legal advocacy."<sup>23</sup> In "Clio on the Stand: The Promise and Perils of Historical Review,"<sup>24</sup> Peter Irons acknowledges this fact. He goes on to argue, however, that historical scholarship is itself a form of advocacy. Irons disagrees with those, such as Tushnet,<sup>25</sup> who contend that historians should confine themselves to educating judges and the public and should not attempt to contribute directly to contemporary litigation. While "troubled about the fuzzy line between scholarship and advocacy,"<sup>26</sup> he knows that historical research can be used to right old legal wrongs; he has employed it for that purpose himself. In his article, Irons discusses his successful efforts to get federal courts to set aside convictions arising out of the forced relocation of Americans of Japanese ancestry from the West Coast during World War Two. For him, history is a source of evidence that a skillful advocate can exploit to win a case. For interpretivist justices it is a lode of arguments they can mine to support a particular interpretation of the Constitution.

Michael Griffith and Chet Orloff view the relationship between law and history quite differently than Irons. Their concern is with collecting and preserving the historical materials (printed works, manuscripts, artifacts, oral histories, paintings and photographs) that reveal the development of our judicial institutions. Griffith, who is the archivist for the United States District Court for the Northern District of California, and Orloff, who serves as the executive director of the new Ninth Judicial Circuit Historical Society, are part of a rapidly expanding effort to safeguard and make accessible to attorneys, scholars, and the general public the materials that document the history of American law. As they point out

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22. See pages 287-335 *infra*.

23. Murphy, *Time to Reclaim: The Current Challenge of American Constitutional History*, 69 AM. HIST. REV. 64, 77 (1963).

24. See pages 337-354 *infra*.

25. Tushnet, *supra* note 6, at 12-13.

26. Irons, *Clio on the Stand: The Promise and Perils of Historical Review*, 24 CAL. W.L. REV. 337 (1988).

in “Historical Societies and Legal History,”<sup>27</sup> in recent years numerous state and federal courts have set up organizations that are working in diverse ways to ensure the survival of our judicial heritage and to increase awareness of the contributions to the development of the United States made by lawyers and judges.

Orloff and Griffith view the relationship between law and history as a relatively simple one; for them the function of history is simply to record what law and legal institutions have done in the past. The other contributors to this symposium see the relationship as more complex. They picture two disciplines that are alike in many respects yet significantly different in others, interacting in an extremely complex way with one another. Their articles and comments may lead some readers to conclude that this interaction has had coercive effects on both law and history. Yet the contributions to this symposium issue also indicate that, like an affair the paramours cannot bear to end despite the pain it causes them, the relationship is an amazingly durable one. The following pages offer convincing evidence of both the persistence and the importance of the controversial and often stormy association between law and history.

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27. See pages 335-361 *infra*.

