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A Comment on William Wiecek, "Clio as Hostage . . ."

CHARLES A. LOFGREN*

I am both pleased and awed by the opportunity to comment on Professor Wiecek's paper. My pleasure derives from the importance of the topic and from the paper itself. The awe comes from the depth and comprehensiveness of Professor Wiecek's study. As a commentator, I feel a bit in the position of someone who had remained in St. Louis when Lewis and Clark went west and who then tried to tell the two explorers what they really saw—or should have seen—at the headwaters of the Missouri and beyond.

First, the importance of the topic: We all know that judges use history. Moreover, as the willing or unwilling legatees of legal realism, we all probably suspect, even in the absence of systematic inquiry, that they sometimes misuse it from the perspective of the workaday historian. But what seems obvious often needs careful investigation. In the present instance, I say this with a degree of self interest, because I, too, have probed several episodes involving judicial history and my own dabbling leads me to appreciate the ambitious scope of Professor Wiecek's paper.

I am even more impressed with the importance of his project because of another paper I recently read. It is a preliminary report on a study of how frequently members of the Burger Court turned to the era of the Constitution's framing and ratification. The authors are Gordon Lloyd and Arthur Svenson, political scientists at the University of Redlands, who presented the paper at this year's annual meeting of the American Political Science Association. With their permission, I quote parts of two of their paragraphs. The first outlines the questions they sought to answer, and the second summarizes their findings.

Their questions included these:

How frequently do the justices cite the Framers? Are the citations located in landmark decisions? What percentage of cases disposed of by written opinion raise constitutional issues? What percentage of cases raising constitutional issues refer to the Framers? What sort of citation distribution exists among the justices?

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After a detailed investigation which nonetheless probably undercounted references to the Framers, or, more accurately, to the views of the Framing generation, Lloyd and Svenson reached these conclusions about the seventeen years of the Burger Court:

First, roughly half of the Burger Court cases disposed of by written opinions raised constitutional issues. Second, of those cases that . . . raised constitutional issues, nearly 20% contained one or more opinions which cited the Framers. Third, of those cases which cited the Framers, more than half have been viewed as significant or landmark decisions by legal scholars and political scientists. Fourth, in terms of both opinions written and opinions joined which cited the Framers, a fairly even distribution among the justices is present. This distribution, therefore, cuts across the traditional conservative and liberal divisions on the Court.

Regarding the last point, and apropos the current debate over a "jurisprudence of original intention," mentioned by Professor Wiecek in his concluding section, Lloyd and Svenson present intriguing figures. Justice Rehnquist, for example, averaged 2.4 opinions per term making some use of Framer history; Chief Justice Burger, 2.6 opinions per term; and Justice Brennan, 3.0 opinions per term.

To be sure, historians are justifiably suspicious of such numbers, for they leave so much unsaid, telling us little about the importance within an opinion of a particular reference to the founding era, or about the extensiveness, accuracy, and appositeness of the usage. Notwithstanding those limitations, I have related Lloyd and Svenson's findings, albeit in skeleton form, because they underscore that Professor Wiecek has indeed embarked on an important enterprise.

What of Professor Wiecek's paper itself?

Like all good presentations, it has an introduction, a body, and a conclusion. The introductory pages take us back to Alfred Kelly's classic article and add to his typology. As a minor point, I read the second of Kelly's two less controversial modes of historical usage not, as Professor Wiecek has it, as the investigation of legislative history, but rather the investigation of "the circumstances surrounding earlier judicial expositions of the law," to quote Kelly himself.¹ Put differently, Professor Wiecek's legislative-history mode constitutes yet another approach.

In any event, his three major additions to Kelly's list are history as a lode of values, history as refutational argument, and history as a medium of education. When we take these in combination

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

with Kelly's two major focuses—history by judicial fiat and law-office history (often used for breaking a line of precedent)—we see that history figures into constitutional adjudication both as an argumentative device *and* as a contextual element.

This suggests that rather than having a single focus—the Court's use of history—the paper in addition encompasses a second focus: history's impact on the Court. The first focus suggests a conscious technique. History's role in the second focus *may* occur at a conscious level in terms of individual judges' awareness of it, but it may also take place over their heads, as it were. Or, to play on the theme of "usage" (and, admittedly, to fall into the fallacy of reification), besides being itself used, history also uses the Court.

The body of the paper is fascinating and so meets one *sine qua non* of good history. At the level of explanation, however, I wish Professor Wiecek had been more overt in telling us why, with reference to the categories he initially delineates, he selected the areas and cases that he has examined.

He first discusses, in his words, "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." The cases do reveal a lot about the interrelation of history and the Court; but so do other areas and cases. Because a single paper cannot tell all, the criticism I am making may be something of a cheap shot. Yet I miss an explanation of what guided his selection process. It may be that the three areas he covers reveal more, say, than do the Court's once-important commerce cases, but, to repeat, I would like to be told why.

The body of the paper also illustrates that history may use the judges, in addition to being used by them. Professor Wiecek makes the point explicit in discussing the road to *Erie Railroad Co. v. Tompkins*, and most of all, I think, in asserting the influence of Louis Dembitz on his nephew, Justice Louis Brandeis. This episode leads me to wish for comparable attention regarding some of the other justices he mentions. Or perhaps identifiable historical influences are clearer with respect to some judges than others. I would like fuller attention to whom and why.

When Professor Wiecek turns to the line of cases dealing with rights of privacy and intimate association, he finds that "history-by-judicial-fiat dominated the development of doctrine." The record, he explains, also reveals the impact of history as a lode of values. But additionally, history-for-purposes-of-refutation enters the picture. In fact, the same historical discussion by a judge may fit into more than one of the Kelly-Wiecek categories.

This leads me to speculate—or rather to state the obvious—that the categories themselves imply a neatness contradicted by careful investigation.

As for the second portion of the paper's body, I can only say "amen!" The Court's uses of history in race-related issues during the nineteenth century offered scant sustenance to blacks. Much of this was history by fiat or law-office history at its worst. But that dominant feature should not blind us to the fact that in certain instances even well done history would have offered little additional sustenance.

Let me illustrate the point in this fashion: Professor Wiecek makes no pretense of carrying the race-related story into the twentieth century. In his introduction, however, he mentions *Brown v. Board of Education* and praises the Court for finding history indeterminate. With some trepidation at taking up a subject Professor Wiecek knows far better than I do, I suggest that in *Brown* the relevant "original intent" was perhaps *not* so indeterminate. If "original intent" includes the immediate understandings and concrete expectations of the constitutionally crucial ratifiers, this intent may have been all too clear as regards the acceptability of segregation under the fourteenth amendment's first section.

What I am reminded of is akin to a point that I consciously wove into my book on the *Plessy* case. "Good" social science in the 1890s provided a slim foundation for true equality of constitutional right. By extension, when I think about the use of history, I am left a bit uneasy. Historians understandably applaud accurate historical reconstruction—although the most insightful of them, which includes Professor Wiecek in his paper and especially in his conclusion, caution that history's application to legal-constitutional issues is often problematic. But in those instances where it *is* applicable, we may not always be happy with the results of accurately done history.

Finally, one last thought about Professor Wiecek's conclusion: After aptly describing some of the differences between the purposes and techniques of the historian and of the lawyer-judge, he suggests that Jacobus ten Broek erred in viewing history as an *extrinsic* aid. Instead, as Professor Wiecek puts it, 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." That well indicates his own nuanced concerns—and does so better, I think, than the discussion of categories with which the paper begins.