

Nova Law Review

Volume 11, Issue 1

1986

Article 13

Book Review: *The Constitution in the Supreme Court: The First Hundred Years 1789-1888*. By David P. Currie, Chicago IL: University of Chicago Press, 1985. Pp. xii, 504. \$40.00

Johnny C. Burris*

*

Copyright ©1986 by the authors. *Nova Law Review* is produced by The Berkeley Electronic Press (bepress). <https://nsuworks.nova.edu/nlr>

Book Review: The Constitution in the
Supreme Court: The First Hundred Years
1789-1888. By David P. Currie, Chicago IL:
University of Chicago Press, 1985. Pp. xii,
504. \$40.00

Johnny C. Burris

Abstract

The Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age

KEYWORDS: history, supreme court

Book Review: The Constitution in the Supreme Court: The First Hundred Years 1789-1888. By David P. Currie,¹ Chicago, IL.: University of Chicago Press, 1985. Pp. xii, 504. \$40.00.

Reviewed by Johnny C. Burris²

The Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age.³

Three questions came to mind while reading this book which professes to offer a critical history of the United States Constitution as interpreted by the Supreme Court. Why was this book written now? Is the methodology used and are the conclusions reached in the book intellectually sound? Should this book be considered part of legal history scholarship?

I. Why was this book written now?

There has been a revival of interest in legal history recently in legal academician circles. The revival has occurred in both public and private law fields,⁴ and is somewhat surprising. It has been noted on many occasions that legal history at least in the law school milieu was considered outside the mainstream of scholarship⁵ and teaching.⁶ Some

1. Harry N. Wyatt Professor of Law, University of Chicago Law School.

2. Assistant Professor of Law, Nova University Center for the Study of Law.

3. W. WILSON, CONSTITUTIONAL GOVERNMENT IN THE UNITED STATES 69 (1927).

4. A special mini-workshop on the role of legal history in the basic law school curriculum was held at the Association of American Law Schools annual convention in 1986. It was attended by over two hundred law professors and other academicians from related fields of study. See also Friedman, *American Legal History: Past and Present*, 34 J. LEGAL EDUC. 563 (1984); AMERICAN LAW AND THE CONSTITUTIONAL ORDER HISTORICAL PERSPECTIVES vii-ix (L.M. Friedman and H.N. Schreiber ed. 1978) (commenting on the increased interest in legal history); EASAYS IN NINETEENTH - CENTURY AMERICAN LEGAL HISTORY xiii (Holt, ed. 1976) (commenting on perceived renewed interest in American legal history).

5. See, e.g., Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017, 1018 (1981); G. GILMORE, THE AGES OF AMERICAN LAW 102-04 (1977) (commenting on the ahistorical tradition in legal scholarship).

6. See Woodward, *History, Legal History and Legal Education*, 53 VA. L. REV. 89-95 (1967); Swindler, *Legal History — Unhappy Hybrid*, 55 LAW LIBR. J. 98, 103-

have gone even further and questioned its relevancy to legal education and scholarship and lamented that legal history was ever recognized as a discrete area of intellectual inquiry.⁷

What is the genesis of this renewed interest? Two explanations come to mind,⁸ both of which in part provide a plausible explanation for why this book was written. First, we are entering an era of bicentennial celebrations of significant early moments in the development of our Constitution. The first will commemorate in 1987 the drafting of the Constitution in Philadelphia during the summer of 1787.⁹ Celebrations commemorating the bicentennials of the ratification of the Constitution,¹⁰ the meeting of the first Congress of the new government,¹¹ the

10 (1962); J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 151 (2d ed. 1921). Cf. Downer, *Some Thoughts on Legal History*, 3 U. W. AUSTRALIAN ANN. L. REV. 13 (1954) (Rebuttal to criticism of the inclusion of legal history as a part of the basic law school curriculum in Australia); Downer, *Legal History — Is It Human*, 4 MELB. U.L. REV. 1 (1964) ("Perhaps no subject in the curriculum . . . is called upon to justify itself more frequently than legal history."). But see W. HOLDSWORTH, *SOME LESSONS FROM OUR LEGAL HISTORY* 3 (1928) ("[Legal history] is of importance to lawyers . . . because it helps them to understand, and so either to appreciate or to criticize intelligently, the complicated mechanism of law.").

7. See, e.g., G. GILMORE, *supra* note 5, at 103 n.6.

8. Of course there may be other explanations. One not to be discounted is mere intellectual faddishness. It is legal history's moment in the cyclic process of intellectual inquiry. See F. McDONALD, *NOVUS ORDO SECLORUM THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* vii-ix (1985). Another offered by Professor Friedman is that legal history is a more interesting intellectual enterprise than many other aspects of modern legal scholarship. Friedman, *supra* note 4, at 569.

9. The "drafters" of the Constitution met in Philadelphia from May 25, 1787 until September 17, 1787. See 32 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 73-74 (1936) reprinted in 3 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 13-14 (M. Farrand, rev. ed. 1937) (text of resolution by Congress authorizing the Convention).

10. On September 13, 1788 the Continental Congress adopted a resolution officially declaring that the Constitution had been ratified. 34 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 522-23 (1937). New Hampshire was the ninth state to ratify the Constitution on June 21, 1788, thus satisfying the requirements of Article VII of the Constitution. See 1 J. GOEBEL, JR., *HISTORY OF THE SUPREME COURT OF THE UNITED STATES ANTECEDENTS AND BEGINNINGS TO 1801*, at 324-412 (1971) (discussion of the ratification process).

11. The first Congress met on March 4, 1789, but a quorum was not present in either the House or the Senate. *ENCYCLOPEDIA OF AMERICAN HISTORY* 145 (R. Morris and J. Morris 5th ed. 1976).

drafting of the Bill of Rights,¹² ratification of the Bill of Rights¹³ and *Marbury v. Madison*¹⁴ will follow. It is unlikely these 200th anniversaries will cause the type of gala, emotional, self-congratulatory celebrations we have witnessed recently for the bicentennial of the Declaration of Independence in 1976 and the centennial of the Statue of Liberty just this past summer. It will not be for a lack of effort in attempting to generate such a celebration.¹⁵ It is more a function of lack of commercial interest in exploiting these milestones. Yet this is not to say that there will be no commemorations. There will be local and national educational programs,¹⁶ sponsorship of additional scholarly research and discussions,¹⁷ and appropriate local commemorative activities.¹⁸ These types of activities in many ways are more appealing because they may cause ordinary citizens to devote some serious thought to our Constitu-

12. The Bill of Rights was submitted to the States for ratification on September 25, 1789. See 2 B. SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 983-1166 (1971) (collection of legislative history materials concerning the drafting of the Bill of Rights).

13. The Bill of Rights was officially ratified as part of the Constitution on December 15, 1791. See *id.* at 1171-1203 (collection of materials concerning ratification of the Bill of Rights by the States).

14. 5 U.S. (1 Cranch) 137 (1803). The opinion was delivered by Chief Justice Marshall on February 24, 1803.

15. Former Chief Justice Burger retired from the Supreme Court so he could devote all of his energies to his duties as Chairperson of the Commission on the Bicentennial of the United States Constitution. See Pub. L. No. 98-101, 97 Stat. 719 (1983) (statute establishing the Commission). Recently former Chief Justice Burger commented on the failure of constitutional bicentennials to catch hold in the public's imagination. He noted, "We're waiting for the spark. We haven't found it yet." Sun-Sentinel, (Hollywood, Fla.) Sept. 23, 1986, § A, at 14, col. 1. The Commission's failed efforts to develop a commercialized celebration is chronicled in the reports and newsletters issued by the Commission. The original Commission plans included a three-phrase celebration of all the bicentennials mentioned above except for the ratification of the Bill of Rights and *Marbury v. Madison*. COMM'N ON THE BICENTENNIAL OF THE U.S. CONST., FIRST REPORT OF THE COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION 6-14 (1985).

Similar Commissions were created in the past to memorialize important constitutional anniversaries. These Commissions met with varying degrees of success. See, e.g., U.S. CONSTITUTION SESQUICENTENNIAL COMM'N, HISTORY OF THE FORMATION OF THE UNION UNDER THE CONSTITUTION vii, 3, 583-860 (1940).

16. See, e.g., COMM'N ON THE BICENTENNIAL OF THE U.S. CONST., 2 WE THE PEOPLE no. 2 (May 1986).

17. See, e.g., NAT'L ENDOWMENT FOR THE HUMANITIES, INITIATIVE FOR THE BICENTENNIAL OF THE U.S. CONSTITUTION.

18. COMM'N ON THE BICENTENNIAL OF THE U.S. CONST., *supra* note 16, at 1, 3.

tion and the governmental institutions it has generated. The heightening of this type of awareness by ordinary citizens, not just lawyers or historians, will do more than any commercial extravaganza to strengthen our society and its institutions by encouraging individuals to become active citizens.¹⁹ For academicians these bicentennial moments offer the combined succor of some heightened public interest in constitutional history scholarship (*i.e.*, a large audience of readers) and some possibility of additional financial support for historically focused research efforts.²⁰

Second, the critical legal studies movement²¹ has brought about a renewed interest in legal history. One hesitates to offer any general statement of what CLS is, for it encompasses such a wide variety of perspectives and approaches to the law.²² I offer the following only as my own general understanding of what CLS means based upon an admittedly less than comprehensive survey of CLS literature. First, CLS views law and the legal process as central to defining the boundaries of

19. See Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L. J. 1013, 1032-43 (1984); ACKERMAN, *RECONSTRUCTING AMERICAN LAW* 21-45 (1983); W. HOLDSWORTH, *supra* note 6, at 4 (1928) ("The study of our legal history is important to all citizens . . . first because it teaches them something of the mechanism of government; which they have a right and duty to maintain in working order; and secondly because some knowledge of the outline of the age-long struggle of law against manifold forms of wrong-doing . . . helps to create respect for the law and that law-abiding instinct, which are conditions precedent for the maintenance and improvement of the standards of a nation's life."). In light of the failure of its commercialization efforts some members of the Commission have adopted citizen education about the Constitution as a primary goal. Senator Edward Kennedy, a commission member, recently commented during the Commission's first celebration, an event which was linked to the 15th anniversary of Walt Disney World in Florida, "[t]he idea of getting everyone in the country to read the Constitution would be useful and advisable. It is really a sacred document. We have to ensure that proper reverence is paid to the Constitution and that the Bicentennial Commission does not lessen or cheapen its importance with commercialization." Sun-Sentinel, (Hollywood, Fla.) October 5, 1986, § A, at 18, col. 1. See also Burger, *Marking the Bicentennial of the United States Constitution*, 15 STETON HALL L. REV. 462, 464 (1986).

20. See *supra* note 17.

21. Hereafter referred to as CLS.

22. See, *e.g.*, White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 S.W. L. J. 819 (1986) (offers an assessment of the impact of critical legal studies on legal scholarship); Boyle, *Introduction, A Symposium of Critical Legal Studies*, 34 AM. U. L. REV. 929-38 (1985); Kennedy and Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 1961 (1984) (a somewhat dated listing of a wide variety of works of very diverse methodology all of which are considered within the CLS school).

legitimate conversation about social policy. The law plays a critical role in limiting policy alternatives a decision maker views as available in responding to societal needs.²³ Second, the central role of law in American society has been to offer rationale for why the irreconcilable contradictions between claims of individual freedom and interdependence inherent in the nature of relations between persons are reconcilable. What is needed is for this false sense of rational ordering to be exposed. We must face the reality that the demands for individual autonomy and freedom are irreconcilable with the necessity of functional interdependence of individuals to effectively pursue the general welfare so there will be more social goods including autonomy and freedom available for distribution. What to date has not been taken seriously enough by traditional legal commentators is how the functional interdependence of individuals which is perceived as necessary for the existence of freedom and autonomy also inherently limits such freedom and autonomy.²⁴ Third, law and the legal process are concerned with decisions which are of an inherently indeterminate nature. As such, law and the legal process are seen as merely a particular and very important mode of political decisionmaking designed primarily to support the normative choices of the status quo.²⁵ Fourth, many legitimate normative choices and policy alternatives are either excluded from consideration or their importance is vastly underplayed. This is especially true with regard to policy alternatives reflecting egalitarian and democratic ideals or values which are generally considered necessary for a more just society.²⁶

23. See, e.g., Brainerd, *The Grounds of Law: A Wittgensteinian Account of Law and Structure and Critical Legal Theory*, 34 *AM. J. L. REV.* 223 (1985); Kennedy, *The Structure of Judicial Commentaries*, 23 *BUFFALO L.J. REV.* 202 (1979). See also Goodrich, *Historical Aspects of Legal Interpretation*, 6 *IND. L.J.* 33 (1986) (argues legal interpretation is inherently involved in political communicative practices).

24. See, e.g., Kennedy, *supra* note 23, at 213-18, 379-82. See also R. NOZICK, *ANARCHY, STATE, AND UTOPIA* 10-87 (1974) (discussing the rise of the minimalist state as a necessary intrusion on individual freedom and autonomy in the state of nature). This conflict between the collective will expressed through democratic processes and claims of individual rights as a check on the collective will is the major dilemma facing the modern liberal state. See R. UNGER, *LAW IN MODERN SOCIETY TOWARD A CRITICISM OF SOCIAL THEORY* 166-223 (1976); Burt, *Constitutional Law and the Teaching of the Parables*, 93 *YALE L.J.* 455 (1984).

25. See, e.g., Kairys, *Legal Reasoning*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 11-17 (D. Kairys ed. 1982).

26. See, e.g., Hutchinson and Monahan, *Law, Politics, and the Critical Legal Studies: The Unfolding Drama of American Legal Thought*, 36 *STAN. L. REV.* 199,

Fifth, the current legal system needs to be reformed so the normative choices being made in the allegedly neutral and instrumental legal process are unmasked. This will permit individuals and groups to more effectively seek a just society and better understand the ordering of relationships between individuals and between individuals and the state.²⁷

The reaction to CLS scholarship and other CLS tactics by more traditional legal scholars has been spirited if not always effective. CLS has in many ways shaken complacent legal academicians to the core because it questions some of the basic premises of their professional lives — the neutrality concept and instrumentalist view of law in social order. By equating legal decisionmaking with other forms of normative policy making processes, CLS claims to have exposed the law and legal process for what it truly is, just another means of generating societal norms and rules. In doing so, CLS has threatened the concept of law as a relatively neutral tool for implementing social policy choices made by other institutions. What traditional scholars have resisted is the attempt by CLS to equate the law and the legal process with normal politics. The result has been a growing debate, in academic circles in particular, although some of it has reached the public domain,²⁸ over the nature of law, legal systems and the appropriate boundaries of legitimate academic critique.²⁹ This debate has led to a renewed interest in legal history because many of the leading CLS scholars have used a historical approach to analyzing the development of legal doctrine as the means to drive home their critiques.³⁰ At least in part because of

213-27, 236-42 (1984); Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 294-303 (D. Kairys, ed. 1982).

27. See, e.g., Raes, *Legislation, Communication and Strategy: A Critique of Habermas' Approach to Law*, 13 *J. LAW AND SOCIETY* 183 (1986); Hutchinson, *Part of an Essay on Power and Interpretation (with Suggestions on How to Make Bouillabaise)*, 60 *N. Y.U. L. REV.* 850, 872-86 (1985); Unger, *The Critical Legal Studies Movement*, 96 *HARV. L. REV.* 561 (1983).

28. See, e.g., Trillin, *A Reporter at Large: Harvard Law*, *THE NEW YORKER*, March 26, 1984, at 53.

29. Compare Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222 (1984) with *"Of Law and the River" and of Nihilism and Academic Freedom*, 35 *J. LEGAL EDUC.* 1-26 (1985). Compare Gordon, *supra* note 5 and Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984) with Nelson, *Legal and Constitutional History*, 1984 *ANN. SURVEY AM. L.* 227. See also Chase, *What Should a Law Teacher Believe?*, 10 *NOVA L.J.* 403 (1986).

30. See Gordon, *Critical Legal Histories*, *supra* note 29. As noted by Professor Gordon, this is somewhat surprising because of the traditional role of legal history as an apology for the current state of affairs. See also Woodward, *supra* note 6, at 99-

the central role of legal history in the CLS debate a new vitality has returned to the age old question of what is legal history.³¹

Professor Currie's efforts can be understood as responding to both of these offered sources of intellectual stimulation. His history of how the Supreme Court has interpreted the Constitution is not avowedly designed as part of any bicentennial celebration,³² but nonetheless can be seen as part of the anticipated scholarly concerto during this bicentennial era.³³ The timing of the book's release and the nature of its thesis assure that it can be used as part of consciousness heightening efforts as to the nature of our governmental institutions which one hopes the bicentennial will invoke for ordinary citizens. This book also can be read as a formalist Whiggish³⁴ type of response to the CLS critique of the Supreme Court decisionmaking process. While not directly addressing the CLS critique this book, with its strong positivist and interpretist approaches, offers an apologia for the current modes of

113; Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIS. 275 (1973).

31. A question to which there is no paradigmatic answer. Letter from Robert W. Gordon to William Nelson (August 26, 1985) (response to Nelson's article discussing this point) (a copy of the letter is on file with the Nova Law Review). See also Holt, *Now and Then: The Uncertain State of Nineteenth - Century American Legal History*, 7 IND. L. REV. 615-26 (1974).

32. In fact the book is a compilation of law review articles published between 1981 and 1984. D. CURRIE, *THE CONSTITUTION AND THE SUPREME COURT THE FIRST HUNDRED YEARS 1789-1888* xi n.1 (1985) (listing of law review articles). While I am not privy to Professor Currie's future publication plans, it does seem likely that we shall see the publication of a second volume based upon another series of law review articles sometime before or during 1989 probably titled *The Constitution in the Supreme Court The Second Hundred Years 1889-1988*. See, e.g., Currie, *The Constitution in the Supreme Court: The Protection of Economic Interests, 1889-1910*, 52 U. CHI. L. REV. 324 (1985); Currie, *The Constitution in the Supreme Court: Full Faith and the Bill of Rights, 1889-1910*, 52 U. CHI. L. REV. 867 (1985).

33. Some examples of this work are: R. WIEBE, *THE OPENING OF AMERICAN SOCIETY FROM THE ADOPTION OF THE CONSTITUTION TO THE EVE OF DISSOLUTION* (1984); F. McDONALD, *NOVUS ORDO SECLORUM THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985); M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986); *THE FOUNDERS' CONSTITUTION* (P. Kurland and R. Lerner ed. to be published 1987) (5 volume set which collects the important documents from the 17th, 18th and 19th centuries linked to the intellectual heritage of our Constitution from founding of the American nation through 1830).

34. A Whiggish history is one interpreting the past in light of the present, usually conservative, societal or individual values and policy goals. See, e.g., De Montpensier, *Maitland and the Interpretation of History*, 10 AM. J. LEGAL HIS. 259, 264 (1966); Horwitz, *supra* note 30.

constitutional interpretation and a methodological rebuttal to a CLS approach to the history of the interpretation of the Constitution by the Supreme Court.³⁵

II. Is the methodology used and are the conclusions reached in the book intellectually sound?

Professor Currie has written what he claims is a "critical history, analyzing from a lawyer's standpoint the entire constitutional work of the Court's first hundred years."³⁶ This is a remarkably ambitious task, especially for a one volume work.³⁷ He makes his task more manageable by limiting himself to an evaluation of the Court and its Justices based upon the quality of their work product judged by: (1) the soundness of their methods of constitutional analysis and (2) their opinion writing techniques.³⁸ He makes it clear at the outset that his departure point in analyzing the Court's interpretation of the Constitution is that of a committed legal positivist and interpretist.³⁹ From this perspective the Constitution is viewed as the sole source of power of all branches of the government, including the judiciary. As such, the Constitution is

35. No CLS scholar has yet attempted a systematic analysis of Supreme Court opinions on the scale of Professor Currie's efforts. However, there are CLS articles which indicate some of the significant differences in approach if such an effort was undertaken. See, e.g., Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623, 631-47 (1984); Kainen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation From Vested to Substantial Rights Against the State*, 31 BUFFALO L. REV. 381 (1982); Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981).

36. Currie, *supra* note 32, at xi.

37. The multi-volume history of the Supreme Court sponsored by the Holmes devise has allocated six of its planned eleven volumes to this same period. GOEBEL, *supra* note 10, at xi. Cf. E. BAUER, COMMENTARIES ON THE CONSTITUTION 1790-1860 (1965) (an interesting survey of learned treatises on the Constitution prior to the Civil War).

38. Currie, *supra* note 32, at xi.

39. See J. H. ELY, DEMOCRACY AND DISTRUST A THEORY OF JUDICIAL REVIEW 1-9 (1980) (brief introduction to the interpretist and non-interpretist approaches to Constitutional Law); H.L.A. HART, THE CONCEPT OF LAW 121-50 (1961) (discussion of the role of positivism in the interpretivist approach); Comment, *Dualistic Legal Phenomena and the Limitations of Positivism*, 86 COLUM. L. REV. 823 (1986) (discussion of limitations of positivism as offering a monistic theory of law and legal systems). Justice Black was the strongest proponent of this position ever to sit on the Supreme Court. See H. BLACK, A CONSTITUTIONAL FAITH (1969).

binding on all branches of the government. The judiciary may not in the guise of interpretation add or subtract from this document which constitutes the judgment of the "People of the United States"⁴⁰ where that judgment is fairly ascertainable.⁴¹ It is only in the case of textually open-ended provisions of the Constitution where a broad range of judgment has been left for the Court that it is appropriate for the Court to exercise interpretative discretion. In judging whether this interpretative discretion has been appropriately exercised, one must look to the reasons offered in the opinion of the Court and judge their persuasiveness.⁴²

In format the book is very traditional. It is divided into five parts which follow the traditional divisions by reign of Chief Justice.⁴³ In each part Professor Currie does a fine job of summarizing the constitutional decisions of the Court and clearly setting forth his critique of the opinions. In the conclusion section of each part of the book he offers a succinct evaluation of the work product of the Court as a whole for the period and of each significant Justice.

There is little to disagree with in Professor Currie's summary of the cases as a matter of just reading and briefing the cases from the perspective of a modern day lawyer.⁴⁴ But in many other ways, some of

40. U.S. CONST. preamble.

41. This is the contraconstitutional judicial decision making problem which really is not a problem because the Supreme Court has virtually never taken such a position. See Sandalow, *Constitutional Interpretations*, 79 MICH. L. REV. 1033 (1981).

42. Currie, *supra* note 32, at xii-xiii. Of course this approach does not place much in the way of a limitation on judicial power as almost all of the important provisions of the Constitution, those that perform a checking function or grant power, are of a textually open ended-nature. Thus the important question remains, what are the legitimate boundaries of judicial interpretation? When is it legitimate for the court to "trump" the legislative judgment through its interpretation? See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* xi, 81-149 (1977); Braden, *The Search for Objectivity in Constitutional Law* in *JUDICIAL REVIEW AND THE SUPREME COURT: SELECTED ESSAYS* 172-97 (Levy ed. 1967). However, Professor Currie appears to reject this analysis and believes most questions of interpretation do not involve extreme examples of textually open-ended provisions of the Constitution. Rather he sees the language of the Constitution in its context as providing a rather narrow range of answers for the Court to chose from. CURRIE, *supra* note 32, at 453-55. See also R. BERGER, *GOVERNMENT BY JUDICIARY THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 1-19, 407-18 (1977).

43. There is one exception. Professor Currie has lumped all of the work of the pre-Marshall court into part one which includes the Jay, Rutledge and Ellsworth Chief Justiceships followed by parts two through five corresponding to the Chief Justiceships of Marshall, Taney, Chase and Waite.

44. While this task may be one appropriate particularly for law students engaged

which are minor and others which are major, the arguments and conclusions of the book are flawed and unpersuasive. Professor Currie fails to address except in passing the impact of contemporary intellectual, social, ideological and economic conditions on the Court's decision process. This is a major methodological error. The discussion of the cases was generally set forth as if there were few if any relevant sources other than the opinions themselves. Even where he does allude to events outside the Court's opinions, usually buried in the footnotes, one is left wondering why he chose to rely so uncritically on some sources.⁴⁵ His apparent uncritical reliance on the much criticized work⁴⁶ and theory of the late Professor Crosskey⁴⁷ as one of his primary sources for many of these points substantially detracts from the quality of even this limited discussion of matters not chronicled in the opinions of the Court.⁴⁸

This failure to consider the opinions of the Court in the context of their own contemporary societal setting is particularly frustrating because Professor Currie professes to offer an intellectual history of the interpretation of the Constitution. The efforts of Professor Currie fail

in the study of constitutional law I hesitate to call it legal history let alone a critical legal history. See *infra* pgs. 266-70. One can also quibble with Professor Currie over some areas which he just glosses over. For example, the debate during this period on and off the bench over whether there was a federal common law is virtually ignored. Yet, this was one of the most important constitutional issues in the early 1800s. See, e.g., Jay, *Origins of Federal Common Law: Part One*, 133 U. PA. L. REV. 1003 (1985); M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 9-16 (1977). Cf. Field, *Sources of Law: The Scope of the Federal Common Law*, 99 HARV. L. REV. 881 (1986) (argues the power of federal courts to create federal common law should be much broader than current doctrine permits).

45. At one point he cites the historical novel *Burr* by Gore Vidal as authority. CURRIE, *supra* note 32, at 79-80 n.118.

46. See, e.g., Goebel, *Ex Parte Civ*, 54 COLUM. L. REV. 450 (1954). The late Professor Goebel offered a telling critique of both Professor Crosskey's unitary theory and the adequacy of his research. But see Jeffrey, *American Legal History: 1952-1954*, 1954 ANN. SURVEY AM. L. 866-69 (offers a much more favorable view of Professor Crosskey's efforts).

47. W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953) (2 vols.). The original two volumes have recently been reprinted by the University of Chicago Press along with the publication of the long postponed but promised third volume. 3 W. CROSSKEY AND W. JEFFREY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1980).

48. Of course at many times he relies upon respected commentary which does not suffer from the shortcomings associated with Professor Crosskey's work. See, e.g., FEHRENBACHER, *THE DRED SCOTT CASE* (1978); HYMAN AND WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835-1875* (1982).

in this endeavor for two reasons. First, he never effectively deals with the impact of contemporary intellectual thought on the Justices and their opinion writing. The extent to which a particular mode of argument or perspective was considered a legitimate intellectual approach by one's contemporaries is a relevant consideration in evaluating the quality of judicial opinions from a historical perspective.⁴⁹ To omit consideration of contemporary views is to impose one's own intellectual standards on another era. The result is a Whiggish version of history. Further, by ignoring this rich intellectual heritage which may have offered critical insight as to why a particular mode of argument was used, Professor Currie has missed an opportunity to help us better understand why the Court acted as it did and how this past may be relevant to issues the Court faces today.⁵⁰ Second, Professor Currie has imposed his strong positivist-interpretist views as the paradigm for judging the quality of judicial opinions.⁵¹ This results in his outright

49. See J. WHITE, *WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY* 231-74 (1984) (argues context of language use as central to a critical understanding of any text including the Constitution); G. HAINES, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT AND POLITICS 1789-1835* (1944) (early effort to show the relation of the work of the Court to the political and economic evolution of the American nation); White, *The Working Life of the Marshall Court 1815-1835*, 70 VA. L. REV. 1, 47-52 (1984).

50. It is clear that natural law philosophy is an important part of our legal heritage especially in the 18th and 19th centuries. See, e.g., P. LARKIN, *PROPERTY IN THE EIGHTEENTH CENTURY WITH SPECIAL REFERENCE TO ENGLAND AND LOCKE* 137-73 (1930); C. HAINES, *THE REVIVAL OF NATURAL CONCEPTS* 49-58, 75-165 (1930); *AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805*, 5, 7-9, 14, 72, 75, 83, 88, 100, 111-12, 159, 175-77, 187-90, 211, 221, 330, 413-14, 565-74, 606, 771, 779, 860, 900-906 (Hyneman and Lutz ed. 1983) (2 vols.) (representative collection of contemporary opinion during the founding era); McDONALD, *supra* note 8, at viii, 7, 9-10, 20, 32-33, 40, 51-66, 144-56; WHITE, *PATTERNS OF AMERICAN LEGAL THOUGHT* 24-28 (1978). See also STRAUSS, *NATURAL RIGHT AND HISTORY* (7th ed. 1971) (offers a particularly cogent explanation of the evolution of natural rights philosophy and its impact on the concepts of democratic government and natural law). Some modern commentators on constitutional law have returned to this natural law heritage to provide a partial explanation for why not all constitutional law decisions must be based strictly on the text of the Constitution. See, e.g., M. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982); Grey, *Do We Have An Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

51 Professor Currie agrees with the approach set forth by Justice Story in *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539 (1842) which he endorses as the classic statement of the paradigm for constitutional interpretation.

[P]erhaps, the safest rule of interpretation after all will be found to be

rejection of other plausible modes of interpretation as illegitimate and unprincipled. With such a perspective it is little wonder that even when he avows his discussion is aimed at consideration of the impact of natural law theory on constitutional interpretation that he always concludes the explanations offered are unpersuasive.⁵²

The book also suffers from an often internally inconsistent evaluation of the work of the Court and the Justices. For example, in discussing the work of the pre-Chief Justice Marshall Court, Professor Currie asserts the significance of the opinions of the pre-Chief Justice Marshall Court is that they "establish traditions of constitutional interpretation . . . [which] influence the entire future course of [judicial] decision."⁵³ Specifically, he concludes that the principle of judicial review of the constitutional validity of both federal⁵⁴ and state⁵⁵ legislative acts was established during this period.⁵⁶ However, when later discussing the opinion in *Marbury v. Madison*⁵⁷ specifically and the Marshall Court in general he is critical of Chief Justice Marshall for ignoring prior precedent which was on point.⁵⁸ If Chief Justice Marshall ignored the prior relevant cases, how is it possible to conclude that these cases

to look to the nature and objects of the particular powers, duties, and rights, with all the lights and aids of contemporary history; and to give to the words of each just such operation and force, consistent with their legitimate meaning, as may fairly secure and attain the ends proposed. 41 U.S. at 610-11.

D. CURRIE, *supra* note 32, at 242.

52. See CURRIE, *supra* note 32, at 127-59. For example, he criticizes Justice Story's opinion in *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815), as lacking an adequately reasoned explanation because of his reliance on concepts of natural law or justice in interpreting the Contracts Clause of the Constitution. D. CURRIE, *supra* note 32, at 138-41. He does not limit his hostility to this approach to the early Court's opinions. He also chides Justice Miller's reasoning in *Loan Association v. Topeka*, 87 U.S. (20 Wall.) 655 (1875) and *United States v. Kagama*, 118 U.S. 375 (1886) among other opinions, for invoking natural law concepts in interpreting the scope powers granted and constraints imposed by the Constitution. D. CURRIE, *supra* note 32, at 355-56, 381-82, 432-35, 450, 455.

53. D. CURRIE, *supra* note 32 at 3, 55.

54. *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378 (1798) (dictum); *Hylton v. United States*, 3 U.S. (3 Dall.) 171 (1796) (by implication). *But see* GOEBEL, *supra* note 10, at 778-84, 791-93.

55. *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796) (dictum). *But see* GOEBEL, *supra* note 10 at 741-56.

56. D. CURRIE, *supra* note 32, at 20-23, 31-41, 55.

57. 5 U.S. (1 Cranch) 137 (1803).

58. D. CURRIE, *supra* note 32, at 74, 196.

shaped the mode of judicial decision making in this area? What evidence is there to support such a conclusion? None, unless you argue Chief Justice Marshall self-consciously excluded these prior cases which, according to Professor Currie, are seminal and critical to the issue on which *Marbury* was decided. If such precedent existed given the political context of the *Marbury* case,⁵⁹ it would have been foolish for Chief Justice Marshall to ignore it.

Two more plausible explanations exist. First, Chief Justice Marshall may not have been aware of the prior cases. Marshall did not have the benefit of a major law library or even an accurate official reporting service for cases of the Supreme Court or any other courts, so it is possible at the time he wrote the opinion in *Marbury* that he was unaware of these prior cases.⁶⁰ Second, if Chief Justice Marshall was aware of these prior decisions, perhaps he did not find them sufficiently persuasive or important to use in his argument.⁶¹ Either way, the fact we may today view these cases as relatively important pre-*Marbury* decisions discussing the power of judicial review does not justify reaching the same conclusion as to their impact during the Marshall era or any other for that matter.

Professor Currie's critique of the reasoning in the Court's opinions, aside from his hostility to natural law rationale, is often distorted by other aspects of his twentieth century positivist-interpretist views. For example, in his discussion of *Chisholm v. Georgia*⁶² he chides the Justices for failing to address the real interpretative problem, what did the framers intend?⁶³ In doing so he ignores several important considerations. First, as noted earlier by Professor Currie there was little availa-

59. See, e.g., 2 C. WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 169-268 (rev. ed. 1947); 3 A. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 50-156 (1919). Both offer insight into the politically turbulent time of the *Marbury* case and how the *Marbury* case threatened the integrity and the independence of the Court.

60. Currie, *supra* note 32, at 455 (commenting on the lack of adequate library and clerical assistance for the early Court).

61. Professor Currie also concluded the opinion in *Martin v. Hunter's Lease*, 14 U.S. (1 Wheat.) 304 (1816) by Justice Story was important because it offered a complete and compelling explanation of why the Court constitutionally had the power to review the judgments of state courts as to matters concerning interpretation of federal law. D. CURRIE, *supra* note 32, at 91-96. It would seem if *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796), had so clearly established the principle of judicial review of state legislative acts then the extension of the concept of judicial review to state court opinions would not have been as critical as he asserts.

62. 2 U.S. (2 Dall.) 419 (1793).

63. D. CURRIE, *supra* note 32, at 20.

ble in the way of written records of the proceedings of the Constitutional Convention. Madison's notes⁶⁴ on the proceedings were not published until after the death of all who had participated.⁶⁵ Second, *The Federalist Papers*⁶⁶ had not yet risen to the level of an accepted historical record of the Framers' intent, but were seen as political propaganda used in an attempt to convince the delegates to the New York ratification convention that the Constitution ought to be ratified.⁶⁷ Third, none or very little of the inadequate written records of the state ratification conventions were available to the Court. As such, there was little in the way of published material to use even if the Justices had focused on "the unwritten understandings of those who were at the Philadelphia convention."⁶⁸ It is an unfair and questionable practice to criticize the Court in retrospect for failing to use an interpretative technique for which the resources were not yet available. This transgression is aggravated when it is used, as Professor Currie has, to further reinforce an extremely narrow perspective of appropriate legal argument concerning questions of constitutional interpretation.

Despite these criticisms, Professor Currie's work does provide a reasoned explanation for his judgment of the quality of the work of the various Justices of the Court, if you share his positivist-interpretist paradigm. From this perspective he does not offer any earth-shaking new evaluations or insights. Professor Currie claims, in evaluating the quality of the Chief Justices, that Chief Justice Marshall was the greatest judicial statesman.⁶⁹ But as an opinion writer Marshall could have written more tightly reasoned opinions, avoided so much *dicta*, paid attention to and distinguished prior cases more effectively.⁷⁰ Chief Justice Taney was not as an effective leader of the Court as Marshall, but

64. See Farrand, *supra* note 9 (four volume definitive edition of the records of the Convention including Madison's notes).

65. D. CURRIE, *supra* note 32, at 13.

66. JAY, HAMILTON AND MADISON, *THE FEDERALIST PAPERS* (Bantam ed. 1982) (originally published as newspaper articles during the debate over ratification in New York).

67. See, e.g., D. EPSTEIN, *THE POLITICAL THEORY OF THE FEDERALIST* 1-11 (1984) at vi-xii (introduction by G. Wills); P. SMITH, *THE CONSTITUTION: A DOCUMENTARY AND NARRATIVE HISTORY* 281-85 (1978); Earle, *Critical Commentaries, in REVOLUTION, CONFEDERATION, AND CONSTITUTION* 107, 111-12 (Brown ed. 1971). As these authors note there is little evidence the effort affected the outcome of the ratification vote in New York.

68. D. CURRIE, *supra* note 32, at 20.

69. *Id.* at 194, 454.

70. *Id.* at 195-98.

as an opinion writer he was exemplary. His lucid style effectively, clearly, and persuasively explained the resolution of the issues before the Court. He had the great misfortune to overreach in *Scott v. Sandford*⁷¹ and his judicial reputation has suffered greatly as a result of that one opinion.⁷² But for this opinion, he would be considered a great Chief Justice.⁷³ Chief Justice Chase successfully navigated the Court through the perilous times of radical reconstruction with a minimum of damage to its reputation and power, but was not a very effective opinion writer.⁷⁴ Chief Justice Waite reestablished the prestige of the Court while aligning it with a states' rights perspective of the Civil War Amendments and a generally restrictive view of the power of the federal government. As an opinion writer he was too succinct and failed to provide an adequate explanation of why he resolved cases the way he did.⁷⁵

Professor Currie's evaluation of the other Justices is also very traditional. Justice Story wrote well-crafted opinions but spent most of his years on the bench during a period when his strong federalist and nationalist views were out of favor.⁷⁶ Even if he wrote only nine majority opinions, Justice Curtis was a great Justice because of the clarity of his opinions, his ability to rally a majority of the Justices to his positions, and the importance of the issues resolved.⁷⁷ Justices Miller and

71. 60 U.S. (19 How.) 393 (1857). This opinion was the Supreme Court's failed attempt at providing a definitive resolution of the slavery issue. See FEHRENBACHER, *supra* note 48 (most definitive discussion of the case to date).

72. D. CURRIE, *supra* note 32, at 278, 454.

73. See G. WHITE, *THE AMERICAN JUDICIAL TRADITION PROFILES OF LEADING AMERICAN JUDGES* 64-83 (1976); 5 C. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES THE TANEY PERIOD 1836-64, 969-75* (1974); R. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 98-100 (1960).

74. D. CURRIE, *supra* note 32, at 356-57.

75. *Id.* at 448-50.

76. *Id.* at 279, 454.

77. *Id.* at 279, 454. This is the one case where his evaluation of the impact and quality of a Justice's work is slightly out of step with past evaluations. See, e.g., C. HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 57-58 (1936) (characterizes Justice Curtis only as a man of keen intellect during the reign of Chief Justice Taney). *But see* A. BLAUSTEIN AND R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* 32-51 (1978) (rates Justice Curtis as in the near great category). In part the high esteem accorded Justice Curtis by Professor Currie can be understood because of his strong rejection of a natural law based approach to interpreting the Constitution.

[W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we

Field were the intellectual leaders of the post-Civil War Court. Justice Miller was the better opinion writer, but his reasoning often suffered from the flaw of a natural law perspective.⁷⁸ Justice Field wrote his opinions in a dry and conclusory style. He was a persuasive opinion writer only if you shared the outcome determinative assumptions which underlay his reasoning process.⁷⁹ Other Justices who served during this period generally had little significant impact on the interpretation of the Constitution by the Court.⁸⁰

In short, if one agrees with Professor Currie's positivist-interpretivist twentieth century paradigm, then despite some internal inconsistencies and the flawed methodology he has written a wonderful book reaffirming the correctness of that perspective. If one questions or does not share Professor Currie's perspective of the role of the Court in interpreting the Constitution, then one is left with a sense of having read only one facet of a multi-dimensional argument. For these readers this book is at best a very frustrating experience.

III. Should this book be considered part of legal history scholarship?

Immediately after I finished reading Professor Currie's book I was struck by two thoughts. First, this book bears a striking resemblance in many ways to the late Professor Karl Llewellyn's brilliant book, *The Common Law Tradition Deciding Appeals*,⁸¹ in which he extensively examined, among other things, the styles of judicial reasoning and writing of opinions.⁸² It also reminded me of *The Supreme Court Review*, whose purpose is to provide a "sustained, disinterested and competent

have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Scott v. Sandford, 60 U.S. (19 How.) 393, 621 (1857) (Curtis, J. dissenting).

78. *Id.* at 357-58, 449-50, 454.

79. *Id.* at 450. See WHITE, *supra* note 73, at 84-108 (presents a much more favorable evaluation of Justice Field).

80. Justice Harlan and Chief Justice Fuller began their tenure at the close of this book's time frame. An assessment of their contributions to the Court was properly left for the next volume.

81. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* (1960).

82. He broke down the nature of the opinion writing into two general categories: (1) the grand style of which he approved of as a form of singing reason, and (2) the formal style of which he heartily disapproved. *Id.* at 37-38, 155-59, 186-88, 291-94, 464-68.

criticism of the professional qualities of the Court's opinions."⁸³ What Professor Currie has done indirectly through his evaluation of the quality of these early Supreme Court opinions and the work of the individual Justices is to assert that there is a more correct or better style and method of reasoning for judicial opinions, something the editors of *The Supreme Court Review* believe and Professor Llewellyn believed. His discussion of the cases is written in a manner to prove how the Court has failed or succeeded in its interpretative endeavors, measured by Professor Currie's criteria. There is nothing wrong with such efforts; in fact they are an important part of legal scholarship. However, such efforts can at best be characterized as at the periphery of what is generally considered to be legal history.

It is not my intention to offer a definitive definition of legal history,⁸⁴ but rather to offer some distinctions between traditional legal analysis and legal history which explain why Professor Currie's book is not a paradigmatic example of a legal history text.

Traditional legal case analysis involves reading cases for holdings and rationale in order to determine what they mean today, and how they bear upon the solution to a current problem or controversy.⁸⁵ Gen-

83. Kurland, *Preface*, 1960 SUP. CT. REV. vii (quoting Professor Henry Hart).

84. All such efforts to date have failed. See *supra* note 31; J.W. HURST, LAW AND SOCIAL PROCESS IN THE UNITED STATES HISTORY 1-27 (1960). See generally M. COHEN, THE MEANING OF HUMAN HISTORY 3-34 (discussion of the problem of defining the tasks of a historian); C. WOODWARD, THINKING BACK THE PERILS OF WRITING HISTORY (1986) (thoughtful personal commentary on the dangers of indeterminacy to historical writing). While lawyers and law focused academicians have been unable to define what legal history is, a problem linked to the philosophy of history, they have generally agreed on its function.

The true function of Legal History . . . is to help lawyers and legal scholars, who are essentially concerned with current problems, to be meaningfully aware of the past as a healthy check on our often overly - optimistic and unfounded hopes; to provide gentle redress in our moments of frustration and disappointment; to act as an indispensable aid in drawing the ever-difficult distinction between the "temporal" and the "eternal," the changing and the unchanging; and above all, to provide awareness and appreciation for the value and meaning of civilization.

Woodward, *supra* note 6, at 105-106.

85. R.F. ATKINSON, KNOWLEDGE AND EXPLANATION IN HISTORY 139 (1978) (Observes there are "obvious social and institutional pressures [on lawyers] not to leave everyday concepts and habits of thought too far behind"). Of course a lawyer may and does refer to other materials such as statutes, administrative regulations and rulings and legislative histories in his efforts to resolve a client's problem. My comments are limited to case analysis because this is the focus of Professor Currie's book; however, the same

erally, in this process the opinions of the Court are the sole source of information,⁸⁶ although occasionally lawyers may refer to matters outside the opinions in order to distinguish them from the current problem or controversy.⁸⁷ The legal historian and lawyer share to some extent a commonality of sources.⁸⁸ Writing legal history involves a similar task of reading and understanding cases, but undertaken from a very different perspective. The critical distinction between a legal historian and a modern lawyer is that a legal historian is consciously involved in the problematic process of self-location. Self-location is the process by which a historian recognizes and attempts to deal with the problem of cultural relativism which contaminates all his or her efforts.⁸⁹ To a legal historian a meaningful understanding of an event or a judicial opinion is seen as dependent on the particular time and place of occurrence.⁹⁰ The legal historian must have a pseudo dual personality because of this problem. One personality must be devoted to the effort of understanding the past as clearly as possible on its own terms and in its own context.⁹¹ A second personality must be devoted to seeking to

difference of perspective can be found in how lawyers and legal historians would deal with these other materials.

86. It should not be assumed that opinions are necessarily an accurate source of historical information. The Supreme Court has been criticized for its distortion of legal history by using a "law office" approach to historical questions. See C. MILLER, *THE SUPREME COURT AND THE USES OF HISTORY* (1969); Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119.

87. I am not claiming this is the only major distinction between how a modern lawyer and a legal historian think about and analyze the past. For example, historians are not nearly as certain of events or facts of the past as lawyers. They recognize that knowledge of the past is inherently incomplete. For a historian this uncertainty is a major epistemological concern when offering a theory of explanation of past events. R.F. ATKINSON, *supra* note 85, at 39-68 (introduction to the basic epistemological concerns in the philosophy of history).

88. The Hurst School of legal historians do not even share this commonality as they primarily focus on trial court records as a source. See, e.g., J.W. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* (1950); HURST, *Legal Elements in United States History in LAW IN AMERICAN HISTORY* 3-92 (Fleming and Bailyn ed. 1971) J.W. HURST, *LAW AND SOCIAL ORDER IN THE UNITED STATES* 23-81 (1977).

89. See R. MARTIN, *HISTORICAL EXPLANATION RE-ENACTMENT AND PRACTICAL INFERENCE* 215-40 (1977); R.G. COLLINGWOOD, *THE IDEA OF HISTORY* 7-13 (1946). Briefly, cultural relativism is a term describing how we are all captives of our time and place. This circumstance dictates our understanding and perceptions of the past and of the present. See also W. MCNEILL, *MYTHISTORY AND OTHER ESSAYS* (1986).

90. See, e.g., Gordon, *supra* note 5, at 1017; Gordon, *supra* note 29, at 98-99.

91. See SCHUYLER, *Introduction* in *FREDERIC WILLIAM MAITLAND HISTORIAN*

understand the impact or coloration of one's own time upon attitudes toward the past both as to what are the relevant facts⁹² and how their interrelationships are explained.⁹³ This inexorable linkage between the past and the present is inescapable.⁹⁴ The result is that a legal historian must not only explain what he or she believes the past to have been, but also how the present has effected this perception. A lawyer engaged in traditional legal analysis is relatively unconcerned with this process. In fact, to engage in the process of self-location may not at all serve his short-term interests in understanding how a current court may understand these cases.

Professor Currie has resolved the problematic process of self-location by using two assumptions to moot the problem. First, he assumes that the opinions of the Court are virtually the sole source of relevant information in judging the quality of the Court's interpretation of the Constitution. Second, he assumes that the positivist-interpretist paradigm he offers for the role of the judiciary in interpreting the Constitution has always been the norm for such an interpretative process. By limiting himself generally to only the opinions of the Court he has ignored the intellectual, social, ideological, economic, and political context in which they were written.⁹⁵ Thus, he repeats the fundamental

31-40 (Schuyler ed. 1960); *supra* note 89.

92. Another distinction between what a lawyer and the legal historian do is how differently each perceives what are relevant facts. Lawyers often dismiss as extraneous considerations information not contained in sources such as opinions, statutes, administrative rules or legislative history. Lawyers refer to such extra-legal matters only in an effort to distinguish an opinion or to attack the continued validity of the policy reflected in the opinion. As the future Justice, Oliver Wendell Holmes wrote,

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.

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

Legal historians generally consider reference to facts (i.e., events, etc.) outside the narrow world view of legal opinions as essential to any initial understanding of what happened and what it means. See Frederick, *Law and History*, 14 VAND. L. REV. 1027, 1031-33 (1961).

93. See De Montpensier, *supra* note 34, at 270-72.

94. See, J. AUERBACH, *UNEQUAL JUSTICE LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* vii-xiii (1976); M. KAPLAN, *ON HISTORICAL AND POLITICAL KNOWING: AN INQUIRY INTO SOME PROBLEMS OF UNIVERSAL LAW AND FREEDOM* 3-71 (1971).

95. In doing so he ignored the critique of the formalist approach offered by the Hurst and legal realist schools of legal historians. See, e.g., Friedman, *supra* note 4, at

mistake of the formalist legal historians — seeing the law as having a life independent of society.⁹⁶ This, combined with his paradigm for interpretation, collapses his effort into solely a consideration of what a twentieth century lawyer believes these opinions mean today.⁹⁷ The result is the book provides little insight into or explanation of the interactions of the Court's work with its contemporary society.

By not taking the self-location question seriously the book is converted from an enterprise concerning legal history to a treatise on how a twentieth century lawyer reads these opinions. The result is a book which only marginally relates to legal history because it fails to meaningfully illuminate the past so we may better understand the present.⁹⁸

IV. Conclusion

Professor Currie's book with all its flaws offers a valuable lesson for all who are trained as lawyers and aspire to write in the area of legal history. It is a demonstration of the various pitfalls which await such efforts unless one first clearly understands the difference between legal history and ordinary legal analysis.

564-66. Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition of American Legal Historiography* 10 *LAW AND SOC'Y REV.* 9 (1975).

96. Legal historians of the formalist school reflected the Langdellian concept of law as a legal science "consist[ing] of certain principles and doctrines whose causes and evolution is traceable exclusively, through the study of appellate opinions." C. LANGDELL, *SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (1871). This has been characterized as "technical-competent, lawyerly history." The problem is that it focuses exclusively on the origin and evolution of legal doctrine within the closed universe of the legal system and ignores the social, political and economic context. The formalist approach has been judged a failure because it ignored these important causation factors in the evolution of legal doctrine. Friedman, *supra* note 4, at 563. See Comment, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 *CALIF. L. REV.* 119 (1985) (summary of the impact of the Legal Realist Movement in developing the distinction between formalist and instrumentalist legal thought); Horwitz, *The Rise of Legal Formalism*, 9 *AM. J. LEGAL HIST.* 251 (1975).

97. See, e.g., NIMBLE, *The Historian's Craft* 35-38, 43-47 (1952); De Mott, *supra* note 34, at 266-266; Friedrich, *supra* note 92, at 1036-48. This assumption is similar to the faith many Hurst school legal historians have in social progress. See Friedman, *supra* note 4, at 567-66; Gordon, *supra* note 29, at 71-87.

98. "History, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future." B. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 53 (1921). "The history of what the law has been is necessary to the knowledge of what the law is." O. HOLMES, *THE COMMON LAW* 37 (1881).