STUDIES IN LAW, POLITICS, AND SOCIETY

STUDIES IN LAW, POLITICS, AND SOCIETY

Series Editor: Austin Sarat

Recent volumes:

Volumes 1–2:	Edited by Rita J. Simon
Volume 3:	Edited by Steven Spitzer
Volumes 4–9:	Edited by Steven Spitzer and Andrew S. Scull
Volumes 10–16:	Edited by Susan S. Sibey and Austin Sarat
Volumes 17–33:	Edited by Austin Sarat and Patricia Ewick
Volumes 34–77:	Edited by Austin Sarat
Volume 78:	Edited by Livia Holden and Austin Sarat
Volume 79:	Edited by Austin Sarat
Volume 80:	Edited by Austin Sarat
Volume 81:	Edited by Austin Sarat
Volume 82:	Edited by Austin Sarat

STUDIES IN LAW, POLITICS, AND SOCIETY VOLUME 83

STUDIES IN LAW, POLITICS, AND SOCIETY

EDITED BY

AUSTIN SARAT
Department of Law, Jurisprudence and Social Thought and Political Science, Amherst College, USA

United Kingdom – North America – Japan
India – Malaysia – China

Emerald Publishing Limited
Howard House, Wagon Lane, Bingley BD16 1WA, UK

First edition 2020

British Library Cataloguing in Publication Data
A catalogue record for this book is available from the British Library

ISBN: 978-1-83982-297-1 (Print)
ISBN: 978-1-83982-296-4 (Online)
ISBN: 978-1-83982-298-8 (Epub)

ISSN: 1059-4337 (Series)

CONTENTS

This page intentionally left blank

EDITORIAL BOARD

This page intentionally left blank

LIST OF CONTRIBUTORS

Jacqueline Briggs	University of Toronto, Canada
Richard F. Hamm	University at Albany, USA
Torrie Hester	Saint Louis University, USA
Emily A. Prifogle	University of Michigan, USA
Lee B. Wilson	Clemson University, USA

This page intentionally left blank

CHAPTER 1

LAWYERS AND JUDGES UTILIZING HISTORY: A MULTIFACETED TOOL FOR THE PROFESSION, 1840–1960

Richard F. Hamm

ABSTRACT

In the nineteenth and twentieth centuries, lawyers and judges used history for various purposes. Their works reflected the trends in historical treatments done by historians but was produced for instrumental ends. They drew upon history in their work of making the law and in shaping the profession. Lawyers and judges used history to justify existing law, to bolster calls for change in the law, to provide a defense against critique of the profession, or to provide a shining example for the profession to emulate. This long view of the use of law by the legal profession contextualizes the much-commented phenomena of law office history, which has proved a subject of a contention between the professions of law and history.

Keywords: Law office history; legal profession; law and history; judges; lawyers; legal history

INTRODUCTION

Since Alfred Kelly's (1965) article, "Clio and the Court: an Illict Love Affair," and Charles A. Miller's (1969) book, *The Supreme Court and the Uses of History,* historians and legal scholars have wrangled over how the courts, especially the US

Studies in Law, Politics, and Society
Studies in Law, Politics, and Society, Volume 83, 1–21

ISSN: 1059-4337/doi:10.1108/S1059-433720200000083002

Supreme Court, uses history. Kelly's loaded term, "law office history" has framed the discussion for over a half a century. In the words of legal historian Mark Tushnet (1994), law office history is one that "reduces complexity and contradiction to simplicity" and a single conclusion (p. 173). While the topics have shifted over time, following the course of constitutional adjudication, for the most part, the debates have been rancorous and generated more heat than light. Legal historian Peter Irons (1987) declares "Historians have generally been the aggressors in conflicts with lawyers and judges, accusing their adversaries of twisting and distorting history for partisan ends" (p. 338). Scholars admit the structure of the court system with its winners and losers imposes a limit on historical argument. But it is not just the structure of the courts but the larger ethos of the profession that sets the two professions on a collision course over the past, especially after professionalization of history around the turn of the twentieth century.

This work instead of engaging directly with the law office history debate will seek to broaden scope of inquiry about how law understands the past to suggest that the very nature of the legal profession's commitment to advocacy contributes to the disjuncture between historians and lawyers. It does so in three ways. First, it will look at different legal actors other than Supreme Court Justices who used history in the past. Second, it will move beyond the limited scope of Supreme Court cases to examine other uses of history by the legal profession in other contexts. Third, it will focus on the period before historians became focused on the Supreme Court's law office history. Yet the familiar idea of the instrumental use of history by the lawyers will carry over from the law office history debate. Lawyers and judges in the nineteenth and early-to-mid twentieth centuries used history to justify existing law, to bolster calls for change in the law, to provide a defense against critique of the profession, or to provide a shining example for the profession to emulate. This functional use of history occurred in different modes, it could be mythic, validating, or exemplary. The lawyers' modes of historical expression reflected standards of historical discourse for their time, whether it be the era when gentlemen produced romantic people's epics, through the birth of professional history with its focus on sweeping explanations, and its eventual dominance over historical discourse during the era of the consensus school. Thus, these stories give a more nuanced and fuller view of the how the legal profession employed the multifaceted tool of history.

Lawyers and judges of the nineteenth and twentieth centuries were interested in the past for its immediate relevance. Yet their modes of presenting the past tended to run along the lines that predominated among historians. In the Romantic period, lawyers and judges packaged myth as history. This could take the form of a foundation myth, where the group told stories about their origins. Such stories were their source: there usually was no reference to other sources. Mythic history spoke in rather sweeping terms about the past. During the Progressive era, with the establishment of professional history, the mode of expression shifted to much more thesis-driven approaches. Of all the modes used by lawyers and judges, validating histories tended to most look like professional history. Usually, such studies drew upon a mixture of primary and secondary sources and were aimed at marshaling evidence to make an argument. In validating histories, the legal

authors though, in contrast to most professional historians, explicitly sought to support a current present-day goal, be it the maintenance of a legal rule or a change to it, they marshaled the past to achieve their ends. In the final period covered, one that is often labeled the consensus school, the focus will shift to exemplary history. In an era where American historians presumed and sought to explain American exceptionalism, it is fitting that lawyers would hold up an event or an individual from the past as a clear example of what were best or aspirational practices to show how special the legal profession was or could be. Biography or famous trial treatments leant themselves to this mode of expression.

This article will present examples of lawyers and judges using to the past for instrumental ends. It begins with Justice Thomas Turley in a child custody case, who used history in a mythic sense to explain the differences between common law and equity principles. Then it will turn to the Progressive era, when three legal professionals (E. Parmalee Prentice, Albert Beveridge, and George Wickersham) used history to validate their own position on the extent of the federal commerce power. They produced different interpretations of the Confederation era and Constitution to justify their positions. In later period, where the professional historians had established dominance, history was also useful in helping shape the legal profession's image of itself and deflect criticism. Thus, John W. Davis, one the nation's foremost courtroom lawyers during the twentieth century, wrote a glowing account of Louis XVI's lawyers to construct a heroic image of advocates serving a client. While Davis' account was meant for internal consumption of the profession, William Kunstler, a generation later wrote a popular book that borrowed that private servant model to spur the profession to courageous efforts on the behalf of liberty.

Finally, this essay will look an instance where a lawyer chose not to invoke history. Though it occurs temporally in the last period, the idea behind it applies to any of the eras. Such nonuse underscored the instrumentality of the past for the profession. In this instance, when Henry S. Manley, a prominent New York lawyer who was also a historian, wrote his brief for the case of *Nebbia* v. *New York* before the US Supreme Court, he did not make a historical argument. Yet, the justices invoked the past in both the majority and dissenting opinions.

ROMANTIC AND MYTHIC HISTORY

The early nineteenth century saw the emergence of the first national history of the United States which has been characterized as Romantic. The foremost proponents of this style of history were Harvard College trained gentlemen, Francis Parkman and George Bancroft. They were men of letters who while using primary sources drew upon secondary sources and their imaginations freely in constructing their works. They were part of the republican project of establishing a culture for the new nation as well as making a case for Manifest Destiny. In their accounts, native peoples and other European settler societies were the adversaries who fell before the advancing Americans, who brought modern civilization to its high level. In particular, Bancroft worked to instill pride in the nation's

history among the reading public and portrayed the heroic past as the means that created the institutions of freedom. However, Parkman's history swept across a large canvas of all of North America and often focused on struggles of peoples (read races) be it the British or French to exert control over the environment. He favored the Anglo-Saxons over others, arguing that they had innate racial advantages that made them better suited for self-government. Their works like myth offered a process that allows social groups to build and maintain a collective identity by thinking about the past (Hoefferle, 2011, p. 121; Hoffer, 2004, pp. 21–31; Tosh, 2015, p. 2).

In 1843, Justice Thomas W. Turley produced a similar mythic history to explain the differences between common law and equity principles and thus implicitly ground his decision in a child custody case upon the idea of progress of civilization. William L. Paine sought through a habeas corpus to restore his custody of his three children Henry (age 8), Sarah (near 6), and John (near 4) from his wife, Eliza Paine, who had taken them with her when she fled the marriage (*State ex rel. Paine* v. *Paine*, 1843). That this case came during the transformation of family law underscores the utility of mythic history. In this period, the courts (and legislatures) in the United States retreated from the older common law of showing almost unadorned preference for lodging custody of children with the father when couples separated to a best interest system, which combined with a growing ideas of maternalism, ending being a system which favored the mother. The shift was not without controversy, indeed two spectacular cases from Pennsylvania and New York had made the changing law of child custody a subject of much debate in the nation's press (Grossberg, 1996; Hartog, 1997). The mythic use of history could be a way to explain the shift to a larger audience than that of a courtroom.

The use of mythic history is all the more revealing because counsel for neither side relied on history in their briefs – keeping their focus on the precedents. The father's lawyer asserted that the father's right was supreme citing the leading English cases and a number of American cases that agreed with them. The mother's attorney cited many of the same cases but interpreted them through the filter of discretion and best interest. Justice Turley, delivering the opinion of the court, used the historical myth to explain the abandoning of established precedents and adopting the newer rules (*State ex rel. Paine* v. *Paine*, 1843).

Turley's opinion began with rhetorical lament that judges regretted their duties which caused them to intervene in private life, in this case "interfere with the domestic relations of husband and wife, parent and child" (*State ex rel. Paine* v. *Paine*, 1843, p. 598). This type of lament was an important trope of judges' opinions in this period, and scholars are familiar with it in slave law cases most famously in Thomas Ruffin's opinion in *State* v. *Mann*, but it is also found in child custody cases (Tushnet, 2003, pp. 26–27, 38–41). Turley though adds that "difficulty" of the task was "increased, by the difference of the sources from whence our law is derived" (*State ex rel. Paine* v. *Paine*, 1843, p. 598). He then draws a distinction rooted in stages of civilization and society between the common law and civil law tradition. He ventures onto this path because the lawyers for both the relator and the defendant relied heavily upon English and other American

courts' rulings in child custody cases, drawing upon both common law and chancery decisions.

Turley described the common law as possessing "stern and iron-bound principles" – by which he meant the idea found in treatises and the leading cases that the father had the natural and legal right to the custody of his children even against the claim of the mother. Those principles reflected "the manners, customs, and thoughts of our ancestors." In a tumble of words, he described them as

> a rude and undigested people of rough energy and indomitable pride, addicted to arms and considering battle and conquest as the only great and glorious duties of life, making all their institutions civil and domestic subservient to these ends. (*State ex rel. Paine* v. *Paine*, 1843, p. 598)

Thus, Turley stated (following the outline of Blackstone's *Commentaries* section on personal relations) the common law gave "to the superior over the services, liberty, and even life of the inferior, embracing in this view the relations of landlord and tenant, husband and wife, parent and child" (*State ex rel. Paine* v. *Paine*, 1843, p. 598). The law fixed "their duties and rights without regard to justice or humanity, upon the principles *concentrated power* upon which the feudal system rested" (*State ex rel. Paine* v. *Paine*, 1843, p. 598).

But the civil law tradition came from a different source. Without connecting the dots, he intimated that chancery principles came from the Cannon law, which were shaped by Roman law and traditions. That was

> the jurisprudence of a refined race, one that had emerged from its barbarism, and after having subdued the world, had been for centuries polished by philosophy, poetry, eloquence and art, even to enervation. (*State ex rel. Paine* v. *Paine*, 1843, p. 599)

And that law was more humane than the other tradition.

By the common law "women, and children of immature years, having no will of their own, no rights in contradiction to" the power of husband and father, were "only considered *through him* as a portion of the community in which they lived." But Chancery, "with more regard to the harmony of nature," saw women and children despite their natural "subordinate position" as "having equal rights to all the enjoyments of life, and the safe and adequate protection for them, as the husband and father" (*State ex rel. Paine* v. *Paine*, 1843, p. 599). Turley was too well informed on the precedents to admit that in 1843 that one or the other was the law, characterizing the whole field "at present to a considerable extent" being *in nubibus*. He declared, "These variant principles have for a length of time been antagonist to each other in England, and to a great extent in this country," he admitted with common law and chancery courts pushing their own view. He pleaded for legislation that would "have these relations placed upon a wise and humane basis" (*State ex rel. Paine* v. *Paine*, 1843, p. 599).

Getting down to the case, he announced the common law "entitled the father to the exclusive custody of his children." And if court followed "the rigid principles of the common law would have restored the possession of a minor child to the father under all circumstances." However, "if it ever were so, it is so no longer and perhaps the mitigation so far as it has extended is adopted from the civilians" (*State ex rel. Paine* v. *Paine*, 1843, pp. 599–600). Having now made a vague mythic

history lesson as justification, he then stated what would become the prevailing American doctrines: that on a habeas corpus the court acted upon its discretion and was not bound to deliver the child to the father. In exercising that discretion, the "interest and the welfare of the child is the great leading object to be attained." Applying those rules, the Court divined that neither parent was unfit and divided the three children between them.

> We think exercising our discretion from the best lights that our knowledge of society gives us, that the oldest boy can be better raised by the father than the mother … but the other two are too tender of age to be removed at present from the fostering care of the mother. (*State ex rel. Paine* v. *Paine*, 1843, p. 601)

In short, Justice Turley used a mythic conception of law to explain why the patriarchal order had shifted, and no doubt he hoped would make the new law acceptable to the population.

VALIDATING HISTORIES AT THE TIME OF THE BIRTH OF PROFESSIONAL HISTORY

Professional history emerged in the very late nineteenth century and early twentieth century (in what is commonly called the Progressive era) driven in part by the rise of graduate education and the reorganization of knowledge around science. The epitome of professional history standards became the use of primary sources, and many historians thought that an objective truth about the past could be created by the application of scientific methods to primary sources. Historians sought general rules (some found in social sciences) to account for change over time. Historians portrayed different forces as explaining the development of American society, economy, culture, and politics. Some historians doubted the feasibility of achieving objective truth, but that did not weaken their commitment to primary research and general. Big explanations for historical change became popular. Thus, Frederick Jackson Turner famously saw the frontier as the venue where the nation's character – especially its commitment to democracy – was shaped by the attempts of people to conquer the environment. His later work explained American developments in terms of conflict between regions that were shaped by their environments. Similarly, Charles Beard saw economic conflict between classes as a key force in shaping American life. He provocatively argued that the men of the constitutional convention of 1787 constituted an interest group and that their economic interests had much to do with the making of the nation's constitution. Many historians, including Turner and Beard, were animated by the pressing concerns of their time, a period of tremendous social, economic, and political change – where reformers of all sorts challenged the existing organizing arrangements of society. While their work would never draw a direct parallel with the current debates, their work validated on a grand scale many of the calls for reform of their times. The lawyers active at the same time in employing history were not as shy as to connecting the past with the present (Hoefferle, 2011, pp. 93–94, 117–118; Hoffer, 2004, pp. 39–43; Novick, 1988, pp. 91–97).

Probably no issue bedeviled the polity more in the Progressive era than the question of control of trusts, the newly emerged giant corporations that had reshaped the economy and society of the United States. Technically creations of the states, the business corporations had outstripped their creators' powers (or willingness) to regulate and control them. Many progressives sought to use the power of the federal government to control the trusts, while many others in the United States sought to maintain the status quo. Progressives, in proposing to use the federal government, ran into a jurisdictional question: from which grant of powers to the federal government in the Constitution did the power to control trusts come from? Most policy-makers saw the grant of power to regulate commerce among the states as the basis for regulation. Still, law and practice had long limited the power of the federal government's role in regulating the economy. The first major foray by the general government, the Sherman Anti-Trust Act had been limited significantly by Supreme Court decisions like the Knight Sugar case. History provided activist lawyers who sought greater federal scope of action a path around the obstacles imposed by the courts. However, a narrow form of history was used to assert that such federal action was beyond the scope of constitutional law.

The conservative critique that federal anti-trust law was unconstitutional based on a historical reading of the Constitution and founding era was put forth clearly by E. Parmalee Prentice. Any way you look at it, Prentice had the credentials of true conservative. After earning both bachelor's and master's degrees at Amherst College, he studied law at Harvard Law School. Afterward, he embarked on a career as a corporate attorney in Chicago. At the turn of the century, he moved to New York and became a partner in the firm of Murray, Prentice, and Howland. He soon married a daughter of John D. Rockefeller Sr, and his work became intertwined with Standard Oil's business (Johnson, 1968, pp. 47–49; *New York Times*, 1955, p. 23). His social views were grounded in Malthusian theory, while his political views were within the republican tradition of the eighteenth century. His greatest fear there was of governmental encroachment on liberty. His views were neatly encapsulated in his statement that "The nature of man and the principle of government are" unchangeable. "The influences which endanger free government" he wrote, "if they are unrestrained lead to license of the mob or arbitrary rule, are present in our, as in all other, people" (Prentice, 1907, p. 37).

In two works a 1907 book, *The Federal Power of Carriers and Corporations*, and a 1909 article, "Federal Common Law and Interstate Carriers," Prentice enunciated a conservative, states' rights view of the commerce power. It was rooted in his view of the history, the particulars of the 1780s which formed the context for understanding the Constitution. Unlike others who constructed a history of the commerce power by looking at the larger society, Prentice did not delve deeply into the general history of the 1780s. Rather, drawing upon existing scholarly literature of the day, as well as the published records available, Prentice wrote a historical account of the constitutional convention of 1787 focusing on its balancing of the powers of the states and the federal government. His could easily be called an intellectual history of the commerce power. In particular, he

focused upon the grant of power to Congress to regulate interstate commerce (Prentice, 1907, pp. 10–38).

His conception of the commerce power denied the federal government authority to act to achieve general ends through the use of it. He saw the constitution as a document that had been crafted to preserve liberty and that carefully divided the power of sovereignty, giving each constituent authority the power to check the others. He emphasized that the framers were steeped in the Lockean tradition of protecting the rights of property and built the government accordingly. The constitution, he argued, was "a historical document." Its meaning could "be determined only by" studying the "constitutional practice of states and congress" in connection with "contemporaneous [eighteenth century] conditions." Thus, he asserted, the commerce clause of the Constitution had to be construed with other phrases of the document in mind, especially the clauses giving the general government the power to tax and conduct foreign relations. Those were primary powers, and the power to regulate commerce had been granted to help aid them. It was there to help raise revenue, to aid in conducting foreign affairs, and to prevent imposition of duties by the states. Other than that, the commerce power left the original powers of the states unchanged (Prentice, 1907, pp. vi–viii, 22, 24, 29, 30, 32, 1909).

For Prentice, the states' police power checked any use of the commerce power beyond the limited application to be deduced from the document. Prentice was both an originalist and a textualist. He argued that, since the right to engage in commerce was inalienable and guaranteed by their constitutions, the states naturally limited the federal power. As they had control of granting corporations' charters, monopolies, and licenses, these things could not come under the federal commerce power. It was limited to controlling navigation, as in the eighteenth century, commerce was nearly synonymous with seagoing navigation. The constitution denied the states the power to control it save in the limited exception of inspection. So the federal government had almost unlimited authority over commerce, but commerce was a limited subject. It could not be extended to control child labor or even ban combinations in restraint in trade. Such modern proposals were dangerous steps down the path of centralization, which abandoned the balanced constitutional system and would endanger the liberties of the people. For him, if the government left the settled path of established law, it called the whole purpose of government into question, as it endangered the liberty of the people to engage in the acquisition of property (Prentice, 1907, pp. 212, 214–215).

For a person who had such a serious commitment to an eighteenth-century conception of government, and as a person who benefited greatly from the economic system as it was, Prentice's conception of history was useful. First, it fulfilled the practical need to advance a reason why Standard Oil should not regulated by the federal government through the Sherman Act – the act was an overstepping of the proper bounds of the commerce power. His work was carried on after Ida Tarbell had begun her muckraking work on Standard Oil, which helped to make the corporation a particular target of reformers and before the federal government began its proceedings under the Sherman Act to break up