

ESSAY REVIEW

The "New" Legal History

Equal Justice Under Law: Constitutional Development 1835-1875. By HAROLD M. HYMAN and WILLIAM M. WIECEK. (New York: Harper & Row, 1982. xv, 531p. Illustrations, appendix, bibliography, index. \$20.95.)

The publication of this impressive and magisterial volume completes three of the projected six books within the New American Nation Series to deal with constitutional history. It has been more than ten years since Paul Murphy's *The Constitution in Crisis Times* appeared. A more extended review of *Equal Justice Under Law* than might otherwise be expected is warranted by several factors: the remarkable burgeoning of interest and productivity in American legal history since the 1960s, the distinction of both Hyman and Wiecek as legal historians, and the important role of the New American Nation Series in diffusing recent historical scholarship to a large audience.

Some of the studies within this series, such as Link's analysis of the Wilson era or Leuchtenberg's assessment of F.D.R. and the New Deal have deservedly endured as classics of their kind. Hyman and Wiecek's book will join them. This is not only a work of awesome synthesis; it represents a return to "grand history." Although concentrating on a forty year period, the authors have not been afraid to generalize far beyond it. *Equal Justice Under Law* is welcome if only because its authors have summarized and synthesized as well as specified. Their book is legal-constitutional history greatly improved over the narrow, excessively footnoted "legalese" that too often has appeared in the past.

Actually, both authors gave some indication of what might be expected from a New American Nation Series volume in legal history long before 1982. In 1972, for example, Wiecek favorably reviewed Murphy's work, just mentioned. He asserted that an entry in this series "had to be a comprehensive survey of its chronological-topical area," written primarily for "students, laymen and historians whose speciality lies afieid from constitutional and legal history." Criticizing Murphy's lack of attention to other legal forums besides the United States Supreme Court, Wiecek emphasized that just because "Congress and the state legislatures have been at times almost feckless in assering their proper role does not palliate an overemphasis on judicial interpretation as the font of constitutional growth." He cited Loren Beth's *The Development of the American Constitution 1877-1917*, the first book in the New American Nation Series on constitutional history. Beth, he noted, "gave a full

chapter to the contributions of the state courts and presented material throughout that balanced judicial impact with attention to legislative, executive, and administrative developments."¹

For his part, Hyman offered some insights into Civil War and Reconstruction legal historiography with an article aptly entitled "The Misery of Historians: Legal History and the Civil War," published in 1976. He called attention to the unfortunate tendency for "constitutional history to separate from legal history, and [thus] for the legal history of the Civil War and Reconstruction to remain unstudied." Hyman pointed to the need to study other examples of reconstruction besides that which occurred in military terms within the defeated Confederacy. He meant topics such as "women's legal status, infanticide, landlord-tenant relationships, and novel extensions of state police power practice and theory, such as with the ASPCA, the Granger commission, and the New York Health Board." Historians had too long ignored the fact that "basic reconstructions occurred in Union States throughout the Civil War and Reconstruction."

Hyman found the condition of legal historiography much improved by 1976. Legal historians "worry little about the interstices between legal and constitutional history, but explore them," using a wide variety of sources that go far beyond printed judicial decisions. Moreover, he insisted that Reconstruction did not begin in 1865 simply for the convenience of two semester history courses. In fact Reconstruction began in 1861, and the entire period from the Civil War to the 1870s should be seen as one. "Continuums, not watersheds, are the stress of newer legal-constitutional histories of the Civil War and Reconstruction. . . . That legal institutions, assumptions, and procedures were little altered [by the war] is a consensus of recent work."²

One is not surprised, therefore, to find that Hyman and Wiecek have fashioned a study that treats the period 1835-1875 as one such continuum. Careful attention has been paid to legal and constitutional issues besides United States Supreme Court cases. In particular, state law is given appropriate consideration. Also, important legal terms and concepts are defined in concise footnotes that may well enlighten even those who claim to feel familiar with legal jargon. The authors have cited a formidable number of contemporary and modern sources. But while drawing freely and frankly upon established scholarship, they have gone further. Especially in the final chapters, Hyman and Wiecek offer some new insights into the origins and purposes of the Civil War constitutional amendments and related statutes. These deserve careful reading, although this reviewer does not find them totally convincing.

¹ *Journal of American History*, 59 (1972), 455-456.

² *Law Library Journal*, 69 (1976), 332, 334, 338.

The book begins with an analysis of what appeared to be dominant constitutional values during the second third of the nineteenth century. These included the extension of democracy, sovereignty, the Union, and slavery! All seemed, on the surface at least, fully compatible with each other. Illusion aside, a main theme of this study is that by 1836, "the constitution was entering a new and dangerous period of growth, and Americans were faced with the disagreeable necessity of thinking about sovereignty, slavery and Union in unprecedented ways" (p. 18).

A second theme is the development of "the public law," with attention given to emergence of the state police power. In discussing this topic as well as the related issue of eminent domain, Hyman and Wiecek present an able synthesis. Several caveats, however, may be offered. We are told that Chief Justice Shaw "originated the [police power] doctrine in. . . 1851" (p. 23). Yet the police power was clearly articulated in a United States Supreme Court decision, *Mayor of New York v. Miln* (11 Peters 357) as early as 1837. Moreover, did Shaw break new ground in the 1851 holding, or did he merely accept the arguments of counsel of the winning side? If so, how did he *originate* the doctrine? One cannot quarrel with the importance that Hyman and Wiecek assign to the emergence of the police power, but one can urge that legal historians be a little more chary in awarding credit for originating legal change to the author of an appellate opinion alone.

In asserting that "by the Civil War, railroads and other industries used law to pass off their operating and construction costs onto workers and consumers," (p. 36) the authors appear to accept the thesis of Morton Horwitz, who insists that judges and lawyers placed the costs of the new industrialism upon the shoulders of those least qualified to bear them. Horwitz even goes so far as to imply if not claim some sort of "conspiracy" to attain this end. Although Hyman and Wiecek are careful not to use the word "conspiracy" in this context, they offer no evidence—let alone awareness—that the Horwitz hypothesis may be inaccurate as well as unconvincing. It is one thing to take note of new interpretations, while acknowledging that acceptable and alternative views remain (as indeed the writers have done in other sections of this book); but it is quite another matter to present a school of thought without alerting the reader to critical methodological questions concerning its validity. The words of Harry Scheiber seem particularly pertinent here. "Analysis of law as a reflection of popularly held values," he has warned, "is an exercise fraught with difficulties." Indeed, "we must be alert not to assume that pragmatic doctrines, 'style,' or substantive policy are uniformly the product of a system" that is "responsive to a particular will."

It is equally misguided, however, to assume that if a pattern of action is discerned—whether it be innovation of common-law doctrines that tend to reduce

entrepreneurial costs, or any other pattern of that sort—it is because a silent conspiracy exists or even because lawmakers and judges understand with precision the effects of their doctrinal innovations.³

Certainly Hyman and Wiecek are justified in the importance they attach to legal doctrines such as the fellow-servant rule and the assumption of risk. Similarly, the concept that “liability was to be based only on fault,” may well have “rationalized economic decision making indispensable to capitalism” (p. 39). On the other hand, the authors note that “legislatures moderated the severity of common-law tort rules almost as quickly as judges created them” (p. 41). If this is so, why did they not modify one of the most severe, the fellow servant rule? It is not very helpful to read merely that Shaw’s 1842 decision somehow prevented the enactment of workmen’s compensation acts until the World War I era “by casting over them the vague aura of unconstitutionality” (p. 37). Was there anything in Shaw’s opinion that even hinted at the impropriety of legislative action to modify the rule *if* the lawmakers felt it appropriate to do so?

More than half of *Equal Justice Under Law* is devoted to 1861-1875, years which Hyman and Wiecek treat as a single era. They have done an extremely impressive job in tracing complex and shifting attitudes towards war, reconstruction, race, and republicanism. The writers have placed these in turn within a broader legal context of what they call “the change from instrumentalism to formalism.” Avoiding, as Hyman had urged in his earlier essay, the tendency to separate legal history from constitutional history—they see the Civil War era as “an intersection for old and new ideological roads in the law” (p. 347).

The Thirteenth Amendment receives special emphasis, especially its enforcement clause, the first ever to appear in the federal Constitution. Indeed, Hyman and Wiecek appear to draw a link, almost a causal connection from the Thirteenth Amendment to the Civil Rights Act of 1866 to the Fourteenth Amendment. They wisely refuse to join the increasingly tedious and redundant debate concerning the new amendment’s relationship to the Bill of Rights and the states. They urge us, instead, to consider the Fourteenth in the light of the Thirteenth—if only because “the men who framed and ratified both also connected them as to purpose and means” (p. 387). They note that most slaves were already free by December, 1865, when the Thirteenth Amendment was finally ratified. Why then the enforcement clause, to say nothing of the amendment itself? Because it lent credence to the “Republicans’ consensus that the Amendment’s force went beyond emancipation-as-liberty, for liberty already existed. Emancipation-as-equality was a logical next step, whether or not one favored it” (p. 398).

³ *Wisconsin Law Review* (1980), 1168.

Perhaps. On the other hand, given the veneration for law and proper legal procedure so characteristic of this period, it may be that the Thirteenth Amendment was drafted primarily to place into fundamental law what had become actual fact, the ending of slavery. The enactment can be cited as an apt example of the truth that law is a response to change, not the other way around. Lawrence Friedman has cautioned that in American legal history, what often appears to be innovation is in fact ratification.⁴

Hyman and Wiecek write eloquently in these final chapters of the hopes for genuine racial reform during the immediate post war era. They seem less comfortable in confronting that era's ambivalent desire for a "society run on egalitarian principles without wanting a society of equals" (p. 330). Sometime during the 1870s, they conclude, the Republicans, "as though frightened by the grandeur of their own thrusts toward equality, lost both their vision and constituent support. They fell back in loose disaggregation," basing their retreat in part on "a newer kind of liberty" built upon "pre war constitutional traditions, . . . post war legal doctrines, and . . . innovative notions about science and society" (p. 398). Was it not, perhaps, even sooner than the 1870s?

The authors admit that the Civil War generation, one that "perceived constitutions and bills of rights as limitations on public authority," found it difficult "to readjust to perceptions about government as a source of power and liberty" (p. 235). This made the Republicans' dilemma during Reconstruction even more acute: how, given their commitment to state rights and federalism, to guarantee adequate state conduct towards the ex slave? (p. 462) This ambivalence did not appear during the 1870s. It had been in evidence even as the bombs fell on Fort Sumter.

Hyman and Wiecek see their post war period as one of some real advances towards racial and political equality, only to end in retreat as the new formalism emphasized liberty and the federal system, rather than individual rights attained through government intervention. This reviewer tends to see it as one of much great ambivalence and uncertainty from the beginning. Perhaps the Fourteenth Amendment, one without any mention whatsoever of the words *civil rights*, or *civil liberties*, or *equality*, remains the ultimate example of this ambivalence. Yet, its framers may have seen *far* beyond 1866 when the Amendment was sent to the states for ratification. In endorsing the new enactment—with the words unchanged to this day—old Thaddeus Stevens argued for its adoption because "it is all that can be obtained in the present state of public opinion. . . . I will take all I can get. . . and leave it to be perfected by better men in better times. It may be that that time will not come while I am here to enjoy the glorious triumph; but that it will come is as certain as that there is a just God."⁵

⁴ Quoted in Herbert Bass, ed., *The State of American History* (Chicago: 1970), 12.

⁵ Quoted in *Harvard Law Review* (1955), 44-46.

All in all, *Equal Justice Under Law* will become a standard source for the legal and constitutional history of this period. With few exceptions it represents well written and sophisticated scholarship. Absorbing, stimulating and even occasionally provoking—the book requires and deserves careful reading.

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