

THE JURISPRUDENCE OF POETIC LICENSE

CALVIN R. MASSEY*

Whatever its contribution to the corpus of first amendment law, Chief Justice Rehnquist's dissent in *Texas v. Johnson*¹ provides a dismaying example of the use of history as a rationale for decision. Legal historians have long felt compelled to justify, or at least explain, the reasons for bothering to inquire into law's musty attic. Predictably, those explanations have assumed a variety of forms. One popular version is to the effect that the study of legal history will provide a guide to formulate present and future legal policy.² Opposed to this notion is the idea that knowledge of legal history "explain[s], and therefore lighten[s], the pressure that the past must exercise upon the present, and the present upon the future. Today we study the day before yesterday, in order that yesterday may not paralyze today, and today may not paralyze tomorrow."³ In this view, "[l]aw must grow through re-interpretation of the past,"⁴ whether by exposing past error, pointing out prior foundational postulates now rejected, or simply by making clear the particular and contingent quality of legal reasoning over time.⁵ Related to this latter perspective is the contention that history never can fully answer our

* Associate Professor of Law, University of California, Hastings College of Law. I wish to thank Brian Gray for inspiring me to commit these thoughts to paper and Adam Hirsch for bringing to my attention some of the explanations which have been advanced for studying legal history.

1. 109 S. Ct. 2533 (1989). This is, of course, the "flag-burning" case, in which the Court overturned Texas' prosecution of Johnson for burning a United States flag as part of a political demonstration on the ground that Texas had no interest in regulating Johnson's conceded act of symbolic speech which was unrelated to the speech element of Johnson's conduct.

2. See, e.g., Presser, "Legal History" or the History of Law: A Primer on Bringing the Law's Past into the Present, 35 VAND. L. REV. 849, 889 (1982) ("[S]elected parts of the history of law can suggest the proper course to follow in the future . . ."); Pound, *Introduction*, in F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW (2d ed. 1959) ("[T]he function of Legal History . . . [i]s . . . one of illustrating how legal precepts . . . have met concrete situations of fact . . . in the past and enabling or helping us to judge how we may deal with such situations with some assurance in the future . . .").

3. 3 F. MAITLAND, THE COLLECTED PAPERS OF FREDERIC MAITLAND 439 (1911). See also Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in Early Massachusetts*, 80 MICH. L. REV. 1179, 1269 (1982) ("[L]egal history . . . can at least tell us that [things] . . . need not be the way they are.").

4. S. THORNE, SIR EDWARD COOKE, 1552-1952, at 13 (1957).

5. See, e.g., Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275, 281 (1973). ("[T]he indispensable ideological premise of the legal profession" is that "its characteristic modes of reasoning and its underlying substantive doctrines [are] . . . particular and contingent.")

contemporary queries. As Professor Powell put it, “[h]istory answers—and declines to answer—its own issues, rather than the concerns of the interpreter.”⁶

Chief Justice Rehnquist’s opinion in *Johnson* appears to fall into the first of these categories. He begins with the familiar and opaque observation of Justice Holmes that “a page of history is worth a volume of logic.”⁷ Perhaps Justice Holmes meant by this to embrace the idea that, like a picture that is worth a thousand words, history is a clearer guide to action than logic. If so, the aphorism may be taken to mean that we ought slavishly to emulate past practice.

But we have never done this, for almost any “page of history” will reveal that our history is not a single snapshot but a continually running motion picture. The second Justice Harlan thought that “history teaches . . . the traditions from which [the nation’s constitutional jurisprudence] developed as well as the traditions from which it broke. That tradition is a living thing.”⁸ Indeed, one of the oldest of American traditions has been that while Americans “have paid a decent regard to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience.”⁹

Although Chief Justice Rehnquist may have invoked Holmes for the purpose of placing himself in the camp of those who see historical practice as the *ratio decidendi* for the present and future, he then proceeded to rely upon a patchwork history that, while it may have proved the obvious fact that the American flag has been a symbol of the nation for its entire existence, contained at least one instance of sheer fantasy. According to the Chief Justice, “One of the greatest stories of the Civil War is told in Jolin Greenleaf Whittier’s poem, *Barbara Frietchie*.”¹⁰ The entire poem is then recited, setting forth the story that, when the Confederate Army of Northern Virginia advanced through the town of Frederick, Maryland in September of 1862, the elderly Union-loyal Barbara Frietchie had the courage to display the American flag even in the face of gunfire from Stonewall Jackson’s troops.¹¹ It may be a “great story,” but

6. Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 669 (1987).

7. 109 S. Ct. at 2548, quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

8. *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

9. THE FEDERALIST (No. 14) 66 (J. Madison) (M. Beloff ed. 1987).

10. 109 S. Ct. at 2550.

11. *Id.*:

Up from the meadows rich with corn,
Clear in the cool September morn,
The clustered spires of Frederick stand

as history there is one thing wrong with it: it is unadulterated fiction. John Greenleaf Whittier had a lively imagination and a poetic gift; the

Green-walled by the hills of Maryland.
Round about them orchards sweep,
Apple and peach tree fruited deep,
Fair as the garden of the Lord
To the eyes of the famished rebel horde,
On that pleasant morn of the early fall
When Lee marched over the mountain wall;
Over the mountains winding down,
Horse and foot, into Frederick town.
Forty flags with their silver stars,
Forty flags with their crimson bars,
Flapped in the morning wind: the sun
Of noon looked down, and saw not one.
Up rose Old Barbara Frietchie then,
Bowed with her fourscore years and ten;
Bravest of all in Frederick town,
She took up the flag the men hauled down;
In her attic window the staff she set,
To show that one heart was loyal yet.
Up the street came the rebel tread,
Stonewall Jackson riding ahead.
Under his slouched hat left and right
He glanced; the old flag met his sight.
"Halt!" — the dust-brown ranks stood fast.
"Fire!" — out blazed the rifle-blast.
It shivered the window, pane and sash;
It rent the banner with scam and gash.
Quick, as it fell, from the broken staff
Dame Barbara snatched the silken scarf.
She leaned far out on the window-sill,
And shook it forth with a royal will.
"Shoot, if you must, this old gray head,
But spare your country's flag," she said.
A shade of sadness, a blush of shame,
Over the face of the leader came;
The nobler nature within him stirred
To life at that woman's deed and word;
"Who touches a hair of yon gray head
Dies like a dog! March on!" he said.
All day long through Frederick street
Sounded the tread of marching feet;
All day long that free flag tost
Over the heads of the rebel host.

two talents produced his "great story." But if the Chief Justice wants us to substitute a page of history for a volume of logic he at least ought to provide us with history and not poetic license.

In the years after the Civil War, when tempers had cooled, veterans provided their recollections of the war. In doing so they left a valuable corpus of detail about the large and small incidents of that enormous and bloody conflict. Accounts of the Maryland invasion of 1862 by members of Jackson's Second Corps of the Army of Northern Virginia are all in agreement that Jackson imposed strict control of his troops, forbidding their entry into the town of Frederick without special permission.¹² This was no accident, for General Lee had directed that discipline be enforced, and Marylanders treated with the utmost courtesy and respect, for a simple reason of self-interest: the Confederacy hoped to encourage Maryland secession or, at least, Maryland sympathy.¹³

On only two occasions did General Jackson enter Frederick. On September 7, 1862, he attended services at the Reformed Church, sleeping through a sermon by Dr. Zacharias which concluded with the prelate's prayer for the President of the United States.¹⁴ Major Henry

Ever its torn folds rose and fell
On the loyal winds that loved it well;
And through the hill-gaps sunset light
Shone over it with a warm good-night.

Barbara Frietchie's work is o'er,
And the Rebel rides on his raids no more.

Honor to her! and let a tear
Fall, for her sake, on Stonewall's bier.

Over Barbara Frietchie's grave,
Flag of Freedom and Union, wave!

Peace and order and beauty draw
Round thy symbol of light and law;

And ever the stars above look down
On thy stars below in Frederick town!

12. All but one division of Jackson's command camped three miles short of Frederick, and never entered the city. See H. DOUGLAS, *I RODE WITH STONEWALL JACKSON* 148 (1940). Only Jackson's old division, containing the original Stonewall Brigade, entered Frederick. *Id.* According to John Worsham, an infantry private in that division, "[a] guard was placed around our camp in order to prevent the men from straggling through the town." J. WORSHAM, *ONE OF JACKSON'S FOOT CAVALRY* 82 (1964). Ned Moore, an artillerist with the Rockbridge Artillery in the same division, recalled that as "we were approaching Frederick City [s]trict orders had been issued against foraging or leaving the ranks." E. MOORE, *THE STORY OF A CANNONEER UNDER STONEWALL JACKSON* 130 (1907). Douglas Southall Freeman, who canvassed every scrap of detail pertaining to the Army of Northern Virginia concluded that "[f]irm discipline was enjoined on the army. Sentinels were posted at the stores in Frederick, and the soldiers were forbidden to enter the town" D. FREEMAN, *R.E. LEE* 355-56 (1962).

13. See D. FREEMAN, *supra* note 12, at 351-52.

14. H. DOUGLAS, *supra* note 12, at 150.

Douglas, Jackson's personal aide, who was in attendance, declares that "the General didn't hear [the prayer]; but if he had I've no doubt he would have joined in it heartily."¹⁵ On the 10th of September Jackson made one last visit to Frederick, in the company of Major Douglas. This was supposedly the occasion for the dramatic encounter with Barbara Frietchie. Major Douglas stated:

As for Barbara Frietchie, we did not pass her house. There was such an old woman in Frederick, in her ninety-sixth year and bedridden. She never saw Stonewall Jackson and he never saw her. I was with him every minute while he was in the town, and nothing like the patriotic incident so graphically described by Mr. Whittier in his poem ever occurred. The venerable poet held on to the fiction with such tenacity for years after, that he seemed to resent the truth about it. . . . [T]he real sentiments of the old lady had the flavor of disloyalty and . . . had she waved a flag on that occasion, it would not have been the "Stars and Stripes[]. . . ." ¹⁶

Thus, by all accounts, the occupation of Frederick by the Army of Northern Virginia was a prosaic affair that very well may have sparked the exhibition of American flags by Union-loyal residents¹⁷ but almost certainly did not produce any dramatic encounter of the sort popularized by Whittier.

What can we make of this sort of triviality? Perhaps it is wise not to make too much of anything out of it, but at least it is fair to ask whether the law of the Constitution ought to be driven by poetic fancy masquerading as history. There is absolutely no doubt that the American flag is a symbol of enormous emotional significance.¹⁸ State prosecutions of its

15. *Id.*

16. *Id.* at 151-52. According to Fletcher Green, who annotated Douglas' recollections upon their publication in 1940, Valerius Ebert, a nephew of Ms. Frietchie, "gives the facts almost as Douglas does. He says that his aunt, almost ninety-six years old, was confined to her bed at the time. He disagrees with Douglas, however, as to the disloyalty of Mrs. Frietchie." *Id.* at 367 n.4. In complete agreement with Douglas was General E.P. Alexander, who said of the Barbara Frietchie myth: "No such incident, nor anything remotely resembling it, ever occurred." E. ALEXANDER, *FIGHTING FOR THE CONFEDERACY* 140 (1989). According to Robert Underwood Johnson, a principal editor of the Civil War reminiscences published as *Battles and Leaders of the Civil War*, Alexander's "integrity and candor . . . [enabled Johnson to] . . . rely implicitly on anything . . . [he] said." R. JOHNSON, *REMEMBERED YESTERDAYS* 197 (1929). For more discussion, see Seilheimer, *The Historical Basis of Whittier's "Barbara Frietsche,"* 2 *BATTLES AND LEADERS OF THE CIVIL WAR* 618-19. Until his death Whittier maintained that his poem was fact. See 3 *THE LETTERS OF JOHN GREENLEAF WHITTIER* 513-14 (J. Pickard ed.1973).

17. See D. FREEMAN, *supra* note 12, at 356.

18. Chief Justice Rehnquist may well have also intended to illustrate the durable symbolism of the flag by citing John Greenleaf Whittier's poem. If so, his exercise serves only to underscore the majority's implicit point that, in dealing with objects through which the government has chosen to deliver a purely symbolic message, the State cannot protect its symbolic medium without simultaneously protecting its own message and suppressing Johnson's message. In the context of pure symbols, the medium is indeed the message. When governments employ "pure symbols" to deliver their

destruction as a political protest raise important issues in the shadowy turf of "conduct-as-speech."¹⁹ To resolve those issues by resort to emotion laden poetic fantasy, especially when the fantasy is palmed off as genuine history, debases historical coin, cheapens the process of constitutional adjudication, and even embarrasses the poet.

message, they have utterly fused speech and non-speech. With that fusion comes the impossibility of regulating the "non-speech" element of the symbol's destruction, for it is dissolved in the powerful solvent of pure symbol. See Massey, *Pure Symbols and the First Amendment*, 17 HASTINGS CONST. L.Q. (forthcoming 1990).

19. Compare *Texas v. Johnson*, 109 S. Ct. 2533, 2534 (1989) (noting that while the Court has rejected characterizing a limitless variety of conduct as speech, conduct may be "sufficiently imbued with elements of communication to fall within the scope of the first and fourteenth amendments'") (citing *Spence v. Washington*, 418 U.S. 405, 409 (1974)) with *id.* at 2557 (Stevens, J., dissenting) (holding that the act of desecration turns on "whether those who view the *act* will take serious offense" and not on the "substance of the message the actor intends to convey").