STATE-COURT PROTECTION OF INDIVIDUAL RIGHTS: THE HISTORIANS' NEGLECT

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In the March 1984 issue of the *ABA Journal*, Professor Ronald K.L. Collins of the Willamette University College of Law, writing of the continuing importance of state constitutional safeguards of individual rights, concluded that "lawyers of the 1980s ought to be prepared to bring to state courts working with state law that same measure of talent and imagination that is too often reserved for federal cases." This admonition should also be addressed to students of constitutional history, for they too have neglected state constitutional law. Of course, it is not surprising, after the great expansion of federal constitutional rights, that some civil libertarians treat individual rights solely as a branch of federal constitutional law. Thus, Joel M. Gora of the American Civil Liberties Union, in his book *Due Process of Law*, says that "while the specific guarantees in the Bill of Rights were intended to be direct limitations on the federal government, there were no comparable constitutional restrictions upon the conduct of state and local governments until shortly after the passage of the Fourteenth Amendment."[1] Unfortunately, many professional historians and other scholars seem to hold the same view.

This misapprehension is both reflected and reinforced by the disregard in virtually every constitutional history textbook and anthology of developments in the states during the period between ratification of the Constitution and the twentieth-century "incorporation" of the Bill of Rights into the fourteenth amendment. C. Herman Pritchett's *The American Constitution* exemplifies the problem. Pritchett, a respected constitutional scholar, writes: "Three-quarters of a century elapsed after the Bill of Rights was added to the Constitution before any more amendments dealing with civil liberties were adopted. No detailed account of the application of constitutional guarantees during that period can or need

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1. J. GORA, DUE PROCESS OF LAW 2 (1977).

be attempted."[2] Pritchett's entire discussion of that period consists of one sentence on *Calder v. Bull*, a 1798 case dealing with ex post facto laws, and one on the Alien and Sedition Acts of 1798, which he brushes aside because the constitutional questions they raised "never got to the Supreme Court."

The same omission occurs in textbooks by Carl B. Swisher, Forrest McDonald, Page Smith, and Kelly, Harbison, and Belz, as well as documentary histories assembled by Donald Dewey, Stanley Kutler, and James Smith and Paul Murphy. One searches these works in vain for any suggestion that state courts of the nineteenth century took personal rights seriously.

Many specialized studies are similarly flawed. Nelson B. Lasson's *The History and Development of the Fourth Amendment to the United States Constitution* has four chapters, three on the prehistory and ratification of the fourth amendment and one on its treatment in the United States Supreme Court, which for practical purposes begins with 1886. Francis H. Heller's *The Sixth Amendment to the Constitution of the United States: A Study in Constitutional Development* jumps from the colonial experience to the 1870's and contains not a single citation to a state court decision. *The Right to Counsel in American Courts*, by William M. Beany, brushes lightly over the years from 1789 to 1938, again with no citations to state cases. Robert L. Cord's recent history of church-state relations, *Separation of Church and State: Historical Fact and Current Fiction*, leaps from Jefferson and Madison to the Supreme Court's decision in *Everson v. Board of Education* in 1947.

The treatment of Bible reading in the public schools in the first four editions of Alfred H. Kelly and Winfred A. Harbison's standard textbook, *The American Constitution: Its Origins and Development*, strikingly illustrates the tendency of scholars to overlook state constitutional history. When *The American Constitution* first appeared in 1948, it said nothing at all on the subject of Bible reading. The next two editions (1955 and 1963) noted in passing the number of states that required or permitted the reading of Scripture in the classroom. Then, in 1963, the Supreme Court decided *School District of Abington Township v. Schempp*, striking down a Pennsylvania law that mandated the daily reading of at least ten verses of the Bible in all public schools. The fourth edition of *The American Constitution* (1970) devoted two paragraphs to *Schempp* and more than eight pages altogether to the Warren Court's decisions regarding the establishment of religion.

2. C. PRITCHETT, THE AMERICAN CONSTITUTION 288 (3d ed. 1977).

One might surmise from the successive editions of Kelly and Harbison's text that the Supreme Court entered upon a virgin field and created constitutional doctrine where none existed before. But in fact the nineteenth century witnessed intense constitutional debates over the use of the Bible in the classroom, and the arguments then brought to bear in the state courts retain their relevance today.

The leading nineteenth-century case was *Donahoe v. Richards*,[3] decided by the Supreme Judicial Court of Maine at the height of the nativist movement in 1854. An Irish Catholic girl had been expelled from a public school for refusing to participate in the required reading of the Protestant Bible. The state constitution had its versions of the free exercise clause ("no one shall be hurt, molested or restrained in his person, liberty or estate, for worshiping God in the manner and season most agreeable to the dictates of his conscience") and the establishment clause ("no subordination nor preference of any sect or denomination . . . shall ever be established by law"). The pupil's attorney argued that the mandatory reading of the King James Bible was an unconstitutional religious test for continuance in school; that it was governmental interference with religious belief; that it discriminated against the minority; and, despite the school board's claim that this Bible was used only for instruction in reading, that it was designed to indoctrinate religious dissidents in the majority faith.

The Maine court decided in favor of the school board. It held that the free exercise clause was meant only to prevent the imposition of legal penalties or the deprivation of political rights because of religious belief. It agreed that the teaching of dogma would have been unconstitutional, but denied that the use of the King James Bible for instruction in reading violated the state's establishment clause.

Donahoe v. Richards was a highly influential case; it figured prominently in the Cincinnati "Bible War" of 1869-1870 and was frequently cited by other courts. Yet before the century closed, the judicial tide had begun to turn against Scripture reading in the public schools. The Supreme Court of Wisconsin in 1890 moved toward the "wall of separation" theory adopted by the United States Supreme Court more than half a century later. In *State ex rel. Weiss v. District Board of School District No. 8*,[4] the Wisconsin court held that the practice of reading teacher-selected portions of the King James Bible in the classroom contravened the section of the state constitution that forbade sectarian religious instruction in the

3. 38 Me. 379 (1854).
4. 76 Wis. 177, 44 N.W. 967 (1890).

public schools. The court found it "too clear for argument" that Bible reading, even without comment by the teacher, constituted religious instruction. The fact that Catholic and Jewish children were free to leave the room during the reading did not make the practice constitutional; the exclusion of a small minority from a school exercise, especially when the cause was "apparent hostility to the Bible which a majority of the pupils have been taught to revere," subjected the minority to possible reproach and insult, and tended to destroy equality. One concurring judge went even further, declaring that under the Wisconsin Constitution the state, "as a civil government, and all its civil institutions, are divorced from all possible connection or alliance with any and all religions, religious worship, religious establishments, or modes of worship, and with everything of a religious character or appertaining to religion."[5]

As the Maine and Wisconsin cases show, Bible reading in the public schools was an important constitutional issue long before the Supreme Court passed upon it. So too was freedom of expression in wartime, although state decisions on this subject also are missing from constitutional history texts. Once again, events in Maine are illuminating. Soon after the Civil War, the owner of a pro-Southern newspaper in Bangor sued members of a patriotic mob that had destroyed his press in 1861. The jury, following the judge's instructions, found that the paper had been a public nuisance which the defendants had been justified in abating. In another Maine case a few years later, a man named Prentiss brought an action against several people who had handled him roughly when he praised John Wilkes Booth for assassinating Lincoln. The jury returned a small damage award.

Neither of these cases was "constitutional" in the narrow sense, since the plaintiffs had based their suits on trespass rather than on the deprivation of constitutional rights. However, the contests revolved around the issues of free speech and free press. In the newspaper case, the judge told the jury:

> "Freedom of thought, freedom of speech and freedom of the press, have long been considered a part of republican institutions and necessary ingredients of them; but this freedom has never been an unlimited, unrestricted right to speak, write and publish without accountability. The press enjoys no such privilege now or at any other period in the history of this country. Its constitutional guarantee is not to trample upon the rights of the individual; neither is it to destroy the very government which upholds, and confers upon it its privileges."[6]

5. 76 Wis. at 218, 44 N.W. at 981 (Orton, J., concurring).
6. *Bangor Democrat Case*, Bangor Daily Whig and Courier, Oct. 25, 1866.

In the *Prentiss* case, however, the judge declared: "Under the Constitution, every citizen may freely speak, write and publish his sentiments upon any subject. . . . He may use the most shocking, indecent and revolting language, towards his own father, towards the Government, anywhere, at any time . . . ."[7] As these cases illustrate, some state courts were wrestling with the problem of dissent in wartime decades before the Supreme Court confronted the issue.

At least one torrid nineteenth-century debate over constitutional rights never reached the Supreme Court at all. Most people, including the majority of lawyers, are surprised to learn that criminal defendants in America could not take the stand in their own defense until 1864, and then in only one state. The grant of testimonial competency to the defendant spread during the last third of the nineteenth century, but the reform was not completed until 1962. Supporters of the change argued that the defendant knew best whether or not he had committed the crime and therefore ought to be permitted to speak. Opponents maintained that since no jury would believe in the innocence of a man who refused to testify in his own behalf, the defendant would in effect be compelled to testify, making his privilege against self-incrimination worthless. The debate raged for decades in legal periodicals, legislative halls, and state courts, yet this constitutional controversy of the first magnitude has gone virtually unnoticed by the textbook writers and anthologizers.

Of course, there are exceptions to the record of scholarly neglect of state constitutional history. Some incisive studies, such as Edward S. Corwin's articles on vested rights and due process before the Civil War and Harry N. Scheiber's analysis of eminent domain law before 1877, have examined property rights in the states. There are books that include discussions of religious freedom in the states in the nineteenth century, and the few scholarly biographies of state judges devote considerable space to constitutional issues. There is a growing (but still small) body of journal literature about nineteenth-century civil liberties in the state courts. One hopes that the texts will soon begin to reflect this scholarship. But for now, works on state constitutional rights are still atypical, restricted in scope, and rarely used in constitutional history courses. When most legal historians and lawyers speak of constitutional history, they refer to the decisions of the United States Supreme Court, and since the Supreme Court did not begin incorporating the Bill of Rights into

7. *Prentiss v. Shaw*, Bangor Daily Whig and Courier, Apr. 23, 1867 (Me. Sup. Jud. Ct., Apr. 22, 1867), *aff'd*, 56 Me. 427 (1869).

the Federal Constitution until the 1920's, they ignore important and dramatic constitutional developments in the preceding century-and-a-half.

With the bicentennial of the United States Constitution rapidly approaching, the time is ripe for historians to reassess the writing of constitutional history and to elevate to their proper place the contributions of the states to the American heritage of individual rights.