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The Constitution and the Common Law: The Decline of the Doctrines of Separation of Powers and Federalism, by Randall Bridwell and Ralph U. Whitten

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BOOK REVIEWS

THE CONSTITUTION AND THE COMMON LAW: THE DECLINE OF THE DOCTRINES OF SEPARATION OF POWERS AND FEDERALISM. By Randall Bridwell and Ralph U. Whitten. Lexington, Mass.: D. C. Heath and Company, 1977. Pp. xv, 206.

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During the past decade American legal history has enjoyed something of a renaissance. Scholars have explored the reception of English common law in colonial American,[1] the impact of the Revolution upon the legal system,[2] the court structure of early America,[3] and the history of the organized bar.[4] Legal historians have also edited previously unavailable judicial records and legal papers.[5] Perhaps the most hotly debated question in recent years has been the character and use of common law in 19th century America.

The solid monograph by Randall Bridwell and Ralph U. Whitten[6] is an important contribution to the literature on this subject. Based on extensive research in a variety of fields, this volume analyzes the nature of common law and the function of the federal courts in the first half of the 19th century. Since the authors sharply question the conventional wisdom, their study is bound to be a center of controversy. Bridwell and Whitten focus primarily on questions of private law as administered by the federal courts under diversity

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[1]*E.g.*, ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW (D. Flaherty ed. 1969); Stoebuck, *Reception of English Common Law in the American Colonies,* 10 WM. & MARY L. REV. 393 (1968).

[2]*E.g.*, W. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 (1975); Ely, *American Independence and the Law: A Study of Post-Revolutionary South Carolina Legislation,* 26 VAND. L. REV. 939 (1973).

[3]*E.g.*, R. IRELAND, THE COUNTY COURTS IN ANTEBELLUM KENTUCKY (1972); Ely, *Charleston's Court of Wardens, 1783-1800: A Post-Revolutionary Experiment in Municipal Justice,* 27 S.C.L. REV. 645 (1976).

[4]*E.g.*, M. BLOOMFIELD, AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876 (1976); Nolan, *The Effects of the Revolution on the Bar: The Maryland Experience,* 62 VA. L. REV. 969 (1976).

[5]*E.g.*, COURT RECORDS OF PRINCE GEORGES COUNTY, MARYLAND, 1696-1699 (J. Smith ed. 1964); LEGAL PAPERS OF JOHN ADAMS (L. Wroth & H. Zobel eds. 1965); THE PAPERS OF JOHN MARSHALL (H. Johnson ed. 1974).

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of citizenship jurisdiction. They challenge "the nearly universal insistence" that judicial decisionmaking was "the product of the rational efforts of the government (or some component of the government such as the judiciary) to treat a perceived problem."[7] On the contrary, the authors vigorously maintain that the ante-bellum legal order developed through unplanned private ordering and is best understood as a customary law system. The principal characteristic of this system was "a decisional process or function that was designed to vindicate the legitimate and discernable expectations of the parties to any given dispute."[8]

To demonstrate this thesis the authors trace diversity jurisdiction as understood in the early 19th century. Diversity jurisdiction, of course, was intended to prevent bias in deciding the claims of nonresidents. One concern was prejudicial determination of factual issues, but the federal courts were also expected to apply the private law rules which harmonized with the expectancy of the parties. Thus, common law adjudication placed considerable discretion in the hands of federal judges, but denied them the power to make law according to a subjective view of wise policy. The authors emphasize:

> the proper role of the judge in the common law process did not extend to intervention on behalf of particular classes of litigants to the disadvantage of others, or to the legislation of rules that would operate in an *ex post facto* manner to the transaction of the parties.[9]

The common law which the federal courts utilized was private and customary in origin. These common law rules, the authors declare, were not the product of a sovereign command but reflected the autonomous behavior of parties over a period of time. For example, the principles of commercial law "had still originated in the private transactions of merchants and could be altered or abrogated by them in the future, or disregarded in particular future transactions by use of the proper forms."[10] The federal judicial role in this field was largely confined to determining the relevant commercial practices and applying them to the case at issue. This indicates why judicial decisions in this period were sometimes characterized, not as law, but merely as evidence of law. The common law permitted individuals wide latitude in which to order their affairs. Thus, the common law method envisioned individual responsibility for one's own actions, and the system allowed "the chips to fall where they might in the event of nonplanning."[11]

This view of the common law powers of early federal courts leads to a radical reassessment of *Swift v. Tyson*,[12] an opinion which the authors feel

[7] R. BRIDWELL & R. WHITTEN, THE CONSTITUTION AND THE COMMON LAW xiv (1977) [hereinafter cited as R. BRIDWELL & R. WHITTEN].

[8] *Id.* at 4.

[9] *Id.* at 22.

[10] *Id.* at 66.

[11] *Id.* at 114.

[12] 41 U.S. (16 Pet.) 1 (1842).

has been badly misunderstood by contemporary commentators. Taking issue with those legal historians who see *Swift* as an attempt to fashion a uniform procommercial legal policy,[13] Bridwell and Whitten assert that the result was "a prime example of how the diversity jurisdiction operated to preserve the intentions and expectations of the parties intact when their dealings had taken place against the assumed background of general commercial practice."[14] An independent federal judgment on the applicable commercial law was designed to safeguard the noncitizen who relied on general mercantile customs rather than local rules of business conduct.

The authors further note that Justice Joseph Story's *Swift* opinion interpretating Section 34 of the 1789 Judiciary Act has been misconstrued. Story did not conclude that federal courts in diversity cases must apply state statutes but were free to fashion their own view of common law. Rather, the distinction he drew was between "questions of a more general nature" and state law local in character, including both statutes and "long established local customs having the force of laws."[15] In some instances involving commercial law federal courts disregarded state statutes, or constructions of them by state courts, to preserve the protective function of diversity jurisdiction. On the other hand, Bridwell and Whitten consider the disposition of diversity cases involving real property in order to test the consistency with which the federal courts adhered to the *Swift* formula. They found that the federal tribunals normally followed state law, either statute or common law, in property decisions. Holding a positive view of *Swift*, the authors declare that "the common law authority of the federal courts as it was actually employed between 1789 and about 1860 is constitutionally justifiable."[16]

Bridwell and Whitten assert that after 1860 the federal courts began to alter their earlier decisional techniques in a manner which violated both the limits of federalism and the separation of powers doctrine. Examining municipal bond and tort cases, the authors contend that federal courts began to distort *Swift* by dictating in effect legislative solutions to such litigation. Municipal bonds were obviously creatures of local law, and torts were clearly tied to rules of civil right and wrong determined by the sovereign. Yet federal tribunals found both to be areas of general law and proceeded to fashion an independent federal governing law. As the legislative model of judicial behavior gained acceptance in the late 19th century, autonomous private behavior lost its vitality as both a source of and restriction upon judicial authority.

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[13]G. GILMORE, THE AGES OF AMERICAN LAW 30-34 (1977); M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 245-52 (1977) [hereinafter cited as M. HORWITZ]; Heckman, *The Relationship of Swift v. Tyson to the Status of Commercial Law in the Nineteenth Century and the Federal System*, 17 AM. J. LEGAL HIST. 246 (1973).

[14]R. BRIDWELL & R. WHITTEN, *supra* note 7, at 90.

[15]41 U.S. at 18.

[16]R. BRIDWELL & R. WHITTEN, *supra* note 7, at 90.

By the 20th century *Swift* was seen through new glasses. Influenced by the positivist notion that all law reflected an exercise of sovereign will, the Supreme Court in *Erie*[17] overruled *Swift* but "failed to render an accurate description of what the *Swift* decision really represented in the context of early nineteenth-century jurisprudence."[18] The *Erie* court viewed *Swift* as based upon the notion that federal courts create common law rules. Hence, the Supreme Court perceived a conflict as to which sovereign—state or federal—could constitutionally declare the governing law in diversity cases. The authors contended that *Erie* "represented a change in judicial philosophy about the nature of common law decision making as well as a shift in viewpoint about the proper constitutional role of the federal courts vis-a-vis the state courts."[19]

As one would expect, Bridwell and Whitten have little good to say about the *Erie* doctrine. They tax Justice Louis D. Brandeis' opinion as being historically inaccurate, mistaken about the scope of congressional power to enact substantive rules, and a failure in preventing federal courts from fashioning federal common law in many areas of national concern.[20] Compared to *Swift,* the authors maintain that *Erie* is "less efficient" and is "in fact far less restrictive" on the exercise of federal judicial authority.[21]

How did this judicial and scholarly misinterpretation of *Swift* occur? Bridwell and Whitten maintain that "[t]he fundamental mistake in this process has been the assumption that the legal order has continuously operated according to certain modern precepts, or at least has done so since some indeterminate point in time in the past."[22] In essence, the authors suggest that legal historians have been guilty of reading history backwards. As a consequence, it was easy to adopt the erroneous view that judges consciously devised common law rules to achieve policy goals.

It is apparent that the conclusions of Bridwell and Whitten are diametrically opposed to those of the recently emerged instrumentalist school. Indeed, the authors repeatedly and sharply assail Morton J. Horwitz, the leading instrumentalist historian. According to Horwitz, in 18th century America common law principles were not understood as a tool of legal change. Rather, the common law was seen as a body of fixed doctrine, grounded in natural law and custom, to be applied between private litigants. The role of the judge was correspondingly limited to the discovery of these pre-existing rules. However, Horwitz argues that after the Revolution American judges began to see common law adjudication "as an instrument of

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[17]Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

[18]R. BRIDWELL & R. WHITTEN, *supra* note 7, 136.

[19]*Id.* at 1.

[20]For post-*Erie* federalization of law see G. GILMORE, THE AGES OF AMERICAN LAW 93-98 (1977); Friendly, *In Praise of Erie-and of the New Federal Common Law,* 39 N.Y.U. L. REV. 383 (1964).

[21]R. BRIDWELL & G. WHITTEN, *supra* note 7, at xiii (emphasis in original).

[22]*Id.*

policy,"[23] and private law questions were increasingly considered in terms of their social and economic impact. Horwitz observes:

> In short, by 1820 the process of common-law decision-making had taken on many of the qualities of legislation. As Judges began to conceive of common law adjudication as a process of making and not merely discovering legal rules, they were led to frame general doctrines based on a self-conscious consideration of social and economic policies.[24]

Two major results follow from the Horwitz thesis. First, this shift in legal theory concentrated broad powers of a legislative character in the judiciary. Second, the new instrumentalist attitude was utilized to fashion legal doctrines hospitable to commercial and industrial growth. The instrumentalist judge became the handmaiden of mercantile interests. Through a reinterpretation of private law rules governing torts, property, and contracts, Horwitz charges, the courts "actively promoted a legal redistribution of wealth against the weakest groups in the society."[25]

Bridwell and Whitten take exception to both the methodology and findings of Horwitz. They accuse him of reading evidence out of context, of exercising improper selectivity in marshalling examples, and of inaccurately describing the traditional conception of the common law. Let us consider a few instances of specific disagreement. Central to the Horwitz thesis is his contention that the basis of common law authority was reformulated following the Revolution. As the older theory of the common law as a manifestation of inherent justice collapsed, the legitimacy of common law was explained in terms of popular consent. Yet the authors muster impressive evidence to demonstrate that the consensual explanation of common law was not new in post-revolutionary America.[26]

Conflict of laws is another major area of disagreement between the authors and Horwitz. Horwitz sees the development of the conflicts approach in the 19th century as the consequence of a changing conception of the common law. As judges recognized that different common law rules represented divergent social policies, the resolution of legal conflicts between jurisdictions could not be determined by reference to a uniform common law. Bridwell and Whitten, on the other hand, declare that variation in rules was entirely compatible with the common law system grounded in natural reason. "Consequently," they write, "a conflict of laws approach with which to reconcile differences between jurisdictions in multistate disputes is precisely what one would expect the traditional common law system to produce."[27]

The authors also accuse Horwitz of relying on a conspiracy theory to ex-

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[23] M. HORWITZ, *supra* note 13, at 3.
[24] *Id.* at 2.
[25] *Id.* at 254.
[26] R. BRIDWELL & R. WHITTEN, *supra* note 7, at 24-27.
[27] *Id.* at 87.

plain the transformation of common law. "One marvels at the scope of the conspiracy Horwitz describes," they note, "and the almost uniform participation in it by the judges."[28] The mere fact that judicial decisions had some economic impact does not establish that ante-bellum judges were consciously fashioning policy or dictating procommercial results. Bridwell and Whitten argue that Horwitz "has failed to offer any convincing proof that the conception of the common law process" changed before 1860.[29]

One of the most interesting contributions of *The Constitution and the Common Law* is the analysis of the heated debate over prosecuting common law crimes in federal court. Largely forgotten today except by historians, this was one of the most divisive early issues in the history of American law. The legal problem was complicated by political implicatons and partisan strife. Charles Warren observed:

> The assertion of the jurisdiction of the United States Courts in cases involving criminal indictments based on English common law and on international law, in the absence of any Federal penal statute, had been especially obnoxious to the Anti-Federalists; and the successive cases had been regarded with growing alarm—principally because such common law indictments had been chiefly employed in convictions of persons accused of pro-French activities.[30]

The starting point for the controversy over common law crimes was the Judiciary Act of 1789 which vested the federal courts with "cognizance of all crimes and offenses that shall be cognizable under the authority of the United States."[31] Early federal cases indicated that most judges believed that the federal courts could properly hear criminal cases at common law.[32] In 1799 Chief Justice Oliver Ellsworth specifically advised grand jurors that indictments could be based on common law, and that "by the rules of a known law, matured by the reason of ages and which Americans have ever been tenacious of as a birthright, you will decide what acts are misdemeanors, on the ground of their opposing the existence of the National government or the efficient exercise of its legitimate powers."[33]

The ultimate rejection of a federal jurisdiction over crimes at common law has not stilled the historical debate,[34] and a variety of interpretations

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[28] *Id.* at 56.

[29] *Id.* at 28.

[30] C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 159 (1926).

[31] Act of Sept. 24, 1789, ch. 20, §§ 9, 11, 1 Stat. 76, 79.

[32] *E.g.*, United States v. Smith, 27 F. Cas. 1147 (C.C.D. Mass. 1792); Henfield's Case, 11 F. Cas. 1099 (C.C.D. Penn. 1793); United States v. Ravara, 27 F. Cas. 147 (C.C.D. Penn. 1794). For the leading contrary opinion see United States v. Worrall, 28 F. Cas. 774 (C.C.D. Penn. 1798). A helpful analysis of the *Worrall* case is provided in S. Pressler, A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federalist Jurisprudence, (an earlier version of this unpublished paper was presented to the American Society for Legal History on November 4, 1977).

[33] As quoted in C. WARREN, *supra* note 30, at 162.

[34] *E.g.*, United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32 (1812).

have been advanced over the years. Most of the initial objections were phrased in terms of federalism. "If the principles were to prevail," Thomas Jefferson warned in 1800, "of a common law being in force in the United States" it would "possess the general government at once of all the powers of the state governments and reduce [the country] to a single consolidated government."[35] This Jeffersonian argument confused common law as a source of jurisdiction with common law as a body of rules to be administered within a jurisdiction already established. Some historians have suggested that the problem of judges exercising common law criminal jurisdiction could have been solved by a legislative delegaton of power. Indeed, in 1923 Charles Warren concluded that a framers of the Judiciary Act intended to vest the federal courts with such authority.[36] Horwitz strikingly contends that the assault on federal common law crimes was the first manifestation of the broader change in the conception of law described above.[37] More recently, Stephen B. Presser maintains that the debate over common law crimes must be understood within the political context of the 1790's and the declining fortunes of the Federalist Party.[38]

Bridwell and Whitten offer a fresh explanation for the common law crimes imbroglio. They concur with most scholars that the Jeffersonian objections concerned with an alleged invasion of state rights were mistaken, and that the problem is best analyzed in terms of separation of powers. In other words, the basic issue involved not federal-state relations, but the appropriate function of the judiciary. The authors also reject the Horwitz view as "overbroad" and "quite erroneous."[39] According to Bridwell and Whitten, the very nature of common law crimes is distinct from the more general problem of common law authority. The "fundamental objection" to a federal common law criminal jurisdiction "is that criminal law results peculiarly from an exercise of the sovereign lawmaking authority, which in our system was originally confided to the legislative branch of government."[40] In civil cases at common law, judges followed established custom derived from the behavior of private parties. Since the definition of criminal activity required some arbitrary judgment by the sovereign, "the open-ended nature of the selection process and the lack of popular participation in it . . . made any exercise of judicial authority inappropriate."[41] It follows that the controversy over common law crimes was not the harbinger of a general alteration in the conception of

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[35]7 THE WRITINGS OF THOMAS JEFFERSON 451 (P. Ford ed.).

[36]Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923). Warren's view is rejected by J. GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES: ANTECEDENTS AND BEGINNINGS TO 1801 495-96 (1971).

[37]M. HORWITZ, *supra* note 13, at 9-16.

[38]S. Presser, *supra* note 32, at 56-65.

[39]R. BRIDWELL & R. WHITTEN, *supra* note 7, at 50.

[40]*Id.* at 46.

[41]*Id.* at 49.

common law, but rather a belated recognition of the unique legislative character of criminal law.

The volume is not without some minor problems. The nature of common law and the scope of federal diversity jurisdiction as described by the authors are quite intricate. Clearly there was some degree of uncertainty as to the proper choice of common law rules, and hence some room for sub rosa judicial lawmaking. Bridwell and Whitten may underestimate the policy-making potential open to judges under a traditional view of common law. In addition, the authors' stress on the importance of Justice Story comes close to an indispensable man theory of history. Describing Story as "the most learned and scholarly man ever to sit on the high bench," they attribute in large measure the decline of the common law system to his death.[42] Yet if the common law decisional techniques outlined by Bridwell and Whitten were working properly no single person would be crucial to its continued vitality. As this suggests, the authors might have done more to explore the post-1860 shift to new methods of decision. Did the Civil War have an impact on legal reasoning? William E. Nelson, for instance, has argued that the anti-slavery movement influenced the post-bellum judicial style.[43]

This reviewer wishes that Bridwell and Whitten had considered a wider variety of subject matter areas. For instance, they might have tested their thesis with a treatment of the development of corporate law in the early 19th century, a process in which Justice Story played a key role. It has been argued that the courts, both state and federal, were anxious to facilitate the growth of business corporations and deliberately shaped the law to this end.[44] One should also note that *The Constitution and the Common Law* proceeds on a sophisticated level and might prove difficult for the general reader.

The volume can best be viewed as an effort to revive the conservative tradition of American legal history. Rejecting economic and social interpretations of law, the authors see ante-bellum common law as the embodiment of neutral principles derived from custom. They assert that the common law system minimized the room for judicial intervention in private affairs. Although subject to recent criticism,[45] this outlook has a basically postitive character. Surely the attempt to separate the administration of justice from political considerations is one of the greatest accomplishments of the Anglo-American law. Bridwell and Whitten have written a significant book which merits the close attention of legal historians.

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[42]*Id.* at 123.

[43]Nelson, *The Impact of the Antislavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America*, 87 HARV. L. REV. 513 (1974).

[44]M. HORWITZ, *supra* note 13, at 111-14; L. FRIEDMAN, A HISTORY OF AMERICAN LAW 174-76 (1973); G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT 179-84 (1970).

[45]Horwitz, *The Conservative Tradition in the Writing of American Legal History*, 17 AM. J. LEGAL HIST. 275 (1973). Compare Presser, Book Review, 52 N.Y.U. L. REV. 700 (1977).