

Introducing Applied Legal History

ALFRED L. BROPHY

James Oldham and Su Jin Kim write about the acceptance of arbitration in the early United States in their article, “Arbitration in America: The Early History.”¹ They correct a misperception that stretches back at least to Justice Joseph Story’s 1844 opinion in *Tobey v. Bristol* that said equity did not enforce arbitration awards.² Oldham and Kim recover a robust culture of arbitration in the early United States and thus correct the received wisdom, which led Justice Kennedy to remark in 2001 that American courts were historically hostile to arbitration.³ Perhaps this newly recovered history will add support for the acceptance of arbitration in the federal courts. Oldham’s and Kim’s article is, therefore, part of an emerging and sometimes controversial trend in legal history to speak to contemporary issues. It is also the first of an occasional series for *Law and History Review* on “applied legal history.”

What is applied legal history? It is deeply researched, serious scholarship that is motivated by, engages with, or speaks to contemporary issues. This trend toward self-conscious engagement with the present is part of the turning to history in law, from the increased interest in originalism to the

1. James Oldham & Su Jin Kim, “Arbitration in America: The Early History,” *Law and History Review* 31 (2013): __ .

2. *Tobey v. Bristol* 23 F.Cas. 1313, 1320 (C.C. Mass. 1845).

3. See *Circuit City Stores v. Saint Clair Adams*, 532 U.S. 105, 111 (2001).

Alfred L. Brophy is the Judge John J. Parker Distinguished Professor, University of North Carolina – Chapel Hill <abrophy@email.unc.edu>. He thanks Mary Sarah Bilder, Saul Cornell, Elizabeth Dale, Julian Mortenson, Dana A. Remus, David Tanenhaus, and Karen Tani for help with this article.

use of history to show past injustices or demonstrate alternative, often progressive, intellectual traditions.⁴

Applied legal history may be something very directly engaged in a current debate, such as the work on the meaning and context of the Second Amendment in the late eighteenth and early nineteenth century.⁵ Sometimes we call historical work aimed at responding to an immediate legal issue “law office history”—as in historical work performed in a law office for advocacy purposes. The phrase “law office” highlights that it is both advocacy oriented and unlikely to be good history.⁶ What is very different about some of the recent scholarship on gun regulation is that it is good history. It asks questions that are not solely about advocacy and it asks questions about meaning to the framing generation. It puts into context the issues that the framing generation faced.⁷ That work admits what is not known and what contradicts the arguments that the lawyers who use the scholarship are making. Similarly, the work by Paul Halliday and G. Edward White on the English law of habeas corpus in the eighteenth century and the Suspension Clause was inspired by recent controversy over the scope of habeas corpus for prisoners in the War on Terror.⁸ It occupied a significant place in the majority opinion in *Boumediene v. Bush*.⁹ Sometimes, the legal history scholarship is presented directly to the court through an amicus brief, as happened in *Lawrence v. Texas*.¹⁰

4. See, generally, Laura Kalman, *The Strange Career of Legal Liberalism* (New Haven: Yale University Press, 1996) (discussing the turn to history in law, in part as a response to the decline of other sources of authority).

5. Saul Cornell, *A Well-Regulated Militia: The Founding Fathers and the Origins of Gun Control in America* (New York: Oxford University Press, 2006); and David Thomas Konig, “Why the Second Amendment Has a Preamble: Original Public Meaning and the Political Culture of Written Constitutions in Revolutionary America,” *UCLA Law Review* 56 (2009): 1295–1342.

6. Martin Flaherty, “History ‘Lite’ in Modern American Constitutionalism,” *Columbia Law Review* 95 (1995): 523–90; Saul Cornell, “Heller, New Originalism, and Law Office History: ‘Meet the New Boss, Same as the Old Boss,’” *UCLA Law Review* 56 (2009): 1095–126; David M. Rabban, “The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History,” *Stanford Law Review* 37 (1985): 795–856.

7. See, for example, Nathan Kozuskanich, “Originalism, History, and the Second Amendment: What Did Bearing Arms Really Mean to the Founders?” *University of Pennsylvania Journal of Constitutional Law* 10 (2008): 413–46.

8. Paul D. Halliday and G. Edward White, “The Suspension Clause: English Text, Imperial Contexts, and American Implications,” *Virginia Law Review* 94 (2008): 575–714.

9. *Boumediene v. Bush* 553 U.S. 723, 740, 747, 751 (2008).

10. Brief of Professors of History George Chauncey et al. as Amicus Curiae, *Lawrence v. Texas*, 539 U.S. 558 (2003) http://supreme.lp.findlaw.com/supreme_court/briefs/02-102/02-102.mer.ami.hist.pdf (visited December 15, 2012)

In addition to the literature aimed at the Supreme Court is literature on the history of executive power, inspired by the War on Terror, which targets a general audience. John Yoo, for example, often draws upon examples from early American history using rather suspect methods.¹¹ Conversely, some work returns to constitutional history, finds a rich culture of rights talk, and opens up a wider range of possibilities of constitutional protection.¹² Closely related to this scholarship in which history informs contemporary constitutional rights and power is work that helps us understand the context in which statutes were enacted and how to interpret them, such as work on section 1981¹³ and on Title VII.¹⁴

Often, however, applied legal history is more abstract, or less applied, than the work aimed at understanding the original meaning of the constitution or at interpreting a statute. There are several varieties of work that is both serious as historical scholarship and directed in some ways, even if obliquely, at contemporary issues. It is difficult to try to draw bright lines between varieties of applied legal history, and much scholarship responds in multiple ways to contemporary concerns. Nevertheless, maybe it is useful to try to separate out some of the ways that legal history scholarship is motivated by or responsive to contemporary issues.

A second category of applied legal history normalizes (or in other cases destabilizes) a contemporary practice by showing that it has (or perhaps lacked) antecedents. One classic work of this genre is C. Vann Woodward's *Strange Career of Jim Crow*. Woodward recognized that the "twilight zone that lies between living memory and written history is one of the favorite breeding grounds of mythology."¹⁵ He defeated the mythology that segregation was the natural order of things by showing that in the years after the Civil War, Southern life was more integrated than it was in the early twentieth century. More recently, Larry Kramer and others have shown the vitality of popular constitutional ideas in American history and have thus helped reignite debate about the proper

11. See Julian Davis Mortenson, "Executive Power and the Discipline of History," *University of Chicago Law Review* 78 (2011): 377–443 (exploring examples of Yoo's use of early American history).

12. See, for example, Reva Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115 (2002): 947–1046.

13. See, for example, Robert J. Kaczorowski, "The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of *Runyon v. McCrary*," *Yale Law Journal* 98 (1989): 565–95.

14. See, for example, Cary Franklin, "Inventing the 'Traditional Concept' of Sex Discrimination," *Harvard Law Review* 125 (2012): 1307–80.

15. C. Vann Woodward, *The Strange Career of Jim Crow* xvi (New York: Oxford University Press, 1955, reissued 2002).

role of constitutional thought outside the courts.¹⁶ Risa Goluboff points out alternative possibilities to the development of civil rights and suggests both the limitations that have confined lawyers and the way to new, broader interpretations.¹⁷ Property scholars have re-established the claim that states have regulated property robustly throughout American history.¹⁸ Richard Posner's work on the economics implicit in nineteenth century tort law laid the groundwork for his subsequent push for economic analysis of law by showing that judges had been engaged in an economic analysis for generations.¹⁹ Relatedly, Morton Horwitz' *Transformation of American Law, 1780-1860* was inspired in part by the 1970s controversy over law and economics. It may have, oddly, legitimized the law and economics movement by showing that judicial considerations of utility were central to the common law tradition.²⁰ Oldham and Kim fit within this category, because they show the historical antecedents of arbitration, just as Jenny Martinez points out the precedent that courts that tried violations of the ban on the international slave trade serve for contemporary human rights courts.²¹

A third, exceptionally broad, category of applied legal history looks to "how we got where we are now." Some recent examples of this kind of work are Felicia Kornbluh's book on poverty and welfare rights in the 1960s,²² Reva Siegel's work on early twentieth century legal thought

16. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004); and Reva Siegel, "Dead or Alive: Originalism as Popular Constitutionalism in *Heller*," *Harvard Law Review* 122 (2008): 191–245. Although some question the relevance of popular constitutionalism to contemporary law, Siegel's article on *Heller* shows popular action in practice and, importantly, that it is not the domain of one political viewpoint.

17. Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2007).

18. See, for example, William J. Novak, *The People's Welfare Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); and Gregory Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (Chicago: University of Chicago Press, 1998).

19. Richard A. Posner, "A Theory of Negligence," *Journal of Legal Studies* 1 (1972): 29–96.

20. Morton J. Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard University Press, 1977).

21. See Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* (New York: Oxford University Press, 2012). See also Sarah Ludington, Mitu Gulati, and Alfred Brophy, "Applied Legal History: Demystifying the Doctrine of Odious Debts," *Theoretical Inquiries in Law* 11 (2010): 247–82 (finding tradition of sovereign rejection of "odious" debt in United States history).

22. Felicia Kornbluh, *The Battle for Welfare Rights: Politics and Poverty in Modern America* (Philadelphia: University of Pennsylvania Press, 2007).

that both suggests new avenues of constitutional protection for women's rights and helps us understand the origins of those rights the Court recognizes,²³ and Karen Tani's work on due process rights to government social welfare benefits in *Flemming v. Nestor*.²⁴ David Tanenhaus recovers the context of *In re Gault* and teaches us, in that way, about the state of juvenile justice now.²⁵

Often this kind of work is directly engaged with the continuing effect of past events, or seeks to put those injustices into a better context. This is particularly true of Native American legal history.²⁶ Much of recent African American legal history also turns to the eras of slavery, Jim Crow, and Civil Rights to understand where we are today.²⁷ Perhaps it also encompasses scholarship that focuses on past triumphs and thus provides some inspirational basis for thinking about the United States.²⁸

There is, perhaps, a fourth category that is closely related to the third: work that is motivated—as has happened with historical work on

23. See Reva Siegel, "Roe's Roots: The Women's Rights Claims that Engendered *Roe*," *Boston University Law Review* 90 (2010): 1875–908. Similarly, Sophia Lee's work on how administrative agencies interpret the Constitution has implications for how we approach public constitutionalism and constitutional interpretation. Sophia Lee, "Race, Sex, and Rulemaking: Administrative Constitutionalism and the Workplace, 1960 to the Present," *Virginia Law Review* 96 (2010): 799–886.

24. Karen M. Tani, "*Flemming v. Nestor*: Anticommunism, the Welfare State, and the Making of 'New Property,'" *Law and History Review* 26 (2008): 379–414.

25. David Tanenhaus, *The Constitutional Rights of Children: In re Gault and Juvenile Justice* (Lawrence: University Press of Kansas, 2011).

26. See, for example, Robert J. Williams, *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1989). See also Lindsay Robertson, *Conquest By Law: How the Discovery of America Dispossessed Indigenous Peoples of Their Lands* (New York: Oxford University Press, 2005).

27. See, for example, Leon Litwack, *Trouble in Mind: Black Southerners in the Age of Jim Crow* (New York: Knopf, 1998). The work does not necessarily see a direct line between past and present; it may tell us only about the roots of current issues, such as T.J. Davis' *A Rumor of Revolt: The "Great Negro Plot" in Colonial New York* (New York: Free Press, 1985) or it may be more closely tied to contemporary politics, such as Donald Tibbs' *From Black Power to Prison Power: The Making of Jones v. North Carolina Prisoners' Labor Union* (New York: Palgrave, 2011).

28. Gordon Wood distinguishes historical scholarship from advocacy, and he has warned that presentist work risks losing the distance and control necessary to accurate history. See, for example, Gordon S. Wood, *The Purpose of the Past: Reflections on the Uses of History* (New York: Penguin, 2008), 293–308. The final line warns that "historians who want to influence politics with their history writing have missed the point of their craft; they ought to run for office." However, his work promotes a positive view of American institutions, which has contemporary relevance. See, for example, Gordon S. Wood, *The Creation of the American Republic, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969).

immigration²⁹—by contemporary issues, even if it is not searching for a solution to them. There may be no direct prescriptions from this work; it is inspired by contemporary problems. Robert Cover's *Justice Accused*, which was motivated by Cover's questioning why Vietnam-era federal judges sentenced draft resisters to prison, is one example here.³⁰ That set Cover on the mission of understanding the legal constraints upon antislavery judges who decided cases involving slaves. Oldham and Kim definitely fit here.

Perhaps there is a fifth, catchall category of a "useable legal history," which teaches us something about contemporary law reform. Sometimes there is a direct lesson, such as in Michael Klarman's *From Jim Crow to Civil Rights*, which has a fairly stark message about the dangers of looking to the courts for social reform.³¹ Often the lesson is more indirect, such as how people have remade the law. Felicia Kornbluh's work on welfare comes to mind, because that shows us something about how reform takes place. Kenneth Mack's *Representing the Race*³² and Tomiko Brown-Nagin's *Courage to Dissent*³³ both teach us lessons about how reform happened, from lawyers' offices to civil rights protesters who took to the streets to remake their world. Mack and Brown-Nagin's work is far from the core of applied legal history, but what often motivates that kind of "useable past" is some desire to show how people outside of the traditional seats of power have thought about law and used it, and remade it. Perhaps therein lie possibilities for inspiring more activism. But even if inspiring activism is not the goal, it lets us know that positive legal change happens in many ways; that literature legitimizes activism and, perhaps, change.

29. Mae M. Ngai, *Impossible Subjects: Illegal Aliens and the Making of Modern America* (Princeton: Princeton University Press, 2004); and Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (New York: Oxford University Press, 2006).

30. Robert Cover, *Justice Accused: Anti-slavery and the Judicial Process* (New Haven: Yale University Press, 1975).

31. Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: Oxford University Press, 2004). Compare Robert Post and Reva Siegel, "Roe Rage: Democratic Constitutionalism and Backlash," *Harvard Civil Rights-Civil Liberties Law Review* 42 (2007): 373–434.

32. Kenneth W. Mack, *Representing the Race: The Creation of the Civil Rights Lawyer* (Cambridge: Harvard University Press, 2012).

33. Tomiko Brown-Nagin, *The Courage to Dissent: Atlanta and the Long History of the Civil Rights Movement* (New York: Oxford University Press, 2011). Among the other outstanding examples of this genre, one might think of Patricia Sullivan's *Days of Hope: Race and Democracy in the New Deal Era* (Chapel Hill: University of North Carolina Press, 1996).

Some Perils of “Applied Legal History”

There are some risks in a focus on “applied legal history.” It runs the risk that we ignore the value of pure scholarship. And a focus on the applied may threaten the quality of scholarship. If legal historians become advocates instead of scholars, we may easily lose a connection to truth.³⁴ Such a focus could easily distort history, because often the findings of historians are inconsistent with whatever immediate advocacy or policy goals are at stake; and applied legal history may then slide back into “law office history.” Advocacy sometimes needs history, but history is sometimes—perhaps often—mis-served by a focus on advocacy. Perhaps even more dangerously, talk of applied legal history will reveal that much work in this field—as in other subdisciplines of history—is politically charged. It may even cause the work to become more politically charged if it is designed to serve a master other than truth. Scholarship on the ways that the legal system has treated issues of race, class, and gender is rarely neutral, and those who do not like the implications may, unsurprisingly, oppose it at hiring and tenure, and at other critical moments, such as funding, as well.

There are other, professional dangers in applied legal history. A focus on applied legal history may highlight that “pure” legal history may not relate much to the issues that law school faculties care about most. Legal historians spend a lot of our time on issues that many of our law school colleagues are likely to find irrelevant, even if quite interesting. Some of the “pure” legal history may turn out to be relevant to contemporary law; for example, work done some years ago by colonial historians about arbitration, which then had no discernable connection to the present, supports Oldham’s and Kim’s thesis that early American courts accepted arbitration.³⁵ Not everything, however, needs to be justified or valued

34. Many of applied legal history’s goals are similar to those that William W. Fisher described for legal history, including “contribut[ing] to contemporary policy debates by enabling readers to assess the merits and preconditions of policies pursued in other societies,” “expos[ing] injustice and inspir[ing] indignation and commitment,” and “assit[ing] contemporary judges in construing constitutional texts.” “Texts and Contexts: The Application to American Legal History of the Methodologies of Intellectual History,” *Stanford Law Review* 49 (1997): 1065, 1096, 1101, 1103.

35. See, for example, Eben Moglen, “Commercial Arbitration in the Eighteenth Century: Searching for the Transformation,” *Yale Law Journal* 92 (1985): 135–52 (arbitration in colonial New York); and Alfred L. Brophy, “‘*Ingenium est Fateri per quos profeceris*’: Francis Daniel Pastorius’ *Young Country Clerk’s Collection* and Anglo-American Legal Literature, 1682–1716,” *University of Chicago Law School Roundtable* 3 (1996): 637, 679, 727–28 (discussing forms for arbitration in colonial Pennsylvania). Even what looks to be “pure” legal history—such as constitutional practice in seventeenth century Massachusetts—may

based on its contemporary utility. We should—and obviously will—continue to write “pure” legal history.

What is the value, then, of this discussion? Applied legal history is a way of describing what many of us are already doing. It explains what has motivated much legal history lately and explains to people outside of the historical profession what we are doing. Given how much recent literature falls under the definition of “applied legal history,” one may ask whether almost all legal history is applied in some way. And even if most legal history is applied, what does that mean for how we should think about what we do and why? If we assume that most legal history is applied, should we be rethinking the conversations we are a part of? We tend to define our conversations substantively, such as intellectual history of the old South, and usually we read work by people who write about those things. But maybe we need to think of people who are asking similar practical questions. In which case, the historian of the antebellum South should read about Ancient Rome, England as it emerged from feudalism, Victorian and Edwardian England, and other places where labor tensions, forces of conservatism, and competing notions of people and nation came together. Talk of applied legal history highlights that legal historians are engaged in public debates and having an impact on them. I look forward to the articles that will follow Oldham and Kim and the questions they will prompt about methods and contemporary law, as well.

describe the intersection of legal practices and everyday life and those complex yet common dialectics, and may provide insight into current dynamics. See, for example, Elizabeth Dale, *Debating – and Creating – Authority: The Failure of a Constitutional Ideal in Massachusetts Bay, 1629–1649* (Aldershot: Ashgate, 2001). Although such social history may speak to some contemporary issues, this is different from the more directly applied legal history envisioned in this article.