



# HOW ADAMS BEAT JEFFERSON

AND A FEW THOUGHTS ABOUT THE BAR EXAM

*Jacob A. Stein*

Reviewing

D. KURT GRAHAM, TO BRING LAW HOME:  
THE FEDERAL JUDICIARY IN EARLY NATIONAL RHODE ISLAND  
(Northern Illinois University Press 2010)

**C**OMPETITION BETWEEN the states and the federal courts was a compelling issue confronting those putting together the United States judiciary. The Federalists, the Adamses, wanted the federal courts to prevail. The Republicans, the Jeffersonians, wanted the states to prevail. The Federalists won. The merchant class chose federal because they were impressed with the federal judges, selected from the elite of the bar. The state court judges, so the merchants thought, were unpredictable and sometimes corruptible.

Mr. Graham chose Rhode Island to demonstrate how the competent, ambitious lawyers used their bar associations to exert influence.

He gives us, in interesting detail, how a Rhode Island lawyer commenced as a state court lawyer and then became a federal judge. Henry Bull was a young carpenter when he decided to practice law. He, so the story goes, selected cabbages in his garden to

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practice up on how he would orate before the judges and jurors. He convinced himself that “the same cabbages were in the court house, which he thought he had left in the garden; five in one row, and twelve in another.” He had a gift for the law, and the local bar opened its door to him and recommended him for a Rhode Island federal judgeship.

The Rhode Island bar described itself as “a brotherhood with common interests sharing a single universe of discourse.” This discourse was the language of the law. The legal elites occupied a mediating position between the local traditionalism and the ever growing national cosmopolitanism.

They saw themselves as “lawyer-statesmen.”

The lawyer-statesman ideal was, in a certain sense, a founding principle of the American republic. Alexander Hamilton argued in *Federalist 35* that lawyers as well as other “men of the learned professions,” together with landholders and merchants, would be the natural leaders to whom the people would turn for representation. Because they “form no distinct interest in society,” lawyers were, in Hamilton’s estimation, the ideal republican citizens – able and willing to sacrifice personal well-being for the public good. . . .

These “gentlemen” thought of themselves as interested in the public good rather than private gain. Each was proud of his library made up of English law books, literature in English, French, and German, and the Greek and Latin classics.

Thomas Jefferson’s nephew asked his uncle for a course to prepare for the practice of law. Mr. Graham reports that Jefferson believed that law students should do a term of apprenticeship in a lawyer’s office that had a library within which to study such things as language, mathematics, philosophy, ethics, religion, agriculture, chemistry, anatomy, zoology, politics, government, history, and literature.

The Rhode Island bar required the candidate who wished to become a member of the bar to be at least 20 years old and to have studied, without pursuing any other employment, in a practicing

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attorney's office for two years. The apprentice learned by watching his mentor's day-by-day practice dealing with contract disputes, torts, property issues, and criminal law.

As time went by, proprietary law schools came into existence. The first and most famous was the Litchfield Law School in Litchfield, Connecticut. A lawyer named Tapping Reeve opened up his own law school where he delivered lectures to the apprentices. Reeve's approach became the model for other law schools throughout the country.

During the first half-century after the formation of the United States, legal education and bar admissions varied widely from state to state. Most states permitted admission after the stated apprenticeship without an oral examination. When an oral examination was required, it was often informal.

With the rise of the Progressive Era in the early twentieth century, law schools were being established throughout the country. Students at many top law schools, after graduation, chose to practice law outside the state where they attended law school. The local bars required local written bar examinations as the replacement for the oral examinations.

In the 1970's I was on the District of Columbia Bar Examining Committee. The Committee was selected by the D.C. Court of Appeals. We wrote the bar examination questions and then we graded the papers.

We gave the exam twice a year. In addition to the exam, we reviewed the background of each applicant to see if there was something that raised a question. When there was a question we invited the applicant in to get his or her side of the story.

On one occasion we received a bar exam written entirely in Chinese except for the Latin expression *res ipsa loquitur*. We discovered we had failed to include in our rules that the bar exam answers must be written in English. Bill Gardner (later Judge Gardner), the best lawyer on our committee, came up with the answer. The Bar exam questions were written in English and that carries the presumption that the answers should be in English. The paper was returned to the applicant, who submitted a good paper in English.

*Jacob A. Stein*

During the 1970's the multi-state multiple choice exam was offered up to us by its promoters. It tested six specific areas of the law: torts, contracts, evidence, real property, constitutional law, and criminal law. We, without too much enthusiasm, adopted it. It left to us to continue with the essay questions for topics concerning our local practice.

At our meetings we often discussed just what purpose the bar exam served. Did it screen for competence? Did it really protect the public from lawyers who were incompetent? Did it adequately represent the real world of law practice – procrastination, getting continuances, negotiation, getting to the point, working with dispatch, addressing the court? We watched as the law practice changed from the general practice to the specialty practice. The bar exams did not cover the specialties such as securities law, environmental law, health care, government contracts, and dozens of others.

Let me add a few recollections about my own preparation for the bar exam. Right after graduating from George Washington University Law School, I took Joe Nacrelli's bar review course. Mr. Nacrelli was a short muscular man in his fifties. He looked like he might have been a prizefighter in his youth. He charged \$150 for the course. Today's bar preparation can run up to \$3,000. He said if you took his course and attended class, he would give you good odds that you would pass.

On his bulletin board were letters from former students declaring that Joe Nacrelli made the difference. But for him they would have failed despite an Ivy League law school education. They were right. A significant number of Ivy Leaguers who did not take Nacrelli's course did not pass the bar exam the first time around.

Mr. Nacrelli was uninterested in grand legal theories. He was a master mechanic. If this (the facts), then that (the textbook rule of law), and don't waste time on why that and not something else. You will have plenty of time for such jurisprudential considerations when you are in your law office waiting for the phone to ring.

In those days the bar examiners were senior members of the bar appointed by the judges of the U.S. District Court. Each examiner

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had his own subject, year after year. The bar examiners were remote, austere, and learned guardians of the gate. Nacrelli had, from a distance, psychoanalyzed each of them. He knew their whims, their peculiarities, their obsessions, their misunderstandings of the law, and the types of answers they liked.

The week before the bar exam Nacrelli gave the class of 300 a rousing pep talk. He had an 85 percent pass rate, and we were honor bound to protect his average.

What is the future of the bar exam? Good arguments can be made that bar exams serve no worthwhile purpose, and if there is to be a bar exam, it should not be state by state. There should be one national bar exam. The practice of law has become national and so should the bar exam.

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