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Constitutional Scholarship: What Next?

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the kind of work that must go forward. It can and must go forward in a number of different ways—through historical studies, especially of the founding and the fourteenth amendment, through studies of the contemporary Court, and through more philosophic investigation into the nature of interpretation of the sort Dworkin has so interestingly undertaken.

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The Bicentennial has come and gone, and like other such great national anniversaries it has produced a legacy of both popular schlock and scholarly substance. Recently, we have seen published several new books on events at the Philadelphia Convention, a wonderful (if windy) work by Michael Kammen on the cultural history of the Constitution, Forrest McDonald's breathless (and sometimes historically controverted) examination of the intellectual roots of the document, Philip Kurland and Ralph Lerner's poorly organized *The Founders' Constitution*, and a badly needed edition of Herbert Storing's *The Complete Anti-Federalist*. There have also been numerous special issues of history, political science, and law journals devoted to some aspect of the constitutional order. Project '87, under the relentless leadership of James McGregor Burns and Richard B. Morris, succeeded in typical academic fashion in plodding in dull ways over mostly arid scholarly ground, although it did manage, through *This Constitution*, to persuade academics to produce clearly written articles shorn of the usual mumbo-jumbo trappings that accompany so much scholarly writing about the document.

The times being such as they were, the political Right had the good fortune of being able to make its arguments about original intent during a year when public and scholarly attention was already given over to what the framers intended. The Straussians have enlivened recent constitutional debate, although their pretensions to revealed historical truth have a hollow ring. Moreover, we should be glad, as scholars, for Attorney General Edwin Meese, since he provided such a convenient target for attacking much of the simple-mindedness that surrounded the Bicentennial. The anti-Meese literature has grown apace, and with it has come a new appreciation for the indeterminacy and ideological cast of so much of the scholarship on the Constitution. Given the nature of our polity, it is probably a healthy sign that scholars of all political persuasions believe that they are right about the Constitution's meaning, even if

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it is to argue, as do the Critical Legal Studies advocates, that it has no meaning at all.

Yet the Bicentennial hardly unleashed a fire storm of historical revelation. We are not much further along the road toward understanding our constitutional system's history than we were in the early 1900s when the celebratory and scholarly machinery was first cranked up. The Bicentennial has evoked some good but no great scholarship on the history of the Constitution. At a time when historians in other fields are racing ahead methodologically and interpretively, far too many constitutional historians are viewed as curmudgeons sorting through the detritus of the Philadelphia Convention, its luminaries, and a few great Supreme Court cases. That smart people can write good books that do not tell us much new (and that most scholars in other fields ignore) offers a cautionary tale to future generations of constitutional historians. There is much to be said for being a contrarian in scholarship, and certainly we have to have command of the technical and internal workings of constitutional law. Yet there is no doubt that, if constitutional historians are to have an impact on the larger world of historical scholarship and of the study of the Constitution, they are going to have to pay much more attention to the history of public law in action rather than gnashing their teeth reverentially over what James Madison, George Mason, and Alexander Hamilton intended.

More than a half-century ago, James G. Randall urged constitutional historians to probe the social history of the nation's ruling document, and for more than a quarter century James Willard Hurst and the Wisconsin school of socio-legal historians have been showing the way in which private law and social and economic development have gone hand-in-hand. Yet students of the history of public law, especially law professors and political scientists who have largely claimed the field of constitutional history, have resisted such a behavioral approach, preferring the tried (and tired) practice of doctrinal inquiry. Political scientists have rediscovered (remember Corwin, Swisher, and Mason!) "longitudinal" studies, but they remain blissfully ignorant of the difference between analyzing something in the past and making historical sense of change over time. The scholarship of Paul Murphy, Harold Hyman, Harry Scheiber, and Stanley Kutler, all of whom are historians rather than lawyers, is strikingly different in both its method of analysis and its mode of argument from the history practiced by political scientists and law professors. That difference in scholarly style ought, at the very least, to stir self-doubt among those in either group who have too

often confused putting Supreme Court cases in chronological order with doing history.

The sad truth, however, is that much constitutional history, no matter the practitioner, is at something of a dead end. Or, to put the case in a more charitable way, much remains to be done, and it will not get done if we continue to limit ourselves to traditional sources, great Supreme Court cases, original intentions, and highly literate white males. Take, for example, the matter of state constitutions, surely among the most important documents in the American constitutional tradition and the source of many innovations (e.g., female suffrage and prohibition) ultimately added to the federal charter. Even during the Bicentennial year, most scholars (both in writing and in endless displays as pundits) failed to make the simple connection between the first state constitutions and the work of the framers in 1787. We know, moreover, next to nothing historically about the operation of state bills of rights, and we persist in treating the history of liberty as something that did not begin until the federal Bill of Rights was nationalized through the fourteenth amendment. The history of state constitutions remains one of the most surprisingly barren fields of inquiry in American history, and one that the next generation of constitutional historians ought to pursue. These documents were crucial to the allocation of the costs, risks, and rewards of economic development, to the establishment of the nation's political culture, and to the organization of civil society. Nor do we know much, even with the pioneering efforts of Robert Kagan and his collaborators, about the history of the highest courts of appeal in the states that interpreted these documents. We have only begun to plumb the process by which state regulatory bureaucracies were created, yet we all recognize today that the establishment of the administrative state, and with it a fourth branch of government, was one of the turning points in American history—not just constitutional history.

Even when we move to the much more intensively studied federal constitutional system, the scene is too often one of scholars endlessly trolling the same familiar waters. The substantive research agenda remains largely unfulfilled. Recall, for instance, that we have no broad interpretive history of federalism, although Harry Scheiber has given promise of writing one. There are no satisfactory histories of many of the provisions of the Bill of Rights, including such controversial issues as trial by jury, the right to bear arms, and the provisions of the tenth amendment. We still lack a constitutional history of women and of Native Americans. Even many of the Supreme Court's most significant cases, such as *McCulloch v.*

Maryland, and Justices, especially the conservative ones, lack the kind of detailed, yet methodologically innovative, monographic studies that are essential to a synthesis of our constitutional history.

The case study, even with all of its defects of narrowness, remains one of the most important ways of capturing the historical contingency of constitutional law. Yet too often a case study in constitutional history is just that—the study of a case. We have let ourselves be lulled into the idea that Court and Constitution are synonymous terms, but in the day-to-day operation of the constitutional system that is simply not so, and it is the regular functioning of the constitutional processes outside the courts that deserves our attention in years to come. Students of the Constitution generally have distorted our understanding of the larger constitutional system by lavishing attention on only one part of it—the judicial process—as if it were *the* constitutional process. The history of the presidential appointing power and its relationship to the Senate's duty to advise and consent, for example, is a muddle and the practice of senatorial courtesy begs for historical consideration. Far too many constitutional historians settle on one part of the constitutional process (judicial review, congressional lawmaking, the executive's war-making power) rather than attempting to view the process as a whole. What we need is an approach far more comprehensive in scope and much more attentive to non-judicial constitutional functions. This means, as well, that constitutional historians are going to have to puzzle through more forcefully the relationship between public and private law and the institutions that support each of them.

A final observation. The Critical Legal Studies movement has often been, like Gary McDowell and his right-wing counterparts, more ideological bluster than scholarship. Yet, just as conservatives correctly insist that intentions and precedents matter, CLS proponents have been right to point us toward a constitutional history sensitive to the relationship between the legal/constitutional order and ecological modes of production. In short, constitutional historians need to relearn the old lesson of the Progressive Era that economic interests often drive rather than are driven by ideological concerns.

What we ought to be after is an understanding of the culture of constitutionalism in action. This Bicentennial season too often gave us ideological posturing overlaid with a pretentious veneer of historical certitude. If we continue along this course, constitutional history will remain right where it is—the butt of political opportunism

and an intellectual orphan to the behavioral revolution in historical methodology.

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The next task for constitutional scholarship, it seems to me, remains the grand old task kept alive by a few scholars: taking the Constitution seriously. Preserving the general government in its constitutional vigor and limits, and individual rights in their Constitutional extent, was long understood to be the constitutional duty of officials. It should also be the lodestar of American students of law and politics. So to speak in 1987, however, subjects one to bitter attacks, not to mention ridicule. An orientation by the original Constitution is repudiated in effect by a majority of the Supreme Court—and openly by most judges and scholars. It has become a party matter, and Attorney General Meese's exhortation to abide by original intent has evoked a torrent of indignant repudiation. Another sign: the Bicentennial seems unenthusiastically backed, awkwardly excused, and just plain embarrassing to most judges and legal scholars. It is something like the exhumation of a distinguished elder whom a zealous village establishment would like thought dead of natural causes.

There continue to appear, of course, first-rate studies considering the prudent application of constitutional provisions. I think of Robert Scigliano's examination of "The War Powers Resolution and the War Powers" (in *The Presidency in the Constitutional Order* (J. Bessette & J. Tulis ed. 1981)), Robert Steamer's assessment of the Chief Justices (*Chief Justice* (1986), James W. Ceaser's *Presidential Selection* (1979), and James Q. Wilson's "Does the separation of powers still work?" (*The Public Interest*, Winter 1987). If other scholars take such works as models, we should rejoice.

There are grave obstacles to such a happy future, however. First and foremost is the dominant progressive scholarship of more than a half-century, which has declared obsolete the old constitutionalism of limited government and equality of opportunity. It is now joined to a bastard relative disillusioned with progress and yet determined to progress beyond. Radical or rad-lib scholars are at once politically complacent, since they are assured that history has disposed of the merits of the old, and politically zealous or peculiarly principled, since they suppose that equal dignity and liberation are alone right and historically fitting. We face a scholarly mix of historical assurance and moral zealotry that inclines to corrode

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