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Book Review: Are We to Be a Nation? the Making of the Constitution. by Richard B. Bernstein, with Kym S. Rice; the Illustrated History of the Supreme Court of the United States. by Robert Shnayerson.

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problems, and more generally whether one condemns or praises the fostering of minority officeholding under the Voting Rights Act.

Getting beyond racism, as Justice Blackmun recognized in his concurrence in *Bakke*, may require consideration of race in the context of group as well as individual rights. Does the Voting Rights Act, by balkanizing the races in electoral politics, frustrate progress toward the elimination of racism? Or does the Act, by helping empower minorities, promise to contribute to the eventual eradication of racism? In part, at least, these questions turn on short-term versus long-term perspectives. Thernstrom and those who dissent from her views may agree on ultimate ends, but disagree on the means and the time frame involved. Her book is a major contribution that should foster clearer thinking and more careful analysis of these important issues.

ARE WE TO BE A NATION? THE MAKING OF THE CONSTITUTION. By Richard B. Bernstein,¹ with Kym S. Rice.² Cambridge Ma.: Harvard University Press. 1987. Pp. xii, 342. Cloth, \$35.00; paper, \$14.95.

THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES. By Robert Shnayer-son.³ New York, N.Y.: Harry N. Abrams, Inc., Publishers, in Association with The Supreme Court Historical Society. 1987. Pp. 303. \$60.00.

*Kermit L. Hall*⁴

In the clutter of patriotic and commemorative events that have dominated (and will likely continue to dominate) this Bicentennial, we might well pause to reflect on the sage advice that the mayor of Salina, Kansas gave when asked some years ago how best to celebrate the Declaration of Independence. “[C]ome up with [something],” he pleaded, “that somebody will give a damn about in 50 years.”⁵ Much of what has transpired so far will probably fail the

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mayor's test. The sheer overdone-ness of the celebration is distracting. As Michael Kammen has argued, however, that should hardly surprise. Centennial and bicentennial celebrations in this country tend to be grandiosely patriotic and comprehensively commercial. As a people we accept the luxury of self-congratulation because we assume that the Constitution is self-perpetuating—it is, in Kammen's words, "a machine that would go of itself."⁶

Amid the patriotic gore we have had a good deal more scholarly attention directed toward American constitutionalism than was lavished in 1976 on the more tangible events of the American Revolution. Scholars have usefully gnashed their teeth over a variety of rarefied subjects, but the full implications of these efforts either are lost on the public or pulverized into nonsense (witness the recent nomination battle over Judge Robert H. Bork) by the media. One might argue, moreover, that the challenge of the Bicentennial is not, by itself, solving the long-division problems of originalism and intentionalism, but providing a simpler arithmetic lesson about the Constitution and the institutions that have given it life. That is no easy task, of course; the document is something of an abstraction.

Yet these two fine (and expensive, thus relatively inaccessible) books certainly show what can be done. They are handsomely produced, amply illustrated, clearly written, factually accurate, and generally sensitive to current scholarly debate. They will lend baronial splendor to any coffee table. But they are also successful exercises in how, through visual materials and crisp narration, to bring the educated reader into the world of those persons who created the Constitution and the Justices that have interpreted it. Scholars willing to put aside the theoretical for the pictorial will discover in the numerous illustrations that suffuse both books a wealth of information, all of which tends to humanize the document and the Court.

Are We to Be a Nation? was published as part of the New York Public Library's Bicentennial exhibit drawn from the library's collection. The result is an attractive book that combines reproductions of valuable historic documents with invariably insightful commentary. The task confronting Richard Bernstein, the curator of the exhibit, was how visually to represent a document (the Constitution) and an event (its framing and ratification) for which there are relatively few materials. American cartoons of the 1780s and

Hearings before the House Committee on Post Office and Civil Service, H.R. 4981, 96th Cong., 2d Sess. 74 (1980).

6. M. KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

90s are rather meager and they certainly are wooden by today's standards. Engraved portraits, title pages of tracts, and manuscript excerpts are not in themselves particularly eye-catching. Moreover, the delegates to the Philadelphia Convention met behind closed doors; they were not out hustling for photo opportunities for the next morning's front page. Bernstein has navigated these pitfalls through an ingenious selection of black and white and color illustrations. He stretches from time-to-time to do so, as with the choice of a map from Charles Rollin's *Ancient History* of the siege of Syracuse by the Athenians. The point seems to be that Americans read the admired authors of their day and that such habits reveal the larger republican spirit that lay behind the nation's founding. But in almost every other instance the materials for this copiously illustrated volume ring true, from the Homeric visage of Robert Johnson, a highly respected delegate from Connecticut and later one of the architects of the Judiciary Act of 1789, to a woodcut done in 1788 that shows two cherubic angels hailing the ratification of the Constitution.

The text is of equally high quality. It is lucid, perceptive, and up-to-date. Not many general surveys, for example, incorporate the finding that New York's Governor George Clinton was not the fiercely Anti-Federalist Cato. Bernstein also explains that events at the Philadelphia Convention and during the subsequent debate over ratification entailed an elucidation of the framers' underlying political vision. He provides an especially good analysis of the ratification struggle and the ensuing adoption of the Bill of Rights.

From time to time Bernstein's liberal sentiments intrude. He has a decided propensity to invoke Gordon Wood, Richard B. Morris, and Bernard Bailyn, while paying less attention to Forrest McDonald and other conservative historians. He also blithely asserts that the adoption of the fourteenth amendment guaranteed to all Americans the protections of the first ten amendments. But Bernstein is evenhanded and professional, and he reveals in graphic detail the rich story of the document's creation. As he correctly argues, it is a tale of sufficient complexity that today's generation ought prudently to question assertions that we can rely exclusively on the vaporous notion that certainty can be gleaned from the founders' *specific* intentions.

The Illustrated History of the Supreme Court picks up the nation's constitutional history where Bernstein ends. Today the Court is uniformly acknowledged as the most powerful judicial body in the world. While Alexander Hamilton was correct in asserting in *The Federalist* No. 78 that the federal judiciary was the weakest

department, there is also no doubt, as this fine book by Robert Shnayerson makes clear, that it has also matured, in its role as the final arbiter of the world's oldest written constitution, into a sort of political gyroscope.

Shnayerson blends lavish illustrations with energetic prose to teach a brilliant civics lesson. Doing so, of course, is no easy job. There are no ballads or poems, few dramas, novels or other art of or about the Supreme Court. It is a quiet, scholarly place. But Shnayerson exploits magnificently the photogenic qualities of the marble edifice, its mahogany interior, and the mug shots and portraits of Justices and litigants. He begins with fine colored photographs of the Court which include all floors of the building. Other visual jewels are scattered throughout the volume: a wonderful cartoon from an 1885 issue of *Puck* showing overworked Justices; the *in forma pauperis* petition of Clarence Earl Gideon; a 1936 map (entitled "Compulsory Patriotism in the schools") prepared by the American Civil Liberties Union that shows state requirements for the flag salute; a card used by the San Francisco police to alert arrested persons to their *Miranda* rights; the corrected version of Justice Felix Frankfurter's "all deliberate speed" memorandum in *Brown II*; and a marvelous photograph of a beaming William M. Butler after his victory in *United States v. Butler* (1936). Many of the photographs, such as that of Butler, remind us that personal triumph before the Justices has often prompted government to reassess basic policies.

Shnayerson, a former law editor for *Time* magazine, repeatedly stresses an underlying message as he walks readers through the annals of judicial history. The Supreme Court's mandate, he reminds us, has been to reaffirm the principle that government ultimately belongs to the people, and not the other way around. He concludes with a lively epilogue entitled "Imagine America Without the Supreme Court," that teaches (preaches?) the simple but telling lesson that freedom should never be taken for granted. In the Court's history, Shnayerson quite rightly shows, far too many Americans (and sometimes the Justices themselves) have either forgotten or chosen to ignore this truth. The book has an arresting tone, because it recognizes that ultimately the Court's institutional strength is directly proportional to its perceived legitimacy in the eyes of the public.

Will anyone give a damn about these books fifty years from now? Probably not. In the long run, good "visuals" do not compensate for lack of original ideas, and, while the authors receive high marks for synthesis and clarity, few (if any) fresh insights fill

their pages. Yet the books are skillful and sprightly. The photographs and illustrations have the ingratiating effect of making the document and the institution that has interpreted it seem at once majestic and ordinary. John Marshall, Dred Scott, and William and Lillian Gobitis, in their own ways and in their own times, affirmed the rich brew of ideals and ambitions that form the essence of American constitutionalism. To that extent, both books prove the old saw that a picture is worth a thousand words.

SAVING THE REVOLUTION: THE FEDERALIST PAPERS AND THE AMERICAN FOUNDING. Edited by Charles R. Kesler.¹ New York, N.Y.: The Free Press. 1987. Pp. ix, 334. \$29.95.

*Harvey Flaumenhaft*²

We should make an effort to inquire into the principles of the American political tradition before we abandon it as inarticulate or indefensible—that is the message of this collection of essays, originally presented at a conference on *The Federalist* at the Henry Salvatori Center at Claremont McKenna College in 1985. The editor, Professor Charles Kesler, believes that *The Federalist* was a great achievement in political science, and that Publius remains the educator of a free people and the shaper of their future statesmen.

Professor Kesler claims that while *The Federalist* is more widely read and perhaps more effusively praised than ever before, it is nonetheless much misunderstood. The book which Kesler has produced is a polemic, as was the book which it is meant to elucidate. It is, however, a polemic of a special kind. It praises *The Federalist* for teaching by example a lesson in civility, and what it praises, it practices. It is a very civil polemic, very helpful for thinking about the informing spirit of the American republic.

In our day, says Kesler, the founders' defense of their work is itself in need of defense against two sorts of critiques. On the one hand, some prominent conservatives, who believe that there has been a deterioration in the American citizenry and in its government, find a cause of that decline in the deliberate failure of the

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