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Book Reviews

THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH CENTURY EXPERIENCE. Edited by Donald C. Nieman.[1] Athens, Georgia: The University of Georgia Press. 1992. Pp. xvii, 197. $35.00.

Michael Kent Curtis[2]

The Constitution, Law, and American Life is a collection of essays that discusses selected aspects of law in nineteenth century America. The essays include one on Lincoln, slavery, and the intentions of the Framers; one on a South Bend fugitive slave case; one on *Minor v. Happersett*[3], the 1875 case where Mrs. Minor claimed (unsuccessfully) that the federal Constitution guaranteed women the right to vote; one on African Americans and equalitarian constitutionalism; one on the relation of Victorian moralism and civil liberty; one on nineteenth century drug laws; one on commitment law in Alabama; and finally one on municipal reform in Chicago. The essays are in honor of Harold Hyman, the distinguished legal historian, and the authors of the essays are themselves distinguished historians.

In his introduction, Donald Nieman, the editor of the volume, suggests common themes: the authors, he says, look at law in practice, understand the law in its broader social context, and understand the past on its own terms. If readers look beyond these claims about method, however, they will find the subjects covered in the book quite diverse. The result is a challenge for a reviewer. Each of the essays could merit its own review, by a person familiar with its particular subject. Or a particularly ingenious reviewer might find connections between municipal reform in Chicago and Lincoln, slavery, and the intent of the Framers. Since I lack the knowledge necessary for the first course and the

1. Professor of History, Clemson University.
2. Associate Professor of Law, Wake Forest University.
3. 88 U.S. (21 Wall.) 162 (1875).

ingenuity necessary for the second, I will discuss a couple of the essays and leave exploration of the rest entirely to the reader.

Phillip Paludan looks at Lincoln, slavery, and the intentions of the Framers. Paludan, like Lincoln, thinks most of the Framers looked forward to a day when slavery would wither away and disappear from the constitutional system. While protecting slavery, he believes the Framers sought to quarantine it, to keep it from "overthrowing the larger system." According to Paludan, the Framers created a system of republican government inherently hostile to slavery—for republican government by its very nature pre-supposes freedom of speech and of the press, freedoms that endangered slavery. The Northwest Ordinance certainly supports the idea of a plan to quarantine slavery. But the failure to extend its prohibition to the old Southwest raises a question of the depth of that commitment.

While important elements of the constitutional order threatened slavery, the Framers designed other constitutional provisions to protect slavery. Those threatened liberty. Faced with demands from the deep South, the Framers protected slavery—for example, first in the clause counting slaves as three-fifths of a person for purposes of representation in the House and in the electoral college and, second, in the fugitive slave clause.

So one reasonable historical reading is that the Framers, like most of us, had inconsistent purposes—liberty and recognition of slavery—and sought to achieve them both. This double bind created a republic with multiple personalities—the land of liberty that held people as slaves and periodically sought (in the North as well as the South) to shut up those who complained about it. This explanation (though it might be mistaken) does not seem to me to pose an inherent problem for the historian committed to taking the past on its own messy terms. But it hardly works for the politician seeking to find the best meaning of our past or for the lawyer (or historian) seeking (as Paludan suggests we should) the best interpretation of the Constitution. Neither can simply argue for an unresolved tension, for a past that had enfolded within it radically different implications.

To understand slavery and the intent of the Framers, Paludan looks to legal analysis. He cites Ronald Dworkin[4] for the proposition that "legal reasoning is an exercise in constructive interpretation," seeking the best justification of legal prac-

4. Ronald Dworkin, *Law's Empire* (Belknap Press, 1986).

tices possible in light of constraints posed by precedent, the past, and the necessity of consent. And he seconds Charles Black's[5] call for a structural analysis of the Constitution—for interpreting the Constitution based on how it should function as a whole. So, Paludan suggests, free speech on *national* questions and the right to petition the *national* government can be inferred from how a republican government must function, as well as (though Paludan says instead of) from specific texts protecting them.

In fact, in the years before and immediately after the Civil War, Republicans also thought free speech on *state* issues was protected, sometimes on textual grounds and sometimes because that was what the republican government the Framers envisioned for the states entailed.[6] Paludan shows, as indeed Charles Black has, that lawyers have been using structural reasoning for a very long time.

Paludan suggests that these legal modes of analysis help us to understand the problems Lincoln confronted and the method of interpretation he used. Lincoln read the Constitution in light of its commitment to liberty, and he read that commitment in light of the Declaration of Independence. Paludan quotes Lincoln's numinous reconciliation of the promise of the Declaration with the fact of slavery. I include somewhat more of the passage than Paludan does:

> I think the authors of [the Declaration of Independence] intended to include *all* men. . . .They did not mean to assert the obvious untruth, that all were then actually enjoying that equality, nor yet, that they were about to confer it immediately upon them. . . . They meant simply to declare the *right*, so that *enforcement* of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.[7]

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5. Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (LSU Press, 1969).

6. Michael Kent Curtis, *The 1859 Crisis over Hinton Helper's Book,* The Impending Crisis*: Free Speech, Slavery, and Some Light on the Meaning of the First Section of the Fourteenth Amendment*, 68 Chi. Kent L. Rev. 1113, 1174-77 (1993).

7. Abraham Lincoln, *Speeches and Writings 1832-1858* 398 (Library of America, 1989)

The passage is about ideals and what to make of them when the reality of our practice falls short, as it always does. Lincoln and the Republicans[8] did not argue that the ideal could cancel the reality of slavery or the parts of the Constitutional text that protected it. Rather they argued that the Constitution should be interpreted whenever possible (given the constraints of the text and history) to further the ideal. So when Paludan seeks to use ideas of Dworkin or Charles Black to help us understand the Constitutional thought of Lincoln, he is on to something (though Lincoln was so convinced that history showed that the Framers intended to limit slavery that he felt no need, on that issue, to go beyond their historic intent).[9] To take the exercise one step further, as Paludan does, and use it to understand the thought of the Framers of the Constitution and the purposes of the Constitution seems to be also a legitimate, but not simply historical, undertaking.

Paludan has elected to look at the Constitution and slavery as a lawyer would and to look for the predominant or "better" meaning. This he does by modes of analysis long used by lawyers, though brilliantly illuminated by, for example, the explication of Black. So it is curious, to say the least, to find this intriguing and provocative essay peppered with snide remarks about lawyers. "Lawyers are interested in winning their cases, and historians in telling the truth." Alas. Lawyers, of course, function as one part of a truth seeking mechanism, so Paludan's analysis is incomplete. Lawyers, Paludan insists, seek to narrow rather than broaden the context. " 'If you can think about something that is related to something, without thinking about what it is related to, you can be a lawyer.' " There is no doubt that this is so for legal analysis at its worst, but by that standard similar announcements could be made about any profession.

Paludan sees Lincoln as Hercules unbound, the paragon of wise constitutional analysis. Lincoln was a very good lawyer, and a reading of his speeches on slavery shows how legal methods shaped his thinking and ordered his analysis.[10] Perhaps Professor Paludan's cracks about lawyers simply reveal a deep seated discomfort by a historian long schooled in the shortcomings of lawyers, who finds himself using some of the lawyer's tools of analysis. "What," a still small voice may be asking, "will my

8. Abraham Lincoln, *Speeches and Writings 1859-1865* 111-30 (Library of America, 1989).

9. Id.

10. Id. at 31-58, 111-30, 132-50.

mentors and colleagues say about this?" Perhaps unconsciously Paludan seeks to deflect criticism for using an analysis at least as legal as it is historical and to do so by trotting out the cliches about legal thinking. I am unsure how professional historians will respond, but I guess most are tolerant of methodological diversity and could have taken the medicine without the sugar coating of lawyer bashing. Paludan has used legal methods in a fruitful way—but one that is somewhat different from simply taking the past on its own terms.

Indeed, legal analysis has some purely historical justification: it provides insight as to how at least some lawyers saw the problem of slavery and the Constitution. So, in another way, perhaps, Professor Paludan's emphasis on legal analysis is historically appropriate, too—appropriate because Lincoln and many other leaders at the time were lawyers and tended to see the world, at least partly, through the lens of legal analysis. The historian who sees the world through the eyes of his subject has taken a step toward a deeper understanding of the past.

If Paludan's essay goes beyond taking the past simply on its own terms, Paul Finkelman's essay on the South Bend fugitive slave case seems to highlight the importance of legal doctrine—in this case nineteenth century pleading rules. If Paludan looks at global issues of slavery, legal method, and the Constitution, Professor Finkelman looks at one fugitive slave case that exemplifies some of the tensions inherent in a document that sought to protect both slavery and liberty.

Professor Finkelman tells the complex story of the Powell family. The family had been held in slavery in Kentucky, escaped to Michigan after being taken by their master to a free state, and was forcibly recaptured by their "owner." The family was in turn freed by a state court writ of habeas corpus, enforced at one point by armed local citizens. In his return to the writ, the "owner" alleged that the Powells were his slaves, a fact unhappily not denied by the attorney for the slaves.

Unable to hold his captives in the face of an organized group that helped enforce the state court's order, the "owner" filed suit in federal court under the 1793 Fugitive Slave Law against those who had interfered with his recapture of the Powell family. Supreme Court Justice John McLean, on circuit, followed the Supreme Court's decision in *Prigg v. Pennsylvania*,[11] including its rule allowing the "owner" to seize "his slaves" and return them

11. 41 U.S. (16 Pet.) 539 (1842)

to slavery without the intervention of legal process. McLean instructed the jury that the Powells' counsel's failure to deny the allegation that they were slaves, contained in the return to the petition of habeas corpus, was an admission that they were slaves. As a result the state judge lacked jurisdiction and local citizens enforcing his order were violating supreme federal law.

The story is a remarkable picture of the Fugitive Slave Law in operation, and of the competing forces (not the least of which is legal doctrine) that shape legal decisions. Finkelman suggests that the decision sacrificed substantial justice, even acknowledging the institution of slavery. This was so because the Powells, voluntarily taken by their master to free territory, might have been legally free as a result. Even today, with substantially more liberal rules of procedure, a lawyer's failure to follow procedural requirements can sacrifice substantial rights.

In *Reconstructing Female Citizenship:* Minor v. Happersett, by Norma Basch, and *The Language of Liberation*, by Donald Nieman, the authors examine two groups excluded from many civic promises of American life—women and African Americans. Generally, both followed similar political strategies: they insisted that the nation's broadly phrased promises of equality, republican government, and rights must include them also.

Because of the disability of married women to sue, Virginia Minor's suit seeking the right to vote had to be brought through her husband. He also served as her counsel. Advocates of women's suffrage confronted a Fourteenth Amendment that penalized states that did not enfranchise any part of their 21-year old male (but not female) inhabitants and a Fifteenth Amendment that prohibited denial of the right to vote based on race, but not based on sex. Virginia Minor's arguments ranged from finding women's suffrage in the guarantee of republican government in Article IV to finding it re-confirmed in section one of the Fourteenth Amendment. They were claims that Basch sees as doomed to legal failure.

Women were generally denied the right to vote and, for married women, even the right to control their property. Free speech, press, petition, and test cases were means by which women's rights activists brought their claims to the attention of the political system. Virginia Minor's brief openly acknowledged the aspirational and inspirational nature of the suit. Just as slavery had once been considered a matter for exclusive state control, the brief announced, so many accepted unlimited state control over the elective franchise. But as in the case of slavery, this

view "must and will give way to a truer and better understanding of the subject. The plaintiff's case is simply one of the means by which this end will ultimately be reached." So from the ashes of defeat rose the Phoenix of an invigorated national campaign for women's suffrage. As Basch puts it, "[t]he demands for woman suffrage did not die when the decision was rendered; they acquired a contentious national life."

As Basch sees it, women could only challenge their exclusion from suffrage by using the "rights-oriented, 'masculine' " rhetoric of the constitutional order. By some contemporary understandings the rhetoric of rights is deeply suspect.[12] But it was the rhetoric of the early movement for women's rights. At least in the case of the English and American Revolutions, those who launched the revolutions based their case on broad ideals. The ideals, like ideas of popular sovereignty and fundamental rights, served to rally popular support. They also provided a basis by which previously excluded groups could appeal for inclusion and enfranchisement. The Levellers of the English Revolution, the American campaign for universal suffrage for men unlimited by property qualifications, the crusade against slavery, and the battle for women's rights are cases of the pattern repeating itself.

In a similar vein, Donald Nieman tells a neglected story of the role played by African Americans seeking equality and equal rights. Most African American leaders in the North rejected the Garrisionian view of the Constitution as a covenant with death. As one put it in 1851, "I consider the Constitution the foundation of American liberties, and wrapping myself in the flag of the nation, I would plant myself upon that Constitution, and using the weapons they have given me, I would appeal to the American people for the rights thus guaranteed." Nieman tells of state-by-state struggles by African Americans for the vote, for integrated education, and equal access to public accommodations in the years 1830-1950.

The Constitution, Law, and American Life, Critical Aspects of the Nineteenth-Century Experience has the strengths and weaknesses of a collection of essays by different authors with different interests. Although portions of the book share an underlying theme, there is little connection between many of the essays, except that they deal with law and the nineteenth century. The book does not claim to deal with all aspects of nineteenth century law. Although the book focuses on race and gender, it lacks

12. Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 Rev. Const. Stud. 1, 1-26 (1993).

any essay on those who suffered from and challenged the dominant economic arrangements of the nineteenth century. Labor, unions, and populists do not appear in the essays.

As noted above, the introduction attempts to find common ground among the essays. The essays, its tells us, focus on "law in actual practice: the social functions of the law, the cultural values embodied in law, and the meaning of the Constitution and law to the powerless." These are pursued "[i]nstead of examining formal lawmaking bodies and the development of doctrine." The past is understood on its own terms.

But of course, as the essays in the book illustrate, we see the past from the vantage point of the present. It cannot be any other way. Legal history is a great patchwork quilt.[13] Doctrine, formal lawmaking bodies, and the present meaning of the past are inevitably part of the picture, a picture enriched by fine essays in this book.

APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND IN THE UNITED STATES.

By Gary Jeffrey Jacobsohn.[1] Princeton, New Jersey: Princeton University Press. 1993. Pp. 284. Cloth $39.50.

Michel Rosenfeld[2]

What is the difference between constitutionalism and constitution? Does constitutionalism embody universal norms that transcend differences in historical experiences and in political culture? Is adherence to constitutionalism possible without a written constitution? Can constitutions be transplanted from one political culture to another? These are important and topical questions in the wake of the dramatic contemporary turn towards constitutionalism and recent proliferation of constitutions.[3] Indeed, as more and more countries rush to embrace constitution-

13. The metaphor is not mine, but I cannot recall where I got it.

1. Woodrow Wilson Professor of Government, Williams College.

2. Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University; Co-Director Cardozo-New School Project on Constitutionalism. I wish to thank my colleague David Gray Carlson for his helpful comments.

3. Since the end of World War II, and especially since the collapse of socialist regimes in Eastern Europe and the former Soviet Union, constitutionalism increasingly appears poised to achieve a worldwide sweep. See Michel Rosenfeld, *Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction*, 14 Cardozo L. Rev. 497 (1993).