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Constitutional Scholarship: What Next?

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all political authority, including constitutional institutions. Skeptical about governmental and economic hierarchies, permissive about traditional morality, the mixture caters to the hollow idealist and the crowd. It promotes an idealistic universalism that barely covers a weak political nihilism ("peace," "respect for all lifestyles," "nonjudgmental"), and that encourages the perennial democratic aversions to authority, foresight, civic virtue, and self-restraint. Governing becomes harder and guilt-ridden; indulgence and vice, easier and loud. Big subsidies, big deficits, a weakened presidency, bluff and weakness abroad, the power of public opinion and the media, democratization of elections and of the Congress, vulgar public taste, the erosion of families and real community—follow or are aided. This is the crisis of American constitutionalism.

Scholars can help by defense, by attack, and, in both, by wise constitutional exposition. They can defend the old constitutionalism by accounts of particular institutions and of the general working of our constitutional republic. In such a spirit historical studies are indispensable—for we need to recover what is disdained or forgotten. More obviously useful are applications of constitutional principles to practical problems—such as the extent of Congress's rightful controls over executive war making, or over legislative redistricting. Judges and lawyers do it every day; the problem is to encourage them, as Walter Berns has done, to take seriously constitutionalism, rather than an ignoble and impolitic egalitarianism. Last, but not least, one must reveal the foolishness of the enemy. One must show the difference between preoccupation with the status of the so-called disadvantaged, and the real health of individual rights, of equality of opportunity, of school, city, and church, of the economy, and of, in general, a constitutional republic or democracy.

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When considering "What Next?" in constitutional history, a 1987 *New Republic* piece, decrying scholarship-overload and proposing a partial moratorium on publication of "new" works, came to mind. The journal's editors, foregoing Crit-bashing for a moment, singled out sociology as the most egregious example of hyperpublication, but many of us living in the aftermath of the Bicentennial may have briefly thought that constitutional history could provide an appropriate area in which to test the feasibility of a *limited* Anti-Publication Control Treaty or ABCT. (The more descriptive

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term, Scholarly Defense Initiative, had to be rejected because someone has already spoken for its acronym.)

My Modest Proposal:

"Everyone involved in writing, evaluating, editing, and publishing works of history accepts a moratorium, to be overridden only in cases of a clear and present danger to the health and safety of the constitutional-history community, against anything that talks about 'THE CONSTITUTION' of the United States. (Hereinafter to be cited, albeit irregularly, as IT.)"

Policy Arguments:

The proposal seems, at first glance, to raise free-speech issues. But under currently-favored first amendment "balancing" tests, lawyers can surely find policy arguments for this type of pact. At the very least, for example, a limited ABCT in constitutional history might allow those who use words as weapons to reassess the strength of the article- and book-length stockpiles of their adversaries before replenishing their own arsenals. (An ABCT, of course, would be nothing like a test-ban treaty; everyone would retain the right to bombard friends, colleagues, adversaries, and significant others with memos, manuscripts, and floppy disks.) And, as suggested below, an ABCT might be justified as a positive breakthrough in the battle for better constitutional histories.

An ABCT might even draw the support of various scholarly combatants from the law school community. Those attracted to CLS-type critiques might see it as another attack upon what Duncan Kennedy and Peter Gabel called "poddism"; surely, THE CONSTITUTION must rank as just about the biggest pod of them all. Such a proposal also speaks to the concern, expressed in a wide variety of scholarship, about the failure of conventional approaches to acknowledge the historical and cultural contingency of constitutional phenomena. Moreover, an ABCT seems in line with Owen Fiss's recent (Arthur) Schlesingerian call for liberal-"activist" measures that look to the "quality" rather than simply the quantity of the stuff circulating within the marketplace of ideas. Meanwhile, law-and-economics people can objectively wrestle with ABCT's cost-benefit implications.

An ABCT would not merely be a negative step. The idea for such a pact draws inspiration, at least in part, from Steven Shriffrin's suggestion that genuine scholarly progress might be achieved if people talked less about "THE FIRST AMENDMENT" and "FREEDOM OF SPEECH" and more about the actual conditions

of "speech." An ABCT, by analogy, could serve as a constant warning against the temptation to frame non-contextual and/or ahistorical discussions dominated by the brooding omnipresence of IT.

Suggestions For Implementation:

What, then, purged of ITism, might constitutional history cover? Here are three simple interpretive suggestions, impressive models of which are readily at hand in our own libraries and bookshelves.

(1) First, instead of talking about THE CONSTITUTION, writers might more meaningfully discuss the different "Constitutions," including the one drafted in 1787 and ratified in 1789, which have been part of American social and political life over the years.

As Arthur Selwyn Miller and Theodore Lowi have been suggesting for years, the United States has been arguably blessed (or cursed) with several different constitutions. (Any list of "U.S. constitutions" includes the Articles of Confederation—whatever happened to its Bicentennial?—as well as scholarly "documents" such as Miller's "Constitution of Control" and Lowi's "Constitution of the Second American Republic.") A stricture against works on THE CONSTITUTION might also be interpreted to extend to books, articles and (especially) lectures dealing with "The Development of IT" or "The Evolution of IT." (Similarly, this might be interpreted to include anything purporting to explain the "development" or "original understanding" of all words and phrases contained in IT.) In addition, this proposal would create at least a *prima facie* presumption against "generic" products such as "_____ and IT."

At the same time, the clear-and-present danger proviso of ABCT might actually encourage publication of truly innovative constitutional histories, such as ones that might, following Robert Cover's suggestions, treat IT in terms of those symbolic and mythic cultural structures that deserve the fullest and most imaginative interpretations possible.

(2) In this sense, an ABCT might also help to provoke talk not simply about the cultural dimensions surrounding IT but about the more general, highly diverse "myths" of "constitutionalism." Viewed by Sanford Levinson as a civil religion and suggestively (though incompletely) defined by Walton Hamilton as "the name given to the trust which men repose in the power of words engrossed on parchment to keep a government in order," the ideal of constitutionalism almost inevitably demands close attention to his-

torically- and culturally-grounded consciousness. Especially when linked to a broad vision of "constitutional pluralism," which could draw upon such diverse sources as the work of Cover and his disciples, some strands in CLS work, the law and literature scholarship, and feminist legal criticism, a sharp interpretive turn away from IT holds considerable promise. Free from the grasp of IT, writers could delve into all of those very human stories about power and knowledge, about the reach of social institutions and groups, and about the popular needs and aspirations that actually bring into play—as works such as John Noonan's *Faces & Masks of the Law* remind us—the specialized rhetoric of constitutional lawyers and judges.

(3) Discussions about "constitutional rhetoric" can be broadened. Why should constitutional historians leave analysis of writers such as Herman Melville and the works of mass culture to those in the law schools and English departments? There is a wide range of supposedly "non-constitutional" sources that can be cross-examined in light of what can be drawn from historical studies. Here, quite obviously, constitutional historians need to go beyond the obvious turn toward "political" histories, long prominent in works about IT, and connect the innovative work in cultural and social history that has been published in recent years to a broader, more pluralistic vision of constitutionalism.

Of course, the twin moves toward an ABCT and a broader view of constitutional history would likely result in the work of historians becoming more marginal than ever to constitutional law traditionalists, but—given the realities of the current relationship between law and history—do constitutional historians really have all that much influence to lose?

The Obligatory Quote From "History":

"Let us not negotiate from fear; but let us not fear to negotiate."

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I am hesitant to make recommendations about directions for constitutional law scholarship. In the unlikely event that such suggestions were taken seriously, they might constrict the range of approaches attempted in our field. One thing we do not need is more faddishness. Even if not taken seriously, they might convey an erroneous impression that I think my own work is exempt from

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