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Book Review: A History of the American
Constitution. by Daniel A. Farber & Suzanna
Sherry.

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constitutional conventions, like those of 1787-89, are unlikely to be perceived as outlaws. If they prosper, they will be founders.

A HISTORY OF THE AMERICAN CONSTITUTION. By Daniel A. Farber¹ & Suzanna Sherry.² St. Paul, Minn.: West Publishing. 1990. Pp. xxii, 458. \$23.25 paper.

*William M. Wiecek*³

The flourishing condition of legal history in American law schools and history departments has produced a spate of valuable documentary collections for use in the classroom. These are of incalculable benefit to teachers of legal history. Farber and Sherry's *History of the American Constitution* joins this corpus of teaching books, and a welcome addition it is.

The earlier documentary compilations for classroom use in legal history, including those by Max Radin,⁴ Mark DeWolfe Howe,⁵ Joseph H. Smith,⁶ and Spencer L. Kimball,⁷ reflected assumptions about the teaching of legal history courses in law schools that seem outmoded today. They seldom distinguished between public and private law, and they included both English and American materials. They were Langdellian casebooks, doctrinal in emphasis, containing little that was not derived from published appellate opinions. They reached far back into English history to trace the origins of doctrines or precedents but made little effort to provide non-legal historical background or explanatory material that would embed legal documents in the larger social matrix. They were indifferent to modern American legal developments.

The preeminent modern documentary compilation, Smith and

1. Henry J. Fletcher Professor of Law, University of Minnesota.

2. Professor of Law, University of Minnesota.

3. Congdon Professor of Public Law and Professor of History, Syracuse University.

4. M. RADIN, *HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY* (1936) (a student hornbook).

5. M. HOWE, *READINGS IN AMERICAN LEGAL HISTORY* (1949). Howe's collection, like its other pioneering contemporary, *HART AND SACKS' LEGAL PROCESS*, was never conventionally published; it was photocopied from typescript, printed on less-than-print-quality paper stock, and issued as a "temporary edition." Fortunate the law library that possesses a copy today! Howe's collection was distinguished by its sensitivity to historical context and its partial transcendence of the doctrinal.

6. J. SMITH, *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* (1965).

7. S. KIMBALL, *HISTORICAL INTRODUCTION TO THE LEGAL SYSTEM: CASES AND MATERIALS* (1966).

Murphy's *Liberty and Justice* (1965),⁸ displayed a wholly different orientation, ushering in what may be considered the current era of legal history casebooks. Its compilers were historians, not lawyers (though both were authorities in the field of legal history). The publisher, Knopf, then had almost no legal titles on its list and was oriented to college marketing and general publishing. *Liberty and Justice* was devoted exclusively to constitutional law, and contained no private-law materials. The compilers provided an extensive editorial apparatus that assisted the user in locating documentary materials in their historical context and included documents other than appellate opinions. There were no English documents and the twentieth century got its due. Smith & Murphy has been out of print for some time now, but it remains a model of balanced judgment and clarity of presentation for primary sources.

For two decades now, Stanley Kutler's *The Supreme Court and the Constitution*⁹ has provided a convenient collection of decisions of the United States Supreme Court, for use principally in undergraduate courses. Donald O. Dewey's collection, *Union and Liberty*,¹⁰ did not limit its scope to Supreme Court cases, but it has been out of print for some time. Thus, before 1980, someone who taught legal history in a law school was faced with one of three choices, none of them ideal, when it came time to select a casebook: 1) the older Langdellian collections, rapidly obsolescing; 2) college-oriented materials (usable in a law school classroom if the instructor feels confident with historical materials); and 3) one of two constitutional law casebooks that are rich in historical documents: Freund¹¹ or Gunther.¹²

In 1980, Stephen Presser and Jamil Zainaldin pioneered in the publication of a law-school-oriented legal history casebook, *Law and American History*.¹³ In its trailblazing function, Presser &

8. J. SMITH & P. MURPHY, *LIBERTY AND JUSTICE: FORGING THE FEDERAL UNION: AMERICAN CONSTITUTIONAL DEVELOPMENT TO 1869, VOL. I* (1965) and *LIBERTY AND JUSTICE: THE MODERN CONSTITUTION: AMERICAN CONSTITUTIONAL DEVELOPMENT SINCE 1865, VOL. II* (1968) (two-volume paperbound edition).

9. S. KUTLER, *THE SUPREME COURT AND THE CONSTITUTION: READINGS IN AMERICAN CONSTITUTIONAL HISTORY*, (3d ed. 1984).

10. D. DEWEY, *UNION AND LIBERTY: A DOCUMENTARY HISTORY OF AMERICAN CONSTITUTIONALISM* (1969).

11. P. FREUND, A. SUTHERLAND, M.D. HOWE, & E. BROWN, *CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS* (4th ed. 1977).

12. G. GUNTHER, *CONSTITUTIONAL LAW* (11th ed. 1985). Freund and Gunther have recently been joined by two other constitutional law casebooks that also reflect historical sophistication: P. BREST & S. LEVINSON, *PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS* (2d ed. 1983) and G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* (1986).

13. S. PRESSER & J. ZAINALDIN, *LAW AND AMERICAN HISTORY: CASES AND*

Zainaldin was a counterpart to Lawrence M. Friedman's *A History of American Law*, originally published in 1973.¹⁴ Both marked the debut of legal history in its modern avatar, especially in the law schools. Meanwhile, Herman Belz's thoughtful and stimulating 1983 revision of the Kelly & Harbison text, *The American Constitution*,¹⁵ assured the continued dominance of that classic survey of American constitutional history in the undergraduate classroom.

After the Friedman and Presser & Zainaldin books had made legal history accessible to law teachers who had not been trained as historians, legal history courses established a foothold in the curricula of many law schools where that subject had not been systematically taught before. This, in turn, increased the appetite for more teaching materials. All the previously noted materials, excellent in their own ways, had limitations derived from the necessarily-finite size of books published for classroom use. Consequently, other documentary collections have appeared, or will soon do so, to fill the demand for teaching materials in legal history courses. Melvin Urofsky has recently produced *Documents of American Constitutional & Legal History*,¹⁶ to accompany his survey of the field, *A March of Liberty*.¹⁷ Finally, Kermit Hall, Paul Finkelman and I have compiled a collection of documents to be published in late 1990.¹⁸

It is in the context of this recent publication history that Daniel A. Farber's and Suzanna Sherry's *A History of the American Constitution* makes its debut. Its title notwithstanding, this does not purport to be a constitutional history of the United States; it does not trace the evolution of case law.¹⁹ Instead, Farber and Sherry

MATERIALS (1980), recently reissued in a second edition as LAW AND JURISPRUDENCE IN AMERICAN HISTORY: CASES AND MATERIALS (1989).

14. L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (1973) (2d ed. 1985).

15. A. KELLY, W. HARBISON & H. BELZ, *THE AMERICAN CONSTITUTION: ITS ORIGINS AND DEVELOPMENT* (1983).

16. M. UROFSKY, *DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY: VOL. I: FROM SETTLEMENT THROUGH RECONSTRUCTION; and DOCUMENTS OF AMERICAN CONSTITUTIONAL & LEGAL HISTORY: VOL. II: THE AGE OF INDUSTRIALIZATION TO THE PRESENT* (1989) (paperbound).

17. M. UROFSKY, *A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES* (1988), published simultaneously in a two-volume paperbound edition targeted for classroom adoption.

18. K. HALL, W. WIECEK & P. FINKELMAN, *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* (forthcoming by Oxford University Press 1990).

19. By a convention common among constitutional historians, use of the upper-case C in "Constitution" denotes the document of 1787 and its amendments, while the lower-case c ("constitution") refers to something like the British Constitution, namely, the entire body of traditions, practices, documents, and precedents that comprise the constitutional system. By this usage, Smith & Murphy and Hall, Wiecek & Finkelman document the American constitution, while Farber & Sherry document the Constitution. It is regrettable that such a significant distinction is indicated only by this readily overlooked convention.

have compiled a collection of primary sources that is literally a documentary history of the United States Constitution. Almost two-thirds of the book deals with the Philadelphia Convention, the ratification struggle, and adoption of the Bill of Rights. A fifth is devoted to adoption and ratification of the Reconstruction Amendments (XIII through XV), or what the late Mitchell Franklin referred to as the "Third Constitution," the first two being the document of 1787 and the Bill of Rights.²⁰ The remainder includes materials on the Supreme Court's use of history, the problem of originalism, and documentary appendices consisting of drafts of the Constitution and the Bill of Rights.

A more detailed review of contents may help prospective users determine whether Farber and Sherry is for them. The Philadelphia Convention materials begin with an essay by the editors on some principal components of the framers' republican vision in the 1780s: conspiracy, corruption, liberty, virtue, and democracy. The editors then cover the Philadelphia Convention itself, exploring its debates topically, an editorial device that lends itself well to the doctrinal approach familiar to law students and beloved by most of their instructors.

Farber and Sherry provide generous introductions to the primary sources, a feature that will endear their book to instructors and students who have little background in history. The decision of how much secondary introductory material to provide is a difficult one for editors of legal history casebooks. On the one hand, they must assume that the students and instructors are principally interested in the documents themselves, and not in what the editors have to say about them. Yet on the other hand, no compiler can present raw documents without introduction. Thus the editor is faced with a problem that can be resolved only by compromise. In my opinion, the balance struck by Farber and Sherry is exactly right: the introductory notes are ample enough to orient a law student who took no history courses as an undergraduate, yet not so extensive as to elbow the documents themselves off the page.

For the Philadelphia Convention, the topics selected for discrete treatment include: the decision to abandon the Articles of Confederation; the nature and powers of the federal courts (including the so-called Madisonian Compromise under which Congress was empowered to create lower federal courts but was not obliged to do so, and also including consideration of the Council of Revision, the closest the Convention got to confronting explicitly the

20. Franklin, *Relation of the Fifth, Ninth and Fourteenth Amendments to the Third Constitution*, 4 How. L.J. 170 (1958).

problem of judicial review); the powers of the presidency; the composition and powers of Congress; and, finally, the problem of slavery.

The compilers' handling of the last two topics demonstrates that they are conversant with recent scholarship on the Convention. While they do not go so far as to endorse the neo-Garrisonian view of the Constitution propounded by Paul Finkelman and me,²¹ they have restored slavery to the rightful prominence it occupied in our understanding of the Convention until banished by the currently-dominant interpretation ensconced by Max Farrand in 1913.²² Perhaps that accounts for the wise but atypical treatment accorded the supposed large state—small state controversy and its resolution by what Farrand called "the Great Compromise" of July. The compilers subordinate this topic, at least in the order of presentation, to questions of federal judicial and executive power. This is a welcome and refreshing return to James Madison's perspective on the real nature of the sectional controversy that threatened to stymie the Convention.

The chapter dedicated to ratification amply gives the Antifederalists their due, reflecting the great influence that the late Herbert Storing's compilation of their writings has had on current scholarship;²³ yet it also includes extensive excerpts from Federalist classics, including Numbers 10 and 78 of *The Federalist*. The documents in the Bill of Rights chapter consist almost exclusively of debates in the House in the First Congress (the Senate then not being officially reported).

The structure of Part Two, dealing with the Reconstruction Amendments, tracks that of the earlier portion: a thoughtful introductory essay precedes documentary chapters on each of the three amendments. In this introduction, the compilers firmly locate the Reconstruction Amendments in the context of antebellum struggles over slavery. They reconstruct the antislavery critique, on the well-founded assumption that the framers of the amendments labored in an intellectual milieu dominated by the triumph of antislavery thought. Here particularly the potential user should be aware that

21. Finkelman, *Slavery and the Constitutional Convention: Making a Covenant with Death*, in *BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY* 188-225 (R. Beeman, 1987); Wiecek, *The Blessings of Liberty: Slavery in the American Constitutional Order* in *SLAVERY AND ITS CONSEQUENCES: THE CONSTITUTION, EQUALITY, AND RACE* 23-44 (R. Goldwin & A. Kaufman eds. 1988); Wiecek, *The Witch at the Christening: Slavery and the Constitution's Origins*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 167-84 (L. Levy & D. Mahoney eds. 1987).

22. M. FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 105-110 (1913).

23. H. STORING, *THE COMPLETE ANTI-FEDERALIST* (1981).

this is not a conventional casebook. Rather than relying on cases expounding the meaning of the amendments, the compilers have provided excerpts of the debates on their adoption in Congress. Those who have taught courses in Legislation will find these materials familiar, but others who have worked exclusively with cases, interspersed only occasionally with snippets of legislative debate, may take a while to orient to a different approach.

Many users may find Part Three of the book the most provocative for their students, for it is here that Farber and Sherry explicitly confront two controversial issues of our own day, the use of history by the Justices, and the binding force of the framers' intent. In the chapter dealing with the Court's use of history, the compilers provide brief excerpts from mostly-recent opinions illustrating the ways that the Justices have made and used historical arguments. By themselves, these excerpts would be of little value, because they appear divorced from the context of the cases in which they were embedded. But the compilers obviate this difficulty by preceding them with introductory notes and following them with thought-provoking questions for discussion. These questions ought to spark heated discussions among students and may force them to confront their own jurisprudential premises.

The content and approach of the final chapter, which takes up the originalist debate, are altogether different. Here Farber and Sherry eschew primary sources, instead providing a brief yet dense review of the current debate about the role of the framers' intent. Among the participants in this debate who speak in brief excerpt are John Hart Ely, Robert Bork, Jefferson Powell, Michael Perry, Mark Tushnet, Paul Brest, Earl Maltz, James H. Hutson, Thomas C. Grey, Edwin Meese, and Charles Fried, as well as Justices Oliver Wendell Holmes, Jr., William J. Brennan, Jr., and William H. Rehnquist. As you can imagine, the debate is lively. Regrettably, though, the excerpts are all too brief, providing the merest snatches of thought. We are permitted to listen to the grand debate, but only in sound-bites, not ample passages. When this documentary collection goes into a second edition, Farber and Sherry would perform a service for their readers by greatly expanding this final chapter, providing more than just teasing hints of the participants' thought.

Writing as one who has used documentary collections of one sort or another in constitutional history for over a quarter of a century in teaching undergraduates, graduates, and law students, I salute Farber and Sherry's *History of the American Constitution* as the latest, and one of the best, in the line of compilations that have presented the sources of the American Constitution to generations

of students. Unique in its conceptualization, stimulating in its editorial apparatus, this book provides teachers with a new approach to the endlessly-fascinating history of our public order.

WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION. By Jeanne Holm.¹ Novato, Calif.: Presidio Press. 1982. Pp. xvii, 435. Paper, \$12.95.

WOMEN AND WAR. By Jean Bethke Elshtain.² New York: Basic Books. 1987. Pp. xvi, 288. Cloth, \$19.95.

WEAK LINK: THE FEMINIZATION OF THE AMERICAN MILITARY. By Brian Mitchell.³ Washington: Regnery Gateway. 1989. Pp. viii, 232. Cloth, \$17.95.

ARMS AND THE ENLISTED WOMAN. By Judith Hicks Stiehm.⁴ Philadelphia: Temple University Press. Pp. viii, 331. Cloth, \$29.95; paper, \$16.95.

*John M. Rogers*⁵

To what extent should women be soldiers? The question could not be more timely, as we see cutbacks in military personnel strength, and as we read about American women soldiers having engaged in firefights in Panama and being deployed in Saudi Arabia. Is the issue how to obtain fair treatment and equal access to power for women, or how to have the most effective military force? I was not surprised to find in these four books a correspondence between each author's characterization of the nature of the problem and her or his opinion on the ultimate issue. Indeed, these authors tend to exemplify stereotypes of military women as compromising, academics as effete, military men as male chauvinistic, and feminists as radical. In other words, they take predictable positions.⁶ Holm's and Elshtain's books prepare the reader for the differing views of an

1. Major General, United States Air Force Retired.

2. Professor of Political Science, University of Massachusetts, Amherst.

3. Reporter, *Navy Times*.

4. Provost, Florida International University.

5. Professor of Law, University of Kentucky.

6. For the record, your reviewer is a Field Artillery major in the U.S. Army Reserve, whose sister is a pilot in the U.S. Air Force. My views of course do not necessarily represent those of any service or person other than myself.