

LIBERTY IN AMERICA: 1600 TO THE PRESENT (LIBERTY AND POWER, 1600-1760, VOL. 1). By Oscar & Lilian Handlin.¹ New York, N.Y.: Harper & Row Publishers. 1986. Pp. xix, 280. \$16.95.

CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS. By John Phillip Reid.² Madison, Wi.: University of Wisconsin Press. Pp. ix, 374. 1986. \$25.00.

BEYOND CONFEDERATION: ORIGINS OF THE CONSTITUTION AND AMERICAN NATIONAL IDENTITY. Edited by Richard Beeman,³ Stephen Botein,⁴ and Edward C. Carter, II.⁵ Chapel Hill, N.C.: University of North Carolina Press for the Institute of Early American Culture, Williamsburg, Va. Pp. x, 366. Cloth, \$25.00; paper, \$8.95.

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Perhaps it was fitting that as we moved away from the Bicentennial of the American Revolution and into the celebration of the framing and ratification of the Constitution constitutional matters reemerged as a primary focus of scholars seeking to understand the seminal period from 1763 to 1791. In this sense, two of the three books reviewed here are closely related. The third, the volume by the Handlins, is a useful adjunct, as it illustrates the history of a diverse people increasingly sensitized to the task of securing their liberty.

In this first volume of a study that will take them to the present, the Handlins state that by 1760 Americans, despite their "pluralistic communities," had a recognizable character, which the authors describe as "rude, assertive, prone to risky innovation, trusting calculation above habit, and detached from the drain of traditional ties." As a people who exercised their rights and ac-

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cepted their obligations in return, "they became independent well before 1776."

Although the Handlins do not define the word "liberty" precisely, they are obviously distinguishing it from license and seeing in the term both freedom from something and freedom to do something. In the negative sense, liberty is the freedom from arbitrary authority, no matter what the source, and in the positive sense, it is the freedom to act on the basis of individual will and to establish order by consenting to the exercise of authority. The liberty that the Handlins describe has universal implications, and they contend that it was not deliberately sought but rather discovered in the necessary process of discarding the cultural baggage of the Old World. Focusing upon liberty not as an idea but as a condition of life, the authors stride across the years in their selection of illustrative and generally interesting examples that focus most consistently on the breakdown of the political, economic, and religious patterns of the integrated community. In the sense that the migrants did not, in most instances, deliberately seek to break down old patterns but instead were forced to recognize their unworkability, the Handlins conclude that liberty was not sought but found.

As a selective survey of incidents of social and political history that show how old forms and patterns of organization were challenged and modified in the New World, the book is useful. But no new scholarly vistas are opened, and claimed accretions to individual liberty and personal confidence are often assumed rather than proved. Even the conclusions that Americans were independent well before 1776 or that a distinctive American character had evolved by 1760 stand more as assertions than as judgments drawn from the evidence presented.

Professor John Philip Reid's *The Authority of Rights* is part of his constitutional history of the American Revolution.⁷ In this episode, Professor Reid examines the constitutional rights that American colonials claimed on their way to Revolution.

Before getting to the volume's contents, a word should be said about its often implied target—the influential work of Bernard Bailyn and Gordon Wood. Bailyn dismissed colonial arguments anchored in the British constitution as "abstruse,"⁸ and Wood saw them as a "superficial gloss" on a revolutionary political ideology.⁹

7. The second of three projected volumes, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY TO TAX*, was published in 1987.

8. Bailyn, *The Central Themes of the American Revolution: An Interpretation*, in *ESSAYS ON THE AMERICAN REVOLUTION* 5, 7 (S. Kurtz & J. Hutson eds. 1973).

9. G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 13 (1969).

The work of Bailyn and Wood has clearly expanded the horizon of historians and focused attention on new constitutional ideas. But in the process some continuity with the past has been lost, a continuity that Reid, Stanley N. Katz in an essay in *Beyond Confederation*, and Forrest McDonald¹⁰ seek to reclaim. Furthermore, this new work differs from Charles H. McIlwain's famous 1923 volume, *The American Revolution: A Constitutional Interpretation*, in that it is securely anchored in the eighteenth-century context and not primarily directed to the imperial question.

Reid challenges Bailyn's and Wood's contention that constitutional issues do not explain the coming of the Revolution. Repeatedly, he documents the conclusions that the American colonials thought and said that their conflict with England was over the subject of rights and that those on the other side of Atlantic responded in similar terms. To consider the constitutional issues as no more than superficial rhetoric cloaking the real nature of the dispute strikes Reid as a rather perverse interpretation.

Reid poses the question not of "how rights were altered by events but, rather, how events were altered by rights." He defines the rights under five headings: property, security, constitutional government, equality, and trial by jury. In his treatment of the property right, Reid makes some headway in explaining why this right was at the core of liberty as understood in the eighteenth century.

As Reid himself grants, it is not hard to determine what rights the American colonials claimed. But Reid also undertakes the more difficult task of establishing the sources of these constitutional rights. Here, as with his discussion of rights themselves, Reid is not content to rely upon American claims; he buttresses those claims with evidence drawn from a wide range of British sources, many of which are not directly related to the American controversy. Reid sets out to prove that American colonials had developed arguments to give their rights definition and purpose within the English constitutional tradition. He contends, moreover, that their claims were to English rights, not ones found in the state of nature or anywhere else. In fact, Reid argues, in the eighteenth century "the constitution and rights were one."

Professor Reid draws out the sources cited by American colonials to establish their constitutional rights, including both the fact of migration and the concept of a migration purchase of rights. Correctly stating that these sources have not been tapped by prior

10. F. McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* (1985).

constitutional historians, Reid demonstrates how such claims are clearly supported by reference to British and Irish political history. He distinguishes the social contract that creates a society from the so-called original contract or governmental contract, citing Blackstone as authority for the importance of the latter contract in the British constitutional system. He follows this discussion with a treatment of the original colonial contract, and then demonstrates how Americans employed the contract theories.

Reid is skeptical of the idea, advanced by some historians, that colonial charters provided some security for rights. He argues that American colonials were well aware of the insecure base these charters afforded. Since the charters could be and were modified, they are at best only evidence of the constitutional case and not the case itself.

Having analyzed the sources of rights claimed by the colonials, Reid turns to the effect of rights on the coming of the Revolution. Both sides treated rights as central to the conflict and framed proposals for solution of the controversy accordingly. In the end, Reid concludes, a solution was impossible because the security Americans found in the ancient British constitution, in which rights limited the exercise of sovereign authority, was no longer to be found in its emerging modern counterpart. That modern constitution subjected all to the sovereign command of Parliament. In this new order, there could be no conclusive assurance that rights would be preserved.

This is not to say that the British constitutional picture was altogether clear at the time. Reid does an excellent job of highlighting the British constitutional confusion in the eighteenth century, when the old and new were being mixed together on both sides of the Atlantic. Absolute parliamentary sovereignty clearly characterized the British constitution in the nineteenth century, but to read this clarity into the previous century is to distort a complex period of germination and to disparage unjustly the constitutional argument of the American colonials.

With two volumes still to come, it may be too early to pass judgment on Reid's project. Suffice it to say that in this book he makes an impressive case for resuscitating the issue of constitutional rights and placing it at the center of the revolutionary controversy. Although this is constitutional history in its narrowest sense, the focus is sharp and the argument is well-developed.

Professor Richard Beeman communicates a similar perception of the historian's task in his introduction to *Beyond Confederation*. Professor Beeman may be too sweeping in his conclusion that the

search for original intent in constitutional matters is no longer setting the agenda for scholars. But he is right in pointing to the growing volume of work, including the twelve essays that follow in the book, that evaluates "the eighteenth-century *context* of American constitutional thought in a manner remarkably free from the encumbrances of the nineteenth and twentieth-century *consequences* of that thought."

Divided into three parts, headed "Ideologies," "Issues," and "Aftermath," with an epilogue essay on American nationality, *Beyond Confederation* is a useful compilation primarily consisting of papers presented in Philadelphia in 1984. In the first section, the essay by Stanley Katz, mentioned above, is followed by a piece by Ralph Lerner in which he directly attacks Bailyn, Wood, and other "new historians" for reducing the founders' thought to matters of political ideology and for relegating the leading American actors in the revolutionary-constitutional drama to bit parts. Lerner makes a plea for rescuing "The Thinking Revolutionary," the title of the essay, from historians enamored of contemporary social science methodology. To illustrate his point, he discovers more substance and consistency in the thought of John Adams than Gordon Wood had found. Lerner argues persuasively that something is lost when individuals are swept into a common ideological pool.

This first section concludes with an essay by Gordon Wood suggesting that the Anti-Federalists, not the Federalists, "may have been the real harbingers of the moral and political world we know—the liberal, democratic, commercially advanced world of individual pursuits of happiness." While the Federalists sought to enshrine civic humanism with its postulate of disinterested public service, the Anti-Federalists focused on interests and anticipated the "pluralistic, interest-ridden future of American politics."

In the long run, Wood's conclusion makes sense. In the short run, however, the Federalists may well have been even more perceptive: they understood the immediate need for effective union and led the fight to establish the arena within which interest-group politics could flourish, generally without substantial damage to the social order.

Further evidence of a new scholarly interest in the long-neglected Anti-Federalists comes in two other articles in the collection. Richard E. Ellis, who earlier traced the connection between the Old Republicans and the Jacksonians,¹¹ now discovers the root of much of this thought in the Anti-Federalists. (Jackson T. Main

11. R. ELLIS, THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC 267-84 (1971).

in *Political Parties Before the Constitution* [1973] had found Anti-Federalist thought anticipated in the politics of the 1770s.) Working from this new base, Ellis maintains that such thought remained influential in American politics at least through the administration of James Polk. In fact, he concludes, the fear of an excessively powerful central government, which he sees as a guiding concern of the opponents of the Constitution, is still with us today. In the second essay, entitled "Money, Credit, and Federalist Political Economy," Janet A. Reisman recognizes important Anti-Federalist contributions. Anti-Federalists had less trouble than Federalists in discarding the confining assumption that specie and money were the same thing. Eventually Federalists began to accept the idea that specie could support a more flexible paper currency tied to the economic productivity of the country. The Anti-Federalists, she contends, embraced this notion and grasped its democratic implications—that "true wealth was grounded upon the contribution of the energies and labor of all citizens to the prosperity of the Republic." Crediting Federalists and Anti-Federalists alike, Reisman says that without the momentous shift of views on the matter of public credit the "democratic, freewheeling, bustling society [of the nineteenth century] would not have been possible." Although Reisman's essay is much more than a contribution to giving the Anti-Federalists their rightful due, all three essays put the opponents of the Constitution back in the mainstream of the nation's history.

James Madison figures prominently in *Beyond Confederation*. Reisman finds significance in his essay on money, and two other articles are substantially concerned with his thought. Lance Banning analyzes Madison's work at the Philadelphia Convention and his defense of the constitution that emerged. The finished product differed substantially from what Madison had championed, but Banning argues both that Madison was educated during the course of debate and that the final result was, in fact, that blend of governmental energy and freedom that the Virginian had sought. Banning's most controversial conclusions are that Madison never desired a consolidated national government and that he had always assumed that the unspecified grant of power to the new government under the Virginia Plan was only an outline to be fleshed out during the debates. Another essay, by Drew McCoy, uses Madison's ideas about the demographic future of the United States to demonstrate how and why Southerners miscalculated that future. Southerners believed, says McCoy, that the South and Southwest would soon become the nation's most populous areas. This, he contends, is why Madison insisted in the Convention that representation in the new government be determined solely by population. He concludes that

it "proved fortunate indeed for the new antebellum southern states that Madison did not get his way." The southern demographic error was based on false assumptions about the continued dominance of agriculture; Madison and others underestimated the power of trade and manufacture to attract population.

Two further essays conclude the "Issues" section of the volume. Richard D. Brown contributes a piece that challenges the oft-repeated conclusion that Shays's Rebellion aided both the making and the ratification of the Constitution. He finds that the harsh repression of the rebellion in Massachusetts created a backlash against the Constitution in the state convention, which, he claims, seriously threatened the entire process of ratification. Paul Finkelman studies the issue of slavery during the Convention and concludes that the southern states, without substantial concessions, obtained most of the protection they sought for the institution. He seems to imply that a better deal could have been struck, but the fact remains that any real attempt to rid the fledgling nation of slavery would have doomed the Constitution.

In the "Aftermath" section there are two essays, in addition to the one by Ellis. Jack N. Rakove, who focuses his attention on both the politics and the personnel of the new government under the Constitution, concludes that concepts of public virtue and the filtration of talent were casualties of the ratification fight. It was this controversy that initiated national politics, with its new political expression and action directed toward the shaping of mass opinion. Congressmen and senators were hardly isolated from the pressure of their constituents, and the hope for an elite body of public servants was quickly dashed. Public service had limited appeal, and often private pursuits predominated over a sense of public responsibility. In one sense, Rakove is describing the obvious, but he has performed a service in illuminating the structural change in politics that the ratification process introduced.

The final "Issues" essay probes the Constitution's relationship to the religious temper of the American people. Stephen Botein finds it strange that there was so little protest against a document that—compared to state constitutions of the time—had hardly any religious references. (There was more protest than Botein acknowledges.) Seeking to explain this phenomenon, Botein intriguingly suggests that the Constitution was not perceived as establishing a nation-state but rather a government of specified powers. "It was not so much that church and state had to be separated at the federal level, then, as that there was no federal state to be kept separate." Botein condemns later attempts to read the Constitution in a man-

ner that would accommodate religion as both unhistorical and fraught with danger.

The collection concludes with an essay by John M. Murrin titled "A Roof Without Walls: The Dilemma of American National Identity." Contrary to the Handlins' work, with which this review began, Murrin emphasizes the differences that existed among the people who inhabited the colonies and argues that independence left a diverse people without the normal attributes of national identity. In the Constitution, he argues, Americans found both a symbol and a set of standards, "a substitute for any deeper kind of national identity characterized by an "acceptance of pluralism, frank pursuit of self-interest, and the legitimization of competing factions."

Murrin's imagery is colorful, and his placing of the Constitution at the center of any meaningful conception of national identity is sound. Despite Michael Kammen's recent book on the Constitution in American culture,¹² much work remains to be done in drawing out the cultural importance of that document and tracing its relationship to both the idea and the characteristics of our national identity.

**THE PAPERS OF JOHN MARSHALL, VOLUME V:
SELECTED LAW CASES, 1784-1800.** Edited by Charles F. Hobson,¹ Fredrika J. Teute,² George H. Hoemann,³ and Ingrid M. Hillinger.⁴ Chapel Hill, N.C.: University of North Carolina Press. 1987. Pp. lxix, 583. \$37.50.

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The history of the United States judiciary in the first third of the nineteenth century is epitomized to a large extent by the judicial career of John Marshall, because of the political talents and powers of persuasion that he brought to the bench. In a similar vein, the

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

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