

## BOOK REVIEWS

**“GOVERNMENT FROM REFLECTION AND CHOICE”: CONSTITUTIONAL ESSAYS ON WAR, FOREIGN RELATIONS, AND FEDERALISM.** By Charles A. Lofgren.<sup>1</sup> New York, N.Y. and Oxford: Oxford University Press. 1986. Pp. xviii, 235. \$24.95.

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Professor Charles Lofgren is one of the best contemporary students of American constitutional history, and especially of the respective powers of the president and Congress in the field of foreign affairs. His new book, which draws its title from Hamilton in the first Federalist paper, includes six of his major articles on these themes published during the last twenty years. It is important to have the articles conveniently available. They belong on the short shelf of thoughtful and disciplined scholarly work in a field notable for passion, polemics, and extravagant disregard of the evidence.

Lofgren's craftsmanship is meticulous, but his outlook has two blind spots. The first is jurisprudential: he exaggerates the role of "original intent" in the growth of law, the subject of at least four of his chapters. The second is a defect of formation: he seems to have little familiarity with international law, a weakness which particularly affects Chapter 5, his well-known essay on *United States v. Curtiss-Wright Export Corporation*.<sup>3</sup>

This review will focus mainly on these two aspects of Lofgren's work.

### I

As an expositor of "original intent," Lofgren is not an unsophisticated Luddite, professing the kind of fundamentalism so characteristic of Justice Black in his moments of transcendent con-

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3. 299 U.S. 304 (1936).

stitutional piety. On the contrary, his credo, stated in Chapter 3, is in itself unexceptionable:

As Justice Holmes reminded us, "when we are dealing with words that are also a constituent act . . . we must realize that they have called into life a being the development of which could not have been foreseen by the most gifted of its begetters." "Our whole experience," he cautioned, needs consideration and "not merely" what was said during the founding period. Still, Holmes's choice of the phrase "not merely" is worth pondering. It suggests that one should at least take account of accurate history in fashioning constitutional arguments, even if that history is not fully dispositive of the issues in question.

Thus Lofgren's formal conception of his task as historian is a limited one: to provide the lawyer and legal scholar with an "accurate" version of the lawmakers' "original understanding" of what they were doing. But "the original understanding" of the lawmaker in Lofgren's sense of the term can never be revealed only or even mainly by a review of "what was said during the founding period." What was done or taken for granted as super-obvious, then or immediately thereafter, is often quite as significant as the words one or another of the diarists may have written. Nor can "the original understanding" conjured up by Lofgren's method ever be "fully dispositive" of an issue in controversy, to emphasize his revealing phrase. It is at most one strand and not necessarily the most important strand in the endless process through which a society's ideal of justice responds to its customs and mores to produce its living law. Lofgren's conception of law is far too static. How, for example, would it apply to the electoral college? The "original understanding" of the Founding Fathers is reasonably clear. Have we been electing presidents unconstitutionally since 1788?

Even if one should concede, as I cannot, that the historian's task is in some sense different from that of the lawyer and legal scholar, Lofgren casts too narrow a net. His attention is directed almost exclusively to the records of the Constitutional Convention, *The Federalist Papers* and other documents of the controversy over the ratification of the Constitution, and some other early commentaries. But reading the Constitution, like reading any other law, or indeed like any other reading, requires a wider view. Words come to us with the baggage of life.

The Founding Fathers thought their Constitution should speak for itself. They did not publish their austere official journal and frowned on the publication of private records. The official journal was not published until 1819, and Madison's *Notes* were issued in 1840. Madison's *Notes* and the other direct and indirect evidence of what was said during the debates are fragmentary at best, and often misleading. The documentation of the debates in the state ratifying

conventions is even less satisfactory.<sup>4</sup>

In general, there is the perennial and insoluble problem of how the "intentions" of the thirty-eight men who signed the Constitution and the several hundred who voted for ratification in the state conventions could be inferred from the reported language of the few who spoke or wrote on each issue, even if verbatim transcripts of their words existed. *The Federalist Papers*, magnificent as they are as an exposition of political philosophy, were exercises in advocacy. They were written in large part to allay the fears of those who saw the Constitution as an engine of tyranny, the source of an oppressive national government. It is hardly surprising that *The Federalist Papers* did not fully prepare public opinion for the robust national institutions which developed as the Constitution was tested and applied in the crucible of experience.

These and cognate problems in discerning "the original understanding" of any particular part of the Constitution, or of the Constitution as a whole, are secondary, however. To interpret the Constitution in its full context requires much more than conscientiously poring over the documentary record, such as it is. In itself archival research would be misleading and inadequate even if the records were rich and complete.

First of all, it is intellectually impossible for people of the twentieth century to discover "the original intent" of their eighteenth century forefathers in any detail. American civilization in the late twentieth century is visibly derived from that of the seventeenth and eighteenth centuries, and tightly linked to it. During the last two centuries, however, there have been many changes in the intellectual and moral universe of American life, some of fundamental importance: in attitudes toward religion, for example, race, the treatment of women, poverty, and many other subjects. The role of the United States in world politics has been transformed by its own growth and other changes in the world balance of power. As a result, the problem of American national security is completely different from that which confronted the United States government between 1789 and the years immediately before the First World War, and the inherent friction between the president and Congress has been correspondingly intensified. The landscape of American life is different; the relationship of ideas and problems to each other

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4. See Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1 (1986). Mr. Hutson writes: "The purpose of this Article is to issue a caveat about Convention records, to warn that there are problems with most of them and that some have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans. To recover original intent from these records may be an impossible hermeneutic assignment." *Id.* at 2.

is different. Moreover, the modern scholar inevitably approaches the historical record with the preoccupations of his own period in mind, whereas those of his ancestors usually turn out to have been quite different. No one can successfully put himself in the shoes of Madison or Hamilton, Jefferson or Washington. And even if a scholar of super-human imagination succeeded in doing so, the result might well be disappointing. As Lofgren notes, "Madison and Hamilton, who presumably knew something about the original intent, came to contradictory conclusions" about the respective powers of the president and Congress in the field of war and foreign relations within four years of the ratification. The twentieth century scholar can hardly hope to achieve a better footing.

What survives of the Constitution, and retains its full vitality, is not "the original understanding" of the Founding Fathers about this or that detail, but its constitutional character and its constitutional purpose: its basic structure, on the one hand, and its animating policies, on the other, what Montesquieu called "the spirit of the laws," their shaping aspirations. Marshall's famous sentence—"We must never forget that it is a constitution we are expounding"<sup>5</sup>—is the most important sentence he ever wrote. It sums up a jurisprudence of the utmost subtlety and sophistication which, so far as I know, has never been examined in philosophical terms. Marshall's thesis is that a constitution should not be a "prolix code" but a short, simple, general document which citizens can understand as the guaranty of their rights for ages to come. It is an "outline," Marshall said, and is not intended to anticipate and settle every question but necessarily leaves much to the discretion of future governments. The American Constitution, he made clear, should be construed as a whole, not bit by bit, and construed moreover in its full matrix of cultural history. Its construction should have continuity as well as flexibility. The Constitution should be faithful to its broad principles and purposes yet capable of adaptation to the changing circumstances of the American experience.

Marshall's greatest opinions illustrate the distinction between purposes and values, on the one hand, and detail on the other. He almost never starts with the language of a particular clause of the Constitution. His major premise is drawn from something Marshall calls "the Grand Design" or "the fundamental principles" of "the American polity." After he has formulated and discussed those principles, and applied them to the case before him, he drily comments that no language in the Constitution precludes the Court's

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5. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819).

conclusion or its reasoning.<sup>6</sup>

What were the broad purposes on which the Marshallian Constitution rests? Among those he emphasized in particular cases were establishing a government of laws and not of men; balancing the authority of the one and the many, the nation and the states; and giving the new national institutions ample elbow room to carry out their essential functions, while holding them to high standards of democratic responsibility. We can be confident, for example, that the Founding Fathers thought that the absence of an executive was one of the great weaknesses of the American government under the Articles of Confederation, and that they sought to establish a strong, energetic president as an independent branch of government, a president who was definitely not a prime minister, but would be democratically accountable in appropriate cases to the people, to Congress, or to the courts. Even this highly generalized sentence probes the limits of "the original understanding." Madison, one of the most active and important participants in the Constitutional Convention, resisted the idea that the secretary of state could be summoned before a court.<sup>7</sup> And as Lofgren concedes, we cannot be sure that the signers of the Constitution thought they were requiring a congressional vote before the president could order the armed forces to do anything more than repel a sudden attack on the United States itself.<sup>8</sup>

## II

Lofgren's weakness in international law appears most conspicuously in Chapter 5. In attempting to evaluate Justice Sutherland's opinion in *Curtiss-Wright*, he assembles twenty pages of material drawn from Farrand, the reports of the state ratifying conventions, the controversy over Jay's Treaty of 1794, and other contemporary sources in order to clarify what kind of sovereignty the Founding Fathers thought the government of the United States possessed before and after 1776, and whether that sovereignty was derived from the British Crown, the people of the United States, or the Con-

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6. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 17 (1824); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803).

7. *Marbury*, 5 U.S. (1 Cranch) at 166.

8. Lofgren writes: "Evidence from the years immediately following ratification of the Constitution thus corroborates the conclusion that Americans originally understood Congress to have at least a coordinate, and probably the dominant role in initiating all but the most obviously defensive wars, whether declared or not." Later, however, he declares: "Both sides in the Korean debate conceded that the President could act, without Congress, to counter an immediate, dangerous threat to American interests and security." Professor Lofgren comments on these two passages in his introduction. See generally Rostow, *Once More Unto the Breach*, 21 VAL. U.L. REV. 1 (1986).

stitution. The international law view is the one element of the problem not mentioned in Lofgren's painstaking array of what a number of people said on the subject at the time. But the international law dimension of the problem is decisive.

States are born and come into being by international agreement or by war. Statehood is a question of "fact," the international lawyers say. States have territories, governments, armies, police forces, postal services, and the other accoutrements of statehood. Diplomatic recognition is the political and legal mechanism through which the international community or a considerable number of its leading members acknowledges that a state exists and is endowed with "sovereignty" for purposes of international law.

The Constitution does not purport to confer sovereignty on the United States. On the contrary, from the first words of the preamble to the end, it treats the United States as an ongoing (and sovereign) political entity, whose government was being replaced by the new successor government provided for in the Constitution of 1787, a government created by the sovereign people of the United States, not by the states, and one which acknowledged the debts of the two previous American governments and the treaties they had made. The United States of America became a sovereign state when it was generally recognized as such during and after the Revolutionary War, first by France and then by other European states. Because we (and France) won the Revolutionary War, sovereignty is deemed to have vested at least by the time the Continental Congress, which was already conducting a war, declared the independence of the United States in 1776. The Confederacy, by contrast, is considered never to have existed, at least in American constitutional law.

The Americans were intimately familiar with the significance of recognition in international law. One has only to glance at the instructions of our diplomatic missions during the Revolution to realize that obtaining diplomatic recognition in Europe was a central and urgent goal of United States foreign policy at the time.

The Constitution thus recognizes that by reason of its establishment and recognition, the United States possesses all the powers other states possess under international law. It divides those powers between the president and Congress, Congress being granted the legislative authority and the president, the executive. All that *Curtiss-Wright* says and decides is that Congress may "delegate" some of its discretion in "the broad external realm" to the president, and that the constitutional standards governing congressional delegations of power to the president in the area of foreign affairs may be different from those thought to prevail in other areas, in view of the

president's independent power as the nation's representative abroad.

Lofgren claims to have demolished the legitimacy of *Curtiss-Wright*. He did not succeed.

In Chapter 1, Lofgren's influential paper, *War-Making Under the Constitution: The Original Understanding*, he briefly reviews the international law treatises and practice of the times, and recognizes that "declared" or "unlimited" and "undeclared," "limited," or "imperfect" wars were familiar categories of international law, as common in the usage and doctrine of the period as they are now. He then confronts the question of what article I, section 8 of the Constitution meant when it conferred on Congress only the power to "declare" war.

Hamilton's *Pacificus* papers, to which Lofgren briefly refers, would treat Congress's power to declare war as an exception to the general power of the nation under international law to undertake hostilities in times of peace or of war. Hamilton characterizes this national power as executive in character, and contends that the power to declare war, as an exception to a more general power, should be confined to its express terms—i.e., that the president was given the constitutional power to initiate all forms of war known to international law except fully declared, notorious, and unlimited war. Congress has the last word on the subject, but the president can act first, as many presidents have acted since Washington's first term.

Lofgren dismisses Hamilton's view in uncharacteristically summary terms. It seems "improbable," he says, that a contemporary would have accepted the view that the power to initiate undeclared war was "lodged with the executive." Since Hamilton was a knowledgeable contemporary, and wrote the *Pacificus* papers, it is hard to see the basis for Lofgren's conclusion. At the time and since, Hamilton's *Pacificus* papers have been considered far more persuasive than Madison's half-hearted attempt to answer them. Corwin, the outstanding modern scholar on the subject, accepted Hamilton's opinion, not Madison's. Corwin's treatment of the issues is not discussed or even cited by Lofgren.<sup>9</sup> Moreover, Washington followed Hamilton's advice, and so did every president thereafter, with Congress's support or acquiescence.

Lofgren attempts to reinforce his conclusion by a strained interpretation of international law usage with regard to letters of marque and reprisal. He suggests that Congress's authority to issue

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9. E. CORWIN, *THE PRESIDENT: OFFICE AND POWERS, 1787-1957* (4th ed. 1957); E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* (1917).

letters of marque and reprisal under article I, section 8 is in all probability a grant of exclusive authority to authorize all forms of warfare not conducted pursuant to a declaration of war. This is a far-fetched argument, as Lofgren tacitly acknowledges by calling for "a more detailed consideration" of the subject. The practice of issuing letters of marque and reprisal was ended by treaty in the middle of the nineteenth century.

### III

Professor Lofgren's studies are and will remain useful resources for lawyers and legal scholars, but their utility is limited by the narrowness of their historiographical and jurisprudential foundation, and by the fact that even Lofgren is occasionally tempted to go beyond the evidence. In the heat of battle on the significance of the fact that the Constitution grants Congress the power to "declare" war, for example, his reasoning approaches the level of wishful thinking.

But the basic trouble with Lofgren's method is its preoccupation with what was said, and especially with what was said during the early years under the Constitution, rather than with what was done. The living constitution, the constitution with a small "c," is (like all law) the pattern of behavior the society deems right, in this case the pattern of governmental behavior viewed through the prism of our constitutional values and our constitutional history. The interaction of custom, necessity, and the prescribed law sometimes produces interesting results. Thus Jefferson, confronted with the Louisiana Purchase, concluded that the United States, like every other state, could acquire territory by treaty, and would not have to pass a constitutional amendment, as he had previously thought would be required. And the most important and constructive achievement of Nixon's presidency was his secret warning to the Soviet Union not to bomb the Chinese nuclear plants, a warning which in the nature of things would have been ineffective if it had been made public at the time, authorized by statute, or even revealed to congressional leaders through the mysterious process called "consultation." The "original understanding" was that the president should be capable of "energy, secrecy, and dispatch," as Hamilton put it. That constitutional goal necessarily prevails over the language that the Founding Fathers may have used at the time.