SCHOLARS AND THE CONSTITUTION: BIBLIOGRAPHIC NOTES ON TWO CENTURIES OF SCHOLARSHIP ON THE CONSTITUTION OF THE UNITED STATES*

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If judges can make law, so can commentators.—Edward S. Corwin

1. The debates of the Constitutional Convention on the nature of federalism continued after the adoption of the Constitution. Nathaniel Chipman's *Sketches of the Principles of Government* (1793), presents the "national will" theory, basing the Constitution on the will of the people, rather than the states, rendering the federal union unalterable by states except by the amendment process provided in the Constitution itself. Chipman was Chief Justice of Vermont, a U.S. Senator and a professor of law at Middlebury College.

2. St. George Tucker, a professor at the College of William and Mary and progenitor of three generations of constitutional law scholars, established the southern position on federalism in "A View of the Constitution of the United States" appended to his 1803 edition of *Blackstone's Commentaries*. According to Tucker, the Union was created by the states and remained subordinate to its creators; thus, state legislatures or state courts could limit the powers of the federal government. Tucker's thesis, however, was moderated by a commitment to continuing the federal experiment. He even called for the gradual abolition of slavery to remove the main issue dividing the Union.

3. A more radical southern position was propounded by John Taylor of Caroline in *New Views on the Constitution of the United States* (1823). Taylor claimed complete sovereignty for states with total power in each state to interpret the Constitution. Taylor is

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viewed as the intellectual forebear of the "nullification" doctrine later adopted by the southern states.

4. As the powers of the national government were solidified by the Supreme Court of Chief Justice John Marshall, two northern scholars "codified" the emerging nationalist jurisprudence in works which became definitive statements of the law of the United States. James Kent, in his *Commentaries on American Law* (1826-30), digested the opinions of John Marshall and viewed the Supreme Court as the final arbiter of constitutional questions, including questions of state powers.

5. The jurisprudence of the Marshall Court was also digested by Nathan Dane in a *General Abridgment and Digest of American Law* (1823-29). Dane maintained that individual states never possessed sovereignty, since they gained their freedom not individually, but through the Continental Congress. Dane's *Abridgment* was a financial success and enabled its author to endow the Dane Chair in Law at Harvard University.

6. The first holder of the Dane Chair at Harvard was Joseph Story, whose *Commentaries on the Constitution* (1833), has been called "the most influential and authoritative statement of the nationalist position." Story analyzed the text of the Constitution, emphasizing the "non-contractual" language of the preamble and the supremacy clause. He argued for the authority of the Supreme Court to strike down unconstitutional state laws, but, reciprocating the moderation of St. George Tucker, he also gave weight to the rights of the states to exercise police powers in internal matters.

7. Henry St. George Tucker, son of St. George Tucker and a professor at the University of Virginia, published *Lectures on Constitutional Law* (1843), to refute Joseph Story and restate the southern position. The *Lectures* refer to the possibility of state secession, but, in an echo of his father's moderation, Henry St. George Tucker viewed secession as a last resort tantamount to revolution.

8. The cause of secession came to the fore by 1850 through the "nullification" doctrine espoused most prominently by Vice President John C. Calhoun. In *A Disquisition on Government, and A Discourse on the Constitution and Government of the United States*, published posthumously in 1851, Calhoun advocated sweeping amendment of the Constitution to protect southern interests—including the establishment of a dual executive and a veto power for factions in Congress.

9. Calhoun's counterpart in the northern camp, Daniel Webster, inspired Boston attorney George Ticknor Curtis to publish the first history devoted to the adoption of the Constitution. Curtis's

History of the Origin, Formation and Adoption of the Constitution of the United States (1854-58), restates the nationalist position and lionizes the Founders.

10. With the outbreak of the Civil War, constitutional debate turned to the powers of the government in war. Benjamin R. Curtis, who served on the Supreme Court in the 1850s and wrote a strong dissent in the *Dred Scott* case, authored *Executive Power* (1862), to rebuke President Lincoln for authorizing the military arrest of civilians suspected of disloyalty and suspending *habeas corpus*.

11. In Lincoln's defense, Francis Lieber, in *What is Our Constitution—League, Pact or Government?* (1861), argued that the secession of the southern states, an act unanticipated by the Constitution, justified turning to "natural law" to devise necessary government powers. Lieber was a professor at Columbia College.

12. One commentator has written "it might be said that it was Story who triumphed in the Civil War . . . ." The Union was restored but states' rights were not eliminated, and the debate on their scope continued. Despite the enactment of the fourteenth amendment, John Norton Pomeroy, in *An Introduction to the Constitutional Law of the United States* (1868), maintained that the federal government did not gain the power to protect the civil rights of individuals from state action. Pomeroy was a law professor at the precursor of New York University.

13. Federal deference to states' rights allowed the establishment of Jim Crow laws throughout the South. A number of scholars defended the practice both on the basis of constitutional law and on the basis of racist theories derived from Darwinism. An example is John Randolph Tucker's *The Constitution of the United States* (1899), which warns of a threat of "centralism" in all areas of government if the federal government was to interfere with "customary racial policies" in the South. John Randolph Tucker was Dean of the Law School at Washington and Lee University, and son of Henry St. George Tucker.

14. John W. Burgess took Darwinism one step further. A prominent professor of political science at Columbia University, Burgess adopted German academic concepts of Teutonic/Aryan superiority. His *Reconstruction and the Constitution, 1866-1876* (1902), is directed against immigrants as well as blacks and against socialist concepts which Burgess attributed to immigrants.

15. The post-Civil War constitutional debate was not only about race; perhaps even more significantly, it was about economics. Thomas McIntyre Cooley's *Constitutional Limitations* . . .

(1868), was the most influential law book of the second half of the nineteenth century. Cooley, a Michigan judge and professor of law at the University of Michigan, was the leading advocate of Darwinism in economics and of *laissez-faire* libertarianism in constitutional law—doctrines which thwarted attempts at trade union organization and social welfare legislation and favored corporate interests. With each new edition of his treatise, Cooley could cite more and more decisions of the Supreme Court (many of which cited his book) firmly establishing libertarian economics as constitutional law.

16. Followers of Cooley extended libertarian economics to many areas of law. John Forrest Dillon, professor of law at Columbia University, used libertarian concepts to limit the taxing power to areas serving a "public purpose" in *The Law of Municipal Corporations* (1872).

17. Christopher G. Tiedeman, law professor at the University of Missouri, in *A Treatise on the Limitations of Police Power in the United States* (1866), condemned usury laws and wage and price controls for interfering with the "freedom of contract."

18. In reaction to the predominant libertarian trend in constitutional law, a group of Progressive scholars formulated ideas for reform. Ernst Freund of the University of Chicago, in *Police Power: Public Policy and Constitutional Rights* (1904), directly answered Tiedeman by finding the Constitution's police power flexible enough to promote the public welfare and restrain private property.

19. One of the most remarkable successes of the Progressives was the "Brandeis Brief" first used in *Muller v. Oregon* (1908), in which the young Louis D. Brandeis amassed data detailing working conditions, health, economics and other factors to persuade courts to uphold protective labor legislation. (A rare copy of the brief, signed by Brandeis, is in the collection of the Northwestern University Law Library.)

20. Woodrow Wilson, as a professor at Princeton, wrote *Constitutional Government in the United States* (1908), to advocate a broad construction of government powers, especially of presidential powers.

21. Westel W. Willoughby of Johns Hopkins University, in *The Constitutional Law of the United States* (1910), criticized judges for obstructing Progressive reforms.

22. Frank J. Goodnow, of Columbia University, with his *Social Reform and the Constitution* (1911), advocated an administrative approach to reform based on empiricism.

23. Perhaps the most widely-read book of the Progressive Era

was Charles A. Beard's *An Economic Interpretation of the Constitution of the United States* (1913). Beard, a professor of political science at Columbia University, blamed the resistance to Progressive reform not merely on conservative judges, but on the Constitution itself, seeing the Constitution as a product of the economic interests of the Founders.

24. Charles A. Beard's thesis contradicted the prevailing respect for the Constitution even among Progressive scholars and certainly among constitutional historians, such as the popular George Bancroft, whose *History of the Formation of the Constitution of the United States* (1882), idealizes the Founders as disinterested statesmen.

25. Charles Warren, in *The Making of the Constitution* (1928), which came to replace Bancroft's *History* as the accepted history of the formation era, rejected Beard's thesis.

26. However, Beard also had his followers. In *The Growth and Decadence of Constitutional Government* (1930), J. Allen Smith attacked the "myths" of the Constitution as inventions designed to protect ruling elites.

27. Faced with the judicial rejection of social reforms, most Progressive scholars attacked the "activism" of judges and advocated "judicial self-restraint." The most articulate voice for judicial self-restraint was that of Harvard law professor James Bradley Thayer, author of *The Origin and Scope of the American Doctrine of Constitutional Law* (1893), whose views influenced such Progressive-minded judges as Oliver Wendell Holmes, Jr., Felix Frankfurter, and Learned Hand.

28. Entrenched libertarian judges continued to thwart social reforms even after the wave of reform sentiment following the stock market crash of 1929 and the election of Franklin D. Roosevelt in 1932. Louis B. Boudin's polemical work, *Government by Judiciary* (1932), not only attacks the libertarian judiciary, but also the concept of judicial review.

29. In the 1914 edition of his work, *The American Doctrine of Judicial Supremacy*, Charles G. Haines also criticized the concept of judicial review and called for judicial self-restraint. In the 1932 edition, Haines became an advocate of judicial activism in favor of reform.

30. Irving Brant, in *Storm Over the Constitution* (1936), defended the constitutionality of the New Deal reforms. The book is said to have influenced President Roosevelt in his effort to "pack" the Supreme Court.

31. "Court-packing" failed, but the Supreme Court began to

uphold New Deal measures, which brought in their wake a variety of administrative agencies. Harvard law professor James M. Landis explored the implications of these relatively new governing units in *The Administrative Process* (1938).

32. Professor Edward S. Corwin of Princeton has been called "the most influential constitutional commentator of his time." In his early work, he argued for the constitutionality of New Deal reforms, but supported the concept of judicial review. In his *Constitutional Revolution, Ltd.* (1941), Corwin foresaw a shift in the focus of constitutional debates to issues of civil liberties and civil rights.

33. The Second World War raised constitutional problems of government powers reminiscent of the Civil War era. Political scientist Clinton Rossiter was critical of the growth of executive power engendered by the war. In *The Supreme Court and the Commander in Chief* (1951), and later work, he warned of what came to be called the "imperial presidency."

34. The First World War had also raised issues of governmental powers and gave rise to efforts to protect civil liberties. Harvard law professor Zechariah Chafee, Jr., criticized World War I measures restricting civil liberties in *Freedom of Speech* (1920). His advocacy of civil liberties and labor rights led to unsuccessful moves for his ouster from Harvard. Chafee's free-speech ideas have been credited with changing the law through their influence on Justice Oliver Wendell Holmes, Jr.

35. At the conclusion of the Second World War, University of Wisconsin philosophy professor Alexander Meiklejohn found protections for free speech inadequate. In *Free Speech and its Relations to Self-Government* (1948), Meiklejohn criticized Chafee and Holmes for accepting a "balancing" approach to free speech rights, although Meiklejohn's book also accepts some limits: for example, laws against perjury, defamation, and obscenity.

36. Following the Second World War, attention was also focused on the nation's racial policies. Political science professor Robert K. Carr served as Executive Secretary of the President's Committee on Civil Rights. The Committee's report and Carr's book, *Federal Protection of Civil Rights: Quest for a Sword*, both published in 1947, condemned the inadequate enforcement of civil rights laws since the Reconstruction and are credited with helping to spark the civil rights movement.

37. Wayne State history professor Alfred H. Kelly helped prepare the brief for the major legal victory of the civil rights movement, *Brown v. Board of Education* (1954). In *Quarrels That Have Shaped the Constitution* (John Garraty ed. 1964), Kelly recounted

the inside story of *Brown*. Kelly is also the co-author of *The American Constitution: Its Origins and Development* (6th ed. 1982) which, according to one commentator, is "widely regarded as the best single-volume constitutional history ever written."

38. Current scholarship on the Constitution is focused on sources, methods, and institutional competence in constitutional decisionmaking. In his 1953 book, *Politics and the Constitution in the History of the United States*, University of Chicago law professor William W. Crosskey defended the constitutionality of New Deal legislation by analyzing the eighteenth-century usage of constitutional terms such as "commerce." His work is an example of the resort to "original intent" as the determinative factor in constitutional interpretation, an elaboration of the concept of judicial self-restraint.

39. Even more than James B. Thayer, Felix Frankfurter came to be the standard bearer for judicial self-restraint. Before his appointment to the Supreme Court, Felix Frankfurter exerted influence as a law professor at Harvard through many of his students who entered government service and through his teaching and writings, such as *Cases and Other Materials on Administrative Law* (1932) (a copy of which, with Frankfurter's own annotations, is in Northwestern University Law Library's collection).

40. A student of Felix Frankfurter, Yale law professor Alexander M. Bickel, became the leading constitutional commentator of the 1960s and the early 1970s. True to Felix Frankfurter, Bickel's *The Least Dangerous Branch* (1962), advocates avoidance of constitutional issues by courts whenever possible—focusing judicial review on procedural issues—and deference by courts to the judgments of legislatures and other lawmakers. In the era of Supreme Court "activism" which characterized the tenure of Chief Justice Earl Warren, unlike in the Progressive Era, the doctrine of judicial self-restraint came to be cited not to further social reform, but to restrain it.

41. Contemporary scholars are continuing to examine the justifications for judicial action which may restrict legislation or "create" new law in a constitutional system which delegates lawmaking power to elected representatives. Foremost among contemporary contributions to the debate are *Democracy and Distrust: A Theory of Judicial Review* (1980), by John Hart Ely, former Dean of Stanford Law School; *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (1980), by Jesse Choper, Dean of Boalt Hall at the University of California at Berkeley; and *The Constitution, the Courts, and*

Human Rights: An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary (1982), by Michael J. Perry, professor of law at Northwestern University.

42. The extent of free speech guaranteed by the Constitution continues to be a source of debate. *Free Speech: A Philosophical Enquiry* (1982), by Frederick Schauer, professor of law at the University of Michigan, and *Freedom of Expression: A Critical Analysis* (1984), by Martin Redish, a professor of law at Northwestern University, seek to define the limits of free speech by examining its underlying values.

43. Constitutional scholarship is also being advanced by being organized. The first constitutional law treatise in decades was published in 1978 by Harvard law professor Laurence Tribe. More than a traditional treatise, Tribe's *American Constitutional Law* (2d ed. 1988) not only summarizes the law but creates new structures of analysis and has sparked new controversies.

44. Forces outside of the mainstream of constitutional scholarship are also gaining influence in constitutional analysis. The Law and Economics School, highlighted by *Economic Analysis of Law* (1972), by Judge Richard A. Posner, then at the University of Chicago, is influencing many areas of law; and the Critical Legal Studies movement contributed to the constitutional debate with *Red, White and Blue: A Critical Analysis of Constitutional Law* (1988), by Mark Tushnet of Georgetown University.

45. Scholars have also contributed to constitutional law through judicial biographies, such as Albert J. Beveridge's classic *The Life of John Marshall* (1916-19), Carl Brent Swisher's *Stephen J. Field, Craftsman of the Law* (1930), Alpheus T. Mason's *Brandeis, A Free Man's Life* (1946), Mark De Wolfe Howe's *Justice Oliver Wendell Holmes* (1957, 1963); and G. Edward White's *Earl Warren: A Public Life* (1982). . . .

46. . . . through reference works, such as the *Encyclopedia of the American Constitution* (1986), edited by Leonard W. Levy, Kenneth L. Karst and Dennis J. Mahoney, which was relied on heavily in the preparation of these notes . . .

47. . . . through bibliographic scholarship, such as Kermit Hall's *A Comprehensive Bibliography of American Constitutional and Legal History, 1896-1979* (1984) . . .

48.. . . by compiling and editing source materials, such as the *Records of the Federal Convention of 1787* (1911), edited by Max Farrand, and *The Founders' Constitution* (1987), edited by Philip B. Kurland and Ralph Lerner; . . .

49. . . . by chronicling the history of constitutional develop-

ments, most notably through the ongoing *History of the Supreme Court of the United States* supported by a fund established in the will of Oliver Wendell Holmes, Jr.; . . .

50. . . . and through articles in law reviews and other scholarly journals such as the *Supreme Court Review*, published at the University of Chicago, and *Constitutional Commentary*, published at the University of Minnesota.

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