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BOOK REVIEW

A HISTORY OF THE AMERICAN CONSTITUTION, By Daniel A. Farber and Suzanna Sherry, Minnesota, West Publishing Company. 1990. Pp. 458. Softbound. $31.00.

Reviewed by **Howard C. Anawalt***

This book is an excellent history of our Constitution. It combines selections of original sources, such as draft provisions and debates, with short summaries or commentaries written by the editors to give necessary background and fill gaps. It is short and well organized. The editing and writing keep the reader's attention.

The book is organized into three parts. Part One examines the period of the formation of the original Constitution and Bill of Rights (1787-91). Part Two, "The Reconstruction Amendments," deals with the Civil War history and amendments. Part Three contains two chapters discussing the Supreme Court's use of history and the relevance of original intent to the meaning of the Constitution.

In addition, five helpful appendices round out the book. Appendix A is the Constitution, Appendix B contains drafts of the original Constitution, and Appendix C presents drafts of the Bill of Rights. Appendix D is a bibliographical dictionary which introduces the delegates who attended the Constitutional Convention, the members of the First Congress, and major figures from the Civil War and Construction period. Appendix E gives a list of further reading keyed to the book's three parts. There is an eight page index which seems

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adequate, although my use of it while writing this review suggests that it might be improved in a subsequent edition.[1]

In sum, the book is a great aid to all who study or use the Constitution. As a reference for those teaching constitutional subjects, it is nearly indispensable. It is also a fine book for history students and those who love a good history book.

The history of our Constitution contains themes and episodes that are particularly valuable to think about in our current world of very fast paced and fundamental change. I would like to review just a few of those as they emerge from the book.

I. AUTHORITY AND SOVEREIGNTY

On May 25, 1787, when the convention began, the authority and power of the convention to do anything like draft a *new* constitution was in complete doubt. The doubt remained after the ratification process was completed and perhaps even after some years of successful operation of the constitutional government.

At the time of the convention, the equivalent of a national government was the confederacy established under the Articles of Confederation. Article XIII provided that the union under the confederacy should be perpetual and unalterable, unless alterations were agreed to in Congress and confirmed by each state legislature.[2] The governing authority of the confederacy was, however, weak. It lacked power to tax, to regulate commerce, and to assure that its acts were observed in the several states. These weaknesses led to the resolution of Congress calling for the convention.

The congressional resolution was limited and conformed to the restrictions of the Articles of Confederacy concerning alteration. The resolution called the convention "for the sole and express purpose of *revising* the Articles of Confederation."[3] The convention had no express authority to write a new fundamental law and certainly was granted no authority to override the alteration requirements of Article XIII. Nevertheless, the convention did both. Article VII of the proposed constitution our now existing Constitution boldly stated that "the Ratification of the Conventions of *nine* States *shall be sufficient* for the Establishment of this Constitution between the States

1. The index includes some detail, for example, a reference to a concept of animal rights argued in the original debates on slavery.

2. D. FARBER & S. SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 37 (1990) (referencing article XIII of the Articles of Confederation).

3. *Id.* at 37 (emphasis added).

so ratifying the Same."[4]

The question, "Can we act to propose a new constitution?" was no easy one for the delegates. The matter was brought immediately to a head by Edmond Randolph's proposal of the "Virginia Plan" which would have substituted a national union for the confederacy. Mr. Lansing of New York objected to the plan on the basis of "want of power in the Convention to discuss & propose it."[5] Mr. Patterson of New Jersey added that, "I came here not to speak my own sentiments, but the sentiments of those who sent me." He then referred to Article XIII and added that "what is unanimously done, must be unanimously undone."[6]

Pennsylvania's James Wilson argued that the problem of authority could be solved by sweeping it aside: "With regard to the *power of the Convention*, he conceived himself authorized to *conclude nothing*, but to be at liberty to *propose any thing*."[7] Randolph urged a more radical view:

> Mr. Randolph, was not scrupulous on the point of power. When the Salvation of the Republic was at stake, it would be treason to our trust, not to propose what we found necessary. . . . There are certainly seasons of a peculiar nature where the ordinary cautions must be dispensed with; and this is certainly one of them. He would not as far as depended on him leave any thing that seemed necessary, undone. The present moment is favorable, and is probably the last that will offer.[8]

Randolph's view is understandable. He and others felt the urgency of the times, and understood it to press upon them an obligation to solve. Nevertheless, the view is deeply troublesome, for it is exactly such judgments as to necessity that permit sweeping aside rights people have struggled to establish, including those of our Constitution.

Randolph's argument concerning necessity, in effect, carried the day. However, the issue of authority also led to the question—where did power or sovereignty reside? Before the American Revolution power rested with the British constitutional monarchy,[9] but when

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4. U.S. CONST. art. VII (emphasis added).
5. D. FARBER & S. SHERRY, *supra* note 2, at 32.
6. D. FARBER & S. SHERRY, *supra* note 2, at 32.
7. D. FARBER & S. SHERRY, *supra* note 2, at 33.
8. D. FARBER & S. SHERRY, *supra* note 2, at 41.
9. In. the colonial period, the royal governors constituted an executive that was in some says stronger than the king himself. Because various acts derived from the Glorious Revolution of 1688 did not apply to the colonies, the governors exercised some powers denied to the king in England. Governors were permitted

the ties to Britain were severed, what took its place? The matter would be critical, for the new constitution would have to gain power from somewhere, if it were ever to be a government. The editors point out that "sovereignty was an evolving concept to the men at the Convention."[10] The framers considered at least two sources for the new American sovereignty: power came from the states as nations, or power came directly from the people.[11] The latter idea was novel, indeed.

The debates appear to have been rich with arguments favoring both state and popular sovereignty, but it was not necessary for the convention to choose a theory, so long as they could assure themselves that their power could be *effectively* exercised. In effect the debates served to test political will. The convention did not choose between the theories, but it implicitly determined that it could express an organization of effective government that would be adopted. The delegates gambled. History shows they won.[12]

II. SECRECY

The debates were a delicate matter. The delegates knew that their ultimate product would "go public" on the grandest scale possible. They also believed that absolute secrecy of their proceedings would be essential to their work: without confidentiality, they would not be able to avoid premature politics, posturing, and interference. As a first order of business the convention resolved "That nothing spoken in the House be printed, or otherwise published or communicated without leave."[13] Despite numerous note-takers, "the proceedings in Independence Hall were kept absolutely confidential."[14]

The authors give a very interesting historical and cultural ex-

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> to regulate legislative elections. . . . They held powerful controls over the assemblies, including the right to reject the speaker of the house. . . . Although the king possessed some (but not all) of these controls over Parliament, no monarch had dared to exercise much direct control since 1688.

D. FARBER & S. SHERRY, *supra* note 2, at 79.

10. D. FARBER & S. SHERRY, *supra* note 2, at 38.

11. The revolution had rejected England's rule. England herself had long since rejected the divine right of kings to rule. Charles had been executed after parliamentary trial in 1649, and the Glorious Revolution of 1688 created parliamentary authority which has never since been challenged.

12. The text of our Constitution does not select a particular theory either. The preamble states that the People "do ordain and establish this Constitution," but both ratification and amendment are accomplished by the states as entities. U.S. CONST. art. VII. *See also* U.S. CONST. art. V.

13. D. FARBER & S. SHERRY, *supra* note 2, at 27.

14. D. FARBER & S. SHERRY, *supra* note 2, at 27.

planation for the success of the rule:

> Maintaining absolute secrecy among fifty-five men with political ambitions and widely divergent views was possible only because of the nature of the gathering. All of the delegates were gentlemen, to whom politics was serious but private business. . . . The delegates to the Federal Convention knew, moreover, that any candid discussion of the ills of American polity would inevitably touch on sensitive issues, including, for example, the dangers of too much democracy. Such discussions were possible only in secrecy.[15]

Whether they were right or wrong, these gentlemen of the convention set a fine standard for keeping confidences when agreed or required. It is a standard that we all can benefit recalling when we deal with professional, collegial, or civic matters requiring confidence.

III. STABILITY AND CHANGE

Americans often express the notion that our Constitution is permanent and stable. Yet from the beginning the Constitution has been a story of change. One can scarcely delve into a chapter of the book without confronting some very impressive example of dynamism in our history.

A fine example of change comes from the adoption of the post Civil War amendments. The original Constitution fully recognized and ratified slavery as an institution.[16] It would take amendment to eliminate this denial of human right.

During the debates on ratification of the Thirteenth Amendment, members of Congress were concerned with the abolition of slavery, *and* with the proper scope of power of the national government. In the final debate, one Congressman urged that if the proposed amendment were adopted, it would admit a scope of power far too grand to be consistent with the fundamentals of our system. He argued that if the proponents of the Thirteenth Amendment were correct, then:

> All then that you would have to do in order to make the Congresss of the United States as omnipotent as the Parliament of Great Britain would be to change the fifth article of the Constitution, and provide that a majority of a quorum in Congress might amend the Constitution, and that would confer upon the

15. D. FARBER & S. SHERRY, *supra* note 2, at 28.

16. *See* U.S. CONST. art. I § 2, § 9. *See also* U.S. CONST. art. IV § 2.

> Congress of the United States as plenary, omnipotent, unlimited power over every subject of legislation, ay, sir, it would make the Congress of the United States as omnipotent as the English Parliament.[17]

The logic of Article V does appear to grant that broad a sweep to the amendment power.[18]

The congressional debates on ratification of the Thirteenth Amendment appealed to underlying values of the Constitution as well as to the logic of the amendment power. Mr. Ashley, a proponent, urged: "I do not believe any constitution can legalize the enslavement of men."[19] To him it was simply beyond the power of any government to be able to *legitimize* slavery. Slave laws were in essence no law. Congressman Rogers, however, urged that it would be wrong to concede power to define property to a central government, for it might in turn "interfere with marital relations in the States. . .[and] take away the constitutional provision that a man shall enjoy property by descent. . . ."[20]

In the end, slavery was swept out of the Constitution and the course of our history altered. Yet the urgency and concern evident in the debates show that these political changes were not simple.

In concluding, I would like to return to the American attitude concerning the stability of our Constitution. It is like an enormous keel on a ship. Whatever happens, the Constitution does not really change. The notion of constancy is present despite twenty-six amendments, innumerable hotly debated decisions, and changes in guiding precedents.

The notion of stability is misleading, yet it also reflects a sound assessment of how our society works. We expect—I speak here of average expectations, not those of the legally trained—that our Constitution will reflect main values that may be established after a truly monumental effort. Amendments may be necessary from time to time, but normally these should be confined to larger matters. Even when the sizzling hot issue of the day, abortion or flag burning, comes along, people expect that the existing *institutions* of the con-

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17. D. FARBER & S. SHERRY, *supra* note 2, at 282 (argument of Congressman C. A. White).

18. D. FARBER & S. SHERRY, *supra* note 2, at 292. The Amendment article does contain some limits. Its last clause preserves each state's "equal suffrage" in the Senate. The substance of that restriction is inconsistent with the arguments of Senator Saulsbury that ratification of the Thirteenth would mean that the Amendment power could be used to "blot out of existence any State in this Union."

19. D. FARBER & S. SHERRY, *supra* note 2, at 278.

20. D. FARBER & S. SHERRY, *supra* note 2, at 280.

stitutional government will be able to work and resolve it. We believe that at the end of the working and resolving our society will be fairer, more just. If not, then let us amend.