Review Essay: Charting the Bicentennial

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Our recent national anniversaries have had a dual or, more accurately, a fragmented character. They are convenient way stations for the scholarly community to evaluate prevailing currents in American scholarship, and to indicate new directions for research. At the same time, they are occasions for the general public to celebrate pivotal moments in American history and reaffirm enduring American values. Although these two enterprises need not come into conflict, they often do. As a result, we regularly lose valuable opportunities to build bridges—that is, to inform the general public's understanding of what they are celebrating by reference to the work of the scholarly community.

The bicentennial of the United States Constitution has suffered from this internal contradiction, despite the efforts of organizations such as Project '87 (sponsored by the American Historical Association and the American Political Science Association) and research institutions such as the Library of Congress, The New York Public Library, Columbia University, and the New-York Historical Society, as well as the recent work of individual scholars. Such scholarly efforts are collectively the exception rather than the rule. More representative of the...
depth and accuracy of discourse about the Constitution generated by the Bicentennial is the foreword by former Chief Justice Warren E. Burger to the "official" Bicentennial edition of the U.S. Constitution:

In the last quarter of the 18th Century, there was no country in the world that governed with separated and divided powers providing checks and balances on the exercise of authority by those who governed. A first step toward such a result was taken with the Declaration of Independence in 1776, which was followed by the Constitution drafted in Philadelphia in 1787; and in 1791 the Bill of Rights was added. Each had antecedents back to Magna Carta and beyond.

The work of 55 men at Philadelphia in 1787 marked the beginning of the end of the concept of the divine right of kings. In place of the absolutism of monarchy, the freedoms flowing from this document created a land of opportunities. Ever since then discouraged and oppressed people from every part of the world have made a beaten path to our shores. This is the meaning of our Constitution.

. . . The principal goal of the National Commission is to stimulate an appreciation and understanding of our national heritage—a history and civics lesson for all of us. This lesson cannot be learned without first reading and grasping the meaning of this document—the first of its kind in all human history.¹

Appearing as it does over the signature of the former Chief Justice of the United States, this Foreword is clothed with great ostensible authority. Closer examination reveals that it is riddled with errors of fact and questionable interpretations that exaggerate the Constitution's uniqueness, distort its origins and significance, and paper over its shortcomings and those of American history in general. For example: To declare that the Constitution was "the first [document] of its kind in all human history" slights the entire record of colonial and Revolutionary efforts to forge an American union culminating in the Articles of Confederation, and of state constitution-making in the 1770s and 1780s that contributed to the development of American ideas of constitutional government and specified features of the Constitution.²

To claim that "the work of 55 men at Philadelphia in 1787 marked

the beginning of the end of the concept of the divine right of kings' ignores more than a century of English constitutional history, including
the Civil War and Commonwealth and the Glorious Revolution—
events and controversy that profoundly shaped the political percep-
tions of the Revolutionary generation of Americans.3

To construct a chain of events pointing to the establishment of a
government with 'separated and divided powers providing checks and
balances on the exercise of authority by those who governed' that in-
cludes the Declaration of Independence and the Bill of Rights incor-
rectly implies that these documents directly contributed to the
development of ideas of separation of powers and checks and balances,
and mistakenly implies that this result was the sole significance of the
Revolution and the framing and adoption of the Constitution.

To extol "the land of opportunities" created by "the freedoms
flowing from" the Constitution disregards the Framers' compromises
protecting slavery,4 the nation's history of immigration restrictions,5
breaches of treaties with Native Americans,6 and the slowness and diffi-
culty of the campaign for recognition of equal rights for American
women.7

To imply that the Constitution is the sole source of our national
successes discounts other causes such as the abundance of our natural
resources, the diversity of the American population, and our geo-
graphic insulation for much of our history from the problems and con-
vulsions of the Old World.8 Unfortunately, the Chief Justice's
Foreword typifies most of the accounts of our Constitution's origins
and significance aimed at most Americans in the Bicentennial period.

The record of the Bicentennial confirms the existence of wide-
and widening—gaps between the concerns of the historical profession,
the priorities of the legal community, and the interests of the general
public and those who write for them. This pattern of fragmentation has

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to date, 1987); B. Bailyn, The Ideological Origins of the American Revolution 198–201
(1967); G. Wood, The Creation of the American Republic, 1776–1787, at 10–18 (1969);
D. Lovejoy, The Glorious Revolution in America (1972); H. Colbourn, The Lamp of
Experience (1965); C. Robbins, The Eighteenth-Century Commonwealth Man 342–43
(1958); C. Rossiter, Seedtime of the Republic (1953); R. Bernstein with K. Rice, supra
note 2, at 118–20.

4. A. Higginbotham, In the Matter of Color: Race and the American Legal Pro-
cess—The Colonial Period (1978); R. Kluger, Simple Justice (1975); W. Jordan, White
Over Black (1968); D. Robinson, Slavery in the Structure of American Politics,

5. See generally O. Handlin, The Uprooted (rev. ed. 1971); J. Higham, Strangers
in the Land (1981); D. Reimers, Still the Golden Door (1985).


7. See generally C. Degler, At Odds (1980); S. Lebsock with K. Rice, "A Share of

8. See, e.g., R. Bernstein with K. Rice, supra note 2, at 1–10; D. Potter, People of
Plenty (1954).
disturbing implications for the kinds of issues and research projects that historians of the Founding Period and the origins of the Constitution pursue. Another question emerges at a deeper level: Does it matter whether those outside the historical community read and use accurate and reliable historical information and balanced understandings of the past? To elucidate the dimensions, seriousness, and consequences of the fragmentation of the Bicentennial, this Essay surveys recent publications on the Founding Period and the making of the Constitution.9

Part I describes the latest products of the scholarly community's growing concern with preserving the evidence of the past—the "documentary editing" projects for the records of the Federal Convention, the ratification of the Constitution, the first federal elections, the First Congress, the Supreme Court, and the papers of individual statesmen.

Part II examines several of the most important recent studies of the Founding Period to illustrate the range and depth of the new historical scholarship in this field. Part II also describes a growing schism in constitutional history. This schism divides those scholars who conscript evidence of the past in the service of one or another position in modern public controversy, applying purely utilitarian standards to the definition of research problems and the selection and presentation of evidence, from those scholars who seek to understand the past on its own terms and maintain a respect for its integrity even when they invoke the past to support present-day interpretative arguments.

Part III assesses the principal recent books on the Constitution's origins for a general rather than a scholarly audience, measuring these writers' success or failure in making the findings and interpretations of historical specialists available to the general reader.

Part IV focuses on Michael Kammen's A Machine That Would Go of Itself.10 Professor Kammen's study of the Constitution's place in popular thought and culture suggests that the present fragmentation of the


Bicentennial is nothing new, but rather the latest stage of the American people's uncomprehending celebration of the Constitution and the values it is supposed to embody.

The Conclusion argues that the fragmentation characterizing the Bicentennial is different not merely in degree but in kind from the phenomena Kammen describes. It suggests that those Bicentennial publications seeking to preserve our shared constitutional discourse deserve the highest praise precisely because they preserve the major precondition for the success of American constitutionalism and self-government.

I. RECOVERING THE RECORD OF THE PAST

During the past century, historical and legal scholarship have benefitted from major efforts to gather, edit, and publish the papers of key statesmen from all periods of American history, and in particular from the era of the nation's founding. Largely the work of individual scholars in the years before World War II, these documentary editing projects have flourished in the past four decades under the sponsorship of major academic and research institutions and the National Historical Records and Publications Commission, and their labors have transformed the study of the Founding Period.

A. Multivolume Compilations

It is impossible to imagine modern editions of historical documents—or the study of the origins of the Constitution—without Max Farrand's Records of the Federal Convention of 1787.\(^\text{11}\) Farrand's compilation of the extant notes of debates in the Convention and supplementary documents has set the model for all later editions of historical documents or "statesmen's papers." Farrand published the first three volumes of the Records in 1911, and issued a supplementary volume in 1937 for the Constitution's sesquicentennial—but this fourth volume was confusingly organized and did not include many significant documents having to do with the Federal Convention.

For decades, we have been promised an updated edition of Farrand incorporating this newly discovered material. James H. Hutson, Chief of Manuscripts of the Library of Congress, has published a revised and greatly expanded edition of Farrand's original fourth volume in a fitting commemoration of the Bicentennial.\(^\text{12}\) This new Supplement reorganizes systematically the materials contained in Farrand's original fourth volume. It also incorporates such important materials as New York delegate John Lansing's journal of the Federal Convention (origi-
nally published in 1939);\textsuperscript{13} fragmentary Convention notes and later reminiscences by John Dickinson, Gunning Bedford, Charles C. Pinckney, William Samuel Johnson, Pierce Butler, and other Convention delegates; and even an appendix of weather records dealing with the period of the Federal Convention. The contents are well presented, arranged by date to correspond with the organization of the two main volumes of the \textit{Records}, and edited with scrupulous accuracy. In addition, the \textit{Supplement} reprints the original 1937 index, updated to include references to the new volume.

The scholarly achievement represented by Dr. Hutson’s \textit{Supplement} is admirable. A few minor errors crept into the book, however, as is inevitable with any enterprise of this magnitude. For example, Dr. Hutson’s treatment of Pennsylvania delegate Thomas Fitzsimons’s letter to Noah Webster dated 15 September 1787\textsuperscript{14} is curiously incomplete. He reprint only the first part of this letter, which provides some evidence as to what the Convention was doing in its closing days. But he unaccountably breaks off the text of the letter a bit more than halfway through (though clearly indicating by use of ellipses that he has done so). The omitted portion of Fitzsimons’s letter is, perhaps, even more important than the published part, for in it Fitzsimons solicited Webster’s support for the Constitution two days before the end of the Convention, seeking to enlist the twenty-nine-year-old lexicographer and publicist in the impending pamphlet wars. This passage exacerbates Fitzsimons’s arguable breach of the rule of secrecy binding the Convention’s delegates.\textsuperscript{15} It is also unfortunate that Hutson’s Preface does not present the developed conclusions on “the integrity of the documentary record” that he has published elsewhere.\textsuperscript{16}

Hutson concedes that the materials presented in this revised and expanded \textit{Supplement} may not compel a major reconceptualization of the framing of the Constitution, but they do add significantly to our understanding of the Federal Convention. And the resulting republication of the first three volumes of Farrand’s \textit{Records} once more places the single most important compilation of sources for studying the origins of the Constitution before the public.

Hutson’s \textit{Supplement} is but one of the major documentary publication projects focusing on the Founding Period. For example, John P. Kaminski, Gaspare J. Saladino, and Richard Leffler have continued the late Merrill Jensen’s \textit{Documentary History of the Ratification of the Constitu-
tion and the Bill of Rights, a major undertaking that will replace the fragmentary, unreliable edition of the ratification debates prepared in the nineteenth century by Jonathan Elliot. Kaminski, Saladino, and Leffler have organized their volumes into two series. The first reconstructs to the extent possible the votes and debates in the several state ratifying conventions; the second assembles in chronological order the public dialogue—in news reports and squibs, newspaper and periodical essays, and pamphlets—and private correspondence of supporters and opponents of the Constitution. The texts are accurate and reliable, and the annotations are careful and complete without overwhelming the primary source materials they are intended to supplement. When this project is completed, it will be an unparalleled resource for future scholars studying the ratification of the Constitution as "the first national political campaign" or as a sophisticated and wide-ranging argument over political theory and practice.

Until the Documentary History of the Ratification is complete, those interested in the polemical literature against the Constitution can turn to the late Herbert J. Storing’s The Complete Anti-Federalist, the fullest modern edition of major and minor pamphlets, newspaper essays, and broadsides by the opponents of the Constitution. Storing’s great project, which appeared posthumously due to the devoted efforts of Murray Dry and the commitment of the University of Chicago Press, has reshaped our understanding of the Anti-Federalists’ arguments against the Constitution and enhances our sense of their enduring significance. Storing’s first volume, reprinted separately as What the Anti-Federalists Were For, is the single best analysis of Anti-Federal thought.

We also have three of the four projected volumes of The Documentary History of the First Federal Elections, prepared by the late Merrill Jensen and Gordon DenBoer, and the first installment of a projected seven volume Documentary History of the Supreme Court, edited by Maeva Marcus and James T. Perry. Most important of all, under the leadership of Charlene Bickford, are the first six volumes of the Documentary History of the First Federal Congress, including new, definitive editions of

18. The Debates in the Several State Conventions on the Adoption of the Federal Constitution, as Recommended by the General Convention at Philadelphia in 1787 (J. Elliott ed. 1827, 1828 & 1830).
19. R. Bernstein with K. Rice, supra note 2, at 199.
the Senate Legislative and Executive Journals, the Journal of the House of Representatives, and three volumes of "Legislative Histories." These last volumes are a treasure trove for students of early American politics and legislative practice; they calendar and reprint the full texts of all bills and resolutions introduced in the House and Senate, all extant committee reports and drafts of legislation, and the final texts of all bills, resolutions, and other documents emanating from the First Congress. Among the measures benefiting from this detailed attention are the Judiciary Act of 1789\textsuperscript{25} and the proposed constitutional amendments (including the Bill of Rights).\textsuperscript{26} Future volumes of the \textit{Documentary History of the First Federal Congress} will include a reliable edition of the diary of Senator William Maclay of Pennsylvania (even in its present bowdlerized form a priceless primary source for early American politics),\textsuperscript{27} surviving notes of debates by other members of the House and Senate, the extant correspondence of all members of the First Congress and all published records of the debates of the House of Representatives—this last of particular importance, as it will enable us to supplant the debates as reprinted in the \textit{Annals of Congress},\textsuperscript{28} a text harshly criticized for its incompleteness and inaccuracy.\textsuperscript{29}

In addition to these major documentary histories, the "statemen's papers" projects— including editions of the papers of Benjamin Franklin,\textsuperscript{30} George Washington,\textsuperscript{31} John Adams,\textsuperscript{32} Thomas Jefferson,\textsuperscript{33} John Jay,\textsuperscript{34} James Madison,\textsuperscript{35} John Marshall,\textsuperscript{36} and Robert Morris\textsuperscript{37}—

\textsuperscript{25} See 5 id. at 1150–1212 (1986).
\textsuperscript{26} See 4 id. at 1–48 (1986).
\textsuperscript{27} The \textit{Journal of William Maclay} (C. Beard ed. 1927).
\textsuperscript{28} \textit{Annals of Congress} (J. Gales & W. Seaton eds. 1834).
\textsuperscript{29} See infra notes 230–231 and accompanying text.
\textsuperscript{30} The Papers of Benjamin Franklin (L. Labaree, H. Boatfield, W. Bell & H. Fineman eds., 26 vols. to date 1959–87).
\textsuperscript{32} The Adams Papers are also at present planned to appear in several different series—Series I, Diaries and Autobiographies, including The Diary and Autobiography of John Adams (L. Butterfield ed., 4 vols. 1961) and the Earliest Diary of John Adams (L. Butterfield ed. 1966); Series II, Family Correspondence; Series III, Special Series, including The Legal Papers of John Adams (L. Wroth & H. Zobel eds., 3 vols. 1965); and Series IV, Political Correspondence and Related Papers, including The Papers of John Adams (R. Taylor, M. Kline & G. Lont eds., 6 vols. to date, 1977–83).
\textsuperscript{33} The Papers of Thomas Jefferson (J. Boyd & C. Sellers eds., 22 vols. to date 1950–86).
move forward. We already have Robert A. Rutland's superb edition of The Papers of George Mason.\textsuperscript{38} Another completed edition, The Papers of Alexander Hamilton, has published a supplement incorporating materials omitted from previous volumes and including a comprehensive index.\textsuperscript{39} The Madison and Jefferson projects have progressed beyond the end of the First Congress on 4 March 1791, and the final two volumes of The Papers of John Jay, covering his political career from 1784 to 1801 and his retirement years (1801–1829), are well advanced and should appear before the end of the decade. Although they receive occasional criticism for being too ambitious to be completed,\textsuperscript{40} these documentary editing projects perform invaluable services by cataloguing and encouraging preservation of original manuscript sources, training scholars in historical editing and the uses of historical evidence, and making otherwise inaccessible manuscript materials available to scholars across the nation and throughout the world.

B. One-Volume Compilations

Several new and three older one-volume compilations of materials concerning the framing and adoption of the Constitution, clearly targeted for use in secondary school, college, and graduate courses, have appeared for the Bicentennial. Even the least satisfactory of these collections signals the intellectual enrichment of teaching the origins of the Constitution. Professors and teachers can now draw on and communicate the intellectual range and depth of the Founding Period and, in particular, the debates over the Constitution, due in large part to the work of the editors of the "documentary histories" and "statesmen's papers" projects described above.

The best new one-volume collection is Michael Kammen's The Origins of the American Constitution.\textsuperscript{41} Professor Kammen's book is the only modern compilation to consider the making of the Constitution as a process reaching back before the Federal Convention and stretching beyond ratification to include the reshaping of American politics within the matrix of the Constitution in the early 1790s. His choice of materials—drawing on private correspondence of leading American politicians such as Washington, Hamilton, and Madison, key public documents, and the best writings for and against the Constitution—is sound and well considered. He presents complete texts, sparingly but

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\textsuperscript{40} See, e.g., Levy, Editing the Framer, in L. Levy, Judgments: Essays on American Constitutional History 106 (1972).
\textsuperscript{41} The Origins of the American Constitution (M. Kammen ed. 1986).
judiciously annotated, with informative head notes. And his introductory essay is a lucid overview of the period.

None of the other new volumes is as useful or as comprehensive as Origins. They emphasize the Anti-Federalists' writings in the apparent hope of achieving classroom status as complements to The Federalist. Murray Dry has prepared a one-volume abridgment of The Complete Anti-Federalist under the title The Anti-Federalist.\(^{42}\) Cecelia Kenyon's The Anti-federalists has reappeared, with a new introduction by Gordon S. Wood.\(^{43}\) Ralph Ketcham has prepared a compilation including extracts from James Madison's "Notes of Debates in the Federal Convention of 1787" and a traditional sampling of Anti-Federalist writings.\(^{44}\) These books are interchangeable, though The Anti-Federalist offers a slight edge in the number and quality of Anti-Federal tracts it reprints.

J.R. Pole's The American Constitution: For and Against\(^{45}\) presents a comparable selection of Anti-Federal writings side-by-side with a heavily abridged sampling of The Federalist. Although Professor Pole's introduction is a fine brief essay for the student on the period of the Constitution's origins, his handling of The Federalist is incomprehensible. Unlike Professor Kammen's volume, which reprints complete texts of the twenty-one best essays (probably by reference to the late Clinton Rossiter's authoritative list),\(^{46}\) The American Constitution: For and Against presents an outline table of contents of the eighty-five essays, sprinkled here and there with extracts of varying lengths and, only rarely, the full texts of some essays. Those wishing to use only one documentary collection in the classroom would be well advised to select Professor Kammen's as the best all-around volume.

Two shortcomings plague even the best of these one-volume collections. By referring to "The Anti-Federalist Papers" in obvious echo of The Federalist, these books suggest an illusory unity and coherence in their contents. There were no "Anti-Federalist Papers." The only Anti-Federal work that could compare in scope with The Federalist is the collected Letters from the Federal Farmer to the Republican,\(^{47}\) and even one of its warmest advocates has conceded, in his excellent modern edition, that it is not as impressive a theoretical and polemical performance as The Federalist.\(^{48}\) Moreover, there was no centerpiece of Anti-Federal writings equivalent to the role that The Federalist assumed for supporters of the Constitution. Cecelia Kenyon's collection has handled the mat-

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42. The Anti-Federalist (M. Dry ed. 1985).
44. The Anti-Federalist Papers and the Constitutional Convention Debates (R. Ketcham ed. 1986) [Hereinafter R. Ketcham].
47. Letters from the Federal Farmer to the Republican (W. Bennett ed. 1978).
48. Id. at xxxiv.
ter correctly, using the title *The Antifederalists* to convey the multifarious character of the opposition to the Constitution.

These compilations also fall short in their implicit assumption that *The Federalist* is the only pro-Constitution polemic worthy of study. Only Ralph Ketcham chooses to reprint a pro-Constitution work other than *The Federalist*—one of James Wilson's speeches to the Pennsylvania ratifying convention—and only because so many Anti-Federal writers responded directly to it. Several important pro-Constitution pamphlets do deserve a modern audience. These include John Jay's *Address to the People of the State of New-York*—perhaps the most popular pro-Constitution pamphlet—and Noah Webster's *Examination into the Leading Principles of the Constitution*. These writings are at present available only in expensive, hard-to-find reprints of Paul Ford's volumes of a century ago. Although all of these materials have appeared or will appear in the Documentary History of the Ratification, the finest of them should be reprinted in more accessible form. Indeed, as Hamilton's *Federalist* No. 85 cites Jay's *Address* approvingly and as this essay represents Jay's fullest development of arguments that illness prevented him from making as Publius, it would be appropriate for future editors of *The Federalist* to include Jay's *Address* in an appendix.

Readers should also take note of another reissued anthology with a different purpose from the compilations discussed above. Richard B. Morris' *Basic Documents on the Confederation and the Constitution* originally appeared in 1970. This excellent book gathers well-known documents such as the Articles of Confederation and the Treaty of Paris of 1783, reprinting them together with usefully edited and introduced extracts from rare works such as Lord Sheffield's *Observations on the Commerce of the American States* and newspaper accounts of uprisings in Vermont contemporaneous with Shays's Rebellion. Professor Morris puts these readings in larger perspective in an introductory essay that is a fine


50. Introduction to The Anti-Federalist Papers and the Constitutional Convention Debates, supra note 44, at 22.

51. [J. Jay], An Address to the People of the State of New York, on the Subject of the Constitution . . . (New York 1788).

52. [N. Webster], An Examination into the Leading Principles of the Federal Constitution Proposed by the Late Convention . . . (Philadelphia 1787).


54. See supra note 17.

55. In addition, Professor Bernard Bailyn is preparing a volume entitled The Debate over the Constitution for publication by the Library of America in 1989.

56. The Federalist, No. 85 (A. Hamilton).

brief account of the Confederation period by its leading modern historian.

With great fanfare, Penguin Books has produced a new edition of *The Federalist Papers*, prepared by Professor Isaac Kramnick of Cornell University, as part of its authoritative Penguin Classics series. This new version is a prodigious disappointment, although it has a few features to recommend it, including its republication of Hamilton's preface to the original McLean edition of 1788. The troubles begin on the cover, which lists Madison as senior author even though Hamilton conceived the project and wrote nearly two-thirds of the essays; perhaps this is a reflection of the prevailing scholarly preoccupation with Madison's *Federalist* 10 and 51. The back cover speaks of a hitherto unknown creature called the "Constitutional Congress," dubs *The Federalist* "[t]he definitive exposition of the American Constitution" (a claim that none of its authors made for it), and declares, despite the reshaping of constitutional federalism by the fourteenth amendment, that "the Constitution . . . has proved resilient enough to survive, almost unchanged, for two hundred years." The brief biographies of the authors are riddled with errors, including its dating of Madison's disestablishment campaign as taking place during his Presidency (1809–1817) rather than three decades before, its declaration that Hamilton "held the casting vote against Burr and for Jefferson in 1801" (his actual role, though critical to Jefferson's success in 1801, was not so direct), and its claim that Jay harbored dreams of succeeding Washington as President. The text of the Constitution included as an appendix lacks the twenty-fifth and twenty-sixth amendments. The introductory essay by Professor Kramnick is an odd mixture of suggestive ideas—such as his argument that the Pennsylvania constitution of 1776, usually thought to be unicameral, was in fact bicameral, with the great body of the people serving as the lower house of a two-house legislature—and outdated information and careless citation. Often, Professor Kramnick paints with far too sweeping a brush. His discussion of the state constitutions, for example, lumps them together as enshrining legislative supremacy and crippling the institution of the governor by depriving it of any independent power or role in the legislative process, leaving out all mention of the New York and Massachusetts constitutions, which directly contradict his argument. Similarly, he argues that the

59. Id. at 85.
60. Id., back cover.
61. Id. at 1.
62. Id. at 22.
63. Id. at 21.
Confederation Congress had only one house because the “spirit of ’76” would not have admitted an “aristocratic” second body—forgetting that, even in the days of deferential colonial politics, all plans for intercolonial union, either in opposition to the French and Indians or to British oppression, had but one house, and that mostly as a matter of historical accident that became habitual up to the Federal Convention. Equally puzzling is his declaration that “the events which led to the Constitutional Convention took place totally within the states”; how can this be, when the state governments were hostile to efforts to strengthen the Articles of Confederation? Rather, the effort to strengthen and ultimately to replace the Articles was the work of individuals operating almost entirely outside the established channels of federal and state politics, who replicated the patterns of organization and communication that led to the Revolution. In short, Professor Kramnick’s account of the context, arguments, and origins of The Federalist, while at times provocative, is neither reliable nor accurate.

Clearly intended for use as a classroom text, the Penguin Federalist should not replace the now-classic edition prepared in 1961 by the late Clinton Rossiter. Indeed, the most evocative text on the back cover of the Penguin Federalist is quoted from Rossiter’s introduction to the Mentor Federalist. The great pity is this edition of The Federalist casts grave doubt on the great, and hitherto deserved, reputation of the Penguin Classics series for accuracy and reliability.

C. Reference Works

We conclude this survey of works intended to recover and make accessible the records of the Founding Period with two vast, collaborative reference projects—the Encyclopedia of the American Constitution and The Founders’ Constitution. The Encyclopedia, the brainchild of Professor Leonard W. Levy of the Claremont Graduate School and edited by him with Professors Kenneth W. Karst and Dennis J. Mahoney, brings together over 200 constitutional scholars who have prepared hundreds of articles on a remarkable variety of concepts, individuals, cases, documents, and events of importance for constitutional history and law. This work will be a standard reference in the field, though one cannot help expressing concern that teachers in American history and

65. Federalist (Kramnick), supra note 58, at 19.
67. Federalist (Kramnick), supra note 58, at 22.
68. R. Bernstein with K. Rice, supra note 2, at 81–83, 97–110.
69. Federalist (Kramnick), back cover; id. at 11 & n.1.
72. I am one of the contributors to this project.
government courses may find some of these articles distressingly familiar (via student plagiarism) in the years to come.

The Founders' Constitution is an altogether different enterprise. Professors Philip Kurland and Ralph Lerner of the University of Chicago have assembled in this five-volume compilation extracts from the leading works of political theory, history, law, and constitutional argument on which the Framers and their contemporaries drew and which they themselves produced. The first volume focuses on general themes of American constitutionalism; the succeeding volumes present the text of the Constitution (up to the twelfth amendment, ratified in 1804), exhaustively annotated and glossed clause by clause in Talmudic form with the central text threading its way through masses of commentary, explication, and illustrative citation. Professors Kurland and Lerner break off their search for supplementary and illustrative materials with the mid-1830s, to incorporate Joseph Story's Commentaries on the Constitution.73 Some may contend that Story, who was eight years old in 1787, does not really fit within the scope announced by this project's title; others would argue that the editors should have pushed their inquiry forward to the present day. But these are captious quibbles with a project remarkable for its learning and scholarly care. This set will be most useful for smaller libraries and for individual scholars, who will have at their fingertips access to the key passages of otherwise rare and inaccessible texts, pamphlets, commentaries, and documents. It is destined to become the Oxford English Dictionary of American constitutional history.

II. SCHOLARSHIP, NEW AND NOT-SO-NEW

A. Introduction

Professor William E. Nelson has offered two short-hand descriptions of types of legal history: “lawyers’ legal history,” written to generate data and interpretations that are of use in resolving modern legal controversies, and “historians’ legal history,” written to provide and support new and interesting interpretations and bodies of data to advance exploration of the past.74 Recent scholarly publications on the Founding Period and the origins of the Constitution suggest analogous terms for constitutional history.

B. Elucidating the Past—Historians’ Constitutional History

Specialists in the history of the Founding Period continue to pursue fruitful lines of research to develop new understandings of the ori-

73. J. Story, Commentaries on the Constitution of the United States (1833).
gins of the United States. The infusion of newly available primary sources, together with the flourishing secondary literature on early American history and culture, have long suggested the need for a synthesis of the Confederation period. The Forging of the Union, 1781-1789,75 the long-awaited volume in the New American Nation series by Richard B. Morris, will fill that gap for at least a generation to come.

Professor Morris has been an active historian for six decades, amassing a roster of publications in legal history, labor, diplomatic, economic, political, and constitutional history, and biography that would be a distinguished body of work for any half-dozen scholars. The Forging of the Union is a notable landmark of his career.76 The book ranges with assurance from the council rooms of Whitehall and Versailles to the streets, legislative halls, and counting houses of Philadelphia, New York, Boston, Annapolis, and Charleston to the woods and snows of the Northwest Territory. This is, in many respects, a work of traditional narrative history in the grand manner, weaving together probing analyses of social, economic, cultural, and legal issues. Professor Morris draws on an extraordinary range of printed sources and secondary literature in several languages comprising nearly two centuries of scholarly output, but this book is perhaps even more remarkable for its command of primary source materials in libraries and government archives on both sides of the Atlantic.

There are a multitude of excellences in The Forging of the Union. Professor Morris's discussion of the economic health of the new republic is probably the most cogent available examination of its subject.77 Was there an economic depression in the mid-1780s? Professor Morris insists that there was, refuting the older work of the late Professor Merrill Jensen (whose optimistic study The New Nation78 was until now our most detailed modern history of the United States under the Articles of Confederation). In addition, he demonstrates the importance of this economic crisis in spurring the movement to strengthen (and, ultimately, to replace) the Articles. Similarly, Professor Morris presents an authoritative account of the workings of government under the Confederation, judiciously considering the achievements and shortcomings of the Confederation government,79 and of foreign policy in the 1780s and its significance in the quest for nationhood.80 Focusing not just on the details of diplomacy and administration of foreign policy but on the

77. R. Morris, supra note 75, at 130-61.
79. R. Morris, supra note 75, at 55-110.
80. Id. at 194-219, 232-44.
intellectual and political consequences of that policy, Professor Morris confirms his argument in *The American Revolution Reconsidered* for the pivotal importance of foreign policy concerns in assessing the performance of government under the Articles (another area shortchanged by Jensen). And Professor Morris never loses sight of his central theme: the process of nation-building and constitution-making.

Both supporters and challengers of Justice Thurgood Marshall's recent criticisms of the Bicentennial celebrations will be fascinated by Professor Morris's persuasive chapter, "A Cautiously Transforming Egalitarianism." Relying on the latest studies of social history, religious freedom, legal history, and the histories of women, blacks, Native Americans, and other minorities, Professor Morris has produced a fair-minded account of the ways in which the "forgotten people" of the American Revolution were largely excluded from political power and the mainstream of American life, yet not permanently barred from ultimately joining what Henry Adams would have called "the political population."

Despite the scope, quality of and largely successful execution of this book's grand design, some questions present themselves. Professor Morris sets forth a convincing case for the primacy of the Union over the states, predating the Revolution. Although he refutes those who argue that "the states created the Federal Government" and that there was no American nation or national consciousness in the Founding Period, his schematic presentation is more a legal argument than an historical analysis. Professor Morris discounts the strong evidence for localist sentiment in New York, Virginia, and other states. One need not disagree with his conclusion, either historically or politically, to feel disquiet at his sometimes dismissive treatment of those who distrusted national government in this period. And, despite the generally first-rate analyses of key documents such as the Treaty of Paris of 1783, his treatment of the details and importance of state constitution-making in the 1770s and 1780s is surprisingly cursory.

But the myriad substantive and stylistic merits of *The Forging of the Union* are what stand out. Professor Morris's book would be a major

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83. R. Morris, supra note 75, at 162–93.
85. R. Morris, supra note 75, at 55–79.
86. President Ronald Reagan declared this to be the case in his First Inaugural Address. *President's Inaugural Address*, 1 Pub. Papers 2 (Jan. 20, 1981).
87. But see infra note 154 and accompanying text.
88. R. Morris, supra note 75, at 196–205 (Treaty of Paris, 1783); id. at 80–91 (Articles of Confederation).
89. R. Morris, supra note 75, at 118–25.
event for American historiography in any year; its appearance in 1987 is peculiarly felicitous. All future students of the Founding Period will have to begin their inquiries with this work.

Another major book that is at the same time traditional in its concerns and up-to-date in its methodology is Jack P. Greene’s Peripheries and Center.90 Professor Greene examines the recurring problem of developing constitutional frameworks for an “extended polity” under the traditions of Anglo-American constitutionalism. The question of forging a constitutional solution to governing a central territory and its colonies—a center and its peripheries—was at the heart of the constitutional struggle between Britain and her North American colonies. Establishing a binding solution to a constitutional controversy required its ratification by both the center and the peripheries. In mutated form during and after the Revolution, this problem became a struggle between nationally minded and locally minded American politicians and political theorists—a contest culminating in the framing and adoption of the Constitution. The Framers and supporters of the Constitution in 1787–1788 believed that they had arrived at a solution to this dilemma by creating a system of government founded on the people of the United States and “endowed . . . with sovereign authority coordinate with that of the states.”91 This system, they believed, would enable each set of governmental institutions to check the other, “to achieve both a workable division of authority between states and nation and a satisfactory balance between local diversity and central unity.”92

Professor Greene points out that the hopes of the Framers were only partly fulfilled, because the tension between the doctrines of coordinate sovereignty and popular sovereignty persisted.93 The cautious assertions of federal power in the early days of the Constitution and the suspicions of adherents of state governments, anchored in the constitutional text in the tenth amendment, nourished this tension, and the development of a constitutional theory of state sovereignty side-by-side with a constitutional theory of perpetual union founded on popular sovereignty shaped the growing tensions between North and South. The crisis of 1860–1861 and the Civil War demonstrated, Professor Greene argues, that the original Constitution failed to resolve the problem of distributing authority between center and peripheries, and the history of American constitutional law bears witness to the continuing problem that disputes between center and peripheries “apparently can be settled only by separation, force, or the threat thereof.”94

Professor Greene has long defended the importance of political

91. Id. at 212.
92. Id.
93. Id. at 212–13.
94. Id. at 216–17.
and institutional history. In this study, he aligns himself with predecessors whose work has gone into eclipse—including Andrew C. McLaughlin,95 Charles McIlwain,96 and Charles M. Andrews97—but Greene single-handedly reinvigorates traditional institutional and constitutional history by fusing its methodology with that of legal historians such as William E. Nelson, John Phillip Reid, Barbara A. Black, and Peter S. Onuf and that of the history of political thought and ideology we now associate with Bernard Bailyn and Gordon S. Wood.98

Professor Greene's new work may be profitably contrasted with the essays of Edward S. Corwin, an "old master" of constitutional studies. Cornell University Press has issued the second installment of a three-volume collection of Corwin's essays on American constitutional history and law under the general title Corwin on the Constitution.99 Volume I,100 which appeared six years ago, collects Corwin's classic studies of American constitutional thought in the Founding Period, together with selected essays on the powers of Congress and the President's power to remove government officers. The newly-issued Volume II focuses on the judiciary; Volume III will collect Corwin's major essays on individual rights and international law. Many of these essays have hitherto been scattered widely in obscure scholarly journals inaccessible to most students of constitutional history and law, and the valuable selection of essays edited by Alpheus Thomas Mason and Gerald Garvey has long been out of print.101 Richard Loss' devoted labors make available once again some of the masterworks of an older generation of constitutional scholarship.102

Although sophisticated, subtle, and provocative in their uses of original source materials and formulation of issues for research and analysis, Corwin's essays are nonetheless old-fashioned. Corwin paid careful attention to the structure and terms of political arguments, and respected the need to understand Hamilton, Madison, and their colleagues in their historical context, but he never sought to reconstruct the framework of implicit assumptions and generalizations about human nature, society, and government that underlying the formal

95. A. McLaughlin, Constitutional History of the United States (1935); A. McLaughlin, The Foundations of American Constitutionalism (1932); A. McLaughlin, The Confederation and the Constitution, 1783-1789 (1905).
100. 1 E. Corwin, Corwin on the Constitution (1981).
102. See also E. Corwin, Presidential Power and the Constitution (R. Loss ed. 1976).
political discourse of the Revolutionary generation. By comparison with such modern studies as Peripheries and Center, Corwin’s work, despite its lasting value, seems rootless and disconnected. Thus, Professor Greene’s book offers encouragement to those who believe in the intrinsic interest and utility of traditional institutional and constitutional history informed by recent developments and refinements of the techniques of intellectual and political history.

Professor Forrest McDonald has also explored the intellectual context of the making of the Constitution, in Novus Ordo Seclorum.103 This is the third volume of Professor McDonald’s trilogy dealing with the Founding Period. Professor McDonald began his labors thirty years ago; We the People: The Economic Origins of the Constitution104 appeared in 1958, and E Pluribus Unum105 was published in 1965. McDonald’s first volume challenged the prevailing understanding of the work of the Federal Convention, which at that time was rooted in Charles A. Beard’s Economic Interpretation of the Constitution of the United States.106 Beard sought to demolish his era’s received wisdom about the disinterested patriotism of the Founding Fathers, arguing that research into their economic interests and property holdings demonstrated that they had framed the Constitution to protect their own property, primarily their holdings in government securities. McDonald’s We the People was one of the leading challenges to Beard’s findings, though his own work in turn became the focus of controversy.107 E Pluribus Unum describes the cut and thrust of state, sectional, and economic interests in American politics between 1776 and 1790—in effect, offering McDonald’s portrait of the clashing interests that produced the Constitution to replace the “Beardian” view. With Novus Ordo Seclorum, Professor McDonald now presents his interpretation of the intellectual sources of the Americans’ political experiments culminating with the Constitution.

Professor McDonald has written a learned, combative, and idiosyncratic book—which should not be news to those familiar with his earlier volumes. He begins with a brief, invaluable statement of “the problem” facing Americans as a consequence of independence—in the words of the Declaration of Independence, “to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety

107. See, e.g., Main, Charles Beard and the Constitution: A Critical Review of Forrest McDonald’s We the People, 17 Wm. & Mary Q. (3d ser.) 86 (1960).
and Happiness.” 108 McDonald identifies four "sets of considerations" that "guided as well as limited" the Americans: (1) "providing protection for the lives, liberties, and property of the citizenry"; 109 (2) "the commitment to republicanism"; 110 (3) "history, in several senses of the term"—as source material, as treasured legacy, and as a flow in which the Americans found themselves; 111 and (4) various bodies of political theory. But, he points out, the Americans faced a difficulty of which they were unaware: "[t]he ingredients were incompatible." 112

The great body of Professor McDonald’s book explores the various systems of ideas, doctrines, common-law rules, political principles, economic theories, and shared experiences available to the Revolutionary generation. Readers should be warned in advance to page through each chapter to get a sense of the shape and flow of the argument, for Professor McDonald often allows his enthusiasm for a particular byway of his inquiry so much freedom that he repeatedly threatens to swamp his grand design. 113

Novus Ordo Seclorum addresses the question of what role (quantitatively and qualitatively) theory played in the making of the Constitution. It combines several prevailing approaches to the Convention in an analysis that may be summarized thus: although the Framers were experienced practical politicians, they were also steeped in history, political and economic theory, and the common law. They often had clashing views of these bodies of theory and data, and irreconcilable understandings of their respective importance and consequences. They may have read the same books, but they read them in different ways and for different reasons. Ideas or bodies of ideas such as economy, virtue, republicanism and so forth did not have common meanings. Moreover, the Americans did not necessarily get their ideas from books; rather, as Professor McDonald (invoking Carl Becker) reminds us, "men are generally influenced by those books which clarify their own thought, express their own notions well, or suggest to them ideas they are predisposed to accept." 114

Novus Ordo Seclorum covers much of the same ground dealt with by Gordon S. Wood in The Creation of the American Republic, 115 but Professors Wood and McDonald disagree on the conclusions they draw. Professor Wood sees a shift from early Revolutionary ideology, grounded in the doctrines of classical republicanism and, as its basis, the virtue of the citizenry, to a "new science of politics," the handiwork of the Feder-

108. F. McDonald, supra note 108, at 1.
109. Id. at 3.
110. Id. at 4.
111. Id. at 5.
112. Id. at 8.
113. See, e.g., id. at 9-55.
114. Id. at 84.
alists in framing and winning adoption of the Constitution. Those espousing this new vision rejected the old emphasis on virtue and argued that republican government could be constructed to take account of the flaws of human nature without special concern for preserving virtue as the foundation of a republic. Professor McDonald sees more complexity, uncertainty, and contradiction in these structures of ideas and assumptions about human nature, society, government, economy, and politics than does Professor Wood; for example, Professor McDonald is not willing to read the funeral service for classical republicanism, civic humanism, and virtue as of 1787–1788. But Professors McDonald and Wood agree that this type of historical investigation is both possible and worth pursuing.

At one point, Professor McDonald, whose book is solidly within the sphere of historians' constitutional history, speaks directly to the controversy now raging over "original intent":

It should be obvious from this survey that it is meaningless to say that the Framers intended this or that the Framers intended that: their positions were diverse and, in many particulars, incompatible. Some had firm, well-rounded plans, some had self-contradictory ideas, some were guided only by vague ideals. Some of their differences were subject to compromises; others were not.

Their understanding was further complicated by the fact that they represented states and voted as states, and most delegates felt obliged to champion the interests of their states as they perceived them. Several delegations were divided against themselves.

Although much enlightenment is available in Novus Ordo Seclorum, there is also a good deal to disagree with in these pages. First, Professor McDonald's chapter "The Lessons of Experience: 1776–1787" generally substantiates but does not explicitly confront the problem of differing perceptions of American affairs in the Confederation period. As Professor Jack Rakove has pointed out, issues of foreign policy, national weakness, and interstate rivalry had less significance for most ordinary Americans because they did not impinge directly on daily life; by contrast, these issues mattered a great deal to those Americans who habitually paid attention to such concerns, whether from official responsibility or intellectual inclination.
ond, Professor McDonald slights the critical importance of foreign policy difficulties in the Confederation period—a point given new importance by the work of Richard B. Morris and Frederick W. Marks III.  

Third, Professor McDonald's lawyerly discussion of the problem of sovereignty downplays the ambiguity of the division of sovereignty between the Continental Congress (and later the Confederation Congress) and the states throughout the Revolutionary period.

Similarly, his discussion of ratification unaccountably declares that, despite the specific provision of Article VII that the ratifications of only nine states were sufficient to establish the Constitution as the new instrument of government of the United States, contradicting the Articles of Confederation, which required unanimous consent by all thirteen states to give effect to amendments, the ratification process of 1787-1788 constituted a valid amendment of the Articles. While, in the end, all thirteen states did ratify the Constitution, surely Professor McDonald is aware that only eleven states were represented in the First Congress that convened in April of 1789, that when North Carolina ratified the Constitution in November of 1789 and Rhode Island finally ratified in May of 1790, the two states joined a Union with a government already in operation, and that before these states ratified the Constitution they were in a jurisdictional limbo vis-à-vis the government operating under the Constitution. Fifth, Professor McDonald unduly minimizes the importance of Shays's Rebellion in spurring the movement to call the Federal Convention. Most observers agree that the uprisings of "desperate debtors" under the symbolic leadership of Daniel Shays—focused in Massachusetts, but including risings in every New England state but Rhode Island and even as far south as Virginia and South Carolina—posed a serious threat to the stability and authority of the state governments, and reports of the Shaysite uprisings alarmed moderate and conservative nationalists throughout the nation. Professor McDonald persists, however, in treating the matter as a minor squabble deliberately exaggerated by the Confederation's Secretary for War, Henry Knox of Massachusetts, by means that we


123. F. McDonald, supra note 103, at 144-52.

124. Id. at 279.


126. R. Morris, supra note 75, at 264-65.

127. See id. at 258-66; D. Szatmary, Shays' Rebellion: The Making of an Agrarian Insurrection 120-33 (1980); R. Bernstein with K. Rice, supra note 2, at 97.
would describe today as disinformation.  

Finally, Professor McDonald's otherwise subtle and perceptive account of the influence of David Hume's political essays on James Madison's understanding of factions and interests in a republic needlessly minimizes Madison's recognition that factions could find their causes in attachments to particular leaders or families and religious zeal. Professor McDonald claims that Madison had no personal experience or "felt heritage" of these causes of factionalism. Madison's experience as the key figure in the successful campaign to disestablish the Church of England in Virginia heightened his sensitivity to the divisiveness of religion in public life, even though Madison was a member of the very denomination he sought to topple. And Madison's experience of Virginia politics, in which established families such as the Harrisons, the Lees, and the Randolphs and their allies were pitted against "new men" such as Patrick Henry, made him fully aware of the importance of familial connections as sources of factional strife.

Paradoxically, Professor McDonald's book suffers from its greatest strength—his close attention to and emphasis on the Constitution's intellectual roots. It may well be the case that one or another Framer's or Federalist's or Anti-Federalist's ideas came from Montesquieu originally, but was the historical actor necessarily aware of this? Although Professor McDonald may have felt the need to note Carl Becker's warning about treating the relationship between an historical figure's ideas and the books he read with caution, his tendency to cast various delegates to the Convention as Humeans or Montesquieuans unwittingly perpetuates the problem of seeing the Convention soley as a seminar in political theory.

Another attempt to enter into the intellectual world of the Founding Period is Morton White's Philosophy, The Federalist, and the Constitution. Professor White is best known as a historian of philosophy; in this study, he focuses on The Federalist, using it as a means to trace the intellectual concepts and philosophical understandings underlying the work of the Framers of the Constitution. Professor White's study is intricate and challenging, demanding a high degree of sophistication

128. F. McDonald, supra note 103, at 177, 180.
129. F. McDonald, supra note 103, at 162–66; see also D. Adair, Fame and the Founding Fathers (T. Colbourn ed. 1974).
130. F. McDonald, supra note 103, at 216.
132. See infra notes 243–46 and accompanying text.
133. See, e.g., F. McDonald, supra note 103, at 233–35, 259.
from the reader in following his exegeses of the ideas of John Locke and David Hume, and their contrasting views of such hallmarks of The Federalist and the debate over the Constitution as "reason" and "experience," "history" and "human nature." Professor White examines the ways in which these philosophers and their contemporaries helped to shape the ideas of Hamilton and Madison, and ultimately the defense and explication of the Constitution set forth in The Federalist.

To use The Federalist as a means to understand the Constitution and its underlying philosophy is a risk-laden pursuit, especially if undertaken for the purpose not of historical understanding but of prescription for modern constitutional law and politics. Such is the enterprise at the heart of Vincent Ostrom's The Political Theory of a Compound Republic,136 a 1970 study newly revised for the Bicentennial. Professor Ostrom frankly concedes that he discounts the historical context of the origins of The Federalist, using arguments of Hamilton and Madison (he omits John Jay from consideration) to build a theory of "constitutional choice" emphasizing the ideas of a compound republic and government decentralization for our own day.137 By contrast, Professor White enters into his interpretative venture with full knowledge of the many difficulties in his path:

Somewhere in the middle of my journey to the end of this book I came to appreciate the great difficulty of trying to formulate the philosophy of a work such as The Federalist, a work which is not exclusively or even primarily philosophical in purpose. The scholar who studies a strictly philosophical text has the advantage of studying one which usually contains an argument that leads to philosophical conclusions, and therefore such a scholar’s task may be limited to clarifying that argument and those conclusions. By contrast, my task in presenting the philosophy of The Federalist was peculiarly difficult because I sought to extract a philosophy from a work whose authors were not primarily concerned with advocating one. . . .

I hope, therefore, that this work will be judged as a study which is primarily concerned to show the part that philosophy played in The Federalist’s defense of the Constitution. How big a part I leave it to others to say, to others who are ingenious enough to measure in a clear way the relative importance of intellectual and nonintellectual factors in that defense.138

It is a measure of the value of Professor White’s erudite and complex book that he remains faithful throughout to the vision sketched in the

137. Id. at 1–28. Professor Ostrom’s book is one of the major studies in the “public choice” school of political science, whose practitioners apply the tools of economic analysis to the study of political decisionmaking. See generally D. Mueller, Public Choice (1979).
passage quoted above, and that he pursues his interpretative and re-
constructive purposes with intellectual integrity, and especially, with fi-
delity to the history of political thought in the Founding Period. Some
readers may object to Professor White’s tendency to read the essays
collected in The Federalist as writings by the fictional “Publius” rather
than as the sometimes inconsistent writings of Hamilton, Madison, and
Jay. Clinton Rossiter once pointed out, however, that Publius speaks in
The Federalist as “at least as whole a personality as any reasonable man
can be when he has to deal with the everlasting tensions of free govern-
ment. His own tensions . . . are only an honest reflection of those built
into the Constitution.”139 Although Professor White’s study says little
to the modern constitutional lawyer seeking the support of Publius for
a given position or constitutional interpretation, it will be of great value
to those who take the history of ideas seriously. Professor White dem-
onstrates how political thought and political action intersected in the
Founding Period to produce in the Constitution and The Federalist su-
perb examples of what he aptly calls “political technology” (that is, de-
scriptions and defenses of methods to solve problems of politics and
government, rather than descriptions of those problems themselves).140

A symposium volume occasioned by the Bicentennial is a first-rate
exploration of the frontiers of historical scholarship on the Founding
Period. Beyond Confederation, edited by Richard R. Beeman, the late
Stephen Botein, and Edward C. Carter II, presents a fine collection of
papers delivered at a 1984 conference in Philadelphia.141 As Professor
Beeman points out in his introduction, several of the collected essays
show an appreciation of the importance of the “republican synthesis”
pioneered by such scholars as Douglass Adair, J.G.A. Pocock, Bernard
Bailyn and Gordon S. Wood142 together with an inclination to move
beyond these scholars’ emphasis on the ideas of classical republican
thought. Professor Stanley Katz143 reminds us that the Americans also
drew on bodies of legal and constitutional thought distinct from—
though not inconsistent with—republican doctrines in their disputes
with Great Britain and their efforts to frame a new system of govern-
ment for themselves after the winning of independence.

Professor Ralph Lerner challenges the Bailyn-Wood republican
synthesis directly,144 emphasizing the conscious construction and use

139. Rossiter, Introduction to The Federalist Papers, supra note 46, at xv.
141. Beyond Confederation: Origins of the Constitution and American National
142. Beeman, Introduction to Beyond Confederation, supra note 141, at 3–12. See
the articles by Shalhope cited infra note 296.
143. Katz, The American Constitution: A Revolutionary Interpretation, in Beyond
Confederation, supra note 141, at 23–37.
144. Lerner, The Constitution of the Thinking Revolutionary, in Beyond Confeder-
ation, supra note 141, at 38–68. Professor Lerner has revised this essay for republica-
by the members of the Revolutionary generation of intellectual and
political arguments, Professor Lerner rejects the implication that the
Framers and their contemporaries were "prisoners" of ideological sys-
tems and that their political and constitutional discourse was nothing
more than reflexive invocations of inculcated bodies of ideas.

Gordon Wood focuses on the perennial controversy over the con-


flict between virtue and self-interest in American politics in the Found-
ing Period. Traditionally, the Anti-Federalists have appeared as
defenders of the idea that government had to encourage virtue in the
citizensry in order to sustain a republic, the only form of government
that could preserve liberty; on the other hand, Federalists argued that
government could be structured to take advantage of human beings'
tendencies to pursue their own interests, rather than to encourage vir-
tue, because self-interest itself could be used to preserve a republic.
Professor Wood argues that, whereas the Federalists had constructed
the Constitution to ensure the selection of disinterested statesmen who
would pursue the general interest, Anti-Federalists such as William
Findley of Pennsylvania were aggressively entrepreneurial and thus
fully willing to tolerate pursuit of one's own self-interests in politics;
thus, Professor Wood maintains that the Anti-Federalists were closer to
the future development of American politics than the Federalists were.

Several essays in Beyond Confederation treat familiar topics in un-
familiar and thus suggestive ways. Two essays on James Madison, by
Lance Banning and Drew McCoy, demonstrate the protean na-
ture and enduring fascination of Madison's role in the Founding Pe-


riod. Professor Banning focuses on the significance of the Convention
for Madison's development as a theoretician and constitutional politi-
cian; Professor McCoy considers Madison as a Southerner and a Virgin-
ian, recovering the localist currents in the political thought of a man
traditionally acclaimed as one of our most ardent nationalists.
Professor Richard D. Brown declares that Shays's Rebellion had little
influence on the Massachusetts ratifying campaign, except insofar as
the harsh measures taken to suppress the rebellion encouraged public
sympathy for the debtors and hostility to measures favored by their op-


tion as the prologue to his important new book (which unfortunately arrived too late for
detailed discussion in this Article), R. Lerner, The Thinking Revolutionary: Principle


146. Banning, The Practicable Sphere of a Republic: James Madison, the Constitu-
tional Convention, and the Emergence of Revolutionary Federalism, in Beyond Confeder-
ation, supra note 141, at 162-87.

ponents. Professor Richard E. Ellis traces the persistence and transformation of Anti-Federalism even after the Constitution's apparent triumph in 1789. Finally, Professor Paul Finkelman presents a meticulous account of the Constitution's proslavery bias, tracing the Convention's many compromises on slavery—including the adoption of the three-fifths ratio for representation and taxation, the fugitive slave clause, and the compromises protecting for twenty years the trans-Atlantic slave trade—and endorsing the antebellum abolitionist critique of the Constitution.

Still other essays in this volume preview exciting developments in the study of the Founding Period. Jack N. Rakove's essay "The Structure of Politics at the Accession of George Washington" offers the hope of an entirely new approach to understanding the beginnings of government under the Constitution, one that stresses the emerging possibilities of politics on a national scale and the consequences of this untried form of politics for the several theories of representation and of the permissible role of the new government held by the Framers, the Federalists, and the Anti-Federalists. Similarly, Stephen Botein's superb meditation on "Religious Dimensions of the Early American State" urges us to escape from the well-worn contours of the debate over the original understanding of relations between church and state by seeking to understand this aspect of the past in its own terms. And Professor Janet Riesman's essay on Federal and Anti-Federal conceptions of political economy and the importance of prosperity in American political discourse marks a major advance in our understanding of the economic dimensions of the debate over the Constitution.

John M. Murrin's concluding essay, "A Roof Without Walls: The Dilemma of American National Identity," presents a suggestive and daring response to the arguments that the American Revolution represented a stage in the ongoing development of an American national identity. Professor Murrin highlights the difficulties of forging a new national identity in the 1770s and 1780s, ironically noting that the forces of nationalism pointed backward to Great Britain as the source

of the nationalizing factors of American life, not forward to an independent nation. Even those historians, such as the present writer, who hold to the view that Professor Murrin criticizes, will benefit from his vigorous essay redressing the balance between nationalism and parochialism—what Professor Greene would call centrifugal and centripetal tendencies—in the making of the Constitution and the American political community. If historians working in this field explore the ideas and suggestions marked out in *Beyond Confederation*, they will add significantly to our understanding of the Founding Period.

Another symposium appears in the *William and Mary Quarterly*—for more than four decades the leading journal of early American history and culture. The *Quarterly*’s July 1987 issue\(^\text{155}\) devoted to the Constitution is an equally important conspectus of the new scholarship.

James H. Hutson offers a cautionary keynote to this issue in his essay, “Riddles of the Federal Constitutional Convention.”\(^\text{156}\) Drawing on his familiarity with the Convention and with the many recent studies of its work, Professor Hutson reminds us of the hazards of trying to write the Convention’s history in light of the uncertain state of the documentary record,\(^\text{157}\) as well as our near-total lack of information and evidence concerning the delegates’ formal and informal discussions. Dr. Hutson concludes by calling for a new scholarly consensus on our understanding of the Convention.

In another essay, Steven Boyd explores another recurring issue of our constitutional history. Analyzing the early understandings of the Constitution’s bar on state acts impairing the obligations of contracts,\(^\text{158}\) Professor Boyd champions the correctness of Madison’s assertion in *Federalist* No. 39\(^\text{159}\) that the Constitution was neither wholly federal nor wholly national but a mixture of the two. Professor Boyd also shows the impossibility of establishing a clear and convincing statement of original intent underlying even a seemingly clear and specific constitutional provision.

Robert Webking’s article identifying Melancton Smith of New York as the author of the two pamphlets published under the pseudonym the “Federal Farmer”\(^\text{160}\) is a fine illustration that it is still possible to add to our body of information about the origins of the Constitution as well as to propose new interpretations. The “Federal Farmer” pamphlets, as noted above,\(^\text{161}\) are perhaps the best and most comprehensive single

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155. 44 Wm. & Mary Q. (3d ser.) (1987).
157. Id. at 411–19.
161. See supra text accompanying notes 47, 48.
statement of the moderate Anti-Federal position. For many decades, it was widely believed that Richard Henry Lee of Virginia had written the "Federal Farmer" pamphlets, but Gordon Wood demolished this attribution in 1974.162 Webking's persuasive argument in support of Smith's authorship of the pamphlets is yet another indication of the importance of this remarkable New York lawyer and politician who deserves more recognition.163


Two additional points that Webking does not address may reinforce his central thesis. I am indebted to Gordon S. Wood for suggesting the first, which focuses on Smith's reasons for not claiming the "Federal Farmer" essays as his own if he were indeed the author. Whatever Smith's reasons for keeping silent before the New York ratifying convention—and they were probably the usual reasons described by Herbert Storing in his general discussion of Anti-Federal pamphleteering, 2 Complete Anti-Federalist, supra note 20, at 222 n.6—his vote for the Constitution, following his weeks of activity as the Anti-Federal floor leader, would have presented insuperable political obstacles to his stepping forward.

The second point, for which I am indebted to Kym S. Rice, focuses on additional means to test Webking's argument. Webking's principal source material is Melancton Smith's speeches in the New York ratifying convention. Research in Smith's surviving private correspondence covering the ostensible dates of the "Federal Farmer" essays may well yield additional confirmatory parallels. Compare, e.g., the Federal Farmer's Letter XV, dated Jan. 18, 1788, covering article III and the judiciary, Letters from the Federal Farmer, supra note 47, at 98:

In this country, we have been always jealous of the legislature, and especially the executive; but not always of the judiciary: but very few men attentively consider the essential parts of it, and its proceedings, as they tend to support or to destroy free government: only a few professional men are in a situation properly to do this; and it is often alledged, that instances have not frequently occurred, in which they have been found very alert watchmen in the cause of liberty, or in the cause of democratic republics. Add to these considerations, that particular circumstances exist at this time to increase our inattention to limiting properly the judicial powers, we may fairly conclude, we are more in danger of sowing the seeds of arbitrary government in this department than in any other.


I wish you . . . would favou[r] me, as your leisure and opportunities will permit, with your observations on this system, especially on the Judicial powers of it, about which very little has yet been written. It appears to me this part of the system is so framed as to clinch all the other powers, and to extend them in a silent and imperceptible manner to any thing and every thing, while the Court who are vested with these powers are totally independent, uncontroullable and not amenable to any other power in any decisions they may make.

More suggestive is the comparison as to the federal judiciary's equity powers. First Smith's letter to Yates, as quoted in R. Bernstein with K. Rice, supra note 2, at 228:

What are the cases in equity arising under the Constitution? Will not the
Daniel Walker Howe’s study of “The Political Psychology of The Federalist” differs from most of the recent students of Publius who focus on “the enduring validity of the papers.” Rather, Professor Howe seeks to reconstruct the acceptance by Hamilton, Madison, and Jay of the body of thought known as “faculty psychology.” Faculty psychology examines human faculties in terms of their purposes, and is rooted in the works of such writers as Lord Shaftesbury, Thomas Reid, and John Witherspoon. Professor Howe seeks to identify the sources of Publius’ understanding of human nature and to show how that understanding, informed by faculty psychology, molded The Federalist’s theories of good government, its prescriptions for achieving it, and its “techniques for persuading men to adopt it.” In this respect, Professor Howe’s essay is in the tradition of Morton White’s fine monograph on The Federalist discussed above.

It is fitting that the Quarterly has devoted a substantial part of this special issue to a Forum on Gordon Wood’s The Creation of the American Republic, the most influential single work of historical scholarship on the Founding Period to appear in the past two decades. A dozen specialists in the history of the Founding Period offer their reactions to and matured reflections on Professor Wood’s book—its argument, its enduring significance, and its influence on the field—with Professor Wood

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supreme court under this clause have a right to enlarge the extent of the powers of the general government—and to curtail that of the States at pleasure?

Now, the Federal Farmer, Letter XV:

By art. 3 sect. 2, “the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States,” &c. What is here meant by equity? what is equity in a case arising under the Constitution? . . . Perhaps, the clause would have the same meaning were the words, “this constitution,” omitted: there is in it either a careless complex misuse of words, in themselves of extensive signification, or there is some meaning not easy to be comprehended. Suppose a case arising under the constitution—suppose the question judicially moved, whether, by the constitution, congress can suppress a state tax laid on polls, lands, or as an excise duty, which may be supposed to interfere with a federal tax. By the letter of the constitution, congress will appear to have no power to do it: but then the judges may decide the question on principles of equity as well as law. Now, omitting the words, “in law and equity,” they may decide according to the spirit and true meaning of the constitution, as collected from what must appear to have been the intentions of the people when they made it. Therefore, it would seem, that if these words mean any thing, they must have a further meaning: yet I will not suppose it intended to lodge an arbitrary power or discretion in the judges, to decide as their conscience, their opinions, their caprice, or their politics might dictate. Without dwelling on this obscure clause, I will leave it to the examination of others.

Letters from the Federal Farmer, supra note 47, at 104–05.

165. Id. at 485.
166. Id. at 489.
167. Id.
168. See supra notes 134–39 and accompanying text.
having the final word.¹⁶⁹

Nearly all the commentators find many good things to say about Creation, but the criticisms they offer represent a remarkable variety of individual concerns, priorities, and (in some cases) complaints. Edward Countryman,¹⁷⁰ Jackson Turner Main,¹⁷¹ and Gary B. Nash¹⁷² argue that Creation is too superficial, too monochromatic in its view of the political thought of the Revolutionary era; they contend that Professor Wood has bypassed or ignored evidence of conflict and disparate traditions of understanding politics and society. Essentially, they charge, Professor Wood is writing "elitist" history due to his almost exclusive reliance on the writings of the literate and the articulate. Several commentators—notably John M. Murrin¹⁷³—draw on the works of Lance Banning,¹⁷⁴ Drew McCoy,¹⁷⁵ and others extending the "republican synthesis" into the early national and Jeffersonian periods to suggest that Professor Wood's interment of classical republicanism and civic humanist thought in 1787-1788 was premature. Ruth Bloch¹⁷⁶ adds that Creation inadequately assesses the importance of religion in the political culture of the Founding Period (a view shared by Stephen Botein).¹⁷⁷ Jack Rakove¹⁷⁸ and Peter Onuf¹⁷⁹ suggest that Creation offers perhaps too intellectualized a view of politics, one too distant from the actual issues and problems of governance that the Americans faced in this period. Ralph Ketcham,¹⁸⁰ Pauline Maier,¹⁸¹ and John R. Howe, Jr.¹⁸² criticize Creation's view of the Anti-Federalists as too optimistic

¹⁷⁷. See supra note 152 and accompanying text.
and black-and-white; from varying perspectives, they challenge Professor Wood’s view of the Anti-Federalists as heroes of the cause of democratic government.

In his response, Professor Wood perceives two main themes running through the Forum: “(1) the relation between ideology and behavior, and (2) the relation between what have been called ‘classical republicanism’ and ‘liberalism.’” He ably defends his view of the relationship between political culture and political action, though he reads Professor Rakove’s strictures concerning his book as too sweeping a rejection of studying political ideas and ideology. Professor Rakove asks only that historians respect the balance between the study of ideas and the study of events and acts in writing political history. Professor Wood also reproves Professors Ketcham and Maier, arguing that they fail to take Anti-Federal thought seriously because they have “bought” the Federalists’ characterizations of both the Constitution and its opponents. In his discussion of the debate between “classical republicanism” and “liberalism”—what might be called the revived coroner’s report on classical republicanism—Professor Wood parallels his argument in his essay in Beyond Confederation, maintaining that the Constitution contained the seeds of destruction of the classical republican dream of a society governed by virtue and the seeds of a new political and social order permitting—even encouraging—the pursuit of self-interest undiluted by considerations of the common good. He also reiterates his argument that this transformation spelled the end of republicanism and its replacement by liberal democracy.

Jack Rakove and William E. Nelson, in two articles that are probably the most significant pieces in this symposium, offer the hope of a new coherent understanding of the Convention in response to James Hutson’s opening plea for a new interpretative model. In “The Great Compromise: Ideas, Interests, and the Politics of Constitution Making,” Professor Rakove uses the Convention’s compromise over representation of 16 July 1787 as the foundation of his effort to develop an understanding of the Convention’s workings as something more than a mere series of negotiations of state and sectional interests or a seminar on political and constitutional theory. In his view (one shared by the present writer), the Framers of the Constitution acted simultaneously as tough-minded protectors of the interests of their states and constituencies and as intellectual politicians groping towards a vision of an American nation governed by republican principles. Similarly, in “Reason and Compromise in the Establishment of the Federal Consti-

184. See supra note 145 and accompanying text.
Professor Nelson convincingly argues that the Framers operated on two levels of political argument at once: interest-group politics and "constitutional" or "instrumental-reasoning" politics. The former is self-explanatory; when practicing the latter, the delegates to the Convention did not set out to advance interests of their states or sections but engaged in reasoned and temperate explorations of institutional means to achieve the public good or general interest. Professor Nelson traces this distinction between interest-group and constitutional politics through the controversy over ratification and into the first decade of politics under the Constitution. Throughout this period, Professor Nelson argues, the distinction persisted between issues that pitted interests against each other and issues that posed larger general questions about the means to achieve fundamental ends desired by all members of the political community.

Three other collections of essays on the origins of the Constitution present useful surveys of prevailing modern understandings of the field. *The Framing and Ratification of the Constitution,* edited by Professors Leonard W. Levy and Dennis J. Mahoney, gathers essays by leading constitutional historians, including John M. Murrin, Jack P. Greene, Jack N. Rakove, Judith A. Best, Peter S. Onuf, and Robert A. Rutland, summarizing their recent work. This collection is a reliable and well-considered collaborative history of the making of the Constitution. *The Reluctant Pillar,* edited by Professor Stephen L. Schechter, focuses on New York State and the adoption of the Constitution, combining interpretative and historiographical essays with detailed assemblages of primary data into a useful sourcebook for students of this pivotal battle of the ratification controversy. Another specialized collection, this one focusing on *The Federalist,* is *Saving the Revolution,* edited by Charles Kesler. The product of a 1985 conference, this fine anthology assembles leading historians and political scientists who examine various aspects of *The Federalist*’s origins, political and constitutional arguments, and subsequent fate in the hands of nineteenth- and twentieth-century politicians, judges, and academics.

C. The Significance of Historians’ Constitutional History for Constitutional Discourse

One of the central concerns of this essay is the widening gap between historians’ constitutional history and lawyers’ constitutional his-

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As lawyers and judges continue their quest for the articulable and applicable "intent of the Framers" and as historians pursue their efforts to recover and reframe the past, each group tends to view the other's concerns and proposals with puzzlement, if not outright hostility. Witness, for example, Gordon S. Wood's recent comments on this question:

When confronted with [Federalists' and Anti-Federalists'] contrasting meanings of the Constitution, historians, it seems to me, are not supposed to decide which was more "correct" or more "true." Our task is rather to explain the reasons for these contrasting meanings and why each side should have given to the Constitution the meaning it did. There was not in 1787-1788—and today there is still not—one "correct" or "true" meaning of the Constitution. The Constitution means whatever we want it to mean. Of course, we cannot attribute any meaning we want and expect to get away with it. We have to convince others of our "true" interpretation, and if we can convince enough people that that is the "true" meaning, then so it becomes. That is how the culture changes. It may be a necessary fiction for lawyers and jurists to believe in a "correct" or "true" interpretation of the Constitution in order to carry on their business, but we historians have different obligations and aims.¹⁹¹

Professor Wood's concern about the differing "obligations and aims" of historians' constitutional history and lawyers' constitutional history has immediate application to The Creation of the American Republic and the "republican" school of historians of the Founding Period. To an extent that Professor Wood himself might not realize, Creation has had a major influence on those who practice lawyers' constitutional history. It is cited repeatedly by scholars seeking to legitimate judicial review by reference to the central values and principles of the American political and constitutional system.¹⁹² In addition, recent work in constitutional jurisprudence juxtaposes the traditions of "liberal legalism" (a term describing the complex of ideas and values at the heart of our modern legal system) with the supposed lost opportunities for a communitarian legal and jurisprudential system represented by the abandoned republican synthesis.¹⁹³ Creation has played a central role in both these enterprises. Thus, the vigorous and combative William and Mary Quarterly Forum on Creation is especially important as a potential

¹⁹¹. Wood, supra note 183, at 632-33.
corrective to the legal community's overextensive reliance on one view of the Founding Period, no matter how good that one study might be.

Despite Professor Wood's qualms, which on their face are directed at a specific brand of lawyers' constitutional history—"original intent" scholarship—it is possible for legal and constitutional theorists to draw on both the newest research in original sources and the newest interpretative products of historians' constitutional history to advance


the inquiries and research agenda of constitutional law. One ambitious and largely successful attempt is Bruce Ackerman's Storrs Lectures at Yale Law School, published as "Discovering the Constitution." 195 Professor Ackerman proposes to construct a new understanding of judicial review different from the traditional view of that doctrine as "counter-majoritarian." Traditional analysts of judicial review emphasize that this power is exercised by a body of men and women who are not elected or otherwise directly responsible to the people. This nondemocratic institution's possession and use of such vast power as the linchpin of a democratic polity presents a theoretical and political paradox. For generations, constitutional scholars have produced a large body of literature seeking various ways to legitimate the doctrine of judicial review while constructing an intellectually defensible mechanism for guiding its exercise and limiting its reach. 196

Professor Ackerman describes this prevalent view of judicial review's origins, nature, and dangers as the product of the "Progressive" interpretation of the Constitution's origins associated with Charles A. Beard and other historical and legal scholars of the turn of the century. He identifies a preoccupation with "the dangerous tendency of our governmental institutions to act undemocratically...as a central source of scholarly anxiety" in the modern disciplines of constitutional history, law, and political science. 197 In response to "Progressive" doctrines of judicial review, Professor Ackerman offers a "neo-Federalist" vision of the Constitution that effectively restores judicial review to legitimacy despite its seemingly nondemocratic character. He uses The Federalist as his jumping-off point:

The most important reason why The Federalist is worth reading—not merely by lawyers but by all thinking people—is that it proposes a third way to solve the problem of revolutionary legitimacy. While rejecting the possibility or desirability of permanent revolution [the first way], The Federalist nonetheless places a high value on public-regarding forms of political activity, in which people sacrifice their private interests to pursue the common good in transient and informal political association. While rejecting revolutionary amnesia [the second way], The Federalist insists that the public-regarding form of politics should become preeminent only under certain well-defined historical situations. When these conditions do not apply, the claim of the legally established authorities to speak in the name of the People [of the United States] must be conceded by all thoughtful citizens. 198

196. See, e.g., A. Bickel, The Least Dangerous Branch (2d ed. 1986); R. Bernstein with K. Rice, supra note 2, at 308 n.54.
197. Ackerman, supra note 195, at 1015.
198. Id. at 1020.
Professor Ackerman maintains that "The Federalist's task is to construct the constitutional foundations for a different kind of politics"—what we would recognize as interest-group politics. Like Professors Rakove and Nelson, Professor Ackerman identifies a distinction between "normal politics" (another term for interest-group politics—and "constitutional politics") those "moments of constitutional creation" characterized by a quest to achieve the common or public good by "a mobilized mass of American citizens" acting outside established institutions and through extraordinary means. The problem facing the practitioner of constitutional politics is how to comprehend and handle the cycle between normal and constitutional politics—how "to palliate the most pathological aspects of the normal condition."

The Federalist chooses the latter path, using the newly-developed ideas of representation to channel the course of normal politics "into directions that do not endanger the principles of the American Revolution." But, recognizing the danger that such institutional expedients as the constitutionalization of these doctrines of representation may fail to rein in the destructive tendencies of normal politics (for example, of Congressional or Presidential actions), the Constitution contains a failsafe device—the doctrine of judicial review.

Judicial review, in Professor Ackerman's reading, is the means by which a judge exercises her duty to remind another institution of government seeking to speak for the People of the United States that that institution cannot "abuse . . . the People's name in normal politics." Ultimately, Professor Ackerman identifies judicial review as the third of three measures by which the Constitution is designed "to economize on virtue"—(1) the distinction between normal and constitutional politics; (2) the empowering of democratically elected government officials by the doctrine of separation of powers to challenge other officials' claims to speak for "the People"; and (3) the doctrine of judicial review, which "gives judges special incentives to uphold the integrity of earlier constitutional solutions against the pulling and hauling of normal politics."

Professor Ackerman then identifies the judicial interpretation of the constitutional text—the authoritative utterance of the People of the United States—not as antidemocratic, but rather as a preservation of the dualist political system created by the Constitution. Because authoritative statements of the People of the United States are presumptively more weighty and binding than congressional or presidential actions at the level of normal politics—even if based on an allegedly

199. Id.
200. Id. at 1022. See supra notes 185–87 and accompanying text.
201. Id. at 1024, 1022–24.
202. Id. at 1025.
203. Id. at 1025–29.
204. Id. at 1030.
205. Id. at 1031.
Paralleling the concerns later expressed by Professor Wood, Professor Ackerman does not posit that his is the "correct" reading of *The Federalist*. He simply suggests that the "mainstream" of modern constitutional theory has misread *The Federalist*, has conscripted Publius as a spear carrier in the battle to legitimate and constrain judicial review at the same time. Professor Ackerman's subtle and sensitive analysis of judicial review as an element of the "neo-Federalist Constitution" is an excellent example of an historically sensitive use of historical evidence and materials to propose solutions to a contemporary legal and constitutional dilemma. Furthermore, this proposed solution may have interesting implications for historical discourse as well. For example, consider Professor Wood's analysis in *Beyond Confederation* of the recurring problem of understanding virtue, self-interest, and the relations between them as applied to Federalists and Anti-Federalists. Rather than seeing the Anti-Federalists he selects as more predictive of the future course of development of the constitutional system than the Federalists because they were more apt to engage in the pursuit of self-interest in politics, it is equally plausible to fit the Anti-Federalist case studies at the heart of Professor Wood's argument into the "normal politics" level of the nascent dualist structure of politics, and to see the Federalists' and Anti-Federalists' political and polemical battle over the Constitution in 1787-1788 as taking place on the higher level of constitutional politics.

One could point out that Ackerman's project is based on little more than a reading of *The Federalist* and of Wood's *Creation of the American Republic*. Is this article historically sensitive or selective? The response is that although Ackerman may well have read selectively, he uses the materials he draws on, however selective his research, with ample sensitivity to their arguments and historical contexts. Moreover, inasmuch as this study is an interim report on a much larger work-in-progress, perhaps such criticisms of Ackerman's selectivity are premature.

D. Conscripting the Past in the Service of the Present: The Allure and Pitfalls of Lawyers' Constitutional History

One of the long-standing controversies of American constitutional law is whether we are bound in interpreting the Constitution by the "intent of the Framers" or the "original understanding" of the Constitution or one of its provisions. Within recent years, that dispute has

206. Id. at 1044-72.
207. Wood, supra note 183, at 692-33.
208. Wood, supra note 145.
been revived not only within the scholarly and legal communities but also in public controversy. The leading spokesman for the "Jurisprudence of Original Intention" is Attorney General Edwin Meese III. His opponents tend to be constitutional lawyers and scholars affiliated with the liberal jurisprudential landmarks that the Attorney General and his allies have repeatedly denounced.\textsuperscript{209}

In two speeches in 1985, Attorney General Meese urged "a deference to what the Constitution—its text and intention—may demand . . . a Jurisprudence of Original Intention."\textsuperscript{210} The Attorney General threw down the gauntlet to opponents of the Reagan Administration's positions on modern constitutional controversies:

Those who framed the Constitution chose their words carefully; they debated at great length the most minute points. The language they chose meant something. It is incumbent upon the Court to determine what that meaning was. This is not a shockingly new theory; nor is it arcane or archaic.

. . . . It has been and will continue to be the policy of this administration to press for a Jurisprudence of Original Intention. In the cases we file and those we join as amicus, we will endeavor to resurrect the original meaning of constitutional provisions and statutes as the only reliable guide for judgment.\textsuperscript{211}

Afterwards Justices Brennan and Stevens, in public speeches, impliedly criticized the call of the Attorney General for a Jurisprudence of Original Intent as "arrogance cloaked as humility" (Brennan)\textsuperscript{212} and stressed "[t]he importance of evaluating subsequent developments in the law, as well as the original intent of the Framers" (Stevens).\textsuperscript{213} In response, the Attorney General made the following historical argument:

I would like to make a few commonplace observations about the original document itself. It is easy to forget what a young country America really is. The bicentennial of our independence was just a few years ago, that of the Constitution still two years off. The period surrounding the creation of the Constitution is not a dark and mythical realm. The young America of the 1780's and 90's was a vibrant place, alive with pamphlets, newspapers and books chronicling and commenting upon the great issues of the day. We know how the

\textsuperscript{209} See the useful compilation prepared by the Federalist Society, The Great Debate: Interpreting Our Written Constitution (1986), and L. Caplan, the Tenth Justice (1987).

\textsuperscript{210} Address by Attorney General Edwin Meese III, reproduced in The Great Debate, supra note 209, at 9.

\textsuperscript{211} Id., at 9–10.

\textsuperscript{212} Address by Justice William Brennan, reproduced in The Great Debate, supra note 209, at 14.

\textsuperscript{213} Address by Justice John Paul Stevens, reproduced in The Great Debate, supra note 209, at 28.
Founding Fathers lived, and much of what they read, thought, and believed. The disputes and compromises of the Constitutional Convention were carefully recorded. The minutes of the Convention are a matter of public record. Several of the most important participants—including James Madison, the "father" of the Constitution—wrote comprehensive accounts of the convention. Others, Federalists and Anti-Federalists alike, committed their arguments for and against ratification, as well as their understandings of the Constitution, to paper, so that their ideas and conclusions could be widely circulated, read, and understood.

In short, the Constitution is not buried in the mists of time. We know a tremendous amount of the history of its genesis. The Bicentennial is encouraging even more scholarship about its origins. We know who did what, when, and many times why. One can talk intelligently about a "founding generation."214

Ironically, the Attorney General's delight that scholars are continuing their inquiries into the origins of the Constitution has not met with ringing endorsements from the academic community. In fact, several historians have complained that the cottage industry of original intent scholarship and analysis215 is diverting scholarly energies from exploring the history of the Founding Period on its own terms.216

In addition, two recent articles cast a bleak light on the original intent controversy, offering little encouragement for those who believe in the possibility of an identifiable, clear, and applicable intent of the Framers about the meaning of constitutional provisions. James H. Hutson's "The Creation of the Constitution: The Integrity of the Documentary Record"217 sets forth Dr. Hutson's reflections on his experience in preparing the Supplement to Max Farrand's Records of the Federal Convention of 1787.218 Because Dr. Hutson's assessment of the basis of original intent analysis—the actual documentary record of the framing, adoption, first stages of implementation, and amendment of the Constitution in 1787-1791—strikes a mighty blow at the central assumption of the argument for original intent analysis, it deserves extended description.

Dr. Hutson turns, first, to the traditional questions raised about the integrity and accuracy of James Madison's notes of the Convention.

215. See supra note 194.
218. See supra notes 11-16 and accompanying text.
Originating with the late Professor William Winslow Crosskey of the University of Chicago Law School, the indictment of Madison runs essentially as follows: Madison deliberately abridged and falsified his notes of the Federal Convention and of key debates in the Confederation Congress to remove all evidence that the Convention was authorized to produce, and did knowingly produce, a unitary republic granting Congress broad, sweeping powers over legislation and especially over commerce. Crosskey first aired these arguments in his 1953 magnum opus Politics and the Constitution in the History of the United States. Despite a scathing counter-blast by Madison’s principal biographer, Irving Brant, Crosskey’s allegations will not go away. But Dr. Hutson confirms that Brant’s defense of Madison was sound—Madison did not conduct later wholesale depredations on his Notes.

Dr. Hutson’s findings concerning New York delegate and Anti-Federalist Robert Yates’s notes of the Convention are more disturbing. Known as the Secret Proceedings, Yates’s notes are usually considered second only to Madison for what they reveal about the Convention until Yates and his colleague, John Lansing, departed for New York in early July. The original manuscript of what Yates called his “exact Journal” has long since disappeared, as has the manuscript of Lansing’s transcript of Yates’s notes for 5 July 1787. When compared with the published version of that day’s record in the Secret Proceedings, these

221. Brant, Mr. Crosskey and Mr. Madison, 54 Colum. L. Rev. 443 (1954).
223. Id. at 27–35.
225. Letter of Robert Yates to Abraham Yates, Jr., 1 June 1787; see also R. Bernstein with K. Rice, supra note 2, at 193. The letter appears in full in Supplement, supra note 12, at 41–42.
manuscript pages demonstrate that Genêt doctored Yates's notes, suppressing half of the information that Yates recorded and garbling the other half.\textsuperscript{227} If the balance of the *Secret Proceedings* bears the same relationship to the original manuscript, now lost, then we cannot regard Yates's published *Secret Proceedings* as an accurate source for what happened in the Federal Convention.

Dr. Hutson's most important point focuses on the quality—or lack of quality—of parliamentary reporting in the Founding Period. Madison emerges as perhaps the best American parliamentary reporter of his time. Yet, in admittedly unscientific experiments using his colleagues and a stopwatch, Dr. Hutson suggests that Madison was able to record only seven to ten percent of what was said in the Convention.\textsuperscript{228} In large part, Madison probably summarized the arguments that delegates presented; on occasion, it appears, he also expanded arguments contained in embryo in his speeches as actually delivered.\textsuperscript{229} Even with these faults, Madison is still without peer as a recorder of debates in this period. By contrast, Dr. Hutson describes the work of Thomas Lloyd, the alcoholic journalist who was hired to take down the debates in the Pennsylvania ratifying convention, botched the job, and then assumed the same task for the House of Representatives' debates in the First Congress.\textsuperscript{230} One of the starkest and most disturbing sections of Dr. Hutson's article, his analysis of Lloyd's work is accompanied by a photograph reproducing a typical page of Lloyd's shorthand record of the House's 1789 debates—a page more notable for his caricature of an unknown politician and his sketch of a running horse than for his record of what was said on the floor of the House. Dr. Hutson also assembles a disquieting collection of quotations indicating most Representatives' low opinions of the published record of their debates during the First Congress. In sum, he suggests, we build on sand if we treat the surviving records of debates in the Federal Convention, the state ratifying conventions, or the House of Representatives in the First Congress—the body that, among other things, framed the Bill of Rights—\textsuperscript{231} as accurate verbatim transcripts enabling us to ascertain the original intent of the Framers, ratifiers, or Representatives.

If Dr. Hutson's article casts doubt on our ability to get at evidence of original intent, H. Jefferson Powell's essay, "The Original Understanding of Original Intent," \textsuperscript{232} suggests that we may face profound intellectual difficulties in that pursuit as well. Drawing on a vast body of

\textsuperscript{227} Id. at 14–19.
\textsuperscript{228} Id. at 31, 33–35.
\textsuperscript{229} Id. at 35.
\textsuperscript{230} Id. at 35–38.
\textsuperscript{232} Powell, The Original Understanding of Original Intent, 98 Harv. L. Rev. 885 (1985).
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sources to outline the hermeneutical theories of the Revolutionary generation, Professor Powell argues that the Framers of the Constitution and their contemporaries did not intend their personal understandings of the meanings of constitutional provisions to be binding on the people or on posterity. His study also examines the political and intellectual controversies of the late 1790s and 1800s to elucidate the origins of what the Framers and their contemporaries would have dubbed "original intent analysis"—but he concludes that that method of interpretation differs significantly from what we would mean by the term today. Professor Powell's persuasive analysis of this question suggests that a truly consistent application of original intent analysis would swallow its own tail and, ultimately, itself. It remains only to add that scholarly study "original intent" generates historical evidence and interpretations in response to litigants' or policymakers' demands and dissipates valuable scholarly energies that would be better applied elsewhere.

III. WORKS FOR THE GENERAL READER

When we turn to those books specifically addressed to readers without scholarly background, the quality fluctuates wildly.

Two fine introductions to the Constitution for the general reader address the Constitution's origins as well as its substance. How Free Are We? What the Constitution Says We Can and Cannot Do, by John Sexton and Nat Brandt, is an excellent introductory guide to American constitutional history and law, arranged in question-and-answer format by a professor of constitutional law at New York University School of Law and a former editor of American Heritage and The New York Times Book Review. The book is divided into two parts: "Our Federal System," which covers the origins of the Constitution, the amending process, the three branches of the federal government, and the states, and "Our Rights and Liberties." Each chapter includes several questions, each of which is answered in a brief essay of one to four pages. The authors' treatment of the origins of the Constitution is well grounded in the recent scholarly literature, and is particularly good on the connection between the making of the Constitution and the development of American national identity. The selection of subjects is imaginative,
ranging from the origins of the national Election Day to the history of attempts to force the calling of a second constitutional convention. The book includes extensive citations to leading constitutional cases and a good short bibliography. The U.S. Constitution for Everyone\textsuperscript{237} presents the text of the Constitution with extensive annotations explaining the origins and meaning of the document and supplementing it with pithy quotations and lively drawings. An entertaining first book on the Constitution, it painlessly instills a substantial quantity of useful information about the Constitution's history and meaning.

Two biographies of key figures in the making of the Constitution figure prominently among the good books addressed to general readers. Robert A. Rutland bases his new biography of James Madison\textsuperscript{238} on his decades of study of the Founding Period and, in particular, his experience as editor of The Papers of James Madison.\textsuperscript{239} The only full-length modern study of Madison now in print, James Madison: The Founding Father derives its strengths—and some weaknesses—from Professor Rutland's immersion in his subject. Professor Rutland clearly admires Madison; on occasion, his admiration leads him to offer too friendly or charitable an analysis of Madison's actions and motivations. For example, in discussing the dispute over the location of the permanent national capital, Professor Rutland is quick to stigmatize Northerners' motives for fixing the site at or near New York City or Philadelphia, but assumes that Madison and his allies had none but disinterested, virtuous reasons for their campaign to locate the capital in the area near the Potomac River. If the Northerners wanted the capital to be close to centers of finance and speculation to facilitate lobbying, the Southerners also wanted to ensure that the capital would be accessible to Southern agricultural interests.\textsuperscript{240} Professor Rutland has structured his book in a seemingly lopsided fashion—beginning in October of 1787 and sketching Madison's first thirty-six years in a series of backward glances and referential flashbacks. This unconventional methodology unavoidably slight critical stages of Madison's career and the development of his ideas about politics, government, and society. But, in return, Professor Rutland offers us a fine overview and interpretation of Madison as one of the principal political leaders in the new nation—a pivotal figure in the process of adjusting American politics to the Constitution. Moreover, Professor Rutland has crafted an account as politically knowledgeable and perceptive and as exciting as the best of

\textsuperscript{239} Supra note 35.
Theodore H. White's *Making of the President* volumes\(^{241}\)—or Professor Rutland's own classic *The Ordeal of the Constitution*.\(^{242}\) 

Like Jefferson, Madison began his political career with regard and admiration for Patrick Henry—and, again like Jefferson, Madison soon lost his enthusiasm for the "backwoods Demosthenes." Jefferson and Madison cooled towards Henry for several reasons. They resented Henry's disinclination to buckle down to the business of government. They also disliked but grudgingly admired Henry's ability to throw up legalistic and political roadblocks to policies favoring national rather than local interests. They frowned upon (perhaps enviously) Henry's extraordinary skills in mustering and directing popular opinion, enthusiasm, and suspicion. Too, the Virginia aristocrats may have felt some snobbish disdain for Henry, a self-made and largely self-taught lawyer from the western frontier who defended the interests and expressed the beliefs and concerns of the "common folk" from whom he sprang. Henry Mayer stresses this aspect of Henry's life and character in *A Son of Thunder: Patrick Henry and the American Republic*.\(^{243}\) 

Mr. Mayer's biography is especially welcome during the Bicentennial as a rare full-scale study of one of the Constitution's leading opponents. Indeed, Mr. Mayer offers his study as a challenge to the prevailing veneration of the framers and supporters of the Constitution.\(^{244}\) In a sense, his rejection of the "miracle of Philadelphia"\(^{245}\) view of the making of the Constitution is outdated; instead of a lonely challenge to received wisdom, *A Son of Thunder* is but one of several new studies of the Anti-Federal movement reevaluating the ratification controversy.\(^{246}\) Readers of Mr. Mayer's lively, well-written, impassioned book should keep in mind that Mr. Mayer views the world and the Constitution through his subject's eyes, rather than offering a cooler, disinterested assessment of what gap, if any, there was between the way things were and the way Henry saw them. In Mr. Mayer's defense, it should be pointed out that most earlier accounts of the making of the Constitution err in the same manner but in the opposite direction; *A Son of Thunder* energetically sets out to redress the balance.

A neglected book of a few years ago is of special interest for the Bicentennial, as it makes accessible to the general reader one of the more important trends in historical scholarship of recent years.


\(^{244}\) Id. at xv, 374–95.

\(^{245}\) Id. at xv.

\(^{246}\) See supra notes 17–21, 145, 148, 153, 160, 162, 163, 169–89 and accompanying text.
William Everdell's *The End of Kings: A History of Republics and Republicans* performs for our time the service that Machiavelli's *Discourses* or John Adams' *Defence of the Constitutions of Government* performed for their periods. It is an intelligent, clearly written survey of republicanism in theory and practice throughout the history of Western civilization, ranging from the ancient Greeks and Romans to the late Senator Sam J. Ervin, Jr.

*Witnesses at the Creation* is Richard B. Morris's engaging group biography of Alexander Hamilton, John Jay, and James Madison, the three authors of *The Federalist*. Professor Morris ties together the lives, experiences, and developing political theories of the men behind Publius in a good introduction for the general reader to the background of *The Federalist*. In this connection, it should be noted that Professor Morris's *The Forging of the Union* is also accessible to the intelligent general reader, as are several other books addressed primarily to a scholarly audience—*The Framing and Ratification of the Constitution* and *The Reluctant Pillar* among them.

One aspect of the Bicentennial offering the hope of building bridges between the scholarly community and a more general audience is the series of major historical exhibitions—some of which have also produced companion volumes—at important research libraries throughout the nation. The New York Public Library's Constitution Bicentennial Project is one example; another is The New-York Historical Society's exhibition and companion volume honoring the Bicentennial. Written by the exhibition's curator, Dr. Elizabeth McCaughey, *Government by Choice: Inventing the United States Constitution* is a concise, handsomely produced analysis of the Federal Convention and interpretation of "the Founders' Prescription for Good Government." Dr. McCaughey offers a clear, generally reliable account of the work of the Convention, interspersed with digressions

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251. R. Morris, supra note 75.
252. The Framing and Ratification of the Constitution, supra note 188; The Reluctant Pillar: New York and the Adoption of the Federal Constitution, supra note 189; see also Winkler, supra note 216.
253. See R. Bernstein with K. Rice, supra note 2.
256. Id. at 79.
describing such matters as the issue of a bill of rights in the ratification controversy.\textsuperscript{257}

As usual with a subject as large and complex as the making of the Constitution, it is possible to find points of disagreement. Dr. McCaughey's discussion of the many problems confronting the Confederation does not address the tendency to minimize or downplay these concerns by those who later became Anti-Federalists.\textsuperscript{258} Also, it is questionable whether there was an identifiable group of "Madisonians" at the Convention—that is, a group of delegates led by Madison and acting as a coherent, consciously organized group.\textsuperscript{259} She claims that the Framers' concerns to find virtuous, independent, public-spirited men to hold office under the new Constitution had no elements of class feeling,\textsuperscript{260} but she overlooks the Framers' tendency to equate independence with ownership of at least a certain amount of property—a point of view that arguably has some tincture of class about it. Most jarring are Dr. McCaughey's occasional efforts to evaluate modern society and government by reference to the expectations and intentions of the Framers.\textsuperscript{261} In light of such a sweeping example of judicial review as \textit{Trevett v. Weeden},\textsuperscript{262} in which the Rhode Island Supreme Court invalidated the state's paper money laws as unconstitutional despite the lack of any provision of the revamped colonial charter having anything to do with the issue,\textsuperscript{263} it is hard to credit Dr. McCaughey's assertion that the Framers would have been shaken by judicial exercises of discretion going beyond the written text of the Constitution; after all, \textit{Trevett v. Weeden}, when mentioned at all in the Convention, was mentioned favorably.\textsuperscript{264} Furthermore, Dr. McCaughey offers no documentation for her attacks on "judicial activism" as contrary to the Framers' expectations. On a more practical level, Dr. McCaughey has been poorly served by her publisher, for \textit{Government by Choice} lacks a table of contents, a table of illustrations, and an index.

Nevertheless, \textit{Government by Choice} is a welcome addition to the literature of the Bicentennial and the historiography of the Founding Period. Especially noteworthy are Dr. McCaughey's provocative analysis of the Framers' understanding of such conceptions as virtue and representation and the relationship between them, and her challenging argu-

\textsuperscript{257} Id. at 72–74.
\textsuperscript{258} Id. at 13–16.
\textsuperscript{259} Id. at 36, 39, 40–41, 46.
\textsuperscript{260} Id. at 86–87.
\textsuperscript{261} Id. at 92, 62, 68, 84.
\textsuperscript{262} See J. Varnum, The Case, Trevett Against Weeden, . . . (Providence, R.I. 1787) at 1–36.
\textsuperscript{263} I. Polishook, Rhode Island and the Union, 1774–1795, at 133–42 (1969); R. Bernstein with K. Rice, supra note 2, at 91–92.
\textsuperscript{264} See, e.g., 2 Records, supra note 11, at 27–28 (James Madison's remarks on 17 July 1787); see also C. Warren, Congress, the Constitution, and the Supreme Court 44 & n.2 (1925).
ment that the Framers principally sought to identify and implement a
theory of leadership to ensure that the government they created would
be staffed by those sincerely committed to achieving the public
good.265

Unfortunately, most of the other books about the Constitution for
a general readership do not measure up to the standard of these books.

The Bicentennial follows the pattern of earlier Constitutional anni-
versaries in generating "constitutional devotionals"—hortatory books
claiming to recover and present the central principles of the Constitu-
tion, guiding the American people away from constitutional heresies of
various sorts.266 This year's contribution to this category are Mortimer
Adler's We Hold These Truths: Understanding the Ideas and Ideals of the Con-
stitution267 and Walter Berns's Taking the Constitution Seriously.268 Both
books come highly recommended—Justice Harry Blackmun introduces
Professor Adler's book, and Professor Berns's flaunts encomiums from
scholars and public officials, including Henry J. Abraham, Michael
Novak, and William Bradford Reynolds.269 But Professors Adler and
Berns are not historians. This is not to say that only historians are
qualified to write about the Constitution and its origins. Still, the flaws
of fact and analysis besetting both books result from their authors' aban-
donning of historical methods and inattention to matters of basic
historical fact.270

Of the two books, Taking the Constitution Seriously is more original
and challenging. Professor Berns sets out to establish continuities of
thought and principle between the Declaration of Independence and
the Constitution. The book's essential flaw is that Professor Berns
wants to find in the Constitution more philosophical consistency and
rigor than the document may contain. Not even Professor Berns's gifts
for graceful writing and vigorous argument can demonstrate convinc-
ingly that the Constitution embodied from the first a consistent, sys-
tematic body of ideas about government, natural law, and individual
rights. This central intellectual difficulty is compounded, moreover, by
Professor Berns's failure to take account of the actual history underly-
ing the Constitution. For example, as part of his discussion of the place
of representation in the constitutional system, he claims that "represe-
tative government is characterized by speech whose purpose is to gain
the consent of others" and that the speech and debate clause was intended to protect the "right [of Senators and Representatives] to speak with a view to gaining consent." He further contends that this clause was part of the Framers' plan "to put some distance—but some 'republican' distance—between the people and their representa-
tives." The problem here is that Professor Berns overlooks the origins of the speech and debate clause in the seventeenth-century struggles by the House of Commons for parliamentary privilege to protect their members from reprisals by the Crown for exercising their freedom of legislative debate on matters of Crown policy.

At another point, seeking to attack the legitimacy of Supreme Court decisions striking down state laws under the fourteenth amendment, Professor Berns asserts that the amendment's due process and equal protection clauses simply do not apply to state legislatures. Rather, the due process clause supposedly limits state courts, and the equal protection clause supposedly restricts members of the states' executive branches. Professor Berns claims this to be a clear and unavoidable result of a literal reading of the text of the amendment, but the text nowhere substantiates his assertion. It imposes its several restrictions on states, not on any particular branch or subdivision of the state government. Even more disconcerting, Professor Berns seems to have forgotten the supremacy clause, which specifically enshrines the Constitution as "the supreme Law of the Land" (which all state officers are bound to uphold by oath or affirmation), "any Thing in the Constitution or Laws of any State to the Contrary Notwithstanding." Article VI would seem to supply any arguable deficiency of federal judicial power over state legislatures under the fourteenth amendment, but Professor Berns does not mention it, either in this context or anywhere else in his book.

What has gone wrong in Taking the Constitution Seriously? Professor Berns, writing from the standpoint of a political philosopher, has let his hunt for consistency and system run away with him. Used to analyzing a given text as a carefully thought-out presentation of a consistent argument about politics, he applies these skills to a document that did not originate in that way at all, as Professor McDonald has shown in Novus

271. W. Berns, supra note 268, at 144.
273. W. Berns, supra note 268, at 144.
274. Id.
275. See, e.g., C. Witteke, A History of Parliamentary Privilege (1938); M. Clarke, Parliamentary Privilege in the American Colonies (1943).
276. W. Berns, supra note 268, at 212.
277. For another example of Berns's literalism failing to take account of historical evidence, see Finkelman, supra note 150, at 218–19 n.87.
278. U.S. Const. art. VI, cl. 2, 3.
Ordo Seclorum. The paradox lurking at the heart of Taking the Constitution Seriously is that, while Professor Berns emphasizes that the only appropriate way to interpret the Constitution is to give effect to the intentions of its Framers, he treats this history selectively, using only that which fits his philosophical agenda and discarding the rest as irrelevant.

Most of the other books on the origins of the Constitution focus on the admittedly dramatic story of the Federal Convention. For example, several publishers have reissued older studies of the Convention. Yale University Press has kept Max Farrand’s competent, bland The Framing of the Constitution of the United States in print ever since its first appearance in 1913. Little, Brown has republished Catherine Drinker Bowen’s well-written, uncritical Miracle at Philadelphia with a new, admiring introduction by former Chief Justice Burger. Penguin has revived Carl Van Doren’s graceful The Great Rehearsal, which in 1946 was intended to advance the case for world federation by reference to the Americans’ experience in 1787.

By far the best of these revived books—and still the best book on the Federal Convention for scholarly and general readers alike—is Clinton Rossiter’s 1966 study 1787: The Grand Convention, which W.W. Norton has returned to print with a new introduction by Richard B. Morris. Rossiter’s study is the finest of the Convention books because he treats the intellectual side of constitution-making seriously without sacrificing the details of color, personality, and drama that intrigue the general reader. He also sets the Convention in context, providing useful sketches of the conditions at home and abroad facing the United States in 1787, the struggle for ratification and the first years of the Constitution, and the last years of the Framers. He presents the most perceptive analysis of the shifting coalitions within the Convention and the most acute evaluations of the background, abilities, and performances of the delegates. With such a high standard to meet, it is little wonder that Rossiter’s study is still unmatched, more than twenty years after its first appearance.

William Peters’s A More Perfect Union, and Bill Moyers’s Moyers: Report from Philadelphia are, on the whole, the best of the new books—in large part because they stick to the story presented in Far-

279. See supra notes 109–19 and accompanying text.
285. B. Moyers, Moyers: Report from Philadelphia (1987). In the interests of full disclosure: I was a historical consultant to the original television project.
RAND'S RECORDS without straining for dramatic effect. Peters disclaims larger intellectual ambitions, seeking only to write a lucid narrative of the work of the Convention. He allows the structure of his work to be determined by that of the Convention's debates, occasionally injecting brief descriptions of later constitutional controversies rooted in problems that preoccupied the Framers. The book maintains a firm hold on the course of the debate, so that despite its lack of footnotes the interested reader can find the debate under discussion in Madison's notes or Farrand's Records with little effort. A More Perfect Union permits us to retire Max Farrand's Framing of the Constitution; it is now the best unadorned narrative of the Convention available. Moyers's book is unique among the works discussed here, in that it is the permanent record of a television project. Moyers and his colleagues prepared ninety-three-minute reports for public television, each recounting the day's events at the Federal Convention, with reflections on larger issues and problems facing the United States in 1787. The project had its limitations, of course—three minutes in television equals no more than two double-spaced typewritten pages written under severe constraints dictated by the medium. Nonetheless, these accurate, incisive, and sensitive essays, accompanied by excellent illustrations by Burton Silverman, are a fine introduction to the work of the Convention, especially as Moyers and his colleagues declare their purpose to be to stimulate their readers to read further and explore the story of the making of the Constitution for themselves.

Much inferior not only to Rossiter, Peters, and Moyers but to Farrand, Van Doren, and even Bowen are The Genius of the People, by Charles L. Mee, Jr., and The Founding, by Fred Barbash. Like Peters, Mee and Barbash seek only to tell the story of the Convention without setting it in its larger intellectual and political context. But neither Mee nor Barbash has Peters's ability to tell the story accurately and responsibly or his confidence in its inherent interest. Both writers veer between treating the making of the Constitution as a pork-barrel session of small-time political bosses and spewing forth clouds of incense around the marble statues of the Framers. Mee unconvincingly represents the Convention as a battle between Madisonites (large-state delegates led by James Madison of Virginia) and Shermanites (small-state delegates led by Roger Sherman of Connecticut), showing no sensitivity to the fluidity with which the various groupings of delegates dissolved and coalesced during the summer of 1787. Barbash has a surer sense of this characteristic of the debates, but unintentionally garbles other matters of fact, such as the internal divisions within the New York delegation, in his superheated narrative. Other errors of fact, major and minor, and puzzling lacunae mar both books. The most as-

tounding is Barbash's omission of the climatic exchange of 16 July 1787 between Edmund Randolph and William Paterson that nearly destroyed the fragile consensus of the Great Compromise.288 Neither book comes to grips with the ratification controversy, in which many of the leading Framers found themselves obliged to reconsider and explain the document they had drafted at Philadelphia. Especially with the outpouring of new primary sources and monographs on ratification, Mee and Barbash have no excuse for shortchanging the subject this way.289

In return for their clumsy, sketchy treatments of the intellectual dimension of the Convention, Mee and Barbash serve up stale rehashes of the "human" details of the Convention and of staple Convention anecdotes. In sum, these books should be avoided, for they offer nothing of value to anyone interested in learning about the Federal Convention.

The most disappointing of the new books on the Federal Convention is Decision in Philadelphia, by Christopher Collier and James Lincoln Collier.290 Christopher Collier is State Historian of Connecticut and the author of a solid biography of Roger Sherman;291 James Lincoln Collier is notable primarily for his distinguished studies of American jazz.292 Together, they have also produced several well-received historical novels about the American Revolution for young adult readers.293 At first glance, Decision at Philadelphia promised to measure up to the quality of its authors' other books, and, indeed, to challenge Clinton Rossiter's 1787 for primacy. Drawing on the most recent scholarship (by contrast, Rossiter's study appeared before the publication of Bernard Bailyn's Ideological Origins of the American Revolution and Gordon S. Wood's Creation of the American Republic and the host of other studies spawned in their wake), Decision in Philadelphia

288. Compare, e.g., id. at 120-21 with 2 Records, supra note 11, at 18-20; C. Rossiter, supra note 283, at 194-96, and R. Bernstein with K. Rice, supra note 2, at 167-68.
290. C. Collier & J. Collier, Decision in Philadelphia: The Constitutional Convention of 1787 (1986). In fairness, it should be noted that both Moyers and Peters also slight ratification.
293. See, e.g., J. Collier & C. Collier, My Brother Sam is Dead (1974).
294. B. Bailyn, supra note 3.
296. See generally Shalhope, Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography, 29 Wm. & Mary (3d ser.) Q. 49-80 (1972); Shalhope, Republicanism and Early American Historiography, 39 Wm. & Mary Q. (3d ser.) 334-56 (1982).
presents superb brief accounts of some of the intellectual issues at the heart of the making of the Constitution and excellent character studies of many leading delegates, such as George Washington, Elbridge Gerry, Luther Martin, and James Wilson.297

Nonetheless, this book is marred by disturbing lapses in scholarship. The most serious has to do with James Madison and Charles Pinckney. Following the lead of such partisans of Pinckney as S. Sidney Ulmer, the Colliers maintain that Pinckney was the true framer of the Constitution and that Madison suppressed the South Carolinian's role out of unbridled distaste and jealousy.298 They rehash the old allegations that Madison deliberately refused to record Pinckney's speech of 29 May 1787 proposing his outline of a new Constitution and all later occasions when Pinckney spoke about his ideas. The detective work of J. Franklin Jameson and Andrew C. McLaughlin in the late nineteenth century299 demolished "Constitutional Charlie's" claims and cast grave doubts on his honesty as well. Despite the fame of the Jameson and McLaughlin articles, and even though most historians of the Convention have accepted their findings as authoritative,300 the Colliers revive the old South Carolinian case for Charles Pinckney, citing the Jameson and McLaughlin studies to substantiate their claims. Similarly, the Colliers cite an exchange of letters between Washington and Madison denouncing Pinckney301 but omit the reason for the letters: Pinckney's publication, in October 1787, of a pamphlet setting forth some of his speeches in the Convention, which both Washington and Madison deemed a breach of the delegates' oath of secrecy.302

The Colliers also accept uncritically the arguments of Staughton Lynd that a detailed agreement was secretly worked out between the South Carolina and Connecticut delegates, who then rammed through the Convention their shared understandings about navigation rights


298. Id. at 64-74. See also Ulmer, Charles Pinckney: Father of the Constitution?, 10 S.C.L.Q. 225, 249 (1958) (suggesting "that Charles Pinckney evidently made a greater contribution to the Federal Constitution than has been generally recognized."); Ulmer, James Madison and the Pinckney Plan, 9 S.C.L.Q. 415 (1957) (arguing that Madison's criticisms of the Pinckney draft do not conclusively show that Pinckney's contributions were minimal); C. Nott, The Mystery of the Pinckney Draught (1908) (asserting that a great deal of the work on the Constitution must have been Pinckney's).


300. See, e.g., 3 Records, supra note 11, at 595-609; C. Rossiter, supra note 283, at 152, 171, 331; R. Bernstein with K. Rice, supra note 2, at 158, 306 n.17.

301. C. Collier & J. Collier, supra note 290, at 69.

and the slave trade. Most analysts of the Convention agree that the
delegates argued, fought, and dealt their way into a compromise with
no clear sense of what the final result would be. And the Colliers
accept charges against Madison that he repeatedly tinkered with his
notes, rendering them suspect as a source for the work of the Conven-
tion, despite the repeated exonerations of Madison by Irving Brant and
others. In the end, although it has substantial virtues, the flaws of
Decision in Philadelphia cripple its claims to be a reliable account of the
work of the Federal Convention.

Finally, several publishers have joined the Commission on the Bi-
centennial of the United States Constitution in issuing editions of the
Constitution for a general audience. Of these, perhaps the most elabo-
rate is that prepared by calligrapher and artist Sam Fink; this large
volume reproduces the text of the Constitution in "poster" form,
lightly sprinkled with historical facts and portraits of some of the lead-
ing Framers. The book also includes a perfunctory introduction by
James Michener. Rather more convenient in size is the Bicentennial Keep-
sake Edition. Accompanying the text of the Constitution are "essays
and commentary" by President Reagan, former Chief Justice Burger,
former Speaker of the House Thomas P. O'Neill, Senator Robert Dole,
and former Senator Charles McC. Mathias, billed as the leading Senato-
rial expert on the Constitution. Mr. Mathias is entrusted with this
dition's account of the Constitution, but his essay, too, is plagued by
misreadings of the history of the document and the problems of sover-
eignty under the Articles of Confederation.

IV. THE CONSTITUTION AS PUBLIC EDUCATOR:
A Machine That Would Go of Itself

The Constitution is at the same time a charter of government and a
national symbol. Among its symbolic functions is public education: the
Constitution and the public officials charged with interpreting and ap-
plying its provisions are supposed to instill the basic principles of
American constitutionalism in the minds and hearts of the American

304. See, e.g., R. Bernstein with K. Rice, supra note 2, at 175–78 and sources cited
at 308–09 nn.56–64.
305. Compare C. Collier & J. Collier, supra note 290, at 66–67, 69, 81 with Hut-
son, supra note 217, at 27–33 (and sources cited therein).
Edition].
308. Id. at front dust flap.
Edition, supra note 307, at 85–111 (Articles of Confederation made "[t]he colonies sepa-
rate and independent nations") with R. Morris, supra note 75, at 55–79, (arguing that
national sovereignty preceded the creation of the states).
people. Most constitutional scholars have focused on the first of the Constitution's functions—as a charter of government; only a few have taken note of its symbolic functions.  

Since 1945, the rise of the discipline of American Studies has helped to develop techniques and intellectual models for assessing the developing symbolic roles and functions of a person, idea, event, or institution in the minds of the American people. For example, we have distinguished studies of "the Jefferson image in the American mind," the development of George Washington as an American symbol, and "Andrew Jackson [as a] symbol for [his] age," as well as Garry Wills's examinations of more recent political figures such as Richard Nixon, the Kennedy family, and Ronald Reagan. In A Season of Youth, Professor Michael Kammen examined the changing importance of the American Revolution as a symbolic event. This earlier book presaged his current study, winner of the 1987 Parkman Prize, A Machine That Would Go of Itself: The Constitution in American Culture, the single most innovative study published for the Bicentennial.

This book deserves separate discussion, not only because Professor Kammen has invented a new field of constitutional history, but also because his study suggests that the fragmented and discordant character of the Bicentennial of the Constitution is nothing new. He explores what might be called cultural constitutional history: the study of the Constitution's place in the minds of ordinary Americans or the writings of legal and constitutional scholars addressed to ordinary Americans. Professor Kammen surveys the vast, often confused literature of American popular constitutionalism, drawing on articles in popular journals and constitutional primers, records of the Immigration and Naturalization Service's citizenship tests and of the Constitution Centennial and Sesquicentennial Commissions, opinion polls, political cartoons and history paintings, and the public and private writings of such constitutional sages and prophets as Andrew C. McLaughlin, Max Farrand, J. Franklin Jameson, James M. Beck, Albert J. Beveridge, Edward S. Corwin, and Sol Bloom.


313. J. Ward, Andrew Jackson: Symbol for an Age (1955).


Professor Kammen’s most immediately relevant chapters, for those immersed in the Bicentennial, focus on the Centennial of 1887–1889 and the Sesquicentennial of 1937–1939. In each case, he demonstrates, hucksterism, misinformation, manipulation for evanescent political advantage, and strident localism managed to mar the anniversary, hampering its usefulness as an opportunity for educating the public about the origins and meaning of the Constitution. Professor Kammen’s account describes a sobering legacy for Bicentennial planners, many of whom all too clearly have not profited from his scholarship and warnings.

Professor Kammen argues that the American people have, and have long had, only the faintest understanding of the terms of the Constitution, of its central principles, its origins, and the ways in which the system of government created by the Constitution is supposed to function. To be sure, as Kammen shows, at times of constitutional crisis the American people reassert their claims to the Constitution and participate directly and often with a high degree of knowledge and sophistication in resolving such crises. Nonetheless, to the extent that we expect the Constitution to perform its symbolic functions as public educator unaided, we expect what never was and never can be.

Why has this happened? Professor Kammen identifies several reasons: the ambiguities inherent in the Constitution itself, the public tendency to confuse the Supreme Court with the Constitution, the generally fumbling and uncertain news coverage of developments in constitutional law, and the metaphors—covenant, mechanical, and organic—that judges, politicians, and other commentators have used to explain and celebrate the Constitution—two functions not necessarily complementary. He correctly suggests that the mechanical metaphor is a particularly significant source of this gulf between the Constitution’s constitutive success and its educative and inculcative failure. The Framers may have instructed us too well. Their emphasis on Newtonian balance in the original system has helped to foster a metaphorical understanding of the Constitution as “a machine that would go of itself.” Professor Kammen finds particularly enlightening this passage by James Russell Lowell in an 1888 essay from which he drew his title:

After our Constitution got fairly into working order it really seemed as if we had invented a machine that would go of itself, and this begot a faith in our luck which even the civil war itself but momentarily disturbed. Circumstances continued favorable, and our prosperity went on increasing. I admire the splendid complacency of my countrymen, and find something exhilarating and inspiring in it. We are a nation which has struck ite [sic], but we are also a nation that is sure the well will never run dry. And this confidence in our luck with the absorption in material interests, generated by unparalleled opportunity, has in some respects made us neglectful of our
Lowell's observation touches upon another point, one that Professor Kammen barely discusses. In the past several decades, the American people have developed an increasing distance from, and lack of interest in, American politics. We have seen several attempts to explain this phenomenon. Some focus on the judiciary, claiming that judicial activism has sapped the people's respect for the political system. Others point to the wholesale disillusionment resulting from a series of failed administrations, government scandals, and crises both foreign and domestic. Still others echo Lowell's suggestion that material prosperity distracts the citizenry from things political—an ancient and honorable doctrine, flowing from the beliefs of classical republicanism that virtue, the precondition for the success of a republic, is threatened above all by luxury.

For whatever complex of reasons, a system of government based on the idea that the people govern themselves, whether directly or indirectly, is fundamentally at risk if they do not take the trouble or have the interest to exercise that right and responsibility of self-government. Professor Kammen's book suggests that constitutional government seems to have survived in the United States through the determined efforts of a relatively small band of committed scholars, judges, and public officials—abetted only at sporadic intervals by the support of an aroused public.

We might conclude from A Machine That Would Go of Itself that the Constitution still functions not because of its veneration by the American people but in spite of that veneration. But, read in light of Professor Ackerman's "Discovering the Constitution," Professor Kammen's study may instead offer support for Professor Ackerman's two-track understanding of American politics under the Constitution. In Professor Ackerman's model, as described earlier, most Americans leave politics to politicians and elected officials during times of normal politics. In times of constitutional politics, however, when the operation of the constitutional system creates problems not resolvable within the track of normal politics, these controversies engage the attention and the energies of the People of the United States, and a large, complex process of debate and discussion at this higher level of analysis ultimately resolves the issue.

Nevertheless, Professor Ackerman's two-track model requires that the people of the United States remain both able and willing to reach the level of constitutional politics when necessary—of thinking and acting as the People of the United States in times of constitutional crisis.

319. Id. at 18 (quoting J. Lowell, The Place of the Independent in Politics, in Political Essays 295, 312 (1888)).
321. Ackerman, supra note 195.
322. See supra text accompanying notes 195–208.
And the portents to be found in A Machine That Would Go of Itself are not reassuring.

CONCLUSION: HISTORICAL SCHOLARSHIP AND CONSTITUTIONAL DISCOURSE

One of the most haunting of Biblical tales is that of the Tower of Babel. The feature of that tale of concern to constitutional historians and theorists is the shattering of a world of shared discourse into a myriad of disparate communities whose members could not understand each other. The common human speech destroyed at Babel perished at the hand of God. Though not of the same origin, a similar threat to the unity of our constitutional discourse is emerging to cast a pall over the Bicentennial and beyond.

By "constitutional discourse," I mean the continuing conversation shared by historians, legal scholars, judges, lawyers, politicians, and the general public about the Constitution's meaning, origins, and application. A map of that intellectual world discloses three distinct though overlapping categories of thought, each with its corresponding method of history: the ceremonial, whose purpose is to celebrate the Constitution's origins and success as a charter of government; the utilitarian, whose purpose is to employ the various elements of our constitutional heritage and system to resolve modern controversies; and the scholarly, whose purpose is to study American history, politics, and jurisprudence as they have shaped and have been shaped by the Constitution.324

324. See Bernard Lewis's typology of history in B. Lewis, History: Recovered, Remembered, Invented 11-12 (1976). A special note about the legal community's relationship to the Bicentennial is appropriate. First, the legal community is a special subset of the audience for the ceremonial Bicentennial. In part, lawyers see the Constitution as fitting within their peculiar province:

The freedom created by the Constitution unleashed the energies, abilities and God-given talents of every individual to develop and prosper. We can all take pride that so many leaders of our profession were key figures in bringing about the miracle in Philadelphia. We lawyers, more than others, have a special responsibility as guardians of that great charter. Every bar association, local or state, should have an active program to help give ourselves a history and a civic lesson.

A.B.A. J., Sept. 1, 1987, at back cover (statement of former Chief Justice Burger); see also Conway, The President's Perspective: Plugging Mr. Madison's Cask, N.J. Law., Summer 1987, at 4-5. Also, they find it congenial to celebrate the Framers as lawgivers and the making of the Constitution as the pinnacle of legal creativity and achievement. Whatever the reason, lawyers have always taken special pride in the several anniversaries of the Constitution, and they have valued those works which at the same time celebrate the Constitution and pay homage to the roles of lawyers as its architects and guardians. This is particularly true of Catherine Drinker Bowen's Miracle at Philadelphia, C. Bowen, supra note 281, by far the most popular of such works. Ms. Bowen's book has won special praise from former Chief Justice Burger and other leaders of the profession, see, e.g., Burger, Foreword, in id., at vii-viii; Conway, supra; Richman, Bookshelf (review of C. Bowen, supra note 281), N.J. Lawyer, Summer 1987, at 47, a significant reason being
In the period discussed in *A Machine That Would Go of Itself*, despite the general public's ignorance or misunderstanding of constitutionalism and particular matters of constitutional government, these distinct categories of thought and historical methodology supported and contributed to each other. The Bicentennial of the Constitution carries portents far more disturbing and threatening to American constitutionalism than anything reported in Professor Kammen's study. Due in part to the outright hostility of some Bicentennial planners to those who do not share their conceptions of American history and values, the process of interchange and cross-fertilization of ideas—our constitutional discourse—is breaking apart in the 1980s. Its dissolution entails the threat of severe damage to a major precondition for the success of constitutional government: an informed and politically active citizenry.

The worst Bicentennial excesses may injure public knowledge and appreciation of the Constitution and its central principles by trivializing them. On the other hand, the best of the Bicentennial publications on the Founding Period represent the valiant efforts of historians, legal scholars, journalists, and other writers to preserve our shared constitutional discourse. In his introduction to one of the best new works of popular constitutional history, Bill Moyers distills the lessons that, if we are fortunate, the American people will absorb in this Bicentennial period:

The Constitution was not chiseled in stone on a sacred mountain. It was talked into existence. Through the give-and-take of debate, men who valued the meaning of words and the

its place as the capstone of her series of books glorifying key figures in the history of the common law and by implication the law itself. Richman, supra.

The legal community also has a deep interest in recovering, elucidating, and applying the "original intent" thought to underlie constitutional provisions. This method of constitutional interpretation ties in well with the ceremonial Bicentennial, for the veneration accruing to the Framers carries over to suffuse interpretative enterprises purporting to identify and apply their intent.

325. A recent interview with Phyllis Schlafly furnishes one example:

Q: Do you think the criticisms of the [Burger] commission have been unfair?
A: I think they were put out by the intellectual types who were bent out of shape because they were not running the bicentennial as an exercise for the intelligencia.

I agree with Chief Justice Burger that this is a bicentennial for all Americans. We don't want it to be the private province of professors and lawyers, and people who think they know more than the rest of us.


326. See supra text accompanying notes 266-79. For two representative samples, see numerous articles and advertisements in Am. Legion Mag., Sept. 1987, *passim*, especially id. at 5 (American Historical Foundation Advertisement offering "Constitution 200th Commemorative .44 Magnum" handgun in two different "editions"); UFO Aliens Helped Congress Write the Constitution, Nat'l Enquirer, undated (copy on file at the Columbia Law Review). I am indebted to Rose Gasbarra and Nina Morais for these references.
power of civilized discussion achieved by reason an agreement on how free citizens could live in society and govern themselves.

The Constitutional Convention . . . was a political process, wrought by men aware of conflicting interests and finite possibilities . . . . Recognizing the Constitution as the product of a political process should inspire us more than if Washington had been Moses, taking dictation from Yahweh. If these men got a republic started through deliberation, then certainly we can keep it going by imagining ourselves their heirs of civil discourse. To be sure, they were an uncommon lot. But we still have available to us the insights and arts they brought to politics in their day: the practical importance of history and experience; the necessity of principled compromise; an understanding of government as a contract between rulers and ruled; the need constantly to monitor that contract and the necessity of revising it occasionally; the value of equilibrium in the distribution of power; a knowledge of human imperfection and skepticism towards its perfectibility; and the importance of civic virtue—public responsibility—in self-governance. This is not the revealed wisdom of demigods. It is the insight of experience, the common sense that time and time again saved the convention from ruinous deadlock. To see them as they were takes the Founders down from those old portraits on the wall, unfreezes them, and opens a dialogue between them and us about what it meant then and what it means now to be an American. . . .

The message of that summer's labor is not dated. It still glows with life. Politics matter. Language matters. Reason and argument matter. We are people born of this event. The debates that shaped it are as relevant as the headlines of the day.327