

# Celebrating the Bicentennial of the Living Constitution

Donald H.J. Hermann

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## BOOK REVIEW

### CELEBRATING THE BICENTENNIAL OF THE LIVING CONSTITUTION

The Court and the Constitution, Archibald Cox\*. Boston: Houghton Mifflin Company, 1987. Pp. 434. \$19.95.

*Donald H.J. Hermann\*\**

The celebration of the bicentennial of the United States Constitution has resulted in the publication and reprinting of a spate of books focusing on writings and the events surrounding the drafting and adoption of the Constitution of 1787.<sup>1</sup> These books include anthologies of federalist and anti-federalist papers,<sup>2</sup> notes on the convention,<sup>3</sup> and historical accounts of the convention process.<sup>4</sup> They provide valuable insights into the thoughts and activities of the delegates to the convention, and their contemporary commentators.

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\* Carl M. Loeb University Professor Emeritus, Harvard University. A.B., Harvard University (1934); LL.B., Harvard University (1937); LL.D., Loyola University of Chicago (1964); LL.D., University of Cincinnati (1967); LL.D., Harvard University (1975).

\*\* Professor of Law and Philosophy, Director of the Health Law Institute, DePaul University. A.B., Stanford University (1965); J.D., Columbia University (1968); LL.M., Harvard University (1974); M.A., Northwestern University (1974); Ph.D., Northwestern University (1981).

1. Perhaps the most valuable recently published work on the Constitution from a scholarly perspective is *THE FOUNDERS' CONSTITUTION* (P. Kurland & R. Lerner eds. 1987). This five volume work collects important selected documents from the seventeenth, eighteenth, and nineteenth centuries that bear on the contents of the Constitution from the Preamble to the twelfth amendment.

2. See, e.g., *THE AMERICAN CONSTITUTION FOR AND AGAINST: THE FEDERALIST AND ANTIFEDERALIST PAPERS* (J.R. Pole ed. 1987) (collection of works which argue both for and against the ratification of the Constitution and were expounded prior to the Constitution's final adoption in 1788).

3. See, e.g., *J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787* (A. Koch ed. 1987) (reprint of Madison's notes from the Constitutional Convention of 1787 which were taken as a function of Madison's self-imposed task as secretarial reporter).

4. For examples of recently published works providing an historical account of the Constitutional Convention process, see F. BARBASH, *THE FOUNDING: A DRAMATIC ACCOUNT OF THE WRITING OF THE CONSTITUTION* (1987). See generally M. LOMASK, *THE SPIRIT OF 1787: THE MAKING OF OUR CONSTITUTION* (1980) (account of the four years leading up to, and including, the adoption of the Constitution). For examples of reprinted editions of works dealing with the Constitutional Convention, see C. ROSSITER, *1787: THE GRAND CONVENTION* (1966); C.D. BOWEN, *MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPT., 1787* (1966).

There is, however, something problematic about the limited focus of the material available on bookstore display for the celebration of the Constitution. A focus limited to the 1787 draft fails to communicate the real significance of the Constitution; its durability and adaptability to two centuries of accelerated change. A more serious consequence of the narrow focus of these works is the support it provides to the ideology of strict construction and to those who would apply the Constitution according to a regimen of original intent.<sup>5</sup> A close reading of original sources makes it clear that there was not a single original intent, nor is it even possible to define any expression of original intent on many serious issues which face the nation today.<sup>6</sup> Even more significantly, these books fail to address the most important features of our Constitution; the Bill of Rights and the fourteenth amendment.<sup>7</sup>

To a great extent, this situation has been altered by the publication of Archibald Cox's *The Court and the Constitution*.<sup>8</sup> Cox, an emeritus professor of law at Harvard University and formerly Solicitor General of the United States, is perhaps most widely known as the Watergate Special Prosecutor who was fired in the "Saturday Night Massacre."<sup>9</sup>

Cox presents a view of the Constitution as a document that establishes the basic structure of government of the United States within which the issues raised by historical and social change can be resolved. This view honors the ideals and recognizes the limits on government action set by the drafters, but accepts that they did not resolve all issues before them or anticipate many problems that would arise.

According to Cox, the dynamic quality of the Constitution has fueled the activity of the United States Supreme Court. It has fallen to the Court, in

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5. See, e.g., Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971) (remarks, originally in the form of lectures, which propose that judges must adhere to the material embodied by the text of the Constitution in order to avoid the use of principles that are not neutrally "derived, defined and applied"). See generally Address by Attorney General of the United States Edwin Meese III, before D.C. Chapter of the Federalist Society Lawyers Division (Nov. 15, 1985), reprinted in *Addresses - Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 22-30 (1985).

6. See, e.g., Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985) (arguing that the appropriate interpretation of "original intent" constitutes an examination of the intention of the parties to the compact, i.e. the states in their ratification proceedings, and not the personal intentions of the Framers). See generally Address by Associate Supreme Court Justice William J. Brennan, Jr., entitled *The Constitution of the United States: Contemporary Ratification at the Text and Teaching Symposium*, Georgetown University (Oct. 12, 1985), reprinted in *Addresses - Construing the Constitution*, 19 U.C. DAVIS L. REV. 1, 2-14 (1985).

7. See generally H. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* (4th ed. 1982) (evaluates the demarcation between individual rights and community rights; examines the basic liberties afforded by the Bill of Rights and the applicability of those liberties to the states).

8. A. COX, *THE COURT AND THE CONSTITUTION* (1987).

9. See P. KURLAND, *WATERGATE AND THE CONSTITUTION* 76-77, 97-99 (1978).

Cox's view, to engineer the adaptation of the Constitution to the changing needs facing the nation. At the same time, the Justices are constrained in their activities by the need to link their decisions to the Constitution itself.

Cox begins by providing an account of the adoption of the Constitution.<sup>10</sup> He stresses the establishment of judicial and federal supremacy as foundations of the nation.<sup>11</sup> The development of a national market and a single nation are viewed as the ultimate achievement of the period ending with the Civil War.<sup>12</sup> Cox shows how, from the end of the nineteenth century through World War II, the basic constitutional stance was transformed from one based on laissez-faire economic theory to one based on welfare state economics.<sup>13</sup> This same period witnessed a tremendous expansion of federal power and the adoption of constitutional doctrines to support it.<sup>14</sup> The last quarter century has witnessed the use of constitutional adjudication as an instrument of reform. Nonconformists, the accused, minorities, and women have all benefitted, according to Cox, from interpretations which support new claims of right.<sup>15</sup>

Cox ends his book with an assessment of the future of the Constitution and the current controversy over the role of the Court.<sup>16</sup> For him, the future will depend on maintaining the strength of the American character. Cox concludes that the future of the Constitution depends upon avoiding an unswerving ideology and maintaining the continued cooperation and tolerance among the American people.

The lively style of the book, which not only relates the history of the life and transformation of the Constitution, but also includes narrative accounts of the history behind many of the important cases arising under the Constitution, makes this an informative and enjoyable book. This is a book that lawyers and citizens interested in the Constitution will find valuable. This is the book to be read by those who want to celebrate the bicentennial of the living Constitution.

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10. A. COX, *THE COURT AND THE CONSTITUTION* 31-43 (1987).

11. *Id.* at 44-83.

12. *Id.* at 84-114.

13. *Id.* at 117-55.

14. *Id.* at 156-73.

15. *Id.* at 177-388.

16. *Id.* at 341-78.

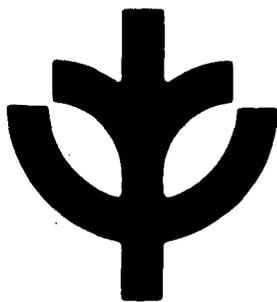


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