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## Review of “The Constitution Reconsidered,” Edited By Conyers Read

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claims. Today, the substance of natural law is traditional; and now that the Whigs and Tories seem to be engaged in a dance to the death, insistence upon recognition of inviolable natural rights may aid in arriving at a compromise.

However, natural law, with its identification of law and morality, with its ideal man in an ideal state of nature, with its insistence upon criteria of universal validity, is only a phase of Jurisprudence. Arm-chair speculation on man as man will not produce a science of law. Historically, natural law afforded a basis for calling to question what had been received as authority, and today it plays an important role in filling in the gaps of the common law. But legal science must take an account of the need for Prosecutor Dewey and blue ribbon juries and what it was that happened between *Swift v. Tyson*<sup>5</sup> and *Erie R. R. v. Tompkins*.<sup>6</sup> As to the former, one may ask why it is that right principles are revealed only in the presence of Mr. Dewey, and as to the latter, why it was that Justice Brandeis caught the gleam but Justice Story failed. However, little can be gained by rehearsing the dissentient notions of unbelievers. In fact, the authors attempt to forestall argument by two methods: first, by declaring that those who disagree with them are the sort of people who do not believe that "two and two make four";<sup>7</sup> and second, by an unqualified use of such words as inherent, truth, fundamental, absolute, and justice. Yet even in the light of such a *caveat*, there may be among the sinful those who persist in unbelief, and for them, the following sentence from Holmes is suggested as a complete creed:

"The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere."<sup>8</sup>

D. M. FEILD.†

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THE CONSTITUTION RECONSIDERED. Edited by Conyers Read. New York: Columbia University Press, 1938. Pp. xviii, 424.

Offspring of a gathering of the American Historical Association met to commemorate the sesquicentennial of the "greatest document ever struck off at one time by the hand of man," this volume comprises twenty-seven papers, the contributions of as many historians, economists, and political scientists. Short but meaty, they offer within the compass of some four hundred pages a commentary on the Constitution that combines the learning, the judgment, and the reflection of a galaxy of intellectual stars. The general high quality of the several essays, born to the occasion under the aegis of a program committee chaired by Walton Hamilton, is matched by the deftness with which shades of emphasis and variations in theme have been utilized by Conyers Read in editing them for publication.

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5. (1842) 16 Pet. 1.

6. (1938) 58 S. Ct. 817.

7. P. 53.

8. Holmes, *Natural Law* (1918) 32 Harv. L. Rev. 40.

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Of the three general areas into which the papers fall, the first concerns the Background of Political, Economic, and Social Ideas behind the Constitution. Charles McIlwain, in opening, sets the general theme by his emphasis upon the "great and very significant difference" between positive checks imposed by one organ of government upon another and negative checks imposed upon governmental power in the aggregate. The latter constitute the chief bulwark of liberty through their imposition of definitive constitutional limitations; the former serve but to weaken government through dissipation of its authority, leaving it incapable not only of doing harm but of achieving good. Incorporation of positive checks into the constitutional structure is, to McIlwain, "proof that the founders of our state had not thoroughly learned the lesson of all past constitutionalism," a lesson which he proceeds to teach with a broad sweep of two thousand years. Thus are posed in sharp relief competing conceptions of ways of attaining and guaranteeing the ideal of a responsive state.

The Bill of Rights, as the embodiment of the school which places its trust in constitutional limitations, enjoys a four-fold diagnosis at the hands of able analysts. William Haller's contribution, directed as it is to a description of those centrifugal forces—disruption of the historic church and emergence of Puritanism—"which made toleration seem so natural a necessity to union," tends to feed the main stream of thought given strong current by Roland Bainton and Herbert Schneider. Both of the latter point, each with the power of a paradox, to the undertow that is set up by constitutional limitation. To Bainton, stressing the Constitution as the product of the Age of Reason, "it is the paradox of the century that the Age of Reason debased reason"; to Schneider, delving into the philosophical profundities of the conflict, "the basic paradox underlying all bills of rights" is caught up in the cry, "Let parliament make a law against parliament." As is reemphasized by Gaetano Salvemini, who carries the analysis into the area of property, as distinguished from political, rights, there is here a study in balance, one that demands all the combined skill of the chemist in the weighing-room and the artist in the garret. But it is the balance of the atomism of the individual against the collectivism of the community, not of legislative power against executive authority.

Balanced government in the latter sense, declares Stanley Pargellis, is unnecessary and ill-equipped to guarantee liberty; what it accomplishes, rather, is governmental impotency and confusion. Indeed, building on the fundamental distinction drawn by McIlwain, he entertains the feeling that, given constitutional limitations as expressed in inclusive bills of rights, optimum balance has already been effected which a separation of governmental powers serves but to overthrow. Yet Pargellis' criticism is directed, not at the balance theory *in toto*, but at so much of it as builds a wall between executive and legislative power, and thereby eschews a cabinet type of government. Even with respect to blending legislative with executive power, he implicitly assumes that the former ingredient is of that purer, later form of actual representation which Carl Stephensen shows to have evolved out of a baser notion of virtual, sympathetic representation

held to even down to the Reform Bill of 1832; and the blending of judicial power as well is no part of his recipe for ideal government. Thus Pargellis would substitute for a tripartite scheme of governmental structure a two-fold one, with legislature and executive combining to formulate and enforce an aggressive social policy, the judiciary left independent to guarantee to the individual a bulwark against violation of the limits that are set upon governmental authority.

Such a view resolves the antinomy otherwise existing between negative and positive checks, for by scaling down the latter to this level, the anti-theoretical aspect of separation of powers is done away with while the remainder is retained as a device for implementing constitutional limitations. Nor does S. E. Thorne's "reexamination of the famous case of Dr. Bonham" sound a discordant note; though it be true, as Thorne contends, that Coke's celebrated argument derives from common-law rules of statutory interpretation rather than from natural law ideas freshly introduced from the Continent, it was little less significant for the future that Coke found repugnancy in a statute that made a man a judge in his own case. For out of the stuff of such realizations there developed the concept of independence in the judicial function which bottoms all philosophies and rationalizations of judicial review.

R. M. McIver devotes his paper to a skillful demonstration of the proposition that European doctrines had as their major effect in America the playing up of a tremendous emphasis upon balance in constitution-making. The theories and writing not alone of John Locke and David Hume, but of Adam Smith and William Blackstone as well, are viewed as contributing to this political swell. If "never before had the world seen an example of a balance of powers so elaborate and so consciously contrived as that provided in the Constitution," it is small wonder that balance mechanisms were not confined to the negative-check category but overflowed into the positive as well. Indeed, McIver's climactic point is that the surge was so strong as to carry the constitution-makers beyond balance of powers as Montesquieu envisaged it, to federalism. "The functional division of powers does not imply the constituent division of sovereignty itself. The latter had no real precedents. It flouted an agelong tradition. \* \* \* Greatly influenced by European influences as were the builders of the Republic, the fabric they constructed was in essentials, almost without their knowing it, profoundly new."

Save for a hint in the closing sentence of the McIver paper that in the fashioning of federalism the founding Fathers "builded better than they knew, indeed better than the world yet knows," there is no attempt in Part I of the present volume critically to appraise the federal concept in any such manner as Pargellis and McIlwain evaluate the doctrine of separation of powers. The two other papers which treat of federalism, those of John Nef and the editor, Conyers Read, are directed rather to an examination of industrial history in the two centuries immediately preceding 1787 and to a consideration of its influence at Philadelphia. Both, Nef's the more explicitly, challenge the Hamilton and Adair thesis which would com-

press into the phrase "commerce among the states" every last drop of merchantile nationalism; to them, temporal and other factors belie the contention that an ascendant merchantilist philosophy could have conditioned the intended content of that phrase so completely as Hamilton and Adair would have us believe.

In his contribution to Part II of the volume, which explores *The Constitution and Its Influence upon American Thought*, Max Lerner, on the other hand, pays his respects to federalism as a principle of American government the strength of which "lies in the past and not in the future." Lerner is not to be gainsaid his professional right to prognosticate; it may be true, however, as the present reviewer has suggested elsewhere, that what appears to be a disintegration of federalism is after all but a metamorphosis and that the principle is only casting off an embryonic form. Certainly the potentialities of a cooperative federalism are appealing for their attractive reconciliation of regional interests and the national common good. By the same token, however, federalism is a complex and delicate governmental mechanism, and those who are lured by the enchanting simplicity and power of nationalism give but short shrift to the values which lie beneath its awkward exterior. As W. Y. Elliott well puts the matter in the concluding paragraph of his paper, the larger question, common to all forms of restraint upon governmental power, be they negative or positive in character, is the possibility of the survival of the American faith in a limited government with restrictions on majorities.

That that faith is today meeting skillful challenge needs no proof here beyond the observation that Elliott's paper lies between those of men who are of a mind to jettison such ancient cargo in favor of a speedier ship of state. Henry S. Cominager's articles of voyage are cast in this vein, and Lerner's embrace it even more wholeheartedly. The notion of a fundamental law superior to legislative enactments, the idea of natural rights of individuals which must be protected against government, we are now told, are historically, not symbols of something abidingly significant in man's organized relation to man, but only rationalizations fit to justify democratic revolutions and then to die away in the glories of a true democracy by majority will. Far from constituting a perpetual bulwark for the preservation of minority tenets from the leveling craze that obsesses majorities, the rights which meant so much to the eighteenth and nineteenth centuries have fulfilled their mission and now threaten, if longer implemented, to thwart rather than to foster democracy. One must tip his intellectual hat to the didactic magic that can effect such a transformation; opinions of the United States Supreme Court do not enshrine all examples of legal legerdemain. It is unquestionably true, as Ralph Gabriel shows in his paper, that earlier generations held a view of the cosmic importance of the individual which has been washed away by the forces of experimentalism and pragmatism, but it is something else to proclaim the essential validity of a view that espouses the divine right of majorities to mould their deviating brethren into the pattern of a super-state.

Two papers, somewhat off the beaten path as we have worn it in these

pages, complete the second division of the volume. One is Beard's note on historiography, in which he reiterates his stand on the necessity of showing, in constitutional history, the configuration and tension of economic interests prevailing in the period under consideration. The other, from the inimitable pen of Walton Hamilton, can only be described as a gem. Here he has set down in a manner that at once bespeaks depth of insight and breadth of perspective, that intriguing story of the coming of substantive due process, of Campbell, of Miller, of Field and the others, the unfolding of which is as spellbinding in the printed page as it is in the Yale classroom.

Although Part III of the volume promises an insight into the Repercussions of the Constitution outside the United States, little attention is given to anything but the influence elsewhere of the American principle of federalism. The uneven, often scant, but nevertheless significant beginnings of judicial review in the South American nations and elsewhere are not explored at all, though such development must, from the uniqueness of the American experiment, find its source in the living Constitution of the United States. Only in C. W. De Kiewiet's paper on the South African Constitution is there a reference to judicial review as an institution of limited government. In South Africa, De Kiewiet shows in an essay bespeaking scholarly analysis, the institution was rejected for what it is, a power that can "compel a reconciliation between legislative enactment and constitutional principle." The great problem, to the South African constitution-makers, was the menace of a large native population. "What might not a South African supreme court do with a 'due process' clause in applying it to the place of the natives in society?" Judicial review as a means to the realization of truly limited government does not lose one cubit of its stature from this frank admission that anything but legislative omnipotence would prove embarrassing to the perpetuation of the white man's supremacy. Only Hajo Holborn, in his observations on the Weimar Constitution, traces out the influence of the check and balance scheme which was the pride of Philadelphia. That influence was, in post-war Germany, rather oblique; the draftsmen of the Weimar Constitution looked not so much to the juridical theory of the division of powers as to the actual American practice under that theory, which places its trust rather in the positive interplay between legislative and executive or, as Holborn describes it, "the mutual restriction of indirect and direct democracy." Only here and there is there any reference to the use of bills of rights, after the American pattern, to set limitations upon governmental authority in the aggregate, to draw the line between individual liberty and social compulsion.

But if the essays which make up Part III are stinging in these areas, they are generous in depicting the wholesale influence of the federal principle among the nations of three continents. W. Menzies Whitelaw sums up this influence in a turn when he speaks of the rôle of the United States "as the mother of federations," even as Great Britain has played, with greater pride, "its rôle as the mother of parliaments." Whitelaw's paper concerns the federal aspects of the Canadian and Australian governmental systems in relation to the American original; his major theme is the striking parallel

in the constitutional development of the three, despite the fact that, especially in the case of Canada, their beginnings were so incomparable. C. P. Wright follows with a running account of the more important decisions of the Judicial Committee of the Privy Council on dominion-provincial relations in Canada, reinforcing Whitelaw's emphasis on the tendency of the American and Canadian systems to grow more and more alike, in the face of originally antithetical notions regarding the correct situs of the residuum of governmental power. Wright's study is the only one to consider the evolution of federalism in terms of judicial decision; the other papers paint their respective pictures against a broad historical background without the detail that is supplied by whatever contributions have come from the various judicial mills. De Kiewiet concludes the study of British federal systems with his paper on the South African development, to which reference has already been made. He finds that the constitution-makers there eschewed federalism for the same reason they frowned upon judicial review; "union, as opposed to federation, permitted the strongest guarantees in favor of the politically powerful whites." That a similar tendency to associate centralism with privileged interests, federalism with individual and regional liberty, was common throughout Latin America, is apparent from the paper of C. H. Harding, who treats Argentina and Venezuela rather cursorily, and from the papers of J. Lloyd Meham and Percy A. Martin, who treat, with much greater detail, Mexico and Brazil respectively. In these four republics of Latin America, however, such associations produced diametrically opposite political thinking; emerging from an age of highly centralized, despotic rule, the peoples of these coming nations, influenced as they were by the great republican example to the north, espoused federalism as a means to the realization of a more truly representative type of government.

Of the nations on the continent of Europe, Germany had, during the nineteenth century, the most reason to contemplate the American experimentation with the federal principle, for it too was faced with the fundamental problem of balancing unity with diversity in a supreme effort to build a nation that would endure. Holborn's paper, to which reference has been made in another connection, touches on the federal element as a point of contact between German and American political thinking; the interplay of the two is dwelt upon much more fully by Robert C. Binkley in his essay on the Holy Roman Empire. But Binkley's paper is most significant for its stress upon the diverse ways in which the federal philosophy worked itself out in Central Europe and the United States. Correctly conceived, federalism is not a fixed formula but a political philosophy; its manifestations and variations may be many. On the one hand, it may evolve into a scheme of centralized policy-formulation with decentralized administration; such Binkley finds to have been true in the Carlsbad system of Central Europe, and Harding declares the evolutionary process has brought similar results in Argentina. On the other hand, federalism may adjust itself to the needs of economically-integrated nations through a process of "uniformity without unity," as in Australia, or central administration of policies

regionally formulated, as seems to be the direction of federalism's evolution in Brazil and, in the reviewer's opinion, in the United States as well. Save for Binkley, the emphasis is not upon the variations which time and place have wrought in the concept of federalism; the adaptations which these papers reveal strongly point, however, to the fact that even as other nations during the last one hundred and fifty years have found help in our pioneering with what Mecham well describes as "the most complicated and delicate governmental mechanism ever devised by man," so we today may well profit in turn from the efforts of those countries to derive the political values that are federalism's and yet mesh that philosophy with the economic and social realities of the twentieth century.

Fittingly enough, the world-wide perspective which Part III of the volume imparts to the great American experiment in constitution-making is bounded fore and aft by papers which seek to evaluate the eighteenth and nineteenth centuries' universal faith in constitutions. Both Geoffrey Brunn and Carl Becker, the latter especially, trace the constitutional cult to the forces which were loosed by the Age of Enlightenment and which gave to man a faith in himself that he had never known before. For the constitutional cult was a faith of religious and romantic tenor, a faith in man's ability to build Utopia in the here and now. If today there is less faith in the ability of a written constitution itself "to delimit with precision the realms of social compulsion and individual liberty," surely there should be the more faith that in the effective balancing of these two basic values the constitutional cultists found the secret of man's political salvation.

FRANK R. STRONG.†

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GOODRICH ON THE CONFLICT OF LAWS. Second Edition. By Herbert F. Goodrich. St. Paul: West Publishing Company, 1938. Pp. xiv, 562.

The author has accomplished to a high degree his aim as expressed in the preface to the first edition of giving "a fair view of the subject, in general, with a more detailed treatment of some interesting and important parts." The work comprehensively covers representative and especially important decisions and a substantial amount of juristic thought in the main conventional divisions of the Conflict of Laws. The discussion of cases and decisions is concrete to a very commendable extent; the descriptions of holdings and judicial views are accurate. It is clear that the temptation to overdraw or color particular phases of judicial handling has been avoided painstakingly. The work is not dogmatic; on the contrary, constant effort to be fair and impartial in the presentation of differing viewpoints is conspicuous. To hold to that is especially difficult in this field in which there is so much diversity of adjudication and so much sharp difference of opinion regarding fundamental modes of approach and analysis. Despite the Re-statement, so much of the subject remains dependent for its future directions upon social-economic *desiderata* and the methods of treatment by which their demands may be woven into the legal pattern that the presentation of non-

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