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I. Does Federalism Exist?

In the age of Andrew Jackson, Alexis de Tocqueville suggested that the "government of the [American] Union depends almost entirely upon legal fictions; the Union is [a] nation, which exists . . . only in the mind, and whose limits and extent can only be discerned by . . . understanding."[1] In the age of President Ronald Reagan, major analysts, especially those in the social sciences, mis-stress de Tocqueville's subtle analysis. They misperceive federalism's present condition in degrading states to a Potemkin village and even to history's graveyard of busted superstitions. One highly regarded political scientist, William Riker, even apologized for having wasted his own time and research studying state-centered federalism, writing that "for purposes of social research we ought henceforth to regard it [federalism] as . . . [a mere fiction]."[2] Riker admitted an exception, however: for lawyers, who must grapple with diverse national and state statutes and local customs, "the most spectral kind of federalism" exists. But that is it. Non-lawyers who assert that federalism is vital and meaningful grapple with ghosts.[3]

Historians who continue to respect and study federalism might respond resentfully to such a judgment with W.H. Auden's lines: "Never sit next to a statistician/Nor commit a social

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1. A. Tocqueville, Democracy in America 166-67 (Knopf ed. 1980).

2. Riker, *Six Books in Search of a Subject—Or Does Federalism Exist and Does It Matter?*, 2 Comp. Pol. 135, 145-46 (1969), construed in Scheiber, *Federalism and Legal Process: Historical and Contemporary Analysis of the American System*, 14 L. & Soc'y Rev. 663, 664 (1980).

3. *Id.*

science."[4] But the pervasiveness of similar obsequies for federalism among social scientists does suggest that a C.P. Snowish "two worlds" phenomenon is developing between them and historians on this matter.[5]

Why a gap? Part of the answer derives from differences in disciplines. Generally speaking, social scientists are norm-seeking futurologists who expect that their conclusions will be used. By contrast and by definition, historians are pastologists. Most historians are mugwumps about the subjects of their research; they steer clear of "use of history" dilemmas, and resist what Oscar Handlin called "vast panoramic . . . aspirations to be that transcendental eyeball . . . . [I]n the waking hours . . . [historians] must return to the note cards and the tyranny of intractable facts."[6]

Happily so tyrannized, historians who describe themselves as constitutional-legal (the two are increasingly combined) specialists, with noteworthy exceptions deny the validity of doomsayers' obsequies about states' declines and present irrelevance. According to the historians' consensus, states were and are vital aspects of constitutionalism, of federalism which, with political democracy and economic capitalism, form the tripod undergirding the Union.[7]

That tripod failed once in our history. Hyper-inflated constitutional doctrines of state sovereignty, designed perpetually to protect primarily one state-defined private property—slaves—eroded two props, democracy and constitutionalism, seriously distorting the element of federalism in the latter. The Union victory in the Civil War restored the tripod, if in an uneasy equilibrium. Soon after Appomattox, the legal profession—itself (as we shall see) changing its pedagogy, its knowledge universe, and its organization for practice—helped to accommodate hierarchies of race and class privileges in the still state-based federal union, an accommodation that continues to plague us. In all this, as Arthur Bestor notes, "The *configurative* role that constitutional issues played is the point of crucial importance."[8]

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4. W.H. AUDEN, *Under Which Lyre*, in SELECTED POEMS 178, 183 (1979).

5. Beam, Conlan & Walker, *Federalism: The Challenge of Conflicting Theories and Contemporary Practice*, in POLITICAL SCIENCE: THE STATE OF THE DISCIPLINE 247 (A. Finifter ed. 1983).

6. O. HANDLIN, TRUTH IN HISTORY 110 (1979).

7. *See generally* C. ANTIEAU, STATES' RIGHTS UNDER FEDERAL CONSTITUTIONS (1984).

8. Bestor, *The American Civil War as a Constitutional Crisis*, 69 AM. HIST. REV. 327, 329 (1964); *see also* Hyman, *Is American Federalism Still a Fundamental Value?*

Agreeing, most historians and some stubborn political scientists see the states as worthy of cerebration and study, not obsequies.[9] Historians, including those fixated on constitutional-legal questions, welcome all allies. The bench and bar should logically be historians' allies, if only because a "spectral" federalism retains enough vestigial clout to impose history on the law, as Riker conceded.[10]

Major law spokesmen do seem to agree with historians about federalism's ongoing significance. "Federalism has been a central element of the American polity from the nation's inception to the present day," wrote University of California at Berkeley law school dean Jessie H. Choper.[11] Implicitly agreeing, the United States Supreme Court recently again sketched federalism's plastic lineaments, in the 1976 *Usery* decision[12] and its overruling in *Garcia* in 1985.[13] Even some law writers who applauded one or both decisions were unhappy, however, about the absence of what one commentator called "anything approaching a well elaborated theory of federalism that would provide a solid intellectual framework for an articulation of the Justices' divergent views on state-national relations."[14]

II. How Timely the Suggestion for a 'Solid Intellectual Framework'?

Despite seeming concurrences about the states' continuing significance, most historians that I know feel that it is premature to initiate now the search for that "well elaborated theory of federalism,"[15] especially if lawyers conduct the search. Many historians are wary of the disciplinary luggage that lawyers bring to research. Historians of legal education note that although prominent law schools recently allowed "non-professional" elec-

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Scholars' Views in Transition, in The Growth of Federal Power in American History 143 (1983); Scheiber, *American Constitutional History and the New Legal History: Complementary Themes in Two Modes*, 68 J. Am. Hist. 337 (1981).

9. *See generally* Changing Patterns in American Federal-State Relations During the 1950s, 1960s, and 1970s (1985).

10. *See* Riker, *supra* note 2.

11. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 Yale L.J. 1552 (1977).

12. National League of Cities v. Usery, 426 U.S. 833 (1976).

13. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

14. Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 Sup. Ct. Rev. 341, 342.

15. *Id.*

tives such as legal history into law curricula, especially in Watergate's wake, law pedagogy has not, it seems, altered substantially, as Derek Bok suggested when in 1984 he described legal training and practice as still a flawed system.[16]

Such dour views from within the law reinforce the common concern among historians and some law academics about limitations exhibited by lawyers and judges who themselves attempt to be legal historians. Philip Kurland, for example, asserted that even Supreme Court Justices and their clerks, like most lawyers, "make lousy historians."[17] John T. Noonan, Jr., while insisting that "[l]aw formed on the judicial paradigm is an incurably historical enterprise," sadly agreed that "lawyers and judges are poor historians" because they predetermine the past in order to reach certain conclusions.[18]

But, however "incurably historical" the law was to Noonan, to historians most law practitioners appear to be almost invincibly ahistorical. For example, many jurists and law writers found "blinding lights" in history.[19] But too often it was the history they remembered from superficial undergraduate textbooks or from obsolete history research monographs or syntheses. Other lawyers and judges simply invented a history that never was for goal-oriented purposes, as in Roger Taney's fanciful *Dred Scott*[20] and *Merryman*[21] manner.[22]

Historians have rarely done better by constitutional law. Those erring textbooks that misled future Justices and Presidents were, after all, the products of historians. For example, one Harvard undergraduate in the young Arthur M. Schlesinger, Jr.'s history courses, the still-younger John F. Kennedy, learned footnoted sentimentalism about the prostrate South suffering unjustly the economic exploitations of Radical Reconstruction, a process in which race equality was allegedly only a sham. As bet-

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16. Bok, *A Flawed System of Law Practice and Training*, 33 J. LEGAL EDUC. 570 (1983); *see also* Hyman, *No Cheers for the American Law School? A Legal Historian's Complaint, Plea, and Modest Proposal*, 71 L. LIBR. J. 227 (1978).

17. Kurland, *Of Meese and (The Nine Old) Men*, 32 U. CHI. L. SCH. REC. 3, 6 (Spring 1986).

18. J. NOONAN, PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 152, 157 (1976).

19. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502, 513-14 (1964).

20. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856).

21. Merryman v. Bourne, 76 U.S. (9 Wall.) 592 (1869).

22. Washburn, *The Supreme Court's Use and Abuse of History*, OAH NEWSLETTER Aug. 1983, at 1.

ter insights from research became available in the 1950-80 decades, the older Professor Schlesinger revised this view, deemphasizing economic motivations and stressing the genuineness of Reconstruction efforts toward race equality, efforts that were to echo in the "Second Reconstruction" of Kennedy's White House years. But meanwhile *Brown v. Board*[23] was decided and ex-undergraduate Kennedy became President of the United States. Much to Schlesinger's embarrassment, Kennedy, who had not kept up with historians' revisions, was unprepared for the southern white resistance to desegregation and for the constraints that federalism imposed on the nation's efforts against racism entrenched in complexes of state laws and customs. Theodore Sorenson recalled that:

> During his years as President he [Kennedy] remarked more than once that history depends on who writes it. The consistent inaccuracy of contemporary press accounts [on school desegregation] caused him to wonder how much credence they would someday be given by those researching his era; and when the Mississippi legislature prepared an official report on the 1962 clash at its state university, placing all blame on the hapless Federal marshals directed by the Kennedys, the President remarked that this was a kind of local document that scholars a generation from now would carefully weigh—and "it makes me wonder," he said, "whether everything I learned about the evils of Reconstruction was really true."[24]

In their defense, historians have rarely enjoyed invitations from the White House or from bench and bar to keep occupants current on historical reinterpretations. This very lack of intercourse is a reason why historians concur that the search for improved knowledge about the states' condition in the 1980s should mark time until possibilities for cooperation are explored.

Perhaps the explorers will consider the fact that in the small number of instances when the law called on Clio's disciples for aid, the historians involved felt the torsions of "twistory," to use Charles Beard's pungent imagery, i.e., the siren song of the wanted result. As examples, in the early 1950s prides of distinguished historians and social scientists researched on behalf of the winning advocates in *Brown v. Board* the question of the

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23. Brown v. Board of Educ., 347 U.S. 483 (1954).
24. T. SORENSON, KENNEDY 4 (1966).

intentions of the framers of the fourteenth amendment.[25] Twenty years later equally renowned historians, plus political scientists and law academics, testified to Congress about the intentions of the Constitution's Framers on whether the White House or Capitol Hill properly led in initiating declared wars and near-wars. The historians "voted" overwhelmingly against presidents' expansive views on commander-in-chief initiatives in Vietnam.[26]

Of the historians involved in *Brown*, Alfred Kelly, a J.D.-Ph.D., although never doubting the rightness of the *Brown* plaintiffs, feared that antisegregation scholars had become lawyerlike advocates more than historians.[27] Similarly, of scholars who testified so warmly in favor of legislative primacy in war-making, Henry Monaghan cautioned: "We do not and cannot know, what, specifically, [the Framers] would have thought about a world so different from their own . . . . The central fact is that the framers left us with a structure of government sufficiently fluid to accommodate a good deal of shifting power between the congress and the president."[28]

If historians are seducible and lawyers ahistorical, are lawyers likely to alter what to historians appear to be their defective ways? Not likely, according to Stanley Katz, a legal historian who, without a J.D., was an associate dean of a major law school. "Lawyers are arrogant, and think they can do anything including write history," Katz asserted to a *New York Times* reporter.[29] Not likely, if the attitude prevails in high law places that law academic Paul Gerwitz prescribed to *Times* readers: of high jurists rejecting an argument because it was, allegedly, merely a facetious, history-based one.[30] Not likely, if disjunctions between law and history are widened by pronouncements that have recently issued from another height of the allegedly "flawed" legal profession, the one inhabited by Attorney General Meese, on the need to restrict constitutional interpretations and public policies to the intentions of the Constitution's Framers.

Would that we could "know" these intentions! Even if

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25. *See, e.g.*, Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119-58.

26. *See, e.g.*, Monaghan, *Presidential War-Making*, 50 B.U.L. REV. 19-33 (1970).

27. *See* Kelly, *supra* note 25, at 155-58.

28. Monaghan, *supra* note 26, at 21-22; *see also* H. HYMAN, QUIET PAST AND STORMY PRESENT? WAR POWERS IN AMERICAN HISTORY (1986); Kelly, *supra* note 25, at 119.

29. N.Y. Times, May 3, 1983, at D26, col. 6.

30. *Id.*, July 8, 1986, at A21, col. 2.

agreement obtained that only eighteenth century purposes should govern now, our perceptions about those purposes derive from a sparse body of uncertainly reliable (because of third-hand sifting decades after 1787) sources such as Madison's notes at the Philadelphia convention. The thought of employing the evidence now available as a Chinese shoe for public policy and high court decisions evoked strong negative reactions from historians and prominent law figures. Among the latter, Justice William Brennan described strict intentionalism as "little more than arrogance cloaked as humility."[31]

Useful middle grounds exist between these polar views. Looking primarily at what he called "the current culture of our constitutional law, [and] . . . our constitutional style in dealing with questions of separation of powers," Paul Bator concluded that the Framers were "practical politicians rather than ideologues, theoreticians, [or] theologians," and noted that

> [t]ime and again in the history of our Constitution we have developed needs that seem to have been unperceived or only dimly perceived by the Framers; yet we have succeeded, in an improvisational and somewhat untidy way, to adapt their document to these needs, while at the same time adapting our own expediencies to their fundamental ideals and aspirations.[32]

Praising this saving sense of the practical, Bator hoped that "as a society, . . . we do not swallow wholehog the love affair the professors are having with issues of theory and methodology. The American style of pragmatic common sense has been a saving solvent in the history of our constitutional development. I hope we do not abandon it."[33]

Reinforcing Bator, Philip Kurland concluded that "[n]either the Attorney General nor Mr. Justice Brennan affords a formula for resolving the ambiguities inherent in the cases that are to be governed by the periphery of the Constitution."[34] Truly important issues before the Supreme Court often arise from federal and/or state interventions and interactions, from uncertainties in federalism and separation of powers. "Certainly the answers are not likely to be found in any formula, such as

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31. *Id.*, Oct. 13, 1985, § 1, at 1, col. 2.

32. Bator, *The Constitution and the Art of Practical Government*, 32 U. CHI. L. SCH. REC. 8 (1986).

33. *Id.* at 12.

34. Kurland, *supra* note 17, at 7.

Roosevelt's 'back to the Constitution,' or Nixon's 'strict construction,' or Meese's 'original intent,' or Brennan's 'will of the people.' "[35] And Kurland advises jurists that "[i]f they are to be true to the spirit of 1787, they will recognize that ideally judicial controversies ought to be resolved by articulable reasons, of which history may be one and the findings of current market surveys none."[36] Constitutional law is a rule of decision; the Constitution is a frame of government.

In similar spirit, Vincent Blasi advised a non-professional audience that few disputes before the Supreme Court are "easy cases." Constitutional determination must occur about "issues for which the sources of legal authority—constitutional text, original understanding, evolving tradition, precedent—do not yield determinate answers."[37]

III. Can History Help?

Although barriers exist between the history and law disciplines, perhaps, as Noonan suggested, effective collaborations between law and history might grow if legal professionals used "good historical knowledge."[38] Doubting the probability, historian Stephen Botein, who died tragically young in 1986, wrote: "Let lawyers be their own legal historians . . . and let historians be the same. Once in a while they may even have something to say to one another."[39]

Blasi had included "evolving tradition" in his short list of essentials for judging.[40] Did he by that term include context, that controlling element of historical research and interpretation? Of historians who consider the Civil War as a crisis both in constitutional and legal relationships, the context is all important.[41] Further, although Bator's and Kurland's cogent summaries were agreeably eclectic and evolutionary, they nevertheless perpetuated the notion of the framing of the 1787 Constitution in creationist terms. This is troubling because during the past

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35. *Id.*

36. *Id.*

37. N.Y. Times, July 16, 1986, at A23, col. 2.

38. J. Noonan, *supra* note 18, at 157.

39. Botein, *Scientific Mind and Legal Matter: The Long Shadow of Richard B. Morris's*, in Studies in the History of American Law, 13 Rev. Am. Hist. 302, 313 (1985).

40. Blasi, *The Role of Strategic Reasoning in Constitutional Interpretation: In Defense of the Pathological Perspective*, 1986 Duke L.J. 696, 701.

41. *See, e.g.*, Bestor, *supra* note 8, at 330.

two centuries, analogous misperceptions led to injustices to millions of Americans and to crises in federalism. What follows is a too-brief effort to recontextualize aspects of federalism's history as illuminated by recent research that is fated itself to be surpassed if my discipline does its unending job.

The argument whether the Constitution is a finished Newtonian mechanism created *de novo* at Philadelphia, or a dynamic, evolving Darwinian organism, is as ancient as the nation; indeed, it predated and gave form to the Revolution. Historians overwhelmingly accept the evolutionary argument. So viewed, the constitutional imperatives of 1787 emerged from the revolutionary and colonial past and from Parliament's and states' practices as well as from Enlightenment theories about federalism and democracy.

Of these, perhaps the state models formed the most compelling context at Philadelphia. The would-be Framers were there because under the Articles the nation was weak and the states vigorous. The Revolution had reaffirmed the validity of the states' democratizing politics, however imperfect that democratization was in terms of class, gender, and race. Links from constituents to states' men (sometimes statesmen, though rarely) in the Continental and Articles of Confederation Congresses had proven their value and prefigured the retention of such links in the new Constitution. Georgia excepted, state models of constitutional organization including tripartite separations of powers and functions lay before the Philadelphia Framers.

IV. Intrastate Federalism

Overwhelmingly veterans of their states' politics, the Framers were familiar with these developments at home, including one that I call "intrastate federalism." As I understand the Philadelphia story, this development was an integral part of its context.

The nature, pace, and results of intrastate federalism remain regrettably unclear. We are beginning to see from research that during the Revolution, the loci of intrastate power tended to drift from colonial capitals identified with Britain and Toryism, to rural towns and county seats. Probably this drift occurred in part because states' militias under governors' orders were off in Continental service. This occurring, localities' home guards and Tory-suppressing committees of public safety (however titled) dominated law and order, tax collecting, and much

state politics. Localities thereby affected national politics through the aforementioned links to their representatives in Congress. By the late 1770s, except in Rhode Island, these centrifugal intrastate tides were reflected in the states' new constitutions. They provided for augmented political democracy for white males and, Taney notwithstanding, for a few blacks, and for county seat-small town overrepresentation—the last substantially preserved until *Baker v. Carr*.[42]

V. Federalism Reaffirmed: 1787

If these preliminary insights are viable, then perhaps the Constitution's Framers were framers, superlative craftsmen more than creative artists. May the "Virginia Establishment" forgive me also the derivative notion that perhaps James Madison did not "create" federalism at Philadelphia. Instead, he and his fellow-Conventioners shrewdly and imaginatively wove into the on-hand constitutional fabric those dual threads connecting state citizens to nation as well as to state, through law, that we duly honor. Their achievement accommodated the fact that federalism flourished, Topsy-like, long before the Revolution, and was so precious to colonists that they defended it forcibly under the banner: "no taxation without representation." In the 1760s-80s an entire generation of rustic Americans understood all this better than Oxbridge sophisticates.

American federalism was tenaciously localistic. This characteristic was to be a hazard not only for Britain but also for the Continental Congresses, the Confederation Congress, and for the new nation under the 1787 Constitution. This commitment to localities reflects the strong current in American constitutional life that I label "intrastate federalism," labelling being needed now because Washington's generation did not bother identifying that which they lived. Not the town or county, but the configurations of the colony (state) and the empire (nation) needed and received attention.

Already exhibiting pragmatic ways, the militant Americans exploited relevant political philosophy without worrying much

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42. 369 U.S. 186 (1962). *See* H. Hyman, To Try Men's Souls: Loyalty Tests in American History 1-87 (1959); D. Lutz, Popular Consent and Popular Control: Whig Political Theory in the Early State Constitutions (1980); A. Millett & P. Maslowski, For the Common Defense: A Military History of the United States of America 1-20 (1984); Bailyn, *Political Experience and Enlightenment Ideas in Eighteenth Century America*, 67 Am. Hist. Rev. 339 (1962).

about its specifics. They lived the Enlightenment while Europeans imagined it.[43] Americans had answers ready-to-hand when admiralty judges and British military officers, denying that the existing federal diffusion of authority existed, implemented imperial trade and revenue laws.

Wartime improvisations in every state permitted the coexistence of a national military effort with sharply diverse laws and customs on the myriad workaday human relationships that states and localities controlled. Madison's Revolutionary comrades treasured federalism's ways enough to defend its awkwardness through eight years of military reverses and Tory unrest. In the midst of this dispiriting Revolution, they contrived the above-mentioned constitutional experiments for both their striving nation and embattled states. In some states, constitutional conventions, themselves an American invention, institutionalized check and balance governments with bicameral legislatures that were harmonious with the centrifugal tendencies of the time in the states. Their adaptations to independence inspired these hardy explorers again to experiment with options for the nation, at Philadelphia—all credit to those skilled weavers. Their product deserves bicentennial tributes because it is so intrinsically sound. But in 1787-89 it seemed so flawed that ten amendments were the price for ratification, two more becoming needed within fifteen years; and it was so weak that in 1860-61 a baker's dozen states seceded without effective or timely federal constraints.

The Framers deserve credit also because they understood the verdict of history to be that federal systems were notoriously weak even for tiny Holland or Switzerland. How much less suitable for the already lengthy United States in the 1780s, a nation with continent-spanning aspirations, remarkably diverse populations, and intense state-local loyalties. The argument of the unsuitability of federalism was to sound repeatedly both from doomsayers at home and abroad through the mid-1860s. In 1787, the Framers, aware that federalism was awkward and risky, refused to admit that it was doomed.[44]

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43. *See generally* H.S. COMMAGER, THE EMPIRE OF REASON: HOW EUROPE IMAGINED AND AMERICANS REALIZED THE ENLIGHTENMENT (1977).

44. *See generally* HEARD ROUND THE WORLD: THE IMPACT ABROAD OF THE AMERICAN CIVIL WAR (H. Hyman ed. 1969); *see also* H. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 99-123 (1973).

VI. How Well Did the 1787 Constitution Accommodate Federalism?

Whatever else moved Americans to replace the Articles with the 1787 Constitution, the immediate impulsion was interstate aggressiveness in commercial near-warfare on the Chesapeake, and intrastate flaccidity as in Shay's Rebellion, the last further illustrating intrastate federalism. Famous commercial law and admiralty decisions of the Marshall-Taney decades (1801-64) attest to the services the Constitution and its implementing judiciary acts provided shippers, investors, inventors, and other mobile risk-takers. Despite or because of its imperfections, the Constitution performed its enormous stabilizing services in large part because of familiar exploitations of the check and balance clauses by creative presidents, congressmen, and jurists. Extra-constitutional institutions, especially statewide political parties, created serviceable links from state citizens to nation. Elastic constitutional doctrines developed that accommodated the Louisiana Purchase, *Marbury*,[45] *Dartmouth College*,[46] the "American System," and the fugitive slave recapture laws. In short, the Constitution worked. Adaptive nation-state relationships and shifting balances in the non-too-separated branches of national government made it work and were possible under its terms.

Another great success of the Constitution was the Northwest Ordinance and its implementing statutes. Like federalism, the Ordinance was on-hand for the Framers. Breaking through Europe's hierarchically-fixed colonial habits, the Ordinance required national territories to become states equal to all others, with orderly land surveys, courts, and public schools, and without slavery (a prohibition Congress dropped when extending statemaking to southwestern areas). Granting all sordid speculations, the Ordinance was singularly effective social engineering. It helped quickly to populate vast areas with small landholders, the derivative states' voters, a process often injurious to displaced Indians. Military veterans merged into the mass of settlers, thus avoiding a feared martial class. The diffused landholdings more than ever linked state citizens to both their state and nation, fostering the notion that allegiance required protection.[47]

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45. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

46. Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

47. H. Hyman, American Singularity: The 1787 Northwest Ordinance, the 1862

Looking forward sixty years, the Union soldiers that Lincoln called "thinking bayonets," many of whom were products of Northwest Ordinance public schools, possessed literacy in such numbers as to inspire creation of the world's first military postal service, and voted as state citizens in globally unique wartime elections. In effect, these bluecoats (with 120,000 black bluecoats among them by 1865) transformed the wartime Emancipation Proclamation into the thirteenth amendment. Meanwhile, Lincoln and Congress enacted Northwest Ordinance-like laws, the 1862 Homestead and Morrill Acts, which for all territories and states provided for small-scale federal land sales and tax support for schools and elementary grades through the collegiate. And major Habeas Corpus-Jurisdiction Acts beginning in 1863 (others followed until 1875) substantially expanded the jurisdiction of federal courts in appeals from state courts, especially in matters of claimed race prejudice and other alleged unfairness. These were as much war aims as the Emancipation Proclamation. Appomattox confirmed them.

This meant that, temporarily at least, most white Americans accepted long-developing and persistently frustrated evolutionary constitutional arguments of abolitionist jurisprudents. These included the following: that the 1787 Constitution's arrangements for federalism were defective because of slavery, and that "freedom national" was not primarily mobility as defined in the 1823 *Corfield v. Coryell* opinion[48] or rights to professional licensing or trades as in the 1867 *Test Oath* cases[49] and 1873 *Slaughter-House* decision,[50] but infinitely numerous, practical, homely, workaday rights of access, as to tramcars, taverns, courts, schools, and jury service, as well as to property including land and to legal remedies for all rights including political action.

So defined, "freedom national" enhanced state-centered federalism. As in the Northwest Ordinance and the Homestead-Morrill Acts (as, indeed, in all Reconstruction efforts including Military Reconstruction), "freedom national" led to more states

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HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL 18-61 (1987); Onuf, *From Constitution to Higher Law: The Reinterpretation of the Northwest Ordinance*, 94 OHIO HIST. 5, 32-33 (1985).

48. Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3,230).

49. *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

50. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

and state voters; the thirteenth amendment, terminating the three-fifths clause, enlarged the powers of southern states' voters. States would continue to make their citizens' civil and criminal relationships as diverse as states' voters and lawmakers wished them to be. The new measure of national freedom was uniform intrastate justice. Equal state protections for persons and property through courts and votes would be the federal duty, a duty the thirteenth amendment imposed on every American, whether official or private citizen.[51]

Antislavery legalists justified this state-right nationalist vision from eclectic, contextual sources ranging from the Declaration of Independence to the Northwest Ordinance, from equity and *Coryell*; from liberalizing recent history to the nation's duty to protect black military veterans who had so visibly exhibited allegiance; and from the enormities slavery and race prejudice exhibited in the slave and black codes and in community customs.[52] Repeating Madison's *Federalist* No. 46 argument that under the proposed Constitution national and state officials would "resist and frustrate the measures of each other," antislavery lawyers noted that Madison, while acknowledging the state bias of his countrymen, in *Federalist* No. 51 had hoped that the new federal authority would actively protect individuals' rights against unfairness perpetrated by any authorities, state or national, and, impliedly at least, by non-officials enjoying officials' sanction.[53] In Virginia's ratifying campaign, Madison had failed to win amendments applicable against nation and states. The best obtainable was what became the ninth amendment, so long forgotten: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[54]

Denying that the ninth amendment was a mere truism, antislavery legalists saw it instead as a stipulation that every official of nation, state, and locality, owed a duty positively to safeguard individuals' equal rights. Madison's insistence on the ninth amendment even as a half-loaf justified arguments that its sup-

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51. *See generally* L. GERTEIS, TOWARD GOD'S POLITICAL ECONOMY: MORALITY AND UTILITY IN AMERICAN ANTI-SLAVERY REFORMS (1986); W. WIECEK, THE SOURCES OF ANTI-SLAVERY CONSTITUTIONALISM IN AMERICA, 1760-1848 (1977).

52. *See generally* AMBIVALENT LEGACY: A LEGAL HISTORY OF THE SOUTH (D. Bodenhamer & J. Ely eds. 1984).

53. THE FEDERALIST No. 46 (J. Madison).

54. U.S. CONST. amend. IX.

porters envisaged incorporating the Declaration of Independence, an argument that abolitionist legalists revived about the thirteenth. To them the ninth amendment did not limit only the new nation. Instead, it was to command not only all authorities but also private offenders, a purpose they also attributed to the thirteenth amendment.[55]

The antislavery champions perceived correctly that injustices were overwhelmingly local and state, that federal justice had been irrelevant as a remedy, and that dual federalism failed for what are now called disfavored persons and groups. The Constitution had faltered most dramatically as state-defined slavery overleaped state boundaries. Slave state spokesmen and their free state coadjutors had long demanded and received extraterritorial protections in the free states and in the future states, the federal territories. But free state law could not travel into slave states. *Dred Scott* made clear that, notwithstanding the Northwest Ordinance and free states' personal liberty laws after *Prigg v. Pennsylvania*,[56] this was an increasingly Orwellian federal union.[57]

To encourage nobler shapes for the Union, abolitionists stressed the virtues not of centralization but of state-based federalism. They resurrected a generation's memories of the Virginia and Kentucky Resolutions, and even of arguments in the Hartford Convention and South Carolina's nullification of the federal tariff that justified obstructions of allegedly unconstitutional federal processes. Antislavery lawyers praised state judges who obstructed federal judgments on recalcitrant militiamen in the War of 1812 and who protected fugitive slaves and their rescuers anytime between 1820-60, explaining to laymen how state *habeas corpus* writs would wrest prisoners from federal custody and how juries, obeying instructions from state judges, might decide against federal officers in damage suits.[58]

All of this taught that some of the Constitution's clauses were illusion. For example, the Constitution afforded the nation ultimate military remedies, but only the Civil War unleashed

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55. Paust, *Human Rights and the Ninth Amendment*, 60 CORNELL L. REV. 231 (1975); *see also* Howard, *Madison and the Constitution*, WILSON Q., Spring 1985, at 80.

56. Prigg v. Pennsylvania, 41 U.S. (16 Pet.) 539 (1842).

57. Finkelman, Prigg v. Pennsylvania *and Northern State Courts: Anti-Slavery Use of a Pro-Slavery Decision*, 25 CIV. WAR HIST. 5 (1979).

58. W. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126, 135 (1980); Warren, *Legislative and Judicial Attacks on the Supreme Court of the United States: A History of the Twenty-Fifth Section of the Judiciary Act*, 47 AM. L. REV. 1 (1913).

that power in states. Indeed, until 1861, except against pirates, Indians, Mormons, and those who aided runaway slaves, the military expedient was largely theoretical. The miniscule force of regulars was divided into tiny coast defense garrisons and Indian fighting units. Real military power was in the states' organized militias. These militias served the nation's perceived interests in the Whiskey Rebellion and the War of 1812, the Supreme Court sustaining presidential authority to "federalize" militiamen in *Martin v. Mott*[59] in 1827. But when a few years after *Mott*, South Carolina nullified the federal tariff law, Jackson dared not risk ordering state militiamen against their own state. No Jackson, Buchanan dithered when Wisconsin judges defied a Supreme Court judgment (*Ableman v. Booth*[60]) on fugitive slave recaptures, and when the Deep South's states, unsatisfied even by *Dred Scott*, seceded.

Indeed, few prewar Americans ever saw federal officials except for village postmasters and equally-familiar land sales personnel, themselves centers of state political organizations. Except for fugitive slave recaptures, almost all federal policies were almost self-executing, overwhelmingly uncoercive, and unbureaucratized.[61] When Appomattox reversed *Dred Scott* and ended the reasonable fear that its spinoffs such as *Lemmon v. People* (1860)[62] might nationalize slavery in free states as well as the territories, the thirteenth amendment was also seen, first, as embracing the enhanced avenues of access to land, education, and legal remedies that the wartime Congresses created in the Morrill, Homestead, and Habeas Corpus Acts, and, second, as largely self-executing, although its framers had wisely appended an enforcement clause.

Only Appomattox made the thirteenth amendment and all its contextual content, such as the Homestead-Morrill acts, worth ratifying, especially in light of *Lemmon* and of a proposed thirteenth amendment of 1860-61 that would have unamendably (an unamendable amendment!) forbidden federal intervention against slavery in states where it existed. But though three states ratified that proposed perpetualizing amendment, it died as officials and voters at last accepted "freedom national" per-

59. Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).
60. Ableman v. Booth, 62 U.S. (21 How.) 506 (1859).
61. W. NELSON, THE ROOTS OF AMERICAN BUREAUCRACY: 1830-1900 at 9-81 (1982).
62. 20 N.Y. 562 (1860).

ceptions and purposes.[63] In 1865 unamendability was as defunct as *Dred Scott*. These folk nightmares were replaced by visions of a dynamic, more decent new federalism. Now the victorious, adaptable constitutional society would transform its agricultural and industrial capabilities into casteless prosperity. Much of post-Appomattox Reconstruction involved these visions, and for champions of race equality under state law, consequent frustrations.

VII. WHY *Slaughter-House?*

No one in the Appomattox spring anticipated Andrew Johnson's hardlining encouragements to southern whites' race prejudices. Prevision did not exist among supporters of the thirteenth amendment that it would require bureaucratic implementation in the Freedmen's Bureau and the Civil Rights Acts, plus Military Reconstruction, plus fourteenth and fifteenth amendments and their enforcement laws. Even to many lawyers nothing was more surprising than the Supreme Court's rise from *Dred Scott* depths to *Slaughter-House* heights. Instead, a consensus existed in much of the law world of 1865-73 that the Constitution had no solo oracle.[64]

Overleaping such sentiments, in 1866 the Court's *Test Oath* decisions reopened licensed professions including the law to recent rebels, though Congress and states (one of the latter by a clause of its constitution) had barred entrance.[65] In 1873 the Court's *Slaughter-House* decision buried the thirteenth amendment in the fourteenth, degrading the former's universal prohibitions against all involuntary servitudes in the state-action formula of the latter, and illuminating ways to Jim Crow and *Plessy*.[66] Alternatives existed as in Chief Justice Chase's 1867 *In re Turner* circuit opinion[67] and Justice William Strong's 1871 *Blyew*[68] views in the Supreme Court. But the *Slaughter-House* majority preferred not to respect actualities, context, or history.

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63. H. HYMAN & W. WIECEK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENTS 1835-1875, at 1-385 (1982); Finkelman, *The Nationalization of Slavery: A Counter-Factual Approach to the 1860s*, 14 LA. STUD. 213 (1975).

64. *See generally* R. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866-1876 (1985).

65. *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

66. Plessy v. Ferguson, 163 U.S. 537 (1896).

67. *In re* Turner, 24 F. Cas. 337 (C.C.N.D. Md. 1867) (No. 14,247).

68. Blyew v. United States, 80 U.S. (13 Wall.) 581 (1872).

Instead, more anxious to preserve what they asserted were the virtues of prewar federalism, but unwilling to explore newer frontiers of racially-equalized federalism, the *Slaughter-House* justices created an abstract, ahistorical recent past. Their creation was adversely to affect the daily lives of millions of Americans until the vital center of the next century.[69]

VIII. The Legal Culture and *Slaughter-House*

We remain unsure why the law world of the 1870s acquiesced so generally and tenaciously to *Slaughter-House* doctrines on federalism and on implications favoring Supreme Court primacy in redefining and distorting the thirteenth amendment and its sequels. Historical context suggests that contemporary changes in legal education and organization are parts of the answers.

In the 1860s, Christopher Columbus Langdell was readying his alterations of law pedagogy. His triumph at Harvard inspired imitations in many private, state, and Morrill Act universities. Law deans conducted astonishingly successful raids on university budgets in order to create the Harvard-like separate law libraries, faculty, and curricula deemed essential for "scientific," professional law. Alert book publishers took notice, and in 1873, the *Slaughter-House* year, West Publishing began operations, perhaps to shape law more than law academics shaped publishing.[70] The separate law libraries began to arrange their holdings, especially case reports, in ways peculiar to the law. Other "new" disciplines, including anthropology, economics, political science, and sociology, were then winning independence. These, plus medicine and other sciences, found their publications accommodated in universities' central libraries by any of similarly new data-retrieval (i.e., cataloging) systems (the Dewey decimal, Cutter, or Library of Congress). All could have coped with law. But Langdell won separateness for the Harvard law library, and his emulators nationwide imitated that victory too. Creating their own retrieval techniques, often in close cooperation with such

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69. *See* H. Hyman & W. Wiecek, *supra* note 63, at 386-438; Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 Sup. Ct. Rev. 39, 53-79; Berger, *The Fourteenth Amendment: Light from the Fifteenth*, 74 Nw. U.L. Rev. 311 (1979); Palmer, *The Parameters of Constitutional Reconstruction:* Slaughterhouse, Cruikshank, *and the Fifteenth Amendment*, 1984 U. Ill. L. Rev. 739.

70. American Law Publishing, 1860-1900: Bibliographic Indexes (B. Taylor & R. Munro eds. 1986) (this source is a four-volume collection that pioneers this subject).

commercial law publishers as West and Lippincott, law libraries came to require specialist librarians and other staff. As communication with other campus denizens declined, law librarians rarely collected other than technical reports and related titles.[71] The contextual material that is the stuff of all legal history as it is of all history—the printed and manuscript autobiographies, diaries, letters, course materials, lower court briefs—were simply not collected systematically if at all. For such reasons the histories of law schools and law firms are generally thin stuff indeed.

Perhaps, as tentative findings suggest, the revamped law schools and law libraries, and the invigorated state bar associations, encouraged generations of yuppie lawyers and state judges to communicate with one another more than before the Civil War. The associations won control of the access roads to practice, requiring both graduation from a new style law school and then state licensing through the bar association, a function the Supreme Court had blessed in the 1867 *Test Oath*[72] and 1873 *Bradwell*[73] decisions. So armed, between them law deans and bar association officials (the latter employing delegated state powers) excluded from law educations and practice generations of white women, black men and women, Catholics, Jews, and other undesirables.[74]

IX. Conclusion: Ways that Lawyers and Historians Might Better Serve Each Other

If the foregoing is adequately verifiable, it suggests the essentiality of further legal history research on a dozen fronts. This is a time when Bok asserts that the law profession is "flawed."[75] By contrast, legal history flourishes. Will allegedly "arrogant" law practitioners of Katz's description welcome deep digs by historians into the archival records of the law? Law deans, senior partners of law firms, bar association officials, and the heads of law publishing houses have not been encouragingly

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71. *See generally* E. Friedson, Professional Powers: A Study of the Institutionalization of Formal Knowledge (1986).

72. *Ex parte* Garland, 71 U.S. (4 Wall.) 333 (1867); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867).

73. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).

74. R. Stevens, Law School: Legal Education in America from the 1850s to the 1980s 3-72 (1983); Harris, *Ecology and Culture in the Communication of Precedent Among State Supreme Courts, 1870-1980*, 19 L. & Soc'y Rev. 449 (1985); Zacharias, *Local Power and Local Knowledge*, 30 Am. J. of Legal Hist. 122 (1986).

75. Bok, *supra* note 16.

open to nonpublic relations researchers. Respect on the law side for "mere history-based" positions appears still to be depressingly underwhelming. Until these situations alter toward openness and colleagueship, the "well elaborated theory of federalism" for which law commentators called after the *Usery-Garcia* train of decisions,[76] will not likely emerge, at least not on a satisfying, contextually sensitive base of verifiable, legal history.

When the bars' bars drop and the law's level of respect for such history rises, legal historians may then enjoy access to the inner records of relevant persons and institutions, including law schools, firms, publishers, and associations. Systematic records management procedures may some day insure that the contextual histories of such institutions will be as recreatable as the historian's skills and unideological skepticism can manage.

All this is worth trying, for, contrary to views expressed vigorously by fellow-Texan Professor Lino Graglia, the Constitution has not disappeared. It has been distorted, sometimes by historians and other times by ahistorical law writers who misperceive its dynamic nature and starve the universe of relevant historical sources. In an engaging recent article, Graglia suggested that he rested his own perceptions on the work of that distinguished, incurably history-based constitutionalist, Charles Fairman.[77] Many here cut their intellectual teeth on Fairman's impressive *oeuvre*. From it, I derived a sense that Fairman, whose research shaped much of the constitutional field, would deny even himself oracular qualities and the possession of eternal verities. Instead, Fairman's scholarship inspired many searches for history's contexts, not for fixed texts. This sense of history's unfinishability is explicit in Fairman's capstone book, in which he concluded: "What Congress did . . . to restore the Union on the basis of the Fourteenth Amendment is entitled to a far more discriminating consideration than it has generally yet received."[78] Similarly, an eminent contemporary of Fairman's, the constitutionalist Arthur Sutherland, after a half-century of studying the often uncomfortable changes (not necessarily negative ones) that the Civil War and Reconstruction made in Amer-

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76. Rapaczynski, *supra* note 14.

77. Graglia, *How the Constitution Disappeared*, COMMENTARY, Feb. 1986, at 19; *see also* Professor Graglia's response to readers' letters, found in *Letters from Readers*, COMMENTARY, June 1986, at 9.

78. 5 C. FAIRMAN, RECONSTRUCTION AND REUNION, 1864-88, HISTORY OF THE SUPREME COURT OF THE UNITED STATES 342-43 (1971).

ican life, apologized because a "confident statement of the immediate and the ultimate effects [of the war and reconstruction years] would require far more wisdom than I can muster."[79]

After only a third of a century at the same kind of inquiry, I apologize also, and with far better claim to limited wisdom. Returning to de Tocqueville's observation which began this paper, I remain unconvinced that American federalism depends "entirely upon legal fictions." But this much-quoted French visitor hit the mark in his insight that ours is a nation "which exists . . . only in the mind." I think that he included in "mind" habits of the heart, including historical commitments to individualism, equality, and diversity. And I applaud above all de Tocqueville's suggestion that the "limits and extent [of American federalism] can only be discerned by . . . understanding."[80]

Perhaps this understanding will improve as lawyers and historians join in non-goal-directed, unideological constitutional and legal history research. As W.B. Yeats observed, it is out of quarrels with ourselves that we make poetry.[81] Perhaps analogous disagreements will generate more verifiable and richly contoured constitutional and legal poets. Auden, in a pensive mood, reminded us that History is the "madonna of silences/To whom we turn/When we have lost control/ . . . [She into whose eyes] we look for recognition/After we have been found out."[82]

79. A. SUTHERLAND, APOLOGY FOR UNCOMFORTABLE CHANGE, 1861-1865, at 19 (1965).
80. A. TOCQUEVILLE, *supra* note 1.
81. M. RAMRATNAM, W.B. YEATS AND THE CRAFT OF VERSE (1985).
82. W.H. AUDEN, *supra* note 4.