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— Book Review —

MICHAEL STOKES PAULSEN AND  
LUKE PAULSEN, *THE CONSTITUTION:  
AN INTRODUCTION*

*Shlomo Slonim*<sup>†</sup>

Mark Twain once defined a classic as a work “that everybody wants to have read and nobody wants to read.”<sup>1</sup> The U.S. Constitution, adopted in 1788, is a classic document that many Americans have surely read, but how many of them are familiar with its contents?

Anyone interested in learning more about the Constitution, its interpretation and development over the past two-plus centuries, and which issues are today the most critically divisive, will find this work to be a superb and eminently readable introduction. It is instructive and enlightening without being ponderous. The prose is crisp and straightforward, unburdened by legal jargon. There are no footnotes or endnotes. And the reader requires no legal dictionary to appreciate the thrust of the discussion at each point.

The authors are a father-son team, Michael and Luke Paulsen, who collaborated on the book over nine consecutive summers. Michael is a foremost Constitutional Law scholar who previously held a distinguished chair at the Law School of the University of Minnesota and who currently occupies such a chair at St. Thomas University in Minneapolis. Luke, a high schooler, and later, college student, thoroughly and challengingly discussed each topic, thereby enhancing the clarity and usefulness of this tome to lay readers as well as to seasoned scholars in the field. Moreover, useful biographical and historical sketches are virtual gems that pepper the work throughout.

The first part of the book is devoted to “The Written Constitution.” Here the authors present the historical background to the adoption of Constitution and to the Bill of Rights. They describe the forces that led to the Constitutional Convention of 1787 and the decision of the delegates to jettison the dysfunctional Articles of Confederation and replace them with a document that would weld the thirteen separate states into one nation ruled by a strong central government. They highlight the controversies that emerged in Philadelphia and the compromises that reconciled large and small states; North and South; and advocates of stronger central government and proponents of more state

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1. Mark Twain, Address at the Dinner of the Nineteenth Century Club: The Disappearance of Literature (Nov. 20 1900).

autonomy. The need to bridge the gap between the last of these rival forces persisted after the Convention closed, and it featured mightily in the ratification struggle. In the end, the controversy was resolved by the adoption of the Bill of Rights which reassured states' righters that the rights of citizens and of independent states would be secured.

In a biographical sketch of James Madison, the Paulsens attribute to him "the structure and content" of the Constitution. In extolling Madison's virtues, the authors, it would seem, have been overly generous to him. Madison is justly remembered as the "Father of the Constitution." His resourcefulness in organizing the 1787 Constitutional conclave, his diligence in promoting the ratification of the Constitution, and his ingenuity in satisfying the Antifederalists with the adoption of a Bill of Rights, all entitle him to that accolade. However, the Constitution's federal system of government was adopted over his strong objections.<sup>2</sup> In fact, he strove to establish a powerful central government that would completely dominate the states, practically converting them into mere counties.<sup>3</sup> For all his contributions to the Founding, the federal character of the Constitution was not of his making.

Notwithstanding all their praise and appreciation of the provisions of the Constitution, the authors understandably roundly condemn what they term the framers' "collusion with evil"—slavery. Three provisions, in particular, highlight the concession to slavery—the "three-fifths clause" which accorded slave states an increment in their representation in the House of Representatives,<sup>4</sup> and which resulted in Jefferson, rather than John Adams, emerging as President in 1800;<sup>5</sup> the fugitive slave clause;<sup>6</sup> and the importation clause permitting importation of slaves for another twenty years.<sup>7</sup> Only the Civil War erased the stain of slavery from the Constitution. In this connection, the authors might well have cited the Jeremiad regarding the historic consequences of slavery, sounded at the Convention by George Mason, himself a slave-owner.<sup>8</sup>

The second and more analytic part of the book is aptly labeled "Living the Constitution." Here the authors trace the background to

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2. See generally, Shlomo Slonim, *Securing States' Interests at the 1787 Constitutional Convention: A Reassessment*, 14 *STUD. IN AM. POL. DEV.* 1 (2000).
  3. *Id.*
  4. U.S. CONST. art. I, § 2, cl. 3.
  5. PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* 253 (2014) ("Indeed, without the electoral votes provided by the three-fifths clause, Jefferson would not have defeated John Adams in 1800.").
  6. U.S. CONST. art. IV, § 2, cl. 3.
  7. U.S. CONST. art. I, § 9, cl. 1.
  8. MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, VOL. 2 370 (1937).

the first vigorous constitutional debate that pitted Hamilton against Jefferson and Madison over expansive versus narrow interpretation of the Constitution. This dispute was only resolved with the epic decision of Chief Justice John Marshall in *McCulloch v. Maryland*<sup>9</sup> in 1819 endorsing Hamilton's broad interpretation.

The drastic consequences of the ill-fated *Dred Scott v. Sandford*<sup>10</sup> decision in 1857 (that paved the way ultimately to the conflict between North and South over the right to extend slavery into the new territories) are well explicated.

In this section one reads of Lincoln's role in saving the Union, and also of his grandeur in giving expression to the cause for which the North was fighting. The authors posit that Lincoln's stand was premised on vigorous denial that the decisions of the Supreme Court could bind the nation and thereby prevent prosecution of the war. Reconstruction and the adoption of the Civil War amendments drastically altered the scope and impact of the Constitution by outlawing slavery and making the states subject to civil rights.<sup>11</sup> But it would take another century before the cause of nondiscrimination would prevail in the Court, and ultimately in the Congress, so as to convert theory into practice.

Why did the struggle for racial equality take so long? The authors address this question in a chapter entitled "Betrayal." The Supreme Court, they explain, adopted a narrow, indeed retrograde, approach to the relevant amendments. In the key case, *Plessy v. Ferguson*,<sup>12</sup> decided in 1896, the Court ruled that "separate but equal" conformed to the 14th Amendment. This laid the groundwork for segregation in the South and legalized racial discrimination throughout the country.

The authors charge that in a series of cases the Supreme Court emasculated the intent of the 14th Amendment by adopting a policy of substantive due process to impose their own social and economic values in judging both state and national legislation. Thus, in *Lochner v. New York*,<sup>13</sup> the Court invalidated a state law limiting working hours in certain industries on the ground that it denied freedom of contract to employers and employees, and thereby violated the 14th Amendment's Due Process clause. In *Hammer v. Dagenhart*,<sup>14</sup> the Court ruled that Congress lacked power under the interstate commerce clause to regulate child labor. This form of judicial activism against legislative prerogative represented a distortion of the Court's role under the Constitution.

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9. 5 U.S. 137 (1803).
  10. 60 U.S. 393 (1857).
  11. U.S. CONST. amends. XII, XIV.
  12. 163 U.S. 537 (1896).
  13. 198 U.S. 45 (1905).
  14. 247 U.S. 251 (1918).

It was only in the 1930's that the Court rectified the gross errors of the era of "Betrayal" and adopted a philosophy of judicial restraint, acknowledging the sovereign right of a legislature to act to improve the public welfare. At the same time, however, the authors are bitterly critical of the Supreme Court's failure, in its 1944 *Korematsu v. United States*<sup>15</sup> decision, to invalidate the wartime internment of thousands of American citizens of Japanese descent. They regard that decision as "one of the most infamous injustices in the Supreme Court's history." The authors applaud the 1952 decision in *Youngstown Sheet & Tube Co. v. Sawyer*<sup>16</sup> for preserving the principle of the separation of powers by denying President Truman the power to seize steel mills during the Korean War to avoid a strike. And the judgments confirming civil liberties and civil rights, especially *Brown v. Board of Education*,<sup>17</sup> are hailed as long-overdue measures to restore rights that had been denied for too long.

Finally, in the last chapter, entitled "Controversy," the authors roundly criticize what they call "The Modern Era of Judicial Activism." Most specifically, they question the Court's approach to such matters as race-based affirmative action; reapportionment; and the privacy decisions on birth control, abortion, gay rights, and the right to die. These decisions, they contend, reflect a revival of substantive due process in the service of interpretive liberty. It all derives from a sense of judicial supremacy which many would contest. Another sphere of judicial activism is revealed in a series of more recent decisions based on the Court's understanding of federalism that ostensibly requires it to protect the states from federal infringement of their sovereignty. Accordingly, the Supreme Court feels obliged to strike down federal laws of a general nature that even incidentally affect state powers.

This work was completed before the Supreme Court handed down its 2015 decision of *Obergefell v. Hodges*,<sup>18</sup> which ruled that the term marriage embraced same-sex unions no less than heterosexual ones, and that official failure to acknowledge this was a violation of the Due Process clause and the Equal Protection clause. It would have been interesting to learn the view of the authors on this revolutionary decision.

The book presents a masterful, albeit brief, analytical account of the importance of constitutional interpretation in the historical development of the United States. It incisively compares the varied interpretations that have been applied to the provisions of the Constitution, for good and bad. It is an invaluable work that challenges as much as it inspires.

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15. 323 U.S. 214 (1944).

16. 343 U.S. 579 (1952).

17. 347 U.S. 483 (1954).

18. 135 S. Ct. 2071 (2015).