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IN the summer of 1987, I was invited, in my capacity as a constitutional law teacher, to appear on a noontime television news show on the day of the Constitutional Bicentennial. I accepted, warning the newscasters that I would use all of my alloted time to denounce Robert Bork, whose nomination to the Supreme Court was then before the Senate Judiciary Committee. I further suggested that nothing else seemed more appropriate as a way of marking the historic anniversary. My hosts did not disagree; the event took place.

My little effort was somewhat different from the mainstream celebration and self-congratulation of the day. Apart from Thurgood Marshall's reminder that the Constitution offered little to such as slaves and women, the prevailing mood of the Bicentennial was arrogant and complacent, rooted in the notion that a big and important job had been done back in the 18th century by a group of wise men, and that the job once done was over, bequeathing to us a magic artifact that could and would endure and solve all of our political problems. The celebratory mood fit in neatly with the Reagan administration's call for a "jurisprudence of original intent" as the sure solution to contemporary constitutional problems.

Both a talismanic belief in the power of the sacred text and a similar belief in the reality of "original intent" are dangerous romantic fantasies. Such fantasies elicit in me the spirit of the questioning child in *The Emperor's New Clothes*, the spirit of critical inquiry central to the academic calling. The men who framed the constitution could not have had any objective original intent, since they harshly and vigorously disagreed

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with one another on almost every basic issue. The document produced was a compromise, hardly a basis for coherent interpretation, since compromises all too often dissolve back into the conflicts that they seek to obfuscate. What the framers did have in common was that they were rich, white, men who, not surprisingly, sought to protect their interests as such against the chaotic forces of the powerless. Even that job was not done by the document acting on its own, but by another rich, white, man—John Marshall—who, drawing on like-minded sources such as Alexander Hamilton, made up constitutional law, sometimes in spite of the apparent intent of the framers,[1] to insure maximum protection for creditors and vested rights.[2] Thus, from its inception constitutional law was active and politically conscious interpretation, not the passive reading of a text that spoke for itself.

Some of the most difficult questions, such as the status of Native Americans, and the future of slavery, were purposely left unresolved in the Constitution. Those who celebrate the endurance and continuity of the document nearly always leave out the fact that it took the bloodiest war in American history to resolve an issue with which the framers could not cope. And the aftermath of that war transformed the document forever, by the amendments, making it one that could speak, however softly, to the aspirations of the powerless, oppressed, and formerly enslaved.

The essays in this volume share a commitment to regard constitutional law and the Constitution itself from a critical rather than celebratory perspective. They seek to clarify, not to romanticize; they look to the past not to rationalize the present but to recover possibilities for a future that might be less hierarchical and more egalitarian.

Those who quest for original intent, according to Mark Tushnet, would do better to quest for a unicorn. Tushnet points out that the actual intent of the "framers" cannot be figured out at all, that their debates about method were actually serious disagreements about results,

1. The classic example of this phenomenon is *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), in which Marshall deployed facile manipulation to conclude that the authors of the Judiciary Act of 1789 (the intent of which must have been fairly close to that of the framers) enacted a provision that was *unconstitutional.*

2. *See e.g.*, Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (vested right in land protected under contract clause despite the fact that the source of title was bribery of the Georgia legislature, which was rescinded within a year by the succeeding legislature); Sturges v. Crowinshield, 17 U.S. (4 Wheaton) 122 (1819) (striking down a bankruptcy law as violative of the contract clause). Marshall failed to get his way, however, in the 4-3 decision in *Ogden v. Saunders.* 25 U.S. (12 Wheaton) 212 (1827). Marshall argued that even a *prospective* bankruptcy law violated the contract clause since it might, among other things, "threaten the existence of credit," "sap the morals of the people, and destroy the sanctity of private faith." 25 U.S. (12 Wheaton) at 224-25.

and that they masked differences by resorting to vague abstractions. We cannot escape the fact that reading is an affirmative act, one that always implies choice. Jennifer Jaff, in a "pre"-view of Tushnet's new book on constitutional law, offers his general views on quests for objective bases of interpretation, concluding that "critique is all there is"; there is no truth, but hope.

Regardless of its objective knowability, we do experience constitutionalism as an ongoing cultural reality, a dialogue with the past, with the text, and with ourselves. Peter Gabel, deploying expertise in both law and psychology, seeks to understand the "socio-psychoanalytic" meaning of our persistence in trying to regain the intent of the framers, despite the hopelessness of the quest. He sees this recurring political move as a largely right-wing attempt to build a magic bond of false community through the marketing of a mythical, historical narrative of origin. He suggests that the underlying project of proponents of original intent is to infuse our relationship to the founding Fathers with a new "sado-masochistic fervor."

Central to the political worldview of liberal legalism embodied in the Constitution is the split between the realms of public and private. The Mensch/Freeman essay explores the way this dichotomy is experienced as real, in both law and daily life, despite its basic incoherence. They suggest that the ideological character of the public/private distinction serves to legitimize oppression while denying us access to more communitarian forms of social life.

If the meaning of constitutionalism is rooted in particular cultural or historical context, cultural difference will likely lead to different versions of constitutionalism. The Fraser/Freeman dialogue is an effort to demonstrate this point by comparing the ostensibly similar (not to Canadians but to Americans in their complacent failure of observation) but, in reality, very different cultures of the United States and Canada. Having adopted a Charter of Rights and Freedoms, Canadians are wondering whether they have begun the Americanization of Canadian legal culture, or whether the peculiarly Canadian approach to issues of authority, community, and public responsibility will produce a distinctively Canadian version of constitutionalism and rights as the Charter is interpreted and experienced by Canadians.

That constitutionalism is not a thing but a process, not a moment but a dynamic flow, not an artifact but an ongoing project, is captured in the form of allegory by Allan Hutchinson. He shows how conflicts such as that between "law as game" and "law as abstract principle," or be-

tween cultural context and mythic form, are never resolved, since compromise always means avoidance of detail. His account of constitutionalism is thus a neverending dialectic of power and interpretation.

If one does want to go back to the beginning, not for the recovery of a romanticized original intent, but for genuine historical understanding, the results offer much more complexity than coherence. In a pair of essays, Wythe Holt shows us how a serious and careful historian deals with the original intent issue. Holt emphasizes detail and particularity, revealing a diversity of persons and political positions. That there were serious disagreements about the role of federal courts led the framers to compromise by leaving the issue largely open. No sooner had the Judiciary Act of 1789 put a structure in place, than efforts began to dismantle and replace it. Holt traces the struggle in the 1790's between those who sought to insure national supremacy by federalizing the state courts, on the one hand, and those who sought to return power to the states by taking away the Supreme Court's power to review state court decisions, on the other. These struggles suggest that the framers were hardly of one mind on these important and basic questions of federalism. Holt illustrates in his second essay the similar ideological struggles that made it impossible in the 1790s, with one exception, to relieve the Supreme Court Justices from the arduous burden of circuit-riding.

Two of the essays serve not to criticize constitutionalism but to criticize the critics, albeit from the left. These essays should make it clear that there is hardly any consensus among critical legal scholars as to method, theory, or anything else. L. H. Larue chides critical legal scholars for overemphasizing doctrine in their treatment of judicial decisions and for failing to take sufficient account of historical context. One cannot quarrel with his substantive point; and he does an admirable job of demonstrating its value in enhancing the understanding of three Supreme Court cases whose context was the emergence of the labor movement in 19th century Chicago. Larue may, however, be overgeneralizing in his characterization of CLS scholars. There is more diversity, and more historical context,[3] than his essay implies, even if Mark Tushnet says that CLS scholarship is "ahistorical."

Anthony Chase seizes on the Tushnet and Gabel essays as represen-

3. One need go no further than our own critical legal household to find recent examples. *See e.g.*, Mensch, *Religion, Revival, and the Ruling Class: A Critical History of Trinity Church*, 36 BUFFALO L. REV. 427 (1987) and Freeman, *Racism, Rights, and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988).

tative of everything that is wrong with CLS scholarship about constitutional law. That there is more to political critique than the repeated demonstration of indeterminacy seems a fair criticism, regardless of Tushnet's insistence on the hegmony of the indeterminacy principle. But there is a lot more to CLS than indeterminacy, as Chase should know. His criticism of Gabel stems from his displeasure that CLS people, or at least some of them, do something called "local politics." He characterizes Gabel's efforts as "micro-techniques of power criticism." Though he concedes that Gabel is well-intentioned, he calls for an emphasis on "macro" issues and real politics, by which he seems to mean a return to the fantasy reductionism of Grand Theory. That there should be vigorous debate over these issues seems obvious. I for one think that one can be very political and unpretentiously "local" at the same time.