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# RECONSTITUTING “ORIGINAL INTENT”: A CONSTITUTIONAL LAW ENCYCLOPEDIA FOR THE NEXT CENTURY†

David M. Skover\*

ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION. By *Leonard Levy, Kenneth Karst and Dennis Mahoney*. New York: MacMillan Publishing Company. 1986. Four volumes. Pp. xciv, 2196. \$320.

[T]o understand what a constitution is, one must look . . . to two uses of the word “constitution” . . . . The first of these uses is “constitution” in the sense of composition or fundamental make-up. . . . The second use of “constitution” [is] . . . the action or activity of constituting — that is, of founding, framing, shaping something anew. . . . And yet, constituting is not just doing whatever one pleases. . . . To constitute, one must . . . establish something that lasts, which, in human affairs, inevitably means something that will enlist and be carried forward by others. . . . So, although constituting is always a free action, how we are able to constitute ourselves is profoundly tied to how we are already constituted by our own distinctive history.

— Hanna Fenichel Pitkin<sup>1</sup>

Of the scholarly offerings that have accompanied the bicentennial celebration of the American Constitution, *The Encyclopedia of the American Constitution* is one of the most noteworthy. It is an original and innovative project, being the first encyclopedia of the Constitution ever compiled. Seeking to present “an epitome of all that is known and understood on the subject of the Constitution by the nation’s specialist scholars” (vol. 1, p. x), it is an ambitious work. It is catholic in the diversity of viewpoints represented by its contributors, and in the range of its targeted audience. And, given eight years in planning and production, it must have been a labor of love for its creators.

For appreciative readers, *The Encyclopedia of the American Constitution* (hereinafter *Encyclopedia*) is likely to represent a great deal more. Considered in its entirety, the work describes, in a fairly bal-

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1. Pitkin, *The Idea of a Constitution*, 37 J. LEGAL EDUC. 167, 167-69 (1987) (original paragraph structure omitted).

anced and accurate manner, the contemporary understanding of the American constitutional heritage. This heritage is portrayed as the product of the historical events, socioeconomic conditions, and political and philosophical beliefs which have been seminal to the evolution of a national people. The *Encyclopedia* reveals the Constitution to be both a symbol that mirrors and an ideology that molds the fundamental nature, the ethos, of America. It understands the Constitution in both of the senses of the word explained by Professor Pitkin: as a tradition that constitutes us, and as a practice that reconstitutes us; as something that we are, and as something that we do.<sup>2</sup>

So understood, the Constitution — or, more precisely, our vision of the constitutional heritage of the American people — is an apt subject for encyclopedic treatment. Indeed, the *Encyclopedia* exhibits the important functions that an encyclopedic work may serve in the legal culture of the twenty-first century. This review essay explores this thought. Part I describes the *Encyclopedia's* organizational structure, the interdisciplinary nature of its commentaries, and the divergent characters of its contributors. Part II considers the potential for its use and explores its role as the record of "original intent" for this century's constitutional "founders."

## I. THE FRAMEWORK OF THE ENCYCLOPEDIA

In his celebrated 1932 essay, "The Rôle of an Encyclopaedia in a Progressive Civilization,"<sup>3</sup> H.G. Wells argued that the intellectual and practical needs of the twentieth century required a new encyclopedic effort, with a distinctive structure and purpose. Its articles would synthesize the composite of knowledge in each field of study; its entries would be written, edited, and critically organized by outstanding authorities in that field.<sup>4</sup> Drawing upon "the genius of Diderot . . . which first revealed the power and importance latent in these great gatherings of fact and theory," the new encyclopedia would provide "the substantial basis of a modernized ideology."<sup>5</sup> At the same time that civilization's debt to tradition and established custom would be recognized, the encyclopedia would organize the new and growing knowledge of the age into an effective instrument of political and social reform. Wells' agenda for the modern encyclopedia largely char-

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2. Professor Pitkin summarizes the first sense in which the term "constitution" is used — as the "characteristic frame or nature" — by submitting that it "is less something we *have* than something we *are*." In contrast, the second sense of the term "is neither something we have nor something we are so much as something we *do* — or at any rate *can* do." *Id.* at 167-68.

3. Wells, *The Rôle of an Encyclopaedia in a Progressive Civilization*, in *THE WORK, WEALTH AND HAPPINESS OF MANKIND* 763 (1932). Wells' exhortations on the modern encyclopedia were reiterated in a series of speeches and essays written in 1936 and 1937, and subsequently collected in H.G. WELLS, *WORLD BRAIN* (1938).

4. Wells, *supra* note 3, at 763-65.

5. *Id.* at 765.

acterizes the standard criteria for evaluating encyclopedic efforts that have become virtually universally accepted since the middle of the twentieth century.

Clearly, the *Encyclopedia* fares well against measures of excellence for structure and organization.<sup>6</sup> The *Encyclopedia* comprises four volumes. The main body of volumes 1 through 4 contains approximately 2,100 entries arranged alphabetically according to subject. The entries vary in length, from brief definitions of terms to expansive treatments of important topics; the longer entries are pegged at approximately 6,000 words. All of the entries are liberally cross-referenced, identified by the use of small capital letters that are readily distinguished from the regular print. Most entries, and all of the longer ones, append a bibliography of authorities to suggest avenues for further research.

Volumes 1 and 4 include the utilities necessary for a research tool. The beginning of volume 1 presents alphabetized lists of the entries and the contributors. All indices and appendices are found at the end of volume 4. The appendices in volume 4 offer valuable amenities for the serious student of the Constitution. A more complete description of the structure and organization of the *Encyclopedia* can be found in the appendix at the end of this review.

Not only in its organization, but in its contents and contributors, the *Encyclopedia* proves exemplary. The articles can be classified into five general subject categories: constitutional law doctrines; celebrated figures in constitutional history; judicial decisions, primarily of the United States Supreme Court; public acts, including statutes, treaties, and executive orders; and commentaries on historical eras in constitutional law. The preface to the *Encyclopedia* establishes that about 55 percent of the work's total volume is committed to doctrinal concepts, 15 percent to people, 15 percent to case law, 5 percent to public acts, and 10 percent to historical surveys (vol. 1, p. vii).

The editors submit that the topics were chosen, and the information within the entries composed, so as "to bridge the disciplines of history, law, and political science" (vol. 1, p. vii). A mere browsing of the contents of any of the volumes would corroborate the degree to which the interdisciplinary dynamic of a subject is explored. For example, Professors Scheiber's and Elazar's entries on federalism iden-

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6. A description of the "general principles of form" by which twentieth century encyclopedias are judged throughout the world is given in R. COLLISON, *ENCYCLOPAEDIAS: THEIR HISTORY THROUGHOUT THE AGES* 199 (2nd ed. 1966), a valuable work that provides a comprehensive and coherent account of the evolution of encyclopedias in world history. Among the most pertinent standards for judging excellence, articles are to be written and edited by subject specialists; liberal cross-references among articles must be provided; supplementary bibliographies are to be appended to longer subject articles; and, subject and person indexes are to be included. *Id.* See generally *Encyclopaedia and Dictionaries*, 18 *ENCYCLOPAEDIA BRITANNICA* 365, 366-73 (1987).

tify the historical stages of federalism by way of the Supreme Court's case law and the predominant political theories of dual sovereignty and cooperative federalism.<sup>7</sup> Similarly, the historian Herman Belz traces the ideological concepts of statehood, nationhood, and federal supremacy through an analysis of the theories of union that were predominant in the nation's politics from 1789 to 1868.<sup>8</sup> Consider Professor Yale Kamisar's tract on the evolution of the *Miranda* doctrine,<sup>9</sup> which canvasses the history of the law of confessions with an eye to the doctrine's sociopolitical functions.

This intertwining of the strands of case doctrine, social history, political theory, and legal philosophy, is characteristic of the entries both as independent articles and as related parts of the larger work, and is ensured in part by the editors' selection of contributors. Although the editors wrote many of the articles themselves (over 875 entries or approximately 42 percent of the total work), 259 authors produced the remaining pieces. Among them, there are 41 historians, 53 political scientists, 145 law professors, 18 legal practitioners, 10 federal judges, 1 state judge, and 2 Congressmen (one current and one former). The balance includes policy analysts, economists, journalists, and publicists. Uniformly, the contributors are intellectual leaders in their respective fields of study; more often than not, they have pioneered definitive scholarly works in the particular subject matters addressed in their *Encyclopedia* articles.

As a group, the contributors present numerous and diverse perspectives on the Constitution. The different visions of the constitutional enterprise which the contributors individually hold are apparent in the substance and the tone of their entries.<sup>10</sup> Thus, we see the originalist perspective of former Judge Robert Bork in his article on constitutional review,<sup>11</sup> in contrast to the broader interpretivist

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7. See Scheiber, *Cooperative Federalism*, vol. 2, p. 503; Scheiber, *Dual Sovereignty*, vol. 2, p. 588; Scheiber, *Federalism (History)*, vol. 2, p. 697; and Elazar, *Federalism (Theory)*, vol. 2, p. 704. The dynamic between the historical stages of federalism and the Supreme Court's promotion of federalism theories, as presented by Scheiber and Elazar, is consistent with the federalism analyses presented in Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, and the dialectic in federalism doctrine and theory traced in Skover, "Phoenix Rising" and *Federalism Analysis*, 13 HASTINGS CONST. L.Q. 271 (1986). Cf. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709 (1985); and Gelfand & Abrams, *Putting Erie on the Right Track* (forthcoming), both articles holding to a more linear concept of "result-oriented" federalism doctrine.

8. Belz, *Theories of the Union*, vol. 4, p. 1885.

9. The Anglo-American roots of the law of admissibility of extrajudicial confessions that culminated in the doctrine of *Miranda v. Arizona*, 384 U.S. 436 (1966), and the blows inflicted on the doctrine in the Burger Court era, are outlined in Kamisar, *Police Interrogation and Confessions*, vol. 3, p. 1400.

10. The editors confirm that they "encouraged the authors to write commentaries, in essay form, not merely describing and analyzing their subjects but expressing their own views. . . . In inviting authors to contribute to the *Encyclopedia*, we have sought to include a range of views." Vol. 1, p. ix.

11. Bork, *Judicial Review and Democracy*, vol. 3, p. 1061.

method for constitutional exegesis suggested by Professor Gerald Gunther in his commentary on judicial review,<sup>12</sup> or the "structuralist" posture in Professor Charles Black's discussion of "relational" constitutional rights to be protected against infringement by private citizens in his essay on state action.<sup>13</sup> For yet another example, consider Justice Hans Linde's promotion of the independent development of state constitutional law:<sup>14</sup> he argues that interpretation of state constitutional guarantees "logically" precedes judicial resort to the federal Bill of Rights under the theory of violative state action that the fourteenth amendment contemplates,<sup>15</sup> a position which he has articulated forcefully in the past.<sup>16</sup>

It may be of interest to note the "whos" and the "whats" that are not represented, or arguably underrepresented, among the contributors. A number of notable scholars in constitutional law, history, and political theory are missing, although their absence understandably may not be due to any oversight by the editors.<sup>17</sup> Among these scholars are several who figure prominently in significant contemporary movements in constitutional thought, such as Critical Legal Studies, Feminist Jurisprudence, Law and Economics, and Libertarianism. Despite the presence of one Supreme Court Justice, William Brennan, on the Advisory Board for the *Encyclopedia*, no current or retired justices are contributors. Moreover, while eleven members of the judiciary have written articles, there is no equivalence in the representation of the federal and state lawmaking branches.<sup>18</sup>

Generally, the problem of obsolescence challenges the future functionality of any encyclopedia.<sup>19</sup> Even if revisions are not projected at

12. Gunther, *Judicial Review*, vol. 3, p. 1054.

13. Black, *State Action*, vol. 4, p. 1729.

14. Linde, *State Constitutional Law*, vol. 4, p. 1738.

15. *Id.* at 1741.

16. See, e.g., Linde, *E Pluribus — Constitutional Theory and State Courts*, 18 GA. L. REV. 165 (1984).

17. A partial list would include Bruce Ackerman, Anthony Amsterdam, C. Edwin Baker, Derrick Bell, Lillian BeVier, Philip Bobbitt, Erwin Chemerinsky, Ronald Dworkin, John Hart Ely, Richard Epstein, Ray Forrester, Alan David Freeman, Lawrence Friedman, Marc Galanter, Lino Graglia, Neil Komesar, Max Lerner, William Lockhart, Catharine MacKinnon, Robert Nagel, David O'Brien, Richard Davies Parker, Judge Richard Posner, H. Jefferson Powell, Martin Redish, Charles Reich, David Richards, Susan Rose-Ackerman, Ronald Rotunda, Albert Sacks, Lawrence Sager, Terrance Sandalow, Bernard Schwartz, Geoffrey Stone, Cass Sunstein, Herbert Wechsler, Gordon S. Wood, and Charles Wright.

18. Among current federal legislators whose significant contributions to the constitutional enterprise in Congress may have been recognized by participation in the *Encyclopedia*, several would be obvious selections: Senators Joseph Biden, Orrin Hatch, Edward Kennedy, and Strom Thurmond, and Congressman Henry Hyde.

19. As the editors of the *Encyclopedia* themselves admit, "[i]n a project like this one, some risk of obsolescence is necessarily present." Vol. 1, p. ix. This risk is highest in the entries that focus most heavily on doctrinal concepts. Articles dedicated to Supreme Court cases or referencing Supreme Court doctrine are current as of the Court's October 1984 Term, ending in July of 1985. The editors sought to minimize the problem of obsolescence by "ask[ing] the authors of

this time, however, the integrity and significance of the current *Encyclopedia* are not seriously compromised. Indeed, the practice of updating encyclopedias on an annual or biannual basis, common among the leading multi-volume general reference works published in America since the turn of the century, is not followed uniformly for "special interest" encyclopedias. The *International Encyclopedia of the Social Sciences*, also published by Macmillan and Free Press, serves as a classic example of a specialized encyclopedia that was only reissued in a completely new edition thirty years after it first appeared.<sup>20</sup> Once the reputation and the value of the *Encyclopedia* are firmly established, at least after a generation of use, it is possible that Macmillan and Free Press will issue "an encyclopedia that is entirely new, entirely expressive of the times."<sup>21</sup>

## II. AN ENCYCLOPEDIA FOR THE TWENTY-FIRST CENTURY: RECONSTITUTING ORIGINAL INTENT

In the preface to the *Encyclopedia*, the editors declare one of the purposes of their project: "This work seeks to fill the need for a single comprehensive reference work treating the subject [of the American Constitution] in a multidisciplinary way" (vol. 1, p. vii). Certainly, among the current surveys of American constitutional law, the *Ency-*

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articles on doctrinal subjects to concentrate on questions that are fundamental and of enduring significance." *Id.* The extent to which obsolescence truly threatens the value of the *Encyclopedia* would seem to depend on the functions that it may serve for the next generation of constitutional students and scholars, discussed in Part II, *infra*.

20. The ENCYCLOPAEDIA OF THE SOCIAL SCIENCES (E. Seligman & A. Johnson eds. 1930-35) was superseded by the INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES (D. Sills ed. 1968) [hereinafter INTERNATIONAL ENCYCLOPEDIA]. The associate editor of the original work, Professor Alvin Johnson, had tried to interest the foundations that had supported the first encyclopedia in financing a revision as early as 1950. In the Foreword to the 1968 publication, Johnson expressed sentiments that are relevant to the issue of obsolescence for any specialized encyclopedia:

We who ardently wanted an encyclopedia agreed that the social sciences were undergoing rapid change, but they had always been undergoing change and would continue to do so. An encyclopedia could summarize the achievements of the outgoing generation. In twenty or thirty years we would need an entirely new encyclopedia, and another in twenty or thirty years after that.

.....  
I had never believed in the practice of revising encyclopedias; I have always held that an encyclopedia, particularly one of the social sciences, should remain a historical document of its time and that each generation should have an encyclopedia — new from the ground up. Johnson, *Foreword*, 1 INTERNATIONAL ENCYCLOPEDIA, at xii-xiii.

21. These were the dedicatory words of Professor Johnson that introduced the 1968 revision of the social sciences encyclopedia. Johnson, *Foreword*, 1 INTERNATIONAL ENCYCLOPEDIA, at xiii. The advantages of a completely new edition of an encyclopedia on the American Constitution over the periodic issuing of supplementary material should be obvious, given the nature of the subject matter. As a work that describes the evolving political, historical, and ideological heritage of a national people, to be current, the *Encyclopedia* must reflect differences in language and idea constructs, as well as describe changes in substantive legal doctrine or leading political and social figures. For one account of the potential for a modified liberal legal consciousness in future constitutional interpretation, see Collins & Skover, *The Future of Liberal Legal Scholarship: A Commentary*, 87 MICH. L. REV. (forthcoming).

*lopedia* can be regarded as *sui generis*. It is distinct from the major treatises on constitutional doctrine and history precisely because of its encyclopedic character. The *Encyclopedia* is not an interrelated series of essays advancing the single theoretical perspective of a treatise writer.<sup>22</sup> Neither is it a collection of independent or previously published essays by diverse authors; its entries interlock conceptually to the extent that the *Encyclopedia* forms an integrated whole.<sup>23</sup>

Given these characteristics, the *Encyclopedia* serves at least two important functions as a research tool. First, for the novice in constitutional law study or in a particular area of interest in constitutional law, the work furnishes a useful starting point.<sup>24</sup> Written in a style and at a level of abstraction that should be accessible to the general reader, the entries suggest avenues for further investigation of the subject matter in their bibliographies of scholarly authorities. As the entries are the product of collaboration among contributors and editors who are subject specialists, the novice may be reasonably confident of the accuracy and reliability of factual information. Moreover, the wide spectrum of constitutional thought represented by the contributors should assure the novice of exposure to diverse perspectives. However one assesses the relative balance of viewpoints, the *Encyclopedia* clearly offers a more sweeping panorama of evaluative positions than can be gleaned from constitutional law treatises.

Second, the *Encyclopedia* may be instrumental in the teaching of constitutional law, legal history, political science, and philosophy, whether in law schools, or in graduate, undergraduate, or secondary schools.<sup>25</sup> Instructors will find it a source of background readings of manageable length and complexity which may be suggested or assigned to students. Unfortunately, for heavily attended classes, student access to the *Encyclopedia* may be restricted; considering the scope of the entire work and its retail price, only one or two copies are likely to be reserved in most public, university, and law school libraries. Perhaps interrelated entries on major doctrinal and theoretical subject matters could be collected in separate books, and offered in

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22. Among constitutional law treatises, compare, for example, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (2d ed. 1988); C. ANTIEAU, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* (1960). Among texts of a related category, which may be classified as "hornbooks," compare, for example, J. NOWAK & R. ROTUNDA, *CONSTITUTIONAL LAW* (3d ed. 1986); B. SCHWARTZ, *CONSTITUTIONAL LAW: A TEXTBOOK* (1972); M. FORKOSCH, *CONSTITUTIONAL LAW* (2d ed. 1969); H. ROTTSCHAEFER, *HANDBOOK OF AMERICAN CONSTITUTIONAL LAW* (1939).

23. Compare, *UNITED STATES CONSTITUTIONAL & LEGAL HISTORY SERIES* (K. Hall ed. 1987) (19 volumes).

24. The editors recognize that "[f]or some readers an encyclopedia article will be a stopping point, but the articles in this *Encyclopedia* are intended to be doorways leading to ideas and to additional reading, and perhaps to the reader's development of independent judgment about the Constitution." Vol. 1, p. x.

25. Apparently, the editors pointedly directed the contributors "to remember that the *Encyclopedia* will be used by readers whose interests and training vary widely." Vol. 1, p. x.

paperback form as supplementary course materials. It is not difficult to imagine, for example, that a small volume containing only the essays canvassing constitutional history<sup>26</sup> would be of great interest to college and graduate students in history and political science. Or a slightly longer paperback containing the entries on cases, doctrinal concepts, theory, and major scholars in free speech and press law could be an extremely useful reference tool in a law or political science course on the first amendment.

Beyond these instrumental functions, the *Encyclopedia* may prove to be an important normative enterprise. It describes the individuals and actions that have shaped our federal governmental system over time and the ideas which have infused our national value structures — always with sensitivity to the interconnections among these various forces. In weaving the complex fabric that we currently recognize as “The Constitution,” the *Encyclopedia* reveals the ideology that *constitutes* us as Americans. The *Encyclopedia* achieves a great deal more, however, when it depicts the national community that we openly acknowledge as our identity. Then it reinforces the beliefs and practices which, in their future application or modification, will *reconstitute* us as Americans. Consequently, the *Encyclopedia* manifests the Constitution in both senses of the term explained by Professor Pitkin.

These purposes for the *Encyclopedia* are confirmed by the editors’ introductory comments on the nature of the Constitution:

The Constitution is a legal document, but it is also an institution: a charter for government, a framework for building a nation, an aspect of the American civic culture. . . . In the final analysis today’s Constitution is the product of the whole political system and the whole history of the many peoples who have become a nation. [vol. 1, p. vii]

By this analysis, the Constitution is a symbol of American civic culture. It mirrors the institutions and the norms that define that culture; but it also molds the practices and the beliefs that sustain and reshape that culture.<sup>27</sup> An understanding of the Constitution, then, requires

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26. Among the entries directed to constitutional history that might be gathered in a single work, certainly the series of articles entitled *Constitutional History*, covering the period from the pre-Revolutionary era to 1985, would be featured. For a list of these articles, see vol. 1, p. xxv.

27. The editors’ understanding of the Constitution as “mirror and mold” itself reflects the earlier constitutional law scholarship by Professors Kenneth Karst and Leonard Levy. Karst discerns in the institution of law, and in the practice of the law, an expression of the “shared values” which define and support a community. The institution of law contributes to a sense of community “by establishing norms which identify a group as people who owe to each other not merely some specific obligation, but a loyalty whose boundaries are only vaguely defined.” Karst, *Individuality, Community, and Law*, in *LAW AND THE AMERICAN FUTURE* 68, 76 (M. Schwartz ed. 1976). The practice of the law reinforces the community of shared values when litigants, lawyers, and jurists appeal to the norms in legal disputes. See, e.g., Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. REV. 303, 373-74 (1986). This is especially the case for constitutional law, which identifies and reinforces the nation’s ideology, the “American civic culture”:

In our society, one of the most prominent bridges between ideology and behavior is the law, particularly constitutional law. It is fair to say that the Constitution today is our pre-

an all-encompassing knowledge of the influences that mirror and mold. It is just such a "holistic" study of the American civic culture — its history, politics, economics, and social thought, as well as its legal doctrine and theory — that the *Encyclopedia* sponsors.<sup>28</sup>

As such, this twentieth-century *Encyclopedia* may play a vital role in the twenty-first century. Because it chronicles meanings that the Constitution holds for contemporary generations of Americans, the *Encyclopedia* is a window into the late twentieth century's conceptions of the nation's constitutional heritage. For the twenty-first century scholar and student, it may expose the framework of issues and ideas that have been thematically crucial to constitutional law developments

eminent symbol of nationhood and that the doctrine of judicial review is a major practical support for both the attitudinal and the behavioral elements of the American civic culture. *Id.* at 373 (footnote omitted); see also Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 9-10, 27 (1977); Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626, 666 (1980).

Leonard Levy's concept of the Constitution appears quite sympathetic with Karst's. Levy posits that "[t]he Constitution is basically a political document." Levy, *Introduction — The Making of the Constitution, 1776-1789*, in *ESSAYS ON THE MAKING OF THE CONSTITUTION* xxxvi (L. Levy ed. 2d ed. 1987) [hereinafter *ESSAYS*], with a longevity and vitality that derive "from the fact that it incorporates and symbolizes the political values of a free people." Levy, *Introduction*, in *AMERICAN CONSTITUTIONAL LAW: HISTORICAL ESSAYS* 4 (L. Levy ed. 1966) [hereinafter *CONSTITUTIONAL LAW*]. The Bill of Rights, in Levy's estimation, embodies a new system of public morality based on the premise that government is but an instrument of man, its sovereignty held in subordination to his rights. As amended, the Constitution became a permanent reminder of its framers' view that the citizen is the master of his government, not its subject.

Levy, *Bill of Rights*, in *ESSAYS*, at 306. Also, similarly to Karst, Levy regards constitutional law as the product of judicial evolution: "In large measure, we have an unwritten constitution whose history is the history of judicial review." Levy, *Introduction*, in *CONSTITUTIONAL LAW*, at 3. See generally Collins, *The Historian as Judge* (Book Review), 15 *REVIEWS AM. HIST.* 191 (1987) (reviewing L. LEVY, *CONSTITUTIONAL CHOICES* (1985)).

28. Given their understanding of the Constitution, it should be expected that Professors Levy and Karst favor a constitutional study which emphasizes the historical relationships of sociopolitical practices to the Constitution's protection of certain substantive values. Karst offers an instructive example in his examination of the evolving "freedom of intimate association." Growing judicial recognition of the values that inhere in intimate associations, he argues, is closely related to two egalitarian trends in recent American history: the crusade for racial equality and the feminist movement have accelerated an awareness of cultural diversity and an acceptance of variations in social roles, which have contributed in turn to the values at stake in intimate associations — self-definition, commitment and self-realization. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 626, 659-63 (1980). Accordingly, in his *Encyclopedia* entry on the subject, Karst carefully explains the substantive values implicit in intimate associations, and the historical gestation of society's tolerance for diverse associations that implicate these values. Karst, *Freedom of Intimate Association*, vol. 2, p. 782.

This emphasis on acute insight into socioeconomic developments that reveal and nurture values over time is evident, as well, in Levy's definitive scholarship on the freedom of the press, see L. LEVY, *EMERGENCE OF A FREE PRESS* (1985), and on criminal procedural rights, see L. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* (1968); L. LEVY, *AGAINST THE LAW: THE NIXON COURT AND CRIMINAL JUSTICE* (1974). As with Karst, this understanding of constitutional law study is conspicuous throughout Levy's articles in the *Encyclopedia*. His pieces, *Marbury v. Madison*, vol. 3, p. 1199, and *Exclusionary Rule*, vol. 2, p. 662, are fine examples of Levy's portrayal of the constitutional culture: The meaning of a substantive value, or the significance of a constitutional moment, is demonstrated by way of its relevant sociopolitical context, its historical treatment, and its ideological trappings.

in our day. By registering differences of opinion among its contributors as to the evolution of doctrine and theory, it may establish the degree of consensus or controversy that attended these changes.

Isn't it interesting to view the *Encyclopedia* metaphorically as a record of the continuing constitutional convention in the twentieth century, and Professors Levy, Karst, and Mahoney as the Madisons of our day? For, similar to the celebrated scribe of the proceedings of the 1787 Convention who noted the intentions of a number of the original framers, the editors of the *Encyclopedia* have collected the understandings of primary figures — jurists and constitutional scholars — among our contemporary “reconstituters.” Moreover, the many constitutional law authorities who did not participate in the record-building project as contributors of articles stand in a parallel position to the “silent” framers and ratifiers of the 1787 Constitution. In addition, the contributors leave to future generations the task of discerning the collective purposes and perceptions of the constitutional “founders” of this era.

However farfetched the metaphor may appear at first glance, upon reflection it is useful for at least two reasons. First, it highlights the difficulties inherent in the originalist project for constitutional interpretation.<sup>29</sup> Whatever historical perspective may be gleaned by the twenty-first century readers of the *Encyclopedia*, if its contributors have not been able to speak beyond their times, their portrayal of the twentieth century's vision of the Constitution will be considered obsolete. Yet, to the extent that they have been successful in avoiding obsolescence, the contributors are likely to have focused on doctrinal and theoretical concepts at a level of abstraction that obscures controversy in application.<sup>30</sup> Furthermore, given the clear evidence of conflicting viewpoints on critical constitutional issues, the future user of the *Encyclopedia* will find it difficult to distill a common understanding from among its contributors alone, much less from the “silent reconstituters” among the many influential jurists, lawmakers, and scholars whose opinions have not been recorded. Thus, the *Encyclopedia* un-masks the myth in the originalists' argument that there is any determi-

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29. Interpretation of constitutional provisions according to the “framers' intent,” once the terrain for esoteric and “principled” discussion among constitutional scholars, has become the ground for political debate since Attorney General Edwin Meese has fired the cannons of “strict construction” and “original intent” in his various broadsides against the liberal constitutional agenda. For accounts of the recent use of the originalist project in the Reagan administration, see L. CAPLAN, *THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW* 115-34, 302-05 (1987); and Collins & Skover, *supra* note 21. Informative summaries of arguments against originalism are found in M. TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 21-69 (1988); Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 493-97 (1981); Schlag, *Framers Intent: The Illegitimate Uses of History*, 8 U. PUGET SOUND L. REV. 283 (1985). An analysis of the 1787 framers' theory of interpretation is given in Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

30. See note 19 *supra*.

native starting point for constitutional analysis.<sup>31</sup>

Second, the metaphor should caution both today's and tomorrow's readers of the *Encyclopedia* against too formalistic a use of its contents. Although it is an archive of much information and opinion, the *Encyclopedia* cannot be regarded as the quintessence of all that is known and knowable on the Constitution, for the record of the continuing constitutional convention ultimately will not be closed. Unlike the major encyclopedias of a much earlier legal era,<sup>32</sup> the *Encyclopedia* is a testament to the interdisciplinary dynamism of constitutional law which does not have static meaning.<sup>33</sup>

In concluding their prefatory comments, the editors acknowledge that their *Encyclopedia* reveals the Constitution that has been and is, but only guides the Constitution that will be. "After all," they write, "when the American Constitution's tricentennial is celebrated in 2087,

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31. See generally Schlag, *Cannibal Moves: The Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988).

32. The "formalist" or "conceptualist" period in American legal history, characterized by the predominant belief that law is a formal science with a unitary set of rules which might be interpreted by lawyers and enforced by judges to resolve all possible controversies, culminated in the publication of the major general reference encyclopedias for legal doctrine that still exist — *Corpus Juris* and *Corpus Juris Secundum*, *American Jurisprudence*, and the restatements — as well as the first multi-volume legal treatises to present encyclopedic treatments of specialized subjects, including such prominent examples as *Wigmore on Evidence* and *Williston, The Law of Contracts*. Quite naturally, these encyclopedic enterprises provided fuel for the cynical fire of the Legal Realists, who denigrated these works, particularly the restatements, as the progeny of a misguided Langdellian faith in the doctrinal rule of law. For general descriptions of the period of American legal conceptualism, and the rise of the general reference encyclopedias and specialized treatises, see G. GILMORE, *THE AGES OF AMERICAN LAW* 41-67 (1977) (dating the formalist era, labelled "The Age of Faith," from the late 1860s to the advent of Legal Realism in the late 1920s and 1930s); L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 381-84, 400-03, 612-32 (2d ed. 1985); J. JOHNSON, *AMERICAN LEGAL CULTURE, 1908-1940*, at 17-24 (1981); and L. KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, at 3-14, 45-49 (1986).

A worthwhile overview of constitutional scholarship in the late nineteenth century is given in Belz, *The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship*, 13 AM. J. LEGAL HIST. 110 (1969). A general account of the reactions of the Legal Realists to the formalist encyclopedic projects is given in G. GILMORE, *supra*, at 87-91; accounts of the Realist assault on the restatements are given in L. KALMAN, *supra*, at 25-28; J. JOHNSON, *supra*, at 54-55, 61, 67-68; J. SELIGMAN, *THE HIGH CITADEL: THE INFLUENCE OF THE HARVARD LAW SCHOOL* 46 (1978). For some of the most vituperative attacks by Legal Realists on the excessive conceptualism in the restatements, see Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800, 814 (1931); Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 833 (1935); and Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183, 192 (1936). General treatments of the Legal Realist movement and several of its leading authorities are provided in Rumble, *Legal Realism*, vol. 3, p. 1133; Rumble, *Sociological Jurisprudence*, vol. 4, p. 1705; Rumble, *Roscoe Pound*, vol. 3, p. 1431; White, *Oliver Wendell Holmes*, vol. 2, p. 920; Glennon, *Jerome N. Frank*, vol. 2, p. 763; and Parrish, *Felix Frankfurter*, vol. 2, p. 764.

33. In light of this metaphorical account of the *Encyclopedia* as the record of the contemporary constitutional convention, it may be surprising that the *Encyclopedia* contains no specific article on "framers' intent" or "originalism," although there may be traces of the approach in some entries. See, e.g., Berger, *Impeachment*, vol. 2, p. 957; Mendelson, *Contract Clause*, vol. 2, p. 493. Or, perhaps it is largely consistent with the spirit of the metaphor that the *Encyclopedia* place no intellectual boundaries on the meaning of "original intent," even as currently understood.

what the Constitution has become will depend less on the views of specialists than on the beliefs and behavior of the nation's citizens" (vol. 1, pp. x-xi). By the editors' apparent design, then, the *Encyclopedia of the American Constitution* is a scholarly venture fitting for our century and the next. It describes many of the elements that constitute our national ideology in the present; and, by awakening or re-shaping our awareness of those elements, stimulates the potential for reconstituting our ideology in the future. Both in what it says, and in its very act of saying it, the *Encyclopedia* reflects the political and sociological character of its celebrated subject.

For the twentieth century, the *Encyclopedia* is a living account of our living Constitution. For the next century, the *Encyclopedia* is almost certain to be the best surviving account of "the original intent" of those who reconstituted our supreme law.

#### APPENDIX

##### *Structure and Organization of the Encyclopedia*

The beginning of volume 1 presents an alphabetical list of all articles by subject name, each entry accompanied by identification of its author. The list of articles is followed by an alphabetical list of all contributors; after each name, the contributor's vocational title and affiliation, and an inventory of all entries written by the contributor, are given.

Volume 4 contains the indices and appendices. A subject index and a name index list all pages on which the reader may find references to the subject or the person identified; within each list of pages, numbers printed in boldface type refer to the main article written on the subject or person. A case index, providing an alphabetical listing of all judicial decisions mentioned in the *Encyclopedia*, the pages on which the references can be found, and case citations to the full opinions in the American federal and state and the British reporter systems, will prove extremely useful to readers of the law. For the novice, a glossary offers definitions of legal terms, and indicates which terms of art are the subjects of separate entries in the *Encyclopedia*.

The appendices in volume 4 include, in the order of presentation: (1) the resolution of Congress, dated February 21, 1787, calling for a Federal Constitutional Convention; (2) a copy of the Articles of Confederation; (3) a copy of the 1787 Constitution and its subsequent amendments; (4) the resolution of the Constitutional Convention, dated September 17, 1787, transmitting the proposed Constitution to Congress; (5) the letter of transmittal by George Washington, as President of Congress, accompanying the submission of the Constitution to Congress; (6) a chronology of important dates in the "Birth of the Constitution;" and, finally, (7) a chronology of important events in the "Development of American Constitutional Law."