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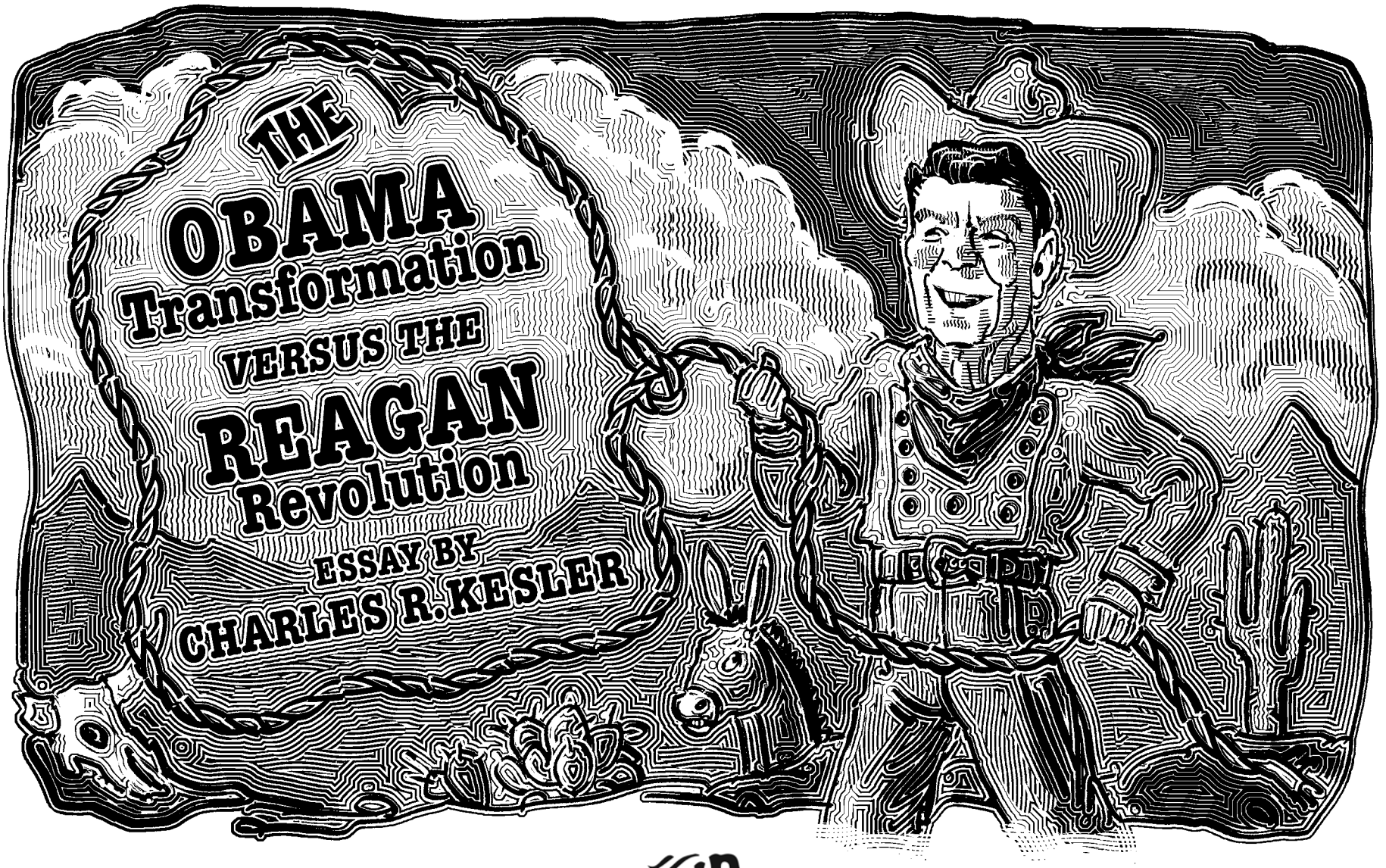

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Book Review by Michael M. Uhlmann

Two Cheers for Originalism

The Constitution: An Introduction, by Michael Stokes Paulsen and Luke Paulsen.
Basic Books, 368 pages, $29.99

Michael stokes paulsen teaches constitutional law about as well as it can be taught, and he writes about it with appealing gusto. A popular professor at the University of St. Thomas Law School in Minneapolis (and before that, for many years, at the University of Minnesota Law School), he has published dozens of articles in leading law reviews and journals of opinion, devoting special attention to the religion clause of the First Amendment, the nature and scope of executive power, the lawless barbarism of the Supreme Court's abortion jurisprudence, and the vices of judicial supremacy and its evil twin, "living constitutionalism." A textual originalist through and through, he believes that the Constitution should be read in accord with the generally accepted public meaning of the relevant word or phrase at the time it was adopted.

In *The Constitution: An Introduction*, Paulsen and his son, Luke, a young software engineer who clearly learned a thing or two about law over many years at the family dinner table, have produced that rare thing: a commentary on the Constitution that may be profitably read by experts and non-experts alike. It is at once intellectually sophisticated without being pedantic, and comprehensible to lay readers without demeaning their intelligence. The Paulsens have accomplished what legions of professors have failed to do, and in truth have scarcely even tried to do: they explain in 300 gracefully written pages the origins, structure, operations, and political development of the United States Constitution.

The authors would readily acknowledge that a work of this character must necessarily eliminate or abridge discussion of certain important matters. Even so, the book's remarkable feature is not what is left out but how thoughtfully it addresses what it chooses to include. There are a few exceptions to this general praise, some of which will be noted below, but on the whole the Paulsens are to be congratulated for covering as much as they do in such a short space and, for the most part, treating diverse points of view fairly—these are no small accomplishments. The book deserves wide readership, including—let it be said at once—law students, many of whom are abysmally educated in constitutional matters thanks to the tyranny of the case method and the increasingly obscurantist 1,800-page casebooks their professors assign.

The book should also be read by undergraduate, as well as graduate, students of government. With the abandonment of traditional civic education, compounded by the leftist ideological tilt of many American government and history texts, it is not at all uncommon these days to encounter bright students who have never heard of *The Federalist*, could not write two intelligent sentences about James Madison, Alexander Hamilton, or the Lincoln-Douglas debates, and believe that the Constitution has vested the Supreme Court with exclusive powers of interpretation. The Paulsens' book will quickly dispel such ignorance and will do so, moreover, with intelligence and charm. All but the dullest students will enjoy reading it.

Structurally, the book is divided into two parts of five chapters each. Part I ("The Written Constitution") begins with the American Revolution. It notes, but does not elaborate upon, the philosophical and legal significance of the Declaration of Independence. The first chapter then introduces the major thematic

materials that will be covered in detail in the ensuing four chapters: the shortcomings of the Confederation; the high points of the debate at the Philadelphia Convention; the how and why of bicameralism, separation of powers, and federalism; the critical differences dividing the Federalists and the Anti-Federalists; the reasons behind the unseemly compromise over slavery; and the adoption of the Bill of Rights.

One would be hard pressed to name anything else in print that covers so much material so well in such a remarkably short space (115 pages). The same holds true for the opening chapters of Part II ("Living the Constitution"), which deal, respectively, with the first 70 years of the Constitution's life, including controversies over judicial review, federalism, and slavery; and Abraham Lincoln's statesmanship and constitutional arguments during the crisis of the Civil War. Readers who stop here, after another 69 thoroughly engaging pages, will have acquired a richer and more sophisticated understanding of foundational constitutional principles than is offered in most American law school and political science classrooms.

Parts of the remaining three chapters—perhaps because they deal with matters of more immediate contemporary controversy—are, I think, somewhat less successful. The theme of Chapter 8 is conveyed by its title: "Betrayal: The Supreme Court's Abandonment of the Constitution (1876–1936)." The authors are here chiefly concerned with three topics: the Court's denial of equal protection to women and racial minorities (*Bradwell v. Illinois* in 1873 and *Plessy v. Ferguson* in 1896 are leading examples); its failure to protect free speech during World War I (*Schenck v. U.S.* and *Debs v. U.S.*, both decided in 1919); and its use of substantive due process to invalidate state social and economic legislation (e.g., *Lochner v. New York*, 1905).

Chapter 9—"Restoration: The Constitution Through Depression, World War, and Segregation (1936–1960)"—might have been subtitled "The Supreme Court confesses error and promises to sin no more." Here, the justices are specially praised for redressing prior injustices towards racial minorities and women (though not if you happened to be a Japanese-American citizen during World War II); for broadening our understanding of First Amendment freedoms; and, above all, for putting a dagger through the heart of *Lochner*. But just when the reader has begun to think the Court was leading the nation to broad vistas of constitutional enlightenment, along comes Chapter 10, entitled "Controversy: The Modern Era of Judicial Activism (1960–2015)," concerning which, to say no more, the Paulsens are decidedly unhappy.

In this final chapter they seem to like the results even as they disdain the Court's reasoning in the cases dealing with reapportionment and criminal procedure. Their praise comes to a screeching halt, however, when the ghost of *Lochner* rises from the grave in *Griswold v. Connecticut* (1965) and the abortion cases and the gay rights decisions of *Lawrence v. Texas* (2003) and *U.S. v. Windsor* (2013). The judiciary's feckless pursuit of busing to achieve racial balance in schools is sharply criticized, as are certain disturbing features of the Court's contemporary religion jurisprudence—to name only two additional matters about which the authors are rightly alarmed.

These are all subjects about which intelligent differences of opinion may be entertained, and the Paulsens do their best to present competing sides fairly, even as they grind their teeth. This is rather more a virtue than a vice in a work of this kind, which is, after all, a primer on the Constitution, not a lamentation for what it has become at the hands of the modern Court. Still, if one pays careful attention to Chapter 10 and the brief, three-page coda that follows, an alarming trend becomes apparent: at the risk of only modest exaggeration, we appear to find ourselves in the grip of an increasingly arrogant judicial supremacy. The Paulsens are clearly worried about this trend, but the preceding chapters have not adequately prepared the reader for its arrival.

Part of the reason lies in their unduly hagiographical treatment of *Brown v. Board of Education* (1954) in Chapter 9. This is driven by their understandable abhorrence for the evils of racial segregation that had been promoted and sustained by the Supreme Court over many decades. *Brown* is extravagantly praised for having put an end to all that. The Paulsens note in passing some of the major criticisms of *Brown*—particularly its reliance on spurious social science data and its failure to articulate a clear constitutional principle to guide lower courts and the public. They nevertheless dismiss such criticisms as "technical flaws" that deserve to be forgiven in light of the nobility and justice of the Court's objective. This sort of rhetoric is hardly what one expects from writers of originalist disposition.

The *Brown* opinion, despite its iconic status, is hardly a model of judicial craftsmanship. Many liberal supporters of the decision noted that fact when the decision came down. Others in our own time have also noted substantial flaws—which is why, among other things, they thought it necessary to greet the decision's 50th anniversary with a book entitled *What Brown Should Have Said*. Yes, the palpable evils of Jim Crow were long overdue for remediation; and yes, *Brown* helped to bring them to an end. One should not, however, exaggerate the role of the judiciary, which, as Gerald Rosenberg shows in his book *The Hollow Hope* (1991), had very little to show for its efforts in the decade following *Brown*. Segregation came crashing down only when the political branches swing into action in the 1960s thanks to Bull Connor's dogs and the heroism and rhetoric of Martin Luther King, Jr.

What precisely *Brown* contributed to this is difficult to assess. Part of the difficulty is that the opinion proceeded more by assertion than by argument, and, by so doing, lost an opportunity to teach the public (especially white America) about the commitment to human equality set forth in the Declaration of Independence and how the 14th Amendment meant to achieve that promise in positive law. It was a Lincolnian moment, but the Court let it pass by.

Brown is iconic not only for its status as a race case; it very quickly acquired greater jurisprudential significance because it largely severed its result from constitutional text. It relied instead on the results of highly dubious social science test data to "prove" that separate was inherently unequal. As legal scholar Edmond Cahn famously pointed out at the time, that is a flimsy and dangerous way to go about securing rights. It would have been far better for the Constitution and the cause of racial equality had the Court simply updated Justice John Marshall Harlan's ringing dissent in *Plessy*—or adopted Justice Robert Jackson's alternative draft opinion (see "The Road Not Taken," *CRB*, Summer 2004). Its virtues aside, *Brown*'s failure to root its conclusion clearly and firmly in the Constitution's text opened the door to a new kind of ideologically fashionable jurisprudence, in which the Court has ever since increasingly sought to free itself from the tyranny of constitutional text in the interest of achieving social justice. This is not the place to elaborate the point, but I think it goes a long way toward explaining many of the adverse "pivots" in the direction of judicial activism the Paulsens note in Chapter 10.

A final related point on the rise of the wretched judicial excess remarked in the book's closing chapters. Substantive due process receives a pretty heavy drubbing at various places in the Paulsens' text. Their argument, in a nutshell, is that the Due Process

Clauses of the 5th and 14th Amendments clearly referred to procedural matters only and were never intended to create substantive rights. In the late 19th and early 20th centuries, however, a misguided Supreme Court nevertheless did just that, opening the way toward the creation of unenumerated rights that permitted judges to mask their personal policy preferences in the forms of law.

In the *Lochner* era, the argument continues, the Court invented an unenumerated "liberty of contract" and used it to strike down otherwise worthy legislative enactments. All that came to an end after Franklin Roosevelt finally got control of the Court in the late 1930s. Despite their longstanding contempt for Lochnerism as applied to economic regulation, liberals eventually revived its spirit when applied to non-economic matters. Justice William Douglas discovered a right to privacy in *Griswold*, finding it after a long search in penumbras formed by emanations of five separate constitutional amendments. It wasn't long before the right to privacy was deemed broad enough to include the right to abortion, which over time morphed into a due process "liberty interest." As we have come to discover in recent years—and as this year's Term of Court underscores with a vengeance—there is no end to the number of rights that can be discovered under the label of due process.

This is a powerful critique, and one not lightly to be ignored. It has become a standard part of the originalist indictment of free-wheeling constitutionalism, and was the leitmotif of the dissenting justices in *Obergefell v. Hodges*, finding a constitutional right to gay marriage. Nevertheless, the critique has been overdone. It is time, I think, to lay that baggage down, or at the very least to revise the argument.

On a practical level, it is fair to ask what the critique of substantive due process has achieved. The answer, I'm afraid, is precious little, as *Obergefell* shamelessly reminds us. For the better part of half a century, originalists have railed against liberal Lochnerism, while the progressive *Zeitgeist* has moved relentlessly on. Liberals talk about justice, the expanding universe of human rights, and the Constitution's duty to keep pace with what Justice Oliver Wendell Holmes called the "felt necessities of the times." Meanwhile, conservatives talk about the importance of respecting procedural proprieties. The point is well taken, but is it likely to attract hearts and minds?

More substantively, the critique should drop the by now almost Pavlovian effort to root the heresy's birth in Justice Taney's *Dred Scott* opinion. It was the late, great Robert Bork, I think, who first sought to make that connection, toward the end of tarring *Lochner*, *Griswold*, *Roe*, and *Casey* with an unsavory heritage. The Paulsens adopt essentially the same position.

Yes, Taney did employ the doctrine, but, significantly, none of his critics at the time faulted him for it, in part because the idea of a substantive content to due process appears to have acquired significant support by mid-19th century among a large portion of the bench and bar—and no less among anti- than pro-slavery advocates. Witness the fact that the Republican Party platforms of 1856 and 1860 specifically stated that allowing slavery in the territories deprived slaves of their liberty without due process of law. Taney's problem, Abraham Lincoln famously noted, was not that he sought constitutional protection for property, but that he failed to distinguish between protecting a person and a hog.

The critique also needs to pay more serious attention to the substantial body of scholarly literature over the past 30 years casting doubt on many of its suppositions concerning *Lochner* in particular.

First, the New York statute appears to have been little more than a rent-seeking gesture on the part of big bakers against mom-and-pop operations—a classic example of what 19th-century judges called "class legislation," i.e., the use of otherwise valid state police powers to mask the transfer of wealth from A to B. Crony capitalism didn't begin with the Great Society. Substantive due process was one of the ways these seedy wealth transfers were once combatted.

Second, "liberty of contract," the much-derided juridical concept employed by the Court in *Lochner* and similar cases, was not an arbitrary contrivance designed to protect the judiciary's favored interests. No, it was not a specifically enumerated constitutional right, but why should that be impossibly problematic? Liberty of contract in fact had an interesting and dignified pedigree associated with the idea of a person's right to pursue an honorable trade free from undue government interference. Few if any advocates of liberty of contract argued that it trumped reasonable regulatory restrictions. The question presented in litigation invariably had to do with the reasonableness of a particular regulation. And in that sense, it makes little difference whether the right in question was specifically enumerated or not. In contrast to Holmes's over-the-top, misleading dissent in *Lochner*, Justice Harlan's dissent, which deserves a wider hearing than it is typically accorded, more accurately describes the typical dilemma facing the Court in regulatory cases.

Third, the critique needs to revisit its statistical claims about the perverse consequences of *Lochner*. Inquiries along this line should begin with Charles Warren's articles in the *Columbia Law Review* from 1913, showing that the Supreme Court upheld the overwhelming majority of state and federal regulatory enactments.

There is much more to be said about all this, of course, and I would not expect that the critique of substantive due process will be abandoned altogether. But, as I say, it certainly needs rethinking. Arguments from process alone have shown themselves to be of little avail against the juggernaut of rights claims. Sooner or later, constitutional conservatives have to start talking once again about the origin and nature of rights. Perhaps Michael and Luke Paulsen can contribute to that conversation in the next edition of their wonderful introduction to the Constitution—and, let us hope, many future editions as well.

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