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Review of George Athan Billias, *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective.*

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tional liberty in a manner that convinced them that they were the oppressed, not the oppressors, the victims, not the tyrants.” Republican efforts to establish democratic constitutional governments were seen as real threats to constitutional liberty. Ultimately, not only were the redeemers successful throughout the south, but Benedict also reminds us that “by the 1870s and 1880s their ideas ‘were no longer just southern.’”

One of the most significant essays in the collection is Benedict’s well-researched critique of C. Van Woodward’s thesis concerning the “compromise” so important to the disputed presidential election of 1876. Through roll call analysis as well as more traditional historical research, Benedict has pretty well demolished Woodward’s claim that there was a well-planned and accepted implementation of a compromise where, in return for certain actions to be undertaken later by Hayes, Democratic members of congress would permit key votes on the move to accept the pro-Hayes findings of the Electoral Commission—without which he could not gain the presidency. Conceding that there was indeed a semi-secret conference between Hayes’s representatives and southern politicians, and that negotiations did in fact occur, Benedict essentially argues that they were irrelevant in that the key decisions had already been reached before the meetings ever took place.

Taken together, these essays offer perceptive and sometimes provocative insights into Reconstruction and the Gilded Age. As is inevitable in such a collection, some repetition does occur, but Benedict skillfully integrates contemporary constitutional history with political developments. How persuasive is his claim that devotion to traditional constitutional values was as significant—if not more so—than simple racism in the demise of Reconstruction? In considering such a question one might note that racism can easily be disguised as a love of constitutional standards. His essays invite reflection on this sad but ineluctable truth concerning our legal history. Production flaw aside, they deserve careful reading.

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GEORGE ATHAN BILLIAS. *American Constitutionalism Heard Round the World, 1776-1989: A Global Perspective*. New York: New York University Press, 2009. 544 pp. \$60.00 (cloth).

That a lot has been written in America about the various European sources of inspiration for the framers of our Constitution is a truism repeated here only for contrast. This book is an attempt, on the other hand, to fill what its author correctly regarded as a conspicuous gap in the literature published in the United States about the influence of American constitutionalism abroad. "No single historical narrative synthesizes the worldwide influence of American constitutionalism [during the time from the American Revolution to the collapse of the Soviet empire]" (p. 373). By and large, the author's attempt succeeds admirably.

George Athan Billias, the Jacob and Frances Hiatt Professor of History Emeritus at Clark University, argues that American constitutionalism has made the world a better place by facilitating attention elsewhere to fundamental human rights and the legal tools for their protection from State abuse. It is a heroic effort on behalf of the national winner of the bronze medal for influential constitutionalism. Early, Billias admits that, among the three brands of Western constitutionalism, the American has had less influence on developments elsewhere than that of either England or France. In his view, this is primarily a function of familiarity, the result of empire, and there is no good reason to question this judgment. Eventually, Billias gets around to positioning the sort of constitutionalism labeled "Marxism Leninism" as competition for the Western sort, a juxtaposition justifiable more in the dimension of ideology than in those of geography and history. In what cardinal quadrant other than the West could Marxism Leninism be positioned? Billias mentions only in passing another, alternative constitutionalism, the "East Asia model," delving no deeper in that direction than to point out that it affords priority to a free-market economy over democratic constitutionalism, and thereby exposing his work at least to criticism that he has unjustifiably discounted a distinct constitutionalism sounding in Confucianism and Buddhism.

This is certainly a comprehensive study, admittedly—and justifiably—the work of twenty years. It makes reference to perhaps more than a hundred constitutions, as well as to numerous constitutional miscarriages. Its reach embraces states and nations large and small, the extant and the nearly forgotten.

What the author sets out to do is to trace the influence of American constitutionalism on constitution makers active from 1776

through 1989 around the world. He treats as originally or distinctively American the concepts of popular sovereignty, textual embodiment, constituent assembly, popular ratification, bicameralism, presidentialism, judicial review, federalism, amendment protocol, and a bill of rights. He identifies as the media for propagation of these concepts six American texts: the Declaration of Independence, the set collectively of the first state constitutions to follow independence, the Articles of Confederation, the Federalist Papers, the Constitution of 1789, and the Bill of Rights. He then demarcates seven "Echoes," or eras of constitutional creativity elsewhere in which he finds more or less American influence. Thus, the work is blessed with more than adequate structure in the form of three axes: element, text, and time. This makes for surprisingly easy navigation of an opus of 376 text pages supported by notes comprising another 112 pages.

In his survey, Billias opts for a set of six American legal media, but a seventh might well have been the Northwest Ordinance of 1787, to which ought to be ascribed not only the American process for admission of new states to the Union, but also confirmation in written law of certain fundamental rights including religious freedom, trial by jury, bail, compensation for property taken by government for a public purpose, and protection from cruel or unusual punishment. It also included America's first national proscription of slavery and involuntary servitude. An eighth medium of the same sort might have been another set comprised at least of the Mayflower Covenant of 1620 and the Fundamental Orders of Connecticut (1628) were Professor Billias to accept that another original or distinctive American concept is constitutional coordination of secular and religious sovereignties. But decisions of this sort are naturally subjective and the set of six texts on which Billias has settled ought to attract little objection for over-inclusiveness.

The elevation from which Billias makes his reconnaissance and the breadth of his study more than excuse the occasional gaffe. Justifying his choice of the Declaration of Independence for the set of American constitutional media, he writes (p. 16), "According to the current school of legal realists—legal historians, law professors, and lawyers—a constitutional text must be based on a positivist view of the law, establish a government grounded on its principles, contain all necessary institutions, and include a proper codification of

laws." In the accompanying note, John Phillip Read and Benno Schmidt are named as legal realists of this ilk, apparently because they both concluded that the Declaration of Independence is not a constitution. Billias leaves it for his readers to make a connection between their espousal of legal realism and their common conclusion about the Declaration, which seems more positivist than realist on its face. My best guess is that Billias assumes only devotees of the Natural Law can agree with him.

By way of overture, Billias offers in Part I an extended definition of American constitutionalism which leads naturally to a conclusion that for him the American constitutional creed is complete by 1789. Equal protection, a concept unmentioned in either the original text of our Constitution or its Bill of Rights, a limit on national power that is purely judicial in origin, eventually emerges in this work as another distinctively American feature, but Billias speaks of it only as a child of the Declaration. Indeed, even his respect for the Bill of Rights is uneven. From his silence, it might be inferred that the Second and Third Amendments are not even parts of American constitutionalism, much less distinctive parts. Perhaps the general disinterest elsewhere in their reproduction justifies giving them such short shrift, but, for his pet concepts, Billias reports even occasions on which their only influence was to move foreign framers in the opposite direction. He is also conspicuously silent about the Ninth, Tenth, and Eleventh Amendments, even though he clearly regards federalism as a distinctly American constitutional concept.

Otherwise, in Part I Billias provides a generally sound sketch of American constitutional law, misspeaking only rarely, as when he says that offices are restricted by the U.S. Constitution to those who own property. Occasionally, his conclusions outstrip their bases, as when he declares that the Articles of Confederation suggested that the national court system was authorized by Article III of its successor and anticipated the Judiciary Act of 1789. This might seem a stretch from a text in which the only courts authorized are those "for the trial of piracies and felonies committed on the high seas and . . . for receiving and determining finally appeals in all cases of captures," but a very plausible case has been made recently by Steven Snell in *Courts of Admiralty and the Common Law* (2007) that the decision to equip federal courts with diversity jurisdiction followed from a prosaic concern by the Framers about how federal admiralty courts might otherwise be enabled to earn their keep.

Having defined his terms, Billias turns in Part II to a report of constitution-drafting events worldwide for which there is evidence of influence by his American texts. In the next nine chapters, Billias visits eras of his own contrivance, ranging in duration from the short remainder of the 18th century after 1789 in Europe to almost the entire 19th century in South America. Sometimes, his evidence of American influence on foreign constitution drafting is direct, when records survive of the discussions among drafters. Sometimes, the evidence is more circumstantial, when drafters or those influencing drafters previously published commentary on American constitutional texts. Sometimes, the evidence is remote, for example when an American influence is found in some provision for judicial review in a single-purpose court of the sort preferred by Kelsen rather than a supreme judicial court exercising supervisory power meanwhile.

Among the foreign constitutionalists commenting on the U.S. Constitution at the end of the 18th century is Condorcet, who according to Billias fretted in his *Projet de constitution* that the power to suspend the writ of habeas corpus might be assigned to judges because of the risk they would abuse that power. A little more about this from Billias would have been appreciated. It might be imagined, for example, that Condorcet feared pusillanimous judges choosing to suspend the Great Writ rather than to confront the government jailer, but where else might a suspending power be placed with less risk to everyone's freedom than in the hands of a judiciary with the independence of life tenure?

When he writes in Chapter 4 about the influence of American constitutionalism in South America during the 19th century, he naturally focuses on the Great Liberator, and uses relations between the United States and Bolivar to explain why American concepts gained relatively little traction. He obviously regards as important an incident in which Bolivar and the United States clashed over the seizure of two merchant ships, but his account of that incident is muddled and simplistic. E. Taylor Parks wrote of the incident in Colombia and the United States 1765-1934 (1935). According to Parks' well-documented version, the ships were American, captured by Bolivar's navy, over objections that they were entitled to the protection of neutrality. Rather than afford their owners the hearing to which international law entitled them, Bolivar's government summarily condemned both ships and offered them for sale

at auction. Viewed in light of continuing breaches of U.S. neutrality by Bolivar's representatives visiting the U.S. and U.S. reluctance to risk a general war with European powers by commencing a war with Spain, the fact that the U.S. did not hasten to formally recognize Bolivar's new republic seems justified. Of course, the real point Billias intended is that Bolivar's pique with the United States stood in the way of significant influence from that direction on his constitution-making.

If his details about constitution-making in Gran Colombia are tangled, at least one generality about the revolutions of South America is also debatable. Billias strikes a contrast between the revolution of Mid-Atlantic colonies against England with the revolutions of South American colonies against Spain on the grounds that, from the perspective of changes in the social order, the former was a radical movement while the latter was a conservative movement by those intent on upholding traditional values and social goals. It is at least as true to say to the contrary that the Creole communities in both regions reacted violently to imperial change in the form of intensified supervision. Thus the cases are as plausibly adjudged alike as different.

In Chapter 6, Billias writes about American influence in the form of advice by Tocqueville to the French constituent assembly of 1848. Tocqueville unsuccessfully urged bicameralism for France for the same reasons that persuaded its American adoption in 1789. But bicameralism was rarely copied elsewhere, especially after proportional voting became fashionable notwithstanding the spectacular failure of the Weimar Constitution in which it was introduced. Billias acknowledges the conventional wisdom that the two concepts are widely deemed incompatible, overlooking, as others have, the useful service bicameralism offers where proportional voting is with reference to national party lists. Such a system's centripetal concentration of power in the seat of government, ordinarily the metropolis, tends to shortchange the hinterland. With bicameralism, a second chamber to which election comes from regional districts can offer a centrifugal counterweight short of federalism.

According to Billias, Laboulaye in 1849 attributed the difference in longevity between the U.S. Constitution and the nine French constitutions of the same period to national attributes: the French were by nature too theoretical and expected too much from their laws,

whereas the Americans were more practical, relied more on experience, and were consistently pragmatic. Another commonplace answer to which Billias pays no attention is that ours has become the world's oldest serving constitution because we are ready to interpret it so imaginatively, if not to honor it in the breach. But Billias writes here of the influence of texts, not of the devices by which they are manipulated.

Overall, his presentation of constitutional developments in most of Europe and in Central and South America is admirably detailed. Billias also covers, adequately under the circumstances, developments in post-colonial Africa and Asia. Respecting the Balkans, however, Billias covers Greece, but overlooks other states after their liberation on the fall of the Ottoman and Austrian empires. He misses four Albanian constitutional moments, most conspicuously those that resulted in the Statute of Lushnja (1914) and its successor, the Constitution of 1925; several constitutions of Serbia (when it was a principality and later a monarchy), and the Tarnovo constitution of the Kingdom of Bulgaria.

In the chapter he entitles "American Crescendo," Billias surveys constitution drafting in the two decades following World War II. His large theme is a Manichaean struggle between the liberal constitutionalisms of the West on the one hand and Marxism Leninism on the other. He also attributes the preference for presidential government in the Baltic states to the notion that it serves better the needs of a state threatened at its borders, but without discussing the obvious example to the contrary, the state of Israel, elsewhere dismissed as a "special case." Having acknowledged the incompatibility of judicial review with parliamentary supremacy, Billias describes (p. 289) the Japanese supreme court as "not very willing to find laws of the Diet unconstitutional. During the first twenty years after the 1946 Constitution went into effect, only two statutes were declared unconstitutional." Students of judicial review in America know that, during the first twenty years after our constitution went into effect, only one act of Congress was struck down by the Supreme Court of the United States, and the same thing did not reoccur for another fifty-four years. Granted, in our federal system, where states continued to enjoy general legislative powers, judicial review far more frequently resulted in nullification of state laws. Students of judicial review in America will also look with at his

special indictment of the Irish Supreme Court (namely, that it turned out to be less than daring in its review of executive decisions in aid of national security, especially in cases of terrorist activities).

Whatever ought to be the standard to which a university press should be held in this post-modern age of publishing, the NYU Press surely could have done better by Billias, as could those who reviewed his manuscript before its publication. Some error, trivial but sufficiently amiss to distract, confronts a reader every ten pages or so. Among examples of the incognizable are such sentences (pp. 177 and 233) as, "Liberalism in the nineteenth century placed a high value on individual liberty, and parliamentary government sometimes offered constitutional monarchy as the best way of attaining it," and "The attorney general informed the Supreme Court that this ruling was necessary because another situation similar to this might set a precedent for other possessions." On the other hand (p. 315), that the United States Central Intelligence Agency was "established originally to operate within the United States" is clear enough, but wrong.

Notwithstanding its peccadilloes, few enough for a project of this magnitude, *American Constitutionalism Heard Round the World, 1776-1989* deserves respect and applause. Not only because of the omnibus nature of the undertaking, but also because of its structural integrity and clear prose, it succeeds in filling a gap deserving of scholarly attention. As the work of one man, it is extraordinary in this day and age and unlikely to be equaled.

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THOMAS H. COX. *Gibbons v. Ogden, Law, and Society in the Early Republic*. Athens: Ohio University Press, 2009. 264 pp. \$44.95 (cloth); \$26.95 (paper).

In 1824, in *Gibbons v. Ogden*, the U.S. Supreme Court declared unconstitutional New York's steamboat monopoly, opening New York harbor to competition from other steamboat operators and ensuring that the nation's waterways would not be bottled up by