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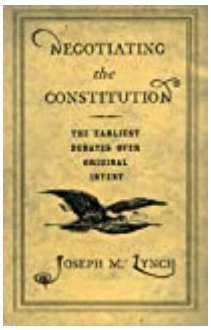

Joseph M. Lynch. *Negotiating the Constitution: The Earliest Debates over Original Intent.* Ithaca, N.Y. and London: Cornell University Press, 1999. x + 315 pp. $42.50 (cloth), ISBN 978-0-8014-3558-4.

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The genesis of this book lies in its author's concern with recent Supreme Court decisions that hint at the willingness of its conservative majority to reopen seemingly settled questions about the extent of the legislative powers of Congress and the states. (The subject of sovereign immunity, so much in the news of late, is neglected, however.) In the views of Joseph M. Lynch, professor emeritus of constitutional law at Seton Hall, the Court's 5-4 divisions in *United States v. Lopez* (1995) and other cases illustrate the persistence of an ancient dispute in American constitutionalism that can be traced beyond the first interpretative debates of the 1790s to the considerations that shaped both the drafting of the Necessary and Proper clause at the Federal Convention and its subsequent discussion during the ratification debates of 1787-1788. As the subtitle suggests, Lynch is also concerned with the role that appeals to original intent, in its various guises, played in these debates. Alleging that "The existing literature on initial attitudes concerning the proper weight to be given original intent is minimal and scattered" (p. 2)–a claim that might be disputed by Jefferson Powell, Charles Lofgren, Leonard Levy, and this reviewer[1]–Lynch undertakes a systematic and impressively thorough review of most (though not quite all) of the major interpretative disputes of the decade from the inauguration of the Constitution through the period of the Alien and Sedition Acts. Doing so necessarily involves retracing ground that David Currie has recently surveyed.[2] Where Currie relentlessly avoids viewing the disputes conducted and the precedents set during this first decade within the highly political context in which they were generated, Lynch insists on the primacy of political concerns in shaping the process of interpretation. But if all of these interpretations had strongly political components, they were not quite equally politicized in the accuracy with which they rendered the original intentions underlying the Necessary and Proper clause. For this is a book that takes a strongly Hamiltonian cast, meaning, in turn, that James Madison appears as the one leading interpreter who most often trimmed his notions of constitutional interpretation to catch the political winds blowing from the South. The book ends with a final paean to Hamilton that Forrest McDonald would relish: "After constitutions are written," Lynch observes, "they must be interpreted and made to work. It is Hamilton who deserves the title of Father of Constitutional Law" (p. 227).

Much of the book is devoted to a careful, detailed, and at times rather tedious review of constitutional disputes, issue by issue and session by congressional session. Readers who are generally familiar with these disputes will be impressed by how ably Lynch reconstructs these debates, and especially by his skill at mapping the interpretative swerves and outright contradictions for

which any of a number of participants could be held accountable if their positions were tracked from issue to issue. At the same time, few surprises await us here. The story remains a familiar one; the basic divergence between strict and broad construction predictably emerges much as one would expect; and Lynch necessarily spends a fair amount of time recounting a basic narrative that most scholarly readers will or should already know.

The argument of the book, however, pushes back beyond the politicized debates of the 1790s to the prior debates of 1787-88. The argument hinges on the relation between the compromises that produced the text of the Necessary and Proper clause and the way in which that "sweeping clause" was in turn defended when it came under sustained Antifederalist assault in 1787-88. Here Lynch takes a firm position on a question that seems (to me at least) to elude definitive resolution. In Lynch's view, Madison entered the Convention a strong nationalist intent on reducing the states to a distinctly subordinate position "as so many counties" (p. 15). Madison's notion of the desired extent of national legislative power was thus accurately expressed in the article of the Virginia Plan that proposed to give the new congress power to legislate "in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation." In taking this view, Lynch rejects two alternate readings advanced by Lance Banning and myself. Banning looks back into the 1780s to temper the portrait of Madison as reactionary nationalist, while concluding that Madison remained open to arguments about the essential value of the states.[3] In my view, the key resolution of the Virginia Plan was something of a placeholder, part of Madison's strategy to force a decision on the crucial issues of representation first, before then proceeding to determine how much legislative power the government would have. But Madison's initial commitment to nationalism was predicated, Lynch further argues, on his success in securing arrangements that would allow Virginia to dominate the new government, and when he lost the key battle over the rule of apportioning the Senate, Lynch concludes, he and his fellow Virginians then switched objectives to seek an enumeration of specific legislative powers. At the same time, Madison, who had previously favored legislative election of the president, now came–"with Washington's approval" (p. 9), Lynch notes, in a statement lacking any shred of historical documentation–to prefer popular election of the executive, and an enhancement of its powers against those of the Senate. (Lynch similarly makes the preposterous and equally unsupported claim that the factor that weighed "most decisively" (p. 26) in Madison's refusal to countenance a second convention was Washington's opposition to the idea.)

Like the Supremacy Clause, the Necessary and Proper Clause was not the subject of significant debate at Philadelphia, so that any inferences to be drawn about its original intent are largely circumstantial. Lynch argues that the acceptance of the clause embodied a compromise at variance with Madison's later interpretation of its import. To make the Constitution acceptable throughout the country, the clause had to be worded ambiguously to assure northern states that the national government would be strong enough to pursue certain essential economic interests, while at the same time not alarming southern interests about the threat of a national government so strong as to run roughshod over the region that would be the initial minority, and that also had a peculiar interest in insulating slavery from national regulation. But this ambiguity should nevertheless be read in favor of an expansive reading of the clause. As Lynch summarizes his main conclusion: "The framers had left it to Congress to determine whether, pursuant to that clause, they could legislate in the general interests of the country or whether they could merely implement the specifically enumerated powers" (p. 100). It was, of course, the latter position that Madison espoused with increasing rigidity, first in the course of the ratification debates, to allay Antifederalist concerns, and then as the rift with Hamilton escalated into sustained partisan conflict. There was, in other words, a true original intent to this clause, authorizing congressional discretion, and Madison's denial of the existence of that discretion, driven by political calculations of state and sectional interest, was therefore an error.

What do we gain from having the problem of early constitutional interpretation framed in this way? Notwithstanding the admirable care that Lynch takes in tracking the various constitutional debates, his argument seems to read results back to causes in rather mechanical fashion. Nowhere in this book does one acquire the sense that the question of how the Constitution was to be interpreted was a genuine problem in its own right, independent of the particular biases that calculations of partisan or regional interest often imposed. Nowhere does one acquire the sense that Madison, our premier constitutional theorist, acted upon any concerns other than the interests of Virginia, which appear as a ubiquitous explanation of everything he did. Nowhere except passingly in the footnotes does Lynch address the arguments about constitu-

tional interpretation in general and originalism in particular presented by Powell, Lofgren, or this reviewer. Beginning with a circumstantial and therefore inherently problematic account of the origins of the Necessary and Proper Clause, Lynch follows his guiding assumptions to their logical end, patiently following the twists and turns of constitutional debate, but not really adding much of substance to what was already known.

An explanation that is ultimately grounded on Madison's calculations of state and regional interest, to the general exclusion of other factors, cannot prove persuasive. That is not to deny the relevance of such calculations in the politics of the late 1780s and 1790s, but rather to object that the point cannot simply be stipulated as self-evident. Thus the weakness of *Negotiating the Constitution* (and what can that title mean, by the way, when Lynch is describing an interpretative process that did not produce negotiated consensus?) is that it combines a thorough and intelligent assessment of the twists and turns of the constitutional debates of the 1790s with a narrow, wooden, and unoriginal account of their political origins.

Notes

[1]. Cf. H. Jefferson Powell, "The Original Understanding of Original Intent," and Charles A. Lofgren, "The Original Understanding of Original Intent?" both conveniently reprinted in Jack N. Rakove, ed., *Interpreting the Constitution: The Debate over Original Intent* (Boston: Northeastern University Press, 1990); Leonard Levy, *Original Intent and the Framers' Constitution* (New York: Macmillan, 1985); and Jack N. Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* (New York: Alfred A. Knopf, 1996), 339-365.

[2]. David Currie, *The Constitution in Congress, 1789-1801* (Chicago: University of Chicago Press, 1997).

[3]. Lance Banning, *The Sacred Fire of Liberty: James Madison and the Founding of the Federal Republic* (Ithaca, N.Y.: Cornell University Press, 1995).

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