

The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship

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Constitutional history was one of the first distinct fields to emerge when the writing of history became professionalized toward the end of the nineteenth century. Throughout the last century indeed the constitutional dimension was a natural focus for the analysis of political affairs, and the earliest academic historians and political scientists often wrote from that point of view. Because they began the modern study of history and politics, scholars in the constitutional field such as John W. Burgess and Herman Eduard von Holst have figured in accounts of general American historiography and political science.¹ Paradoxically, however, they have not been studied in a comprehensive way from the perspective of constitutional history.² One result has been the common assumption that modern constitutional studies began only during the progressive movement of the twentieth century, with scholars such as Charles A. Beard, and that in the previous era students of the constitution, in the words of Professor Paul Murphy, wrote "revealed" history to underwrite the virtue of established institutions.³ While it is true that many constitutional writers reflected a reverential, uncritical attitude, the more important fact is that in the years after Reconstruction American scholars began the realistic study of the constitution, preparing the way for the more critical, reform-oriented scholarship of the early twentieth century.

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1. For example, in John Higham *et al.*, *History* (Englewood Cliffs, N.J., 1965); Anna Hadow, *Political Science in American Colleges and Universities, 1636-1900* (New York, 1939); Bernard Crick, *The American Science of Politics: Its Origins and Conditions* (Berkeley, 1959).

2. Paul L. Murphy has adverted in a general way to the constitutional historians of the late nineteenth century, but without attempting to document his highly critical assertions about their accomplishments and methodology, which he described as "one of philosophic metaphysical analysis." See "Time to Reclaim: The Current Challenge to American Constitutional History," *American Historical Review*, vol. LXIX (Oct. 1963), 64-79. The quoted words are at p. 66.

3. *Ibid.*, 66.

The conception of the constitution as a formal legal instrument or code giving existence to government and prescribing and limiting the exercise of its powers, rather than as the basic structure of the polity, not consciously constructed but growing organically through history, was one of the distinctive achievements of the American Revolution, and oriented constitutional description and analysis in the early republic toward a legalistic approach. For most students of American government in the first half of the nineteenth century the chief fact about the American constitution was, in the words of Francis Lieber, that "It was the positive enactment of the whole at one time, and by distinct authority." This quality of being an "enacted or written constitution," said Lieber, "distinguishes it especially from the English polity with its accumulative constitution" consisting in "usages and branches of the common law, in decisions of fundamental importance, in self-grown and in enacted institutions, in compacts, and in statutes embodying principles of political magnitude." Writers in the ante-bellum period also generally held that America's constitution was a decisive guarantee of liberty because it effectively limited government. Without a written constitution, wrote Frederick Grimké, parties would do what the exigencies of the moment dictated, "for how would it be possible to argue upon the constitutionality of any measure, when there was no constitution in existence." The written constitution was furthermore regarded as definite and clear in its meaning. "Some of its provisions may be subject to dispute," Grimké said, "but in the great majority of instances, it will be a clear and most important guide in judging the actions of all the public functionaries." Generally to discuss the meaning of the constitution at this time meant to discuss the problem of the nature of the Union—whether it was a compact that could be withdrawn from or a binding political obligation. But however they answered this question, according to Alfred H. Kelly, almost all writers and commentators on constitutional matters maintained "the assumption of an ahistorical, static constitution."⁴

Yet there is evidence that at least some students of the constitution disagreed with the prevailing formalistic, static approach. As example, the *American Review* in 1847 carried an article, in-

4. Francis Lieber, *On Civil Liberty and Self-Government* (London, 1853), 131, 221; Joseph Story, *Commentaries on the Constitution of the United States*, second ed. (2 vols.; Boston, 1851), ix; Frederick Grimké, *Considerations upon the Nature and Tendency of Free Institutions* (Cincinnati, 1848), 123, 131; Alfred H. Kelly, "Clio and the Court," *The Supreme Court Review*, 1965 (Chicago, 1965), 122.

spired by opposition to President Polk's actions in the Mexican War, which argued that the government's practical construction of its own powers effectively altered the constitution and enlarged the scope of its "real authority." Observing in English history how "an unwritten or historical Constitution" could develop, the writer warned, "We, in this country, deceive ourselves egregiously if we suppose that, because we began with a written instrument, we are therefore secure against any changes in its features or provisions, except such as may be made according to the forms prescribed in the terms of the written instrument itself, and plainly written down, like the rest, as a part of it."⁵ During the Civil War, Sidney George Fisher criticized the conventional wisdom about the American constitution from a similarly realistic point of view. Fisher attacked the "received theory" that the constitution was alterable only by the people and not by the government. If Congress in an emergency exceeded its usual powers and its action went unchallenged, he asked, "What power has the Constitution to protect itself?" The answer was, none. In time such governmental action would become custom and organic law, he reasoned, so that "we get at last to the English doctrine, that Parliament is omnipotent, that is to say, it cannot be legally restrained." Rejecting the idea that the constitution was "to be interpreted only by itself, and [that] a thousand years hence it will be still the Constitution, unaltered and supreme," Fisher asserted that in actuality "the construction put on the Constitution by the practice of the Government and by judicial decisions [was] the supreme law."⁶

In the last quarter of the nineteenth century the writing of constitutional history took its place alongside, indeed, began to supersede in importance, the traditional legal commentary as an established part of constitutional studies. What is more, much general history was written from a constitutional perspective, a fact which has struck some modern historians as strange or ironic, since both federal and state governments had little direct contact with the average citizen in his everyday life.⁷ Yet against the

5. "The Constitution; Written and Unwritten," *The American Review: A Whig Journal of Politics, Literature, Art, and Science*, vol. VI (July, 1847), 1-3.

6. Sidney George Fisher, *The Trial of the Constitution* (Philadelphia, 1862), 41, 56. Fisher's relationship to English political thought is discussed in William Riker, "Sidney George Fisher and the Separation of Powers," *Journal of the History of Ideas* vol. XV (June, 1954), 397-412.

7. Cf. William T. Hutchinson, "The Significance of the Constitution of the United States in the Teaching of American History," *The Historian*, vol. 13 (Autumn, 1950), 7, and Murphy, "Time to Reclaim," 65.

background of nationalism and constitution-making that characterized the nineteenth century, and in view of the great war fought to determine the nature of the American Union, it was perfectly understandable that constitutional history should become a popular field of study. The typical work in constitutional history, in any event, usually described the formation of the constitution in 1787 and the growth of the nation through the crisis of civil war in the mid-nineteenth century. This was the pattern in the works of George Bancroft, George Ticknor Curtis, Herman E. von Holst, John W. Burgess, and James Schouler, written from a Unionist point of view, and the works of Alexander Stephens and Jefferson Davis, written from a southern view. More interesting than the theme of support or opposition to nationalism, however, are the ideas about law, politics, government and constitutions that informed these and other works in the constitutional field.

The central themes or concerns in historical and analytical writing about the constitution in the period 1875 to 1900 were the historical origins of the American constitution, the role or place or usefulness of the constitution in the conduct of public affairs, and the nature of the constitution. Traditional formalistic concepts of law and politics of course were present in this constitutional writing, as was idealism as represented by the old Jacksonian Democrat, George Bancroft, or the younger German-trained scholar John Burgess. But prominent also were attempts to define and describe the American constitution according to standards of critical historical realism which anticipated the point of view of progressive historiography of the twentieth century.

In the years when historical study was being transformed into a professional discipline which its practitioners likened to science, and in a conservative era which valued stability in its political institutions rather than precipitous change, it was natural that historians, in dealing with the first of these problems, should be concerned to repudiate the theory of the constitution as either a divinely inspired or creative act of the founding fathers themselves, or the sudden product of revolutionary upheaval. It seemed to von Holst, writing in 1876, that Americans overlooked the struggle waged over the constitution and preferred to see instead evidence of "the 'divine inspiration' which guided the 'fathers' at Philadelphia." This was fine for Fourth-of-July addresses, he said, but it had nothing to do with history. The American constitution, wrote von Holst, like every constitution, was "a result of actual circumstances of the past and present, and not a product of abstract politi-

cal theorizing."⁸ Even George Bancroft, whose quotation of William Gladstone's statement that the American constitution was the most wonderful work ever struck off at one time by the brain and purpose of man incurred criticism from a professional historian a short while later, held that the framers "followed the lead of no theoretical writer" and made "the least possible reference . . . to abstract doctrines."⁹ A few years later Brooks Adams wrote an article to disprove the belief that Americans had suddenly invented the written constitution. Explaining that the charters of English trading companies were the embryo of American constitutions, Adams concluded, "Americans are subject to the same general laws that regulate the rest of mankind; and accordingly . . . they have worked out their destiny slowly and painfully, . . . and . . . far from cutting the knot of their difficulties by a stroke of inventive genius, they earned their success by clinging tenaciously to what they had."¹⁰

Around 1890, as though in response to the outpouring of uncritical patriotic sentiment a few years earlier on the centennial of the constitution, several of the emerging class of professional historians turned their attention to the problem of the origins of the constitution. J. Franklin Jameson, in the preface to a book of essays dealing with constitutional developments in the Confederation period, stated that many educated persons "think of our Constitution as having sprung full-armed from the heads of Olympian conventioners." With the progress of historical science, however, he explained, great national acts of settlement were being found to have been preceded by numerous tentative steps or by a long course of gradual development in the nation.¹¹ To refute the unhistorical implications of Gladstone's famous dictum about the constitution, Alexander Johnston, James Harvey Robinson, and W. C. Morey described the historical roots of the organic charter

8. Herman Eduard von Holst, *The Constitutional and Political History of the United States*, transl. by J.J. Lalor and A.B. Mason (7 vols., Chicago, 1877-1892), I, 62-63; *The Constitutional Law of the United States of America*, transl. by A.B. Mason (Chicago, 1887), 2.

9. George Bancroft, *History of the Constitution of the United States*, 6th ed. (2 vols., New York, 1900), II, 322. The criticism of Bancroft was made by William C. Morey, "The Genesis of a Written Constitution," *The Annals of the American Academy of Political and Social Science*, vol. I (April, 1891), 530.

10. Brooks Adams, "The Embryo of a Commonwealth," *The Atlantic Monthly*, vol. LIV (Nov. 1884), 610.

11. J. Franklin Jameson, ed., *Essays in the Constitutional History of the United States in the Formative Period, 1775-1789* (Boston, 1889), viii.

written in 1787. Writing in a frame of mind that is difficult to appreciate, so obvious does the matter appear to us today, Johnston, a professor of history at Princeton, argued that it was not possible to create *de novo* a scheme of government such as the Philadelphia convention produced. According to Johnston, the framers selected from provisions of state constitutions that had been tested by experience, so that the constitution "was no empty product of political theory," but rather "a growth, or . . . a selection from a great number of growths then before the Convention."¹² James Harvey Robinson, a young instructor at the University of Pennsylvania, raised the same issue in asking: "Did they [the founding fathers], left without guide or precedent, by a simple effort of the intellect, draw up a form of government hitherto unknown, . . . Or did they rely on the experience of others, and find in the history of government . . . materials for the new structure?" Of course they did the latter, said Robinson, and their chief model was "their home experience" in the several state constitutions and governments.¹³ A third scholar, William C. Morey of the University of Rochester, seeking to prove that the laws of historical development applied as well to a written as to an unwritten constitution, insisted that the American constitution was "not a fiat-constitution projected from the brain of the Fathers, nor a copy of the contemporary constitution of England." Morey stressed as the historical basis of the American constitution the royal charters to English trading companies, which became the first written constitutions.¹⁴ Thus constitutional historians disposed of the creative- or divine-inspiration as well as the revolutionary theory of the origins of the constitution. By 1897 James Schouler could fairly disregard the problem as a serious matter for investigation in writing, almost as afterthought following an account of the formation of the Union, "Any notion that our Federal constitution of 1787 was a spontaneous birth must be a false and fanciful one. . . . Our brief exposition of the facts has shown that it was a gradual conception; . . . that it ripened as the matured fruit of political experience."¹⁵

12. Alexander Johnston, "The First Century of the Constitution," *New Princeton Review*, vol. IV (Sept. 1887), 176-178, 186-187.

13. James Harvey Robinson, "Original and Derived Features of the Constitution," *The Annals of the American Academy of Political and Social Science*, vol. I (Oct. 1890), 203-207.

14. William C. Morey, "The Genesis of a Written Constitution," *ibid.*, (April, 1891), 530, 533-535.

15. James Schouler, *Constitutional Studies* (New York, 1897), 95-96.

The attitudes of constitutional historians and other scholars toward the constitution as an instrument of government and their conceptions of its usefulness and value varied more than did their views of its origins. The prevailing attitude in the conservative years following Reconstruction was, predictably, one of considerable satisfaction with the constitution as a source of political stability. It is apparent that one of the main conclusions drawn from researches into the origins of the constitution, and one that was not reached reluctantly, was that American political institutions were conservative. Brooks Adams drew the moral with unmistakable clarity: "Then [the American people's] political genius did not lie in sudden inspiration, but in the conservative and at the same time flexible habit of mind which enabled them to adapt the institutions they had known and tested as colonists to their new position as an independent people. . . ." American governmental institutions, he added, "are not the ephemeral growth of a moment of revolution, but . . . are the offspring of a history and tradition as ancient as those which have moulded the common law."¹⁶ Similarly Alexander Johnston held that the secret of success in American politics was to allow institutions to develop simply and naturally, then when they reached maturity to fix them permanently in legislation or in constitutions.¹⁷

That the constitution ensured social and political stability and best solved the ancient problem of the conflict between governmental power and individual liberty has been a favored notion throughout American history, but it had a special currency in the last quarter of the nineteenth century. George Bancroft, concluding a long life of scholarship and public service, wrote in 1882 that in America the gates of revolution were bolted down, for the constitution provided a legal and peaceful way to bring about change. In his best romantic style Bancroft rhapsodized: "The constitution establishes nothing that interferes with equality and individuality. It knows nothing of differences by descent, or opinions, of favored classes, or legalized religion, or the political power of property.

. . . Each one of the three departments [of government] proceeded from the people, and each is endowed with all the authority needed for its just activity."¹⁸ Almost equally uncritically Thomas M. Cooley, the prominent jurist and legal commentator,

16. Adams, "Embryo of a Commonwealth," 619.

17. Johnston, "First Century of the Constitution," 187.

18. Bancroft, *History of the Formation of the Constitution*, II, 334-324, 327.

pointed out some of the conservative benefits of America's constitution. By it the political authority of the national government was conferred and measured exclusively, he said, and could not be enlarged merely by precedent as in other countries. Comparing the value of written and unwritten constitutions, Cooley wrote that in America written constitutions prescribed the extent to which power was exercised and were the "absolute rule of action and decision for all departments and offices of the government."¹⁹ The British writer James Bryce discerned the same conservative effect of the American constitution. Though it was not a magic tool that of itself could restrain passions and cause reason to prevail, Bryce held that it blocked rash and hasty change and tended "to render the inevitable process of modification gradual and tentative, the result of admitted and growing necessities rather than of restless impatience." Moreover, the constitution trained Americans "to habits of legality" and strengthened "their conservative instincts, their sense of the value of stability and permanence in political arrangements."²⁰ Christopher Tiedeman, another leading jurist and constitutional commentator, felt that the operation of democracy had eroded many limitations placed on government officials by written constitutions. Nevertheless, he regarded the written constitution as an important "check upon the popular will in the interest of the minority." Making the same point that progressive critics of American government would emphasize but without any misgivings, Tiedeman wrote: "It [the constitution] legalizes, and therefore makes possible and successful, the opposition to the popular will," thereby enabling the United States to prevent the development of "democratic absolutism."²¹

Although criticism of the politically conservative nature of the constitutional system did not emerge among constitutional scholars until the early twentieth century, in the years 1875 to 1900 there were some dissenters to the general approval of the constitution as an instrument of government and its effect on American political life. Von Holst, for example, railed against the veneration of the constitution among Americans, which prevented them from seeing

19. Thomas M. Cooley, ed., *Constitutional History of the United States as Seen in the Development of American Law* (New York, 1889), 31; T.M. Cooley, *The General Principles of Constitutional Law in the United States of America*, 3rd ed. (Boston, 1898), 22.

20. James Bryce, *The American Commonwealth* (3 vols.; London, 1888), I, 536-538.

21. Christopher Tiedeman, *The Unwritten Constitution of the United States* (New York, 1890), 163-165.

the realities underlying their government. Thus he called it "a happy sign of progress towards a clearer judgment among thinking people" when a writer in *The Nation* declared that the constitution, in spite of its supposed precision and subjection to judicial construction, had through the theory of "latent powers" been made to serve party demands "quite as effectively as though congress had the omnipotence of parliament." Here was the same insight that had informed Sidney George Fisher's criticism of the constitution during the Civil War: the formal legal instrument did not prevent the national government from acting as any other sovereign government would have acted under similar circumstances. Furthermore, it was a "fundamental defect in the constitution itself," von Holst reasoned, that led to the undesirable situation so common in American politics in which discussion of the expediency of a measure was subordinated to discussion of so insubstantial a thing as its constitutionality.²²

A few years later Woodrow Wilson continued the criticism of "an indiscriminating and almost blind worship" of the constitution which on the one hand had not prevented congressional control of the federal government from being established, overriding "all niceties of constitutional restrictions and even many broad principles of constitutional limitation," but on the other hand did prevent a clear and general understanding that the practices of American government were very different from what they ought to be according to the "literary theory" of the constitution. In seeking reforms along the lines of a strengthened executive branch and new forms of responsibility imposed on Congress, Wilson said he was asking "whether the Constitution [was] still adapted to serve the purposes for which it was intended."²³ Henry Jones Ford, like Wilson a political scientist, also was concerned with the effect of giving excessive attention to the formal constitution and thus obscuring the realities of the political system. In popular belief, Ford wrote, "The constitutional ideal is noble; but the politicians are vile. If only the checks could be made more effective, if only a just balance of power could be established beyond the strength of the politicians to disarrange,— . . . the constitution would work perfectly." But according to Ford it was precisely the checks and balances of the constitution and its failure to provide clear and direct responsibility for running the government which was the source of the

political troubles symbolized by party machines and boss rule. Political parties, even the party machines, were "a necessary intermediary between the people and their government," Ford concluded, and if the constitution did not operate well in practice the defect lay in the constitution itself.²⁴

The third major concern of constitutional historians and scholars in the last quarter of the nineteenth century, implicit in the criticisms of writers such as Wilson and Ford, was the very problem of defining the American constitution and the nature of the constitutional process. Here the conflict between law and politics, or legal formalism and political reality, stood out most prominently. The usual view was to regard the constitution as formal, positive law. As noted earlier, throughout most of the nineteenth century when writers dealt with this issue they referred to the question of the nature of the Union, asking what kind of compact or contract, involving what kind of legal obligations, the constitution was. This was the approach of George Bancroft, George Ticknor Curtis, John W. Burgess, Jefferson Davis, and others whose thinking was shaped by the Civil War. That such writers conceived of the constitution in a legalistic way did not, it should be pointed out, mean that they wrote narrow legal history; their works were typically broad, general political histories, as we would describe them today, which gave a prominent place to constitutional disputes and interpretation. They understood, moreover, that answers to legal questions depended on non-legal ideas and events. George Ticknor Curtis, for example, distinguished constitutional history from constitutional law by pointing out that the former consisted of "those events and that public section which have shaped the text of a written Constitution, or which should be regarded in its interpretation." Constitutional law was the body of jurisprudence which included the text of the constitution and the constructions it had received from those whose duty it was to interpret its meaning. In the period with which Curtis was concerned, before the era of judicial supremacy, the President and Congress construed the constitution authoritatively, but the constitution was always the formal, written legal document or code; it was not legislation and governmental action, as in England, which there determined the powers of government and the rights of individuals.²⁵

24. Henry Jones Ford, *The Rise and Growth of American Politics: A Sketch of Constitutional Development* (New York, 1898), 334-335, 352-353.

25. George Ticknor Curtis, *Constitutional History of the United States* (2 vols.; New York, 1903), I, iv. This work was first published in 1889.

22. von Holst, *Constitutional and Political History*, I, 71, 78-79.

23. Woodrow Wilson, *Congressional Government: A Study in American Politics*, Meridian Books ed. (New York, 1956), 31, 27.

Typical of the orthodox formalistic conception of the constitution that prevailed once the question of the nature of the Union was settled was a volume edited and in part written by Thomas M. Cooley, *Constitutional History of the United States as Seen in the Development of American Law* (1889). Henry Wade Rogers, a professor at the University of Michigan Law School, contributed a preface to this volume praising constitutional law as a distinctively American contribution to jurisprudence and calling it "peculiarly the pride and glory" of the country. "Written constitutions," as asserted Rogers, "have been the distinguishing feature of American institutions."²⁶ Constitutional history written under these assumptions concentrated almost entirely on the Supreme Court, which Rogers said was "in reality . . . more powerful in its influence on the character of the government than [were] the President or Congress." The result was the history of constitutional law, but according to Rogers and Cooley, addressing themselves to the student of history, the study of this subject was the best way "to understand the nature of the [American] government."²⁷

Other writers, however, especially historians, conceived of the constitution more in political terms, with emphasis on the actual practices of government, than in formalistic, juristic terms. Simon Sterne, a reformer of the 1870's and 1880's, anticipated this more realistic—as its exponents saw it—point of view in stating that an account of the American constitution ought to consider, in addition to the formal text and its interpretation by the Supreme Court, the political controversies that led to changes in the instrument as well as the situation of political parties. A constitutional history, he thought, should be tantamount to "a view of the institutional condition" of the United States. Frankly approving of the interaction of law and politics in the American constitution, Sterne wrote: "There is an unconscious influence exercised by public opinion

26. Cooley, ed., *Constitutional History of the United States*, 5-6.

27. *Ibid.*, 13, 23-24. By the 1890's a body of literature on the Supreme Court and judicial review was beginning to develop which assumed the proportions of a major political as well as scholarly controversy during the early twentieth century. Generally the focus of such studies were the questions of when judicial review began and whether the framers of the constitution supported it, and the issue of its legitimate scope and place in American politics. Whether for or against judicial review, students of this problem tended to think in terms of the juristic conception of the constitution at this time. For a discussion of this literature see Alan F. Westin's essay, "Charles Beard and American Debate over Judicial Review, 1790-1961," in Charles A. Beard, *The Supreme Court and the Constitution*, Spectrum ed. (Englewood Cliffs, N.J., 1960), 1-34.

upon the minds of those who are called upon to decide finally constitutional questions, which is neither corrupt nor sinister, but which causes a written constitution to approximate more closely to an unwritten one."²⁸ The idea of the constitution as political institutions was more naturally conceivable to an Englishman and in part informed Bryce's *The American Commonwealth*. Disavowing concern with the legal aspects of the constitution and seeking to explain the "framework and constitutional machinery," Bryce described the system of electing presidents, the powers of Congress, the spoils system, and other political institutions and practices which had "sprung up round the Constitution and profoundly affected its working." Similarly, legislation of Congress had "become practically incorporated" with the original text of the constitution and had given to its working a decisive character and direction.²⁹

Around the time Bryce offered to the American public his study of the constitution seen partly as institutional rather than legal development, three young American scholars—J. Franklin Jameson, Woodrow Wilson, and Henry Jones Ford—produced works subscribing to and encouraging a similar broad, political, and to their way of thinking more realistic conception of the American constitution. Jameson, introducing a series of essays dealing with the development of executive and judicial institutions under the Articles of Confederation as well as with constitution-making in American churches and the status of slaves, said that people who lived under a written constitution were inclined to take too narrow a view of constitutional history, confining their interest alone to the document and its formation, adoption, amendment, and interpretation. The chief purpose of the volume, therefore, he explained, was to broaden the conception of the constitutional history. The American constitution included elements not embodied in the written document, such as the "systems of party organization . . . , democracy, . . . the Speaker of the House, [and] . . . its committees, . . . federal statutes, . . . the constitutions and laws of the states, and . . . the practices and usages of the government and the people." Jameson believed that his view of constitutional history was not simply a difference of opinion in the use of terms,

28. Simon Sterne, *Constitutional History and Political Development of the United States* (New York, 1882), iii, 145-146.

29. Bryce, *The American Commonwealth*, I, 6-7, 521-522, 517-518. When discussing judicial interpretation of the constitutional document, however, Bryce was very formalistic, subscribing to the view that judges had no will of their own and simply discovered and declared the law, rather than shaped or made it themselves.

and that too narrow a conception of the field would lead to the neglect of the history of aspects of American political life which went as far toward determining "our form of government as anything set down in the Federal Constitution itself."³⁰

What was necessary in Jameson's point of view was to understand that as law and politics are constantly interacting, the study of the constitution must go beyond merely formal, legal elements to include things political. This idea informed the work of Woodrow Wilson and Henry Jones Ford, who described essential elements of the constitutional system in terms similar to those of Jameson. The Civil War and Reconstruction according to Wilson had made clear "that there has been a vast alteration in the conditions of government: . . . and that we are really living under a constitution essentially different from that which we have been so long worshipping as our peculiar and incomparable possession." The constitution of 1787 was "now our *form of government* rather in name than in reality;" it was a "tap-root," he explained, and "the chief fact . . . of our national history is that from [it] has grown a vast constitutional system,—a system branching and expanding in statutes and judicial decisions, as well in unwritten precedent." Stressing the need in describing this system to "escape from theories and attach himself to facts," Wilson said the main inquiry must concern "the real depositories and the essential machinery of power." He concluded from a study of the "actual practices of the Constitution that the balance inherent in the formal written instrument, or in what Wilson called the "literary theory" of the constitution, was ideal only, and that congressional government was "the real government of the Union."³¹ Henry Jones Ford, whom Wilson brought to a teaching position at Princeton, studied political parties as an element in the American constitution. Ford's conception of the constitution was evident in the title of his great work, *The Rise and Growth of American Politics: A Sketch of Constitutional Development*, and in the fact that nowhere in it did he discuss John Marshall and the Supreme Court. His purpose was to describe the "political structure" or "the actual constitution of the government." Relying in large part on historical analysis, Ford said that party organization in the early nineteenth century stimulated democratic tendencies which made the electoral college a party agency and transformed the presidency into an instrument of popular control. By the end of Jackson's second term, Ford wrote, this transforma-

30. Jameson, ed., *Essays in the Constitutional History of the United States*, ix-xi.

31. Wilson, *Congressional Government*, 28-30, 53.

tion had marked a "profound change in the nature of the constitution." As politics became democratized, party organization took the place of class interests and social connections in providing unity of control between the legislative and executive branches, and became "virtually a part of the apparatus of government itself."³²

By the start of the twentieth century this realistic approach to constitutional studies, defining the constitution in essentially political terms and positing an unwritten constitution, was fairly established, at least in academic circles. The historian and political scientist Albert Bushnell Hart epitomized the new learning in his well known college textbook, *Actual Government as Applied under American Conditions*, first published in 1903. Asserting that the formal constitution and statutes were merely an enveloping husk and that "the real kernel [was] that personal interest and personal action which vitalizes [sic] government," Hart took as his task to describe "the purpose, extent, division, exercise, and limitations of governing power." In an encyclopaedic survey of American legal and political institutions that was historical in scope though not in organization, he attempted to explain how government operated "not simply by what constitutions and statutes say ought to be done, but by the experience of what is done."³³ The constitutional historian Francis Newton Thorpe, though inclined to see the genius of American political science in written constitutions, nevertheless recognized the existence of an unwritten constitution in governmental actions, political parties, and, in general, "the manner of doing the public business." The constitutional historian must explain as his foremost duty the nature and growth of the principles or "civil notions" underlying the governmental system, Thorpe said, reflecting an older idealism; but he conceded that "whatsoever in the history of the unwritten constitution will make clearer the origin and development of civil notions has a just demand on the historian." In a practical sense Thorpe defined the constitution broadly and politically, including in his two volume constitutional history, which he described as a record of the evolution of government in America, accounts of democracy in the eighteenth century, the organization of state governments, suffrage requirements, west-

32. Ford, *The Rise and Growth of American Politics*, v, 217-220.

33. Albert Bushnell Hart, *Actual Government as Applied under American Conditions* (New York, 1908), vii, ix. Other textbooks employing the new realistic approach to constitutional studies were B.A. Hinsdale, *The American Government: National and State* (Chicago, 1891), and Roscoe J. Ashley, *The American Federal State* (New York, 1902).

ward migration, slavery and the free Negro, legislative apportionment, banking and finance, and the judicial system.³⁴

Though lawyers naturally were critical of the definition of the constitution in terms of "actual government" and the conception of an unwritten constitution, some were attracted to the new realistic approach.³⁵ Christopher Tiedeman, for example, defined the constitution as "the order and structure of the body politic" and, anticipating the point of view of progressive historians such as Charles Beard, saw constitutional law as "the resultant of all the social and other forces which . . . make up the civilization of the people." He described among other things the electoral college, the two term tradition concerning the presidency, and corporation and charter rights as aspects of the unwritten constitution. Expressing a kind of conservative sociological jurisprudence and asserting that judges make law rather than declare it, Tiedeman reserved his praise for what he considered the most important element in the unwritten constitution: "the disposition of the courts to seize hold of these general declarations of rights as an authority for them to lay their interdict upon all legislative acts which interfere with the individual's natural rights, even though these acts do not violate any specific or special provision of the Constitution."³⁶

In the late nineteenth century, then, an attitude of critical realism became an important attribute of constitutional scholarship. Research into the origins of the constitution, refuting the divine-inspiration theory about the founding fathers and showing that the laws of historical development applied as well to Americans as to any other people, reflected this attitude in part, as historians tried to establish the credentials of their discipline as a true science. The critical evaluation of the constitutional system and the attempt to go beyond the façade of the formal written document in describing the constitution were a clearer manifestation of this

34. Francis Newton Thorpe, "What Is a Constitutional History of the United States?" *The Annals of the American Academy of Political and Social Science*, vol. XIX (March, 1902), 96-97; *A Constitutional History of the American People, 1776-1850* (2 vols.; New York, 1898).

35. For a critique of the idea of an unwritten American constitution, see Emlin McClain, "Unwritten Constitutions in the United States," *Harvard Law Review*, vol. XV (March, 1902), 531-540. McClain begged the question of whether there was an unwritten constitution by asserting that institutions, practices, traditions are not part of the law, and since the constitution was "a part of the positive law," there could be no unwritten constitution in the United States.

36. Tiedeman, *The Unwritten Constitution of the United States*, 16, 40, 44, 81.

realistic approach. The evidence is insufficient as to a correlation between this constitutional realism and the advocacy of political reform, but it is at least suggestive that Wilson's and Ford's realistic studies were related to specific reformist purposes. A conservative, reverential attitude relying on the traditional legalistic or juristic approach to the constitution persisted alongside this politically oriented constitutional realism. But the more important fact was that several constitutional scholars conceived of their subject in realistic, political terms, thus preparing the way for the broader, more vigorous reformist campaigns of constitutional history and political science in the twentieth century, and raising fundamental issues about politics, law, and the constitution which have remained central to the present day.