History and the Constitution

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PREFACE

The essays collected in this book, with the exception of the final essay, are based on law review articles published between 1999 and 2006. They have been revised with a view toward eliminating some details designed for specialist readers. Persons interested in those details can consult "The Arrival of History in Constitutional Scholarship," 88 Virginia Law Review 485 (2002); "The Constitutional Journey of *Marbury v. Madison*," 89 Virginia Law Review 146 (2003); "Historicizing Judicial Scrutiny," 57 South Carolina Law Review 1 (2005); "The Transformation of the Constitutional Regime of Foreign Relations," 85 Virginia Law Review 1 (1999); "A Customary International Law of Torts," 41 Valparaiso U. L. Rev. 1 (2006); "Unpacking the Idea of the Judicial Center," 83 North Carolina Law Review 1089 (2005); and "The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy," 154 University of Pennsylvania Law Review 1463 (2006).

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G.E.W.
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Introduction

There has been a resurgence of history and historical analysis in the Supreme Court's recent constitutional cases. History has been employed in two quite different ways in recent decisions. The first has been as basis for undermining the weight of prior interpretations of the Constitution by showing the connections between those decisions and attitudes now thought to be outmoded or wrongheaded. The second has been to reinforce a method of constitutional interpretation that emphasizes fidelity to the "original understanding" of provisions of the Constitution, as revealed by close scrutiny of the ways in which those provisions were understood by contemporaries at the time they were enacted.

These two quite different uses of history in constitutional cases have emerged because of the diminished influence of another method of constitutional interpretation that was dominant from the 1940s through the 1970s. That method started from the premise that judges, as constitutional interpreters, were not bound by history or precedent, because the Constitution needed to adapt itself to changing conditions and thus did not have a fixed "meaning." As conditions changed, judges were inevitably going to supply new meanings to constitutional provisions in response to the new circumstances in which they were interpreted. But since judges were not elected officials, their power to interpret the Constitution needed to be constrained in some fashion. The chief constraints on judges, mid-twentieth-century judges and commentators believed, lay in the "undemocratic" character of the judicial branch of government, which featured life tenure and the absence of political checks on judicial officeholders. Since judicial interpretation was a kind of "lawmaking," judges need to take care to confine their decisions to those issues which were either not well suited to resolution by the political branches (such as where an express provision of the Constitution limited the power of those branches) or emerged because of a failure of the political branches to conform to democratic theory (as where legislatures or the executive enacted policies discriminating against minorities who were not adequately represented in popular forums).

The principal area of debate in mid-twentieth-century constitutional commentary centered on the conditions under which judges were required to defer

to other branches and those under which they could employ constitutional review to supercede other branch policies. The former stance was described as judicial "restraint"; the latter as judicial "activism." So long as institutional considerations were treated as the paramount factors in constitutional interpretation, those terms captured the central focus of discussion. But by the 1970s appeals to institutional considerations appeared less frequently in Supreme Court opinions, and commentators began to tire of the "activism"/"restraint" debate. Part of the reason for this development was the appearance of social science literature suggesting that a core assumption of institutional competence theory, that legislatures were more "democratic" institutions than courts, was flawed. Legislatures, the literature indicated, regularly enacted policies designed to promote the agendas of lobbyists and to preserve the power of incumbent legislators; it was often up to courts to penetrate these forms of legislation in the guise of constitutional scrutiny.

But as institutional constraints on judges came to be minimized in the 1970s, this created another apparent dilemma for constitutional interpreters. If judges did not need to emphasize institutional constraints in their interpretations, how did they convince others that interpretations were not simply the results of their policy preferences? How did one prevent the Constitution from simply being a series of shifting interpretations based on the policy judgments of whoever held judicial office? The collapse of institutional competence theory thus had the effect of stimulating a search for other constraints on judges as constitutional interpreters.

History emerged, in the 1980s, as a promising source of constraints to two quite different groups of constitutional commentators. The first group believed that the Constitution was a "living" document whose meaning necessarily altered to fit changing social conditions and attitudes. The group could point to a series of Supreme Court opinions altering the meaning of the Constitution's Due Process, Equal Protection, and free speech clauses. Historical analysis, as a methodology in constitutional cases, appealed to this group because it helped demonstrate the existence of radically altered attitudes, over time, toward such issues as race, gender, abortion, and "offensive" speech, and thus served to justify changing interpretations of the meaning of constitutional language. The "constraint" of history revealed by historical analysis was an obligation of the part of judges to reflect the conditions and attitudes of their time. The "meaning" of constitutional provisions amounted to fidelity to those attitudes.

The second group was far less sanguine about the capacity of judges to reflect the attitudes and values of their time, and worried that a "living Constitution" theory of constitutional interpretation amounted to a license to judges to interpret constitutional provisions in conformity with their particular ide-

ological preferences. As such it turned to historical analysis as a different source of constraints, the constraints of fidelity to the "original understanding" of constitutional provisions. This group believed that the meaning of the Constitution did not change with time, and that only by confining the interpretation of provisions to the sense in which they had originally been understood could judges avoid equating constitutional meaning with their personal preferences.

As history became attractive to judges and commentators in both groups, the locus of jurisprudential debate within the late twentieth-century Supreme Court, and among constitutional scholars, shifted from comparative institutional analysis to historical analysis. It has become common for both justices and scholars to address currently contested constitutional issues from a historical perspective. Sometimes history has been used to ground originalist interpretations; sometimes to support a "living Constitution" approach. It seems not too much to say that history is often the first "turn" taken in discussions of recent questions in constitutional law.

The essays in this book are designed to explore the above issues in more detail. One cluster of essays traces the emergence of historically oriented constitutional jurisprudence in the late twentieth century. The essays describe previous episodes in American constitutional jurisprudence, discussing the emergence of contrasting theories of the role of the judiciary in constitutional cases and of constitutional interpretation. They survey late nineteenth- and early twentieth-century scholarship before the "historical turn" in constitutional jurisprudence, and then address that turn. The essays are designed to show the close connection between the emergence of historically oriented constitutional jurisprudence and changing theories of judicial review and the nature of judicial decisionmaking.

A second cluster of essays brings historical analysis to bear on one of the most contested issues to recently be entertained by the Supreme Court: to what extent should international law be part of the corpus of American legal decisions? That issue seems inseparable from a question long debated in American constitutional history: to what extent does the power of the judicial branch in America extend to international and foreign relations?

There have been two lines of judicial decisions and scholarship on these questions, and the lines are not easily reconciled. Traditionally the decision of foreign relations issues was thought to be reserved to the Executive and the Senate, and when executive agreements that did not take the form of treaties emerged in the late nineteenth century the courts tended to routinely uphold them even though the Senate had not ratified them. At the same time customary international law was routinely treated as among the sources of law

available to the courts in their decisions. But *Erie v. Tompkins*, the 1938 decision in which the Supreme Court held that federal courts were bound to follow the common law decisions of the states in which they sat, has complicated matters. If customary international law is treated as "federal common law" (even after *Erie*), the decisions of federal courts based on customary international law principles would seem to be binding on state courts (under the Supremacy Clause of the Constitution). If customary international law is treated as state common law, the decisions of federal courts would need to follow the relevant state court decisions (of which there are very few). Finally, one could argue that customary international law principles are not relevant to the decisions of American courts at all. These issues are likely to receive considerable attention in the next decades.

A third cluster of essays examines the distinctive character of the Rehnquist Court in light of the contrasting theories of historical interpretation previously outlined. Three features of the Rehnquist Court are examined: the importance on that Court of justices whose interpretive stance has been described as "centrist"; the significance, in the Court's internal deliberations, of the assignment and agenda-setting powers of the Chief Justice; and the distinctive tone and tenor of the Rehnquist Court's constitutional jurisprudence. Each essay is based on the assumption that those features of the Court can be best understood through historical analysis.