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# Book Review: Constitutional Change: Amendment Politics and Supreme Court Litigation Since 1900, by Clement E. Vose

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I think Roman influence has probably been underestimated in those other kingdoms, I do not think that the basic Germanic core can be denied. I would hope that Professor King, or someone else, might someday use the Visigothic family material in conjunction with that of the other barbarian codes and produce a broader study of the early medieval family.

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Clement E. Vose, *Constitutional Change: Amendment Politics and Supreme Court Litigation since 1900*. Lexington, Massachusetts. D. C. Heath and Company, 1972. xxxvii, 446 pp. \$15.00.

While change has been one of the most striking features of American constitutional law in the twentieth century, scholars have devoted relatively little time to studying the practical mechanics behind important legal contests. Social scientists and historians have emphasized the undeniable fact of change, explaining periods of constitutional remodelling with broad generalizations: changing membership and hence politics of the court; emergence of social forces such as the New Deal or the civil rights movement; or the altered way Americans have come to perceive the nature of the law and the needs of an industrial society. While all of those "causes" are surely at work, they miss the crucial specifics of historical change. Why did one particular case reach the Supreme Court and another not? What difference did the relative skills of the participating lawyers make? Who financed a specific appeal, and what types of strategy did the sponsor use? In the American system of constitutional adjudication, answers to those questions may be as important—if not as exciting or obvious—in explaining specific changes as are the impact of the New Deal or the shifting political predilections of the judges. The great virtue of Clement E. Vose's study, *Constitutional Change*, is that it addresses itself to those particulars.

Professor Vose examines a number of instances of constitutional change, by both amendments and direct Supreme Court overrulings, and attempts to explain why they happened *when* they did and *in the particular form* they did. He focuses on five possible historical causes (the judges, the parties and their sponsoring pressure groups, the opposing counsel, public opinion and social movements, and intellectual elites) and assesses their particular importance in each instance. While the author acknowledges that his "explanatory variables" represent nothing new in themselves, he argues that the relative importance of each differs from case to

case and can be accurately evaluated only by studying their varying impact in individual episodes. Additionally, by stressing the occasional determining importance of the participating counsel and the calculating role of various sponsoring pressure groups, he adds elements often slighted and contributes significantly to our understanding of the actual process of legal change.

His essay on the eugenics movement in the first quarter of the century, spotlighting the activities of the privately funded Eugenics Record Office, clarifies the historical position of *Buck v. Bell* (1927) and illustrates the ways in which pressure groups and publicists can help inform a decision of the Supreme Court. His examination of the briefs in *Tipaldo* (1936) and *West Coast Hotel* (1937) lay to rest once and for all the claim made by Justice Owen J. Roberts, the swing man in both cases, that his votes varied because of the pleadings of counsel. Vose shows that Roberts was wrong in maintaining that counsel in *Tipaldo* did not call for an overruling of *Adkins*, while those in *West Coast Hotel* did. Instead, counsel in the former specifically called for a reconsideration of *Adkins*, and counsel in the latter specifically tried to distinguish. The real reasons for Roberts' switch, the author not surprisingly concludes, was the impact of the election of 1936, Roberts' own "simplistic" judicial mentality, and the powerful leadership of Chief Justice Hughes. In what is perhaps the most interesting chapter in the book, Professor Vose examines the twenty-three-year struggle over the successive versions of the Texas white primary which resulted in the final declaration of unconstitutionality in *Smith v. Allwright* (1944). The author carefully delineates the role of various local Texas civil rights groups, the increasing legal sophistication of the New York office of the N.A.A.C.P., and the contribution of prominent counsel in polishing the final appeal briefs. The analysis lends breadth, vitality, and insight to the story of the ultimate rejection of the white primary.

The most perplexing aspect of the book is its sporadic social science tone. Though the author disclaims any belief in a fully "scientific" study of legal change, he constantly shifts back and forth between careful historical analyses and broad generalizations about the nature of constitutional conflict. Of course, suggestive or insightful generalizations are always valuable, and no one can fault the author for seeking them. The problem they present here, however, is two-fold. First, the book's strength lies in its detailed analyses, its recognition of the variety of forces that may affect constitutional changes, and its emphasis on the need to study specific instances fully and with great care. Intermittent references to supposed general characteristics of constitutional change tend to obscure the importance of those very specifics. Sec-

ond, and more important, the generalizations themselves tend to be bland and obvious. ("The most significant finding in this study is that fluctuations in constitutional change are expressive of conflicts between social movements" [p. 334].) The gap between the social science overlay and the actual results is unbridgeable. "A clinician of constitutional change," the author declares, "notices the readiness of losers in a political or legal encounter to blame the system as undemocratic" (p. 244). What strikes the reader is the utter disparity between the two halves of the sentence: the first suggesting science, exactitude, and discovery; the second representing one of the conventions of American politics. Whether this weakness of the book is due to a questionable social science attitude or to the requirements of the book's sponsor, The Twentieth Century Fund, is not clear, but in any case it serves mainly to distract from the real contributions the book makes.

Conversely, it is surprising that the book fails to utilize social science and quantitative techniques in those places where they could be of great service. In assessing the social movements that lent support to various constitutional demands, Professor Vose deals with complicated problems of political and social attitudes that could well be analyzed by quantitative methods. Not only does the author accept some questionable correlations ("... the Bible-belt, temperance-minded, Progressive, rural, small states" opposing "the agnostic and Catholic, sophisticated and cosmopolitan—though often politically conservative—states with growing city populations" [p. 84]), but more importantly he does not provide the kind of organized data necessary to establish those linkages. His evidence on social movements is, instead, impressionistic, and this adds little to an understanding of such complicated questions as the nature of "progressivism." His repeated use of that central term is confusing. Vose emphasizes, for example, that many progressives supported anti-Negro and anti-Catholic legislation, but then notes how other progressives joined the N.A.A.C.P. and denounced the Ku Klux Klan. He is clearly right in acknowledging the diversity among those labelled "progressive," but insofar as progressivism was full of such contradictions it becomes too vague to serve as a meaningful explanatory concept and carry the conceptual burden he assigns it. The author apparently sees progressivism as a predominantly local, rural, and Protestant movement, but there are too many other facets of progressivism to justify that assumption without a more precise clarification of his own definition and a convincing amount of supporting evidence. Quantitative techniques to correlate popular and legislative votes of a variety of issues (the initiative, the referendum, anti-Negro legislation,

prohibition, etc.) could have aided immeasurably in evaluating the importance and validity of the linkages Professor Vose assumes.

In the last chapter the author draws on his research to recommend a number of reforms in the amendment and appeal processes. Though neither new nor drastic, they represent a thoughtful attempt to open, regularize, and protect the procedures of constitutional change. Professor Vose suggests that Congress require sponsoring organizations, much as it does lobbyists, to identify themselves and their purposes in relation to appeals they are supporting. He urges establishment of an independent research bureau for the judiciary, restrictions to increase the "disinterestedness" of judges, and prohibition on congressmen appearing as counsel before the Supreme Court. Finally, he argues that Congress should enact a statute setting out a clear procedure for constitutional amendment, establishing time limits on ratification, and providing opportunity for orderly public debate.

*Constitutional Change* is a helpful and vitalizing addition to the literature of American law in the twentieth century. It clarifies some older issues, utilizes important new source materials, and represents a revealing and dynamic approach to the study of constitutional history. Hopefully, it will also stimulate further studies along similar lines.

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Francis N. Stites, *Private Interest and Public Gain: The Dartmouth College Case, 1819*. Amherst, Massachusetts. The University of Massachusetts Press, 1972. v, 176 pp. \$9.50.

Until the last decade, historical studies of constitutional law traditionally focused on doctrinal developments, lavishing much attention on the evolutionary process by which those doctrines blossomed and matured. Thus we sought to explain the origins and paths of due process, the rise and incidence of judicial review, and the historical understanding of freedom of speech, to cite some notable examples. Historians, political scientists, and lawmen participated in such scholarly ventures, producing a solid corpus of fundamental research that remains vital to our knowledge of American constitutional law and history. Indeed, the rich contributions of men such as Walton Hamilton, Edward S. Corwin, and, more recently, Leonard W. Levy, represent some of the finest and most enduring treasures of American historical scholarship in general.