

In This Issue

The articles in this issue offer new perspectives on constitutional history. In the first article, Mark Golub re-reads the history of the Civil Rights Movement to restore the memory of massive resistance. Golub argues that we will only understand the extent to which racial subordination has been a national and systemic problem if we move away from histories that treat massive resistance as a uniquely southern problem or describe it as a temporary phenomenon that was displaced when southern moderates began to use the institutions of law to frustrate the implementation of *Brown* and the civil rights struggle more generally.

Golub suggests that instead of thinking of the resistance of southern moderates as a principled alternative to racial violence, we should read it in light of Robert Cover's theory that "violence is transmitted through law." And it is there, as he explores Cover's theory that the relationship between law and violence is bidirectional, that Golub's article complicates the current understanding of popular constitutionalism in two key ways. First, by calling massive resistance popular constitutionalism, Golub reminds us that constitutional interpretation acted out in the streets can be just as reactionary, if not more so, than constitutional determinations by the courts. Second, by arguing that we need to consider massive resistance's jurisgenerative relation to the legal resistance of the moderates, Golub suggests we need to erase (or at least blur) the sharp distinction our histories often draw between popular constitutionalism, which takes place outside the courts, and the constitutional theories that develop inside them.

Golub's work complicates our view of constitutional power by suggesting that the line between the constitutional interpretation and implementation that takes place in the courts and that that takes place in the streets is not always bright. The second article in this issue, a study

of antebellum constitutional thought by Helen Knowles, also blurs the boundaries of popular constitutionalism. In her analysis of the abolitionist writings of Lysander Spooner Knowles sketches a complicated dialogue about the constitutionality of slavery and explores how Spooner's own constitutional views evolved. He began with the belief that the courts could and would correct the pro-slavery interpretation of the constitution, but in the 1850s (particularly after the Supreme Court's decision in *Dred Scott*) Spooner came to support the idea that jurors could and should nullify laws, especially pro-slavery laws, that they viewed as unconstitutional.

Knowles' look at Spooner's shift from "un-popular" to a popular constitutionalism suggests that antebellum thinkers like Spooner did not draw sharp distinctions between the popular and judicial exercise of constitutional power. Rather, they appeared to believe that constitutional power could be exercised by multiple actors and existed along a continuum. The third essay, Michael Schoeppner's study of the so-called Negro Seamen Acts, passed by a number of southern states in the period following the Denmark Vesey trial, also complicates our understanding of the antebellum constitutional order. Tracing debates over state power to regulate free black sailors, who were thought to carry the "moral contagion" of abolition and liberty, Schoeppner shows how those who pushed through the Seamen Acts were challenged by a fluid, and transnational movement that worried about the impact the laws had on economic development and trade, challenged the idea that the laws truly fit under state police power, and questioned the constitutionality of regulations that infringed on individual rights and principles of international law.

It may seem counterintuitive to argue that Schoeppner's article is a constitutional history, since Schoeppner defines his work as an alternative to earlier histories that viewed the Negro Seamen Acts through an exclusively constitutional lens. Where those histories looked at the Acts in terms of the Commerce Clause, or citizenship, Schoeppner unpacks the arguments for and against the Acts to reveal the various understandings of regulatory authority in the antebellum era. But his retelling of the story of the Seamen Acts is still a constitutional history in a fundamental sense: these antebellum disputes over the power of police, the significance of rights, and the limits posed by international law were all debates over the nature and extent of the constitutional authority of the state.

The last essay, by Howard Pashman, moves our inquiry even further back in time, to the era of the Revolutionary War. Pashman's study explores how the processes by which property confiscated from Loyalists was redistributed in New York changed over time. At the start of the revolutionary era, when the established legal order fell apart, New Yorkers took the law into their own hands, violently dispossessing Loyalists and

avenging depredations by the British army. Those violent processes of dispossession then gave way to more orderly processes of land distribution through popularly created commissions that confiscated and redistributed property. Ultimately, those processes became the basis of New York's new legal order.

Although he positions his study as an alternative to a literature of the revolutionary era that emphasizes the states' written constitutions, Pashman's study of the law on the ground in revolutionary New York reveals how changes in the legal order led to changes in the constitutional order. The popular forces that expressed their sovereignty in the streets and took the law into their own hands at the beginning of his study embraced more formal structures of order and law at its end. The shifting constitutional order experienced by Pashman's radical New Yorkers tracked along a continuum that was very similar to that explored by Lysander Spooner, but the path they traced along that continuum went in the opposite direction from popular to judicial constitutionalism.

This issue concludes with a selection of book reviews. We invite readers to also consider American Society for Legal History's electronic discussion list, H-Law, and visit the Society's website at <http://www.legalhistorian.org/>. Readers may also be interested in viewing the journal online, at <http://journals.cambridge.org/LHR>, where they may read and search issues of the journal.

Elizabeth Dale
University of Florida