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Constitutional Scholarship: What Next?

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cisions on public opinion. Did *Brown v. Board* lead to greater or less tolerance of blacks by whites? Did *Roe v. Wade* reduce or increase public hostility to abortion? Does the Court form or follow the values of the public or particular segments of the public? Has the Court a constituency to which it caters in its constitutional decisions? Are its decisions at a particular slice in time politically coherent, like the platform of a political party? Political scientists have paid some attention to these questions; legal scholars, very little.

These and many other questions that could be put are designed to draw attention away from endless inconclusive debating over the pros and cons of particular decisions and toward a study of constitutional law as a social institution having causes and effects. The serious pursuit of these questions would require constitutional scholars to equip themselves with new analytical tools, to take a less tendentious and political view of their subject, to become more—scholarly.

PAUL MURPHY²

I have been reading a doctoral dissertation which one of my Ph.D. advisees is completing and was intrigued with a statement by a Kentucky judge, William W. Blair, in 1822:

Judges . . . do not sound the alarm upon any supposed violation of the constitution; nor do they claim the right to issue their injunction to arrest legislative proceedings. . . . They do not undertake to declare any statute unconstitutional which can be carried into execution without their intervention. . . . It is only when the aid of judges is called in to assist in executing (statutes) that they claim the privilege of examining into the constitutionality of such enactments. They refuse to lend their assistance and to become *participes criminales* in a violation of the constitution; they deny to the legislature the power to compel them to become agents in the perpetuation of a crime. Surely this is not an assumption of superiority, but rather an assertion of equality

Looking at constitutional scholarship from the perspective of a constitutional historian, the quote suggests a number of needs. Since the “constitutional revolution” of the late 1930s and especially since the mandate of Harlan Fiske Stone to the Court in his famous footnote 4 in the *Carolene Products* case of 1938, to focus upon the “care and feeding” of the rights of “discrete and insular minorities,” constitutional historians have tended mainly to follow the Court in its gradually reoriented concern for civil liberties and civil rights. All to the good. But as a result there have been some casualties of underemphasis and underconcern. Stone, as you will recall, urged

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that legislation restricting personal rights be looked upon as constitutionally suspect, even though state economic regulation would now be viewed with a tolerance for legislative discretion. Historians have tended to see the mandate as a call for them to focus their work on human rights issues as defined largely by case law and the courts. In other words, they have been interested in how this new concern with minorities—political, economic, religious, racial, ethnic—and gender has been played out.

The result has been that two areas have tended to be neglected. One is non-civil liberties and civil rights issues—principally economic questions and regulatory matters in all their varied manifestations. This is true at both the federal and state level. To take two cases in point, in *National League of Cities v. Usery* (1976), the court for the first time in nearly forty years held that Congress had exceeded the limits of its power to regulate commerce, thereby nullifying 1974 amendments to the Fair Labor Standards Act that extended minimum wage and overtime requirements to the employees of state and local government. These amendments, Justice Rehnquist contended, were unconstitutional infringements on state sovereignty. Similarly Justice Sandra Day O'Connor set forth a judicial version of the New Federalism, accusing Congress in its passage of an energy measure of trying "to kidnap state utility commissions," "conscript (them) into the national bureaucratic army," reduce "state agencies to bureaucratic puppets of the federal government," and transform the states into "field" offices of the "national bureaucracy." Such a posture, however, was assailed by Justice Blackmun, who claimed that it articulated a view of state sovereignty "almost mystical," but also "overstated and patently inaccurate." We need studies in these areas. To what degree has the Court stayed out of state economic activities and with what results, especially in the area of federalism? At the federal level, what would a study of, for example, anti-trust enforcement tell us about constitutional commerce power? Studies of labor law? The FTC?

The other area which needs special attention from constitutional historians involves Congress and the executive branch and constitutional actions and developments of each. We have tended to study primarily judicial action. A large amount of congressional (or state legislative) behavior in the last fifty years has had important constitutional overtones. We seem only to be interested in that when the courts are called upon to "arrest legislative proceedings," and then seem to look mostly at judicial behavior. How seriously do legislators and members of Congress take their oath to support the Constitution?

Similarly, we need studies of presidential constitutional politics and not only of presidential war power and emergency power. Harry Truman's expansion of the "imperial presidency" has really not been carefully assessed from a constitutional standpoint. Neither has Lyndon Johnson's, or for that matter Richard Nixon's or Ronald Reagan's, except, of course, when the courts rapped their knuckles. The constitutional cavalierness of Reagan administration leaders is highly suspect. We need a scholarly assessment of it and hopefully before minor bits and pieces of it hit the courts.

Constitutional behavior occurs in all three branches and at both the federal and state level. We, the People also impact constitutional processes—or at least are supposed to. We need to know about all this—when it happens, how it happens, why it happens, and its results. A step out of our Supreme Court's Constitution fixation would, I think, serve us all well.

JOHN P. ROCHE³

Our first priority must be to recover from the Bicentennial. I knew it was going to be bad when in 1985 a staff member of the commission in Washington wrote to suggest that I organize a costume party for television which would feature leading framers interviewing "Lock, Hobbs, and Montesque" (*sic*). But even my worst-case view was overwhelmed by the blast which followed as forests were felled to provide paper for God only knows how many books and articles, seemingly on any topic that an ingenious author could link to the Constitution and its authors.

Basically I am a tolerant soul. Having grown up listening to oracular great aunts tell how Irish-Americans won the Battle of Bunker Hill, or Gettysburg, or the Argonne Forest, I could chuckle compassionately when various writers ascribed the Constitution's organizing principles to the Torah, the "Great Peace" of the Iroquois Confederacy, the Koran, or old Norse customary law. And, as Madison once noted, turning to Locke or Montesquieu was "a field of research which is more likely to perplex than to decide."

However, what led me to call Leonard Levy and a couple of other old friends and suggest a year in Australia was the onslaught of the political theologians. One might have thought that the Convention was a Great Council of the Church comparable to Nicea or Chalcedon and the framers, like the Church Fathers, animated solely by the Paraclete. While I yield to no one in my respect for the "Republican Virtue" of the framers, my forty years in the pri-

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