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Congress and the Constitution: A Study of Responsibility by Donald G. Morgan

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CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY. By Donald G. Morgan. Cambridge, Mass.: The Belknap Press of Harvard University, 1966. Pp. 490. \$8.95.

Students of American government have long ignored the part Congress has played in the construction of the Constitution. Consequently many scholars, teachers, and Congressmen have assumed that the Supreme Court has always exercised the exclusive right of constitutional interpretation, and the national legislature has traditionally concerned itself only with matters of statutory policy. Such an assumption is erroneous, according to Professor Morgan, who asserts that until recently Congress has been a leading instrument in the exposition of the Constitution.

Early in the nineteenth century three theories emerged concerning the proper relationship of Congress to the Constitution. Thomas Jefferson developed the most complete theory, advocating that Congress consider thoroughly the constitutional implications of all legislative activities. Not surprisingly Jefferson minimized the role of the Supreme Court in this process. He submitted that the national legislature should not confine its deliberations to an analysis of judicial holdings, but should also consult non-legal sources in determining the validity of proposed legislation. John Marshall had other ideas about the proper role of Congress in the constitutional system. Although he recognized the need for Congress to consider the constitutionality of its legislative proposals, he understandably assigned a higher value to judicial precedent. Joseph Story fashioned a third theory. He implied strongly that Congress should leave the interpretation of the Constitution to the Supreme Court. Employing the prerogatives of a political scientist, Morgan brands the first two theories as "tripartite," signifying participation by all three branches in the making of constitutional decisions. He describes the latter doctrine as that of "judicial monopolism," suggesting the dominant role of the Supreme Court.

Morgan writes that during the ante-bellum period, Congress adhered largely to the Jeffersonian version of the tripartite theory. Congress handled constitutional questions with thoroughness and precision, relying on executive studies, recommendations from small committees, and the deliberations of the entire body sitting as a Committee of the Whole. Although there were occasional lapses of responsibility, Morgan submits that the national legislature generally carried out its duty to support the Constitution.

During the Civil War, Congress began to change its attitude toward the Constitution. Instead of following the precepts of Jefferson,

it began to narrow its deliberations to analyses of judicial decisions, thus following the teachings of Marshall. Morgan suggests that the initial cause of this shift was the predominance of Republican sentiment in Congress and the existence of emergency conditions which made hasty legislative action more tempting. Despite this development, the nation's legislators continued for the next seventy years to perform crucial functions in the fashioning of constitutional doctrine. In particular, their deliberations preceding the passage of the Sherman Act seemingly influenced the first important decision of the Supreme Court interpreting the scope of federal power in the area of anti-trust regulation.

Morgan finds that the next change in Congressional attitudes toward the Constitution occurred in the early stages of the New Deal. Beginning in 1935, a substantial number of Congressmen began adhering to the doctrine of judicial monopolism. Since that time, much of our most significant legislation has been enacted with but superficial attention given by Congress to the constitutionality of its actions. In the opinion of the author, this abdication of responsibility on the part of many lawmakers has abetted the rush to executive centralization. Morgan finds this trend most distressing and concludes his book by proposing specific measures to revive Congressional responsibility. In effect, he issues a plea for Congress to return to the days and principles of Jefferson and to consider the constitutionality of all legislation, relying on non-legal as well as legal sources.

Although Morgan does attempt to summarize the entire period from 1789 to 1965, his book is more of a selective case study than a definitive treatment of the subject. He discusses in depth only thirteen episodes involving Congress and the Constitution. Regrettably, he has chosen eight of these thirteen from the post-1933 period, thereby restricting the scope of the book even further. Had the author treated the nineteenth century in greater detail, he might have somewhat altered his interpretation. For example, one wonders if the early Congresses were in fact persistent guardians of the Constitution. Congress does not appear to have exercised sufficient independent constitutional judgment when it hurriedly enacted the Embargo of 1807. This omission is especially significant since it involved a Jeffersonian program and a Jeffersonian Congress. Furthermore, one looks in vain for any evidence of a message from the President, imploring Congress to examine the vital constitutional questions involved in the proposal to shut off all exports. Thus, seemingly, Thomas Jefferson violated his

own standards and those of Morgan, who proposes that a responsible Chief Executive must prompt Congress to do its constitutional duty.

Other inconsistencies appear in the text. In one sentence Morgan implicitly criticizes the Supreme Court for being "ponderous" and then in the next passage deprecates Congress for the hastiness of its debates. Although Morgan continually castigates Congress for confining its constitutional deliberations to the inspection of judicial decisions, he praises a joint Senate committee for resolving a question of executive privilege by resorting almost exclusively to a scrutiny of legal precedent. Likewise, Morgan ignores political realities in his treatment of the regional response to Congressional duty. While it may be that in recent times Congressmen from the South and Borderlands have been the most diligent in the preservation of the Congressional obligation to interpret the Constitution, it is also true that they have had practical as well as theoretical reasons for doing so since they have frequently been opposed to the substance of the legislation under consideration. Morgan neglects to note that, when it served their purpose, Southern Congressmen in the ante-bellum period were capable of embracing judicial monopolism just as enthusiastically as Northern Congressmen do today. This tendency is especially evident in the report on the Missouri Question presented by William Lowndes, which Morgan overlooks in his cursory survey of the nineteenth century.

Despite these shortcomings, Morgan's book is a good one. He has shed light on a critical aspect of our constitutional evolution. Most of his scholarship, as far as it goes, is sound. Hopefully, this monograph will provoke additional studies of the influence of Congress on constitutional interpretation, especially in the nineteenth century.

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