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The Passing of the Cardozo Generations

Stephen E. Gottlieb

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by

Stephen E. Gottlieb[1]

I. INTRODUCTION

I want to make the following three points:

First, constitutional discourse has changed from the consequentialism of the generations of lawyers and judges who followed the model of Benjamin N. Cardozo to the formalism now ascendant in bench and bar.

Second, this change in constitutional rhetoric and argument has widened the disjunctions in argument. Polling data make clear that people have their own views of the Constitution. Knowledge about contrary official interpretations gives them vocabulary, but is relatively unlikely to change minds. Moral arguments and appeals to self-interest are more effective with the public.

Third, one consequence is that both the form and the substance of constitutional guarantees may be threatened by the turn toward a type of legal discourse that omits explanation of the moral imperatives and real-world risks and consequences that mandate the imposition of constitutional guarantees.

II. CARDOZO TO BLACK AND SCALIA

Let me begin by saying that referring to this as the "Cardozo generation" is a shorthand for the work of many people, some of whom preceeded him and can lay equal or more claim to originality and

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1. Professor of Law, Albany Law School. LL.B. Yale Law School, 1965; B.A. Princeton University, 1962. The author is indebted to Brian Quail, a student who gratuitously provided some interesting data used in this essay.

influence. But Cardozo=s greatest opinions embodied some of what Holmes and others had been fighting for and ultimately encapsulated the very vision of good law-making for several generations of lawyers and judges. They incorporated what Cardozo called Asociological jurisprudence@ and what we might call consequentialism. Cardozo, like Holmes, was concerned about the impact of the law on real people.[2]

My first approach to looking at the Cardozo generation was to start with one of Cardozo=s most famous opinions and ask, as I thought a journeyman legal realist might, what the Court had since done with the famous formulae Cardozo had written into *Palko v. Connecticut*.[3] Had the Court asked what were the Aindispensable conditions@ of liberty as Cardozo had in one formulation, and did it use that as more than a citation, but as part of a search or at least an opinion about what liberty rests on? I take that as a consequentialist use of *Palko*. Or had they repeated the Aordered liberty@ formulation and used that merely as a conceptual explanation of what it is we think liberty means?

My first problem was to provide appropriately commensurate treatment for the very different instrumental thinking of the left on how to thwart Fascism, for example, and the instrumental thinking of the right on how to thwart Communism. As you will see I found an elegant solution to that problem. But then I noticed several additional problems. First, there was no period in which the Court was particularly fond of citing the indispensable condition language. Second, Frankfurter was the big comparativist on the Court and it is hard to treat one person, let alone Frankfurter, as representative of

2. Sociological jurisprudence was quickly swallowed by what became known as legal realism. *See* AMERICAN LEGAL REALISM (William W. Fisher III et al. eds., 1993); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986).

3. 302 U.S. 319, 325, 327 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

the Cardozo generation. Not to mention the fact, which Dean Aynes so kindly pointed out to me, that Frankfurter directly -- and through others -- trashed my own mentor who was a protégé of Brandeis.[4] And third, as Glenn Phelps and his colleagues have pointed out in a pair of articles,[5] and as I have developed in a forthcoming book on the Rehnquist Court,[6] the justices largely choose their arguments to reach the conclusions they prefer, rather than reach their conclusions based on the arguments they prefer. There are deeper issues at stake. So I concluded that there were big holes in my hypothesis and I did not have to face my own political prejudices in scoring the justices= instrumental thinking.

Well, that should be the end of the story. Gottlieb should sit down. He thought of an interesting idea. It didn=t work. Why is he bothering us? Keep listening for ammunition against Gottlieb.

Realists, once they became Crits, are now allowed to see multiple levels without having to charge themselves with hypocrisy. And indeed I see another level. The Cardozo generation may not have been any less formalist than any other generation in practice, but it honored a much more functional vocabulary.[7] As Cardozo wrote, ?[t]he final cause of law is the welfare of society. The rule that misses its aim cannot permanently justify its existence.@[8]

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4. Clyde Spillinger, *Lifting the Veil: The Judicial Biographies of Alpheus T. Mason*, 21 REV. AM. HIST. 723 (1993) (discussing Frankfurter's refusal to make the Brandeis papers available to Mason despite the fact that he was Brandeis= chosen and official biographer).

5. Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567 (1991); Glenn A. Phelps & Timothy A. Martinez, *Brennan v. Rehnquist: The Politics of Constitutional Jurisprudence*, 22 GONZ. L. REV. 307, 314-25 (1986).

6. STEPHEN E. GOTTLIEB, MORALITY IMPOSED: THE REHNQUIST COURT AND THE STATE OF LIBERTY IN AMERICA (2000).

7. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921).

8. *Id.* at 66.

That vocabulary had a strong impact. It was the reason that Cardozo himself was honored. When a spot opened up on the Supreme Court, the leaders of the bar put a tremendous amount of pressure on President Hoover to appoint him. And because two other New Yorkers already sat on the Court, Justice Stone even offered to resign to make space for him.

The vocabulary of the realists and of what Cardozo called sociological jurisprudence had a tremendous impact on the ways that lawyers and judges thought about cases. In the law schools themselves, discussions often centered around questions of public policy, elusive though they were. Lasswell and McDougal wrote a famous and influential article about the importance of exploring policy issues and of using the methods of social science in legal education.[9] When the author studied there, Yale had an economist, a political scientist, and a psychologist on the faculty. Public policy itself became a concept that faculty struggled to deconstruct and analyze.

III. CONSTITUTIONAL RHETORIC

Justice Hugo Black joined the Supreme Court following a career in the U.S. Senate. Although Black engaged in the same kinds of arguments that Cardozo had, he argued that the Constitution should be taken at face value. In his view, the Constitution says what it means.[10] On the Hughes, Stone, Vinson, Warren, and Burger Courts, Black was largely an "outlyer" with respect to his interpretive method.

Philip Bobbitt has argued that Black brought the Constitution back to the people by arguing in

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9. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

10. Philip Bobbitt, *Constitutional Fate*, 58 TEXAS L. REV. 695, 707-11 (1980), [hereinafter *Constitutional Fate*] *elaborated on in* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (1982).

clear language about the words of the document.[11] I admire Bobbitt=s work enormously, but on that issue Bobbitt was dreaming. Black made a number of popular decisions on behalf of blacks and unions. But along with Warren, Black nearly had himself hung in effigy over his defense of the procedural rights of people accused of belonging to the Communist Party. Language was not enough to explain those decisions to the people.[12] Indeed, it is not clear that anything could in that hysteria - even now it appears that people continue to argue that since there were spies, therefore it was acceptable for McCarthy to accuse anyone and everyone regardless of evidence. Black=s textualism was not very convincing to anyone but academics and libertarians.

But as the Court began to change, a positivist anti-consequentialist position became the darling of both liberals and conservatives. Liberals, excluding those on the Court itself, adopted positivism to defend the decisions of the Warren Court. During Senate Judiciary confirmation hearings, positivism became a mantra to determine whether candidates would follow precedent. Presumably liberal Democrats could be satisfied by conservative Republican candidates if the Burger Court=s *Roe v. Wade* and the monumental decisions of the Warren Court would be safe because the nominees promised that they would follow the law as it was.

Black=s textual approach also became the battle cry of Justices Rehnquist, Scalia, and Thomas.[13] They have attacked the idea that the Constitution should be understood in terms of the

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11. *Constitutional Fate*, *supra* note 10, at 709-11.

12. The story of the attacks on the Court during the 50's is told in C. HERMAN PRITCHETT, CONGRESS VERSUS THE SUPREME COURT, 1957-1960 (New York, Da Capo Press 1973).

13. *See* William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws, in* A MATTER OF INTERPRETATION: FEDERAL

consequences of alternative interpretations. For them, textualism became a way to attack what they considered the excesses of the Warren Court. They argued that the rights the Warren Court had found were simply not to be found in the Constitution; they were not in the text.

In this way, constitutional discourse has largely changed even though the justices themselves will resort to any argument that works. Constitutional discourse has changed in the priorities attached to each form of argument, the expectations for each type of argument, and the legitimacy that each type of argument now possesses. Most importantly, it is harder now to articulate the consequences of reading provisions one way or the other.

One result is that many of us defend our interpretation of the provisions of the Constitution in public discourse, in talking to reporters, community organizations, or just friends, by telling the public what these clauses mean. We provide an explanation of the text, the Court decisions, perhaps the history of a provision. And lo, a meaning. Look ma, we=re all Justice Scalia now!

IV. THE POLLS

My second major point is that this change in constitutional rhetoric and argument has widened the disjunctions in argument between the pros and the public, or more properly, between the bench and bar on one side, and the reporters who must reflect and communicate with the public on the other.

The ACLU has done polling for its own internal purposes which I as an academic and a member of an affiliate Board was permitted to see. Since these polls were taken for strategic purposes, they have asked me not to be very precise, but I can relate some general conclusions after going through mounds of material. The research makes it clear that it is definitely not very influential to tell the public

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COURTS AND THE LAW 3 (Amy Gutmann ed., 1997); SCOTT DOUGLAS GERBER, FIRST PRINCIPLES: THE JURISPRUDENCE OF CLARENCE THOMAS (1998).

that the Constitution demands a particular result. But when the polling firm questioned the public about its response to some of the various unfairness and inequities involved in the issues, the public responded strongly and many changed their views. The public does care about principle, fairness, and equity, as well as community, and national, and self-interest.

Though I cannot give examples from the ACLU data, there is some fascinating information in publicly available sources such as the Roper Center. They have reported a variety of polls showing that the public does not support the U.S. Supreme Court=s decisions on school prayer. Sixty-five percent of the public believes that schools should allow prayer and only 31% would preserve separation of church and state. More than 40% of the public would support an amendment to the First Amendment. But when the pollsters turned around and started to ask questions about the kind of prayer, the public rejected readings from the Bible or the Lord=s Prayer by an overwhelming margin in favor of either silent prayer or the prayers of many religions. When offered a choice between the Lord=s Prayer, Bible readings, silent prayer, or no prayer, the strict separation approach garners only 21% support. I think it clear the public knows where the courts stand, but we are not speaking their language.[14]

Polling data demonstrate that people have their own views of the Constitution. Knowledge about contrary official interpretations gives them vocabulary, but is relatively unlikely to change minds. I

14. Eighty-three percent of those who consider prayer an overriding issue would support candidates who support school prayer. Search of LEXIS-NEXIS, Public Opinion Location Library or Public Opinion Online Database (poll dated Oct. 1999). Sixty-five percent believe prayer should be allowed in schools. *Id.* (poll dated June 1999). Forty-eight percent believe local schools should decide about prayers. *Id.* (poll dated Oct. 1997). Forty-two percent believe the Constitution should be amended to allow local communities to allow prayer in schools and 90% of those stuck to that position after learning it would be to the First Amendment. *Id.* (poll dated Aug. 1997). Fifty-five percent prefer silent prayer or meditation and 21% prefer no observance. *Id.* (poll dated Dec. 1996). Sixty-five percent preferred prayers from many religions; 24 % preferred a Christian prayer. *Id.* (poll dated Dec. 1994).

remember a restaurateur at the Morgantown airport telling me the Court got it wrong in its decisions on unemployment and minimum wages in the 1930s. I mentioned that I taught those cases in law school. ?I don=t care what you teach,@ he told me. He was not disrespecting me; he was just defending his Constitution.

V. CONSTITUTIONAL RHETORIC AND VOCABULARY

When we try to tell people what is in the Constitution and what it means, all that gives them is vocabulary. We want to argue about what is constitutional. In most public settings, that is mere noise. In the 1988 presidential campaign, Dukakis responded to Bush=s attacks on his treatment of teachers who refused to salute the flag by saying that he, Dukakis, had followed the law and that Bush wanted to break it. His argument was mere noise to all but his committed supporters. It may not be noise to those who are trying to run things, but it is noise to the public and to most activists. They have their own Constitutions in their heads.

We can make arguments of all the familiar types: textual arguments, historical ones, structural ones, doctrinal arguments, and pragmatic arguments. Within the bar there is reason to believe that each of those arguments has some force - because they are supposed to. But what is the public to make of these different lawyers= arguments? What the evidence is telling us and what the experts are telling us is that the public does not care about lawyers= arguments.

Confronted with arguments for different views, what are folks to do? If they are literalists like Scalia, then the generic language of the Constitution may strike them in one way or another and there is little room for argument. Good luck.

In other words, the textualism that is the order of the day cannot save the Constitution. When proposed amendments are afoot, the justices might save the text by changing its interpretation as the

Burger Court may have staved off the ERA.[15] That is their only option. If that guts the meaning of the text, perhaps a future generation of jurists can repair the damage.

Intellectually, people may agree that they should follow you into the history. But here again we meet the same divide. There are those who would repeat history, seeing in it examples of what people meant then and therefore what we should do now. And there are those who would learn from history, seeing the principles people were striving for and where they went astray. The first approach takes us back to a formalist approach. It is clear and sure. The second takes us to a functionalist approach, much more like Cardozo than like Scalia.[16]

But why will people now agree to do what is necessary to accomplish what people 200 years ago wanted to do? Many people fuss about affirmative action because they believe they are not at fault and even their parents were not at fault. What gives us a stake in any clause of the Constitution we do not like? Certainly none of us wrote or ratified the significant provisions of the Constitution. Few of us even had ancestors who were involved. Women, blacks, original Americans among others can claim complete absence of any representation. The Constitution is a hallowed American symbol in gross, but in its particulars none of us were there. We all have our own views, and either by interpretation or amendment, would rewrite it our own way.[17] None of us is actually swayed by the words that are in the document. Judges are swayed by these words only because it is their role to be so swayed.

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15. *See* Frontiero v. Richardson, 411 U.S. 677, 692 (1973) (Powell, J., concurring). *See also* Donna Meredith Matthews, *Avoiding Gender Equality*, 19 WOMEN'S RTS. L. REP. 127, 128 (1998) (discussing recent history).

16. *See* Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980); William Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237 (1986).

My guess is that however vigorously people argue the history, the arguments fall on the deaf ears of non-believers. Thus, my third major point is that both the form and the substance of constitutional guarantees may be threatened by the turn toward a type of legal discourse which omits explanation of the moral imperatives and real-world risks and consequences which mandate the imposition of constitutional guarantees.

What is left is a moral pragmatic argument about why the Constitution is good for us. That is the kind of argument to which we are accustomed.

VI. RESPONSE TO THE POLLS

Moral arguments and appeals to self-interest are more effective with the public. We differ, of course. Some of us are more altruistic than others. And some are more self-centered. But these are the central arguments. What is the right answer? The principled answer? Who is it good for? Who will be hurt? They are answers which make sense in consequentialist and Kantian forms of argument.[18] They are not answers which depend on the ?artificial reason of the law.@[19]

Jefferson Powell argued that the people of the early republic understood law in two competing senses: either the common-law sense which amplified the purpose of the law, or the scriptural sense

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17. *See supra* note 14 and accompanying text; SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988).

18. For one form of consequentialist argument, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (Hafner Publ'g Co. 1948) (1823). For Kantian argument see IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS (Lewis White Beck trans., Bobbs & Merrill Co. 1976) (1785). One offbeat but very interesting comparison is BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1979).

19. Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 232 (1992).

which relied on the plain meaning of the law.[20] But while discoursing on the proper mode of reading the Constitution, these people happily addressed the consequences each alternative would bring.[21] There is little purity in discussion; we use what works. And what motivates us are our ethics and our interests.

If we are to defend the Constitution against political attack, we have to relearn what the Constitution is for, what the Constitution does for us, and, yes, what it has done for us lately.

But the passing of the Cardozo generation makes it increasingly difficult even to think about constitutional argument in those terms. The Constitution says this. The clause means that. AWhy?@ is a very difficult question. Our students are actually much more adept at answering the question AWhy not?@ The casebooks put constitutional issues in terms of all the occasions for exceptions, restrictions, limitations B the gray areas as if the core is transparent. What is the harm if the police academy puts a cross on top of its tower? Or a post office has the nativity scene on its property? Yes, yes, I know it=s unconstitutional. And I even think I know why, but the discourse is in terms of the harm to, not the value of, liberty and non-establishment.

In northern New York, I would rather not raise questions about public religious displays and ceremonies unless those of us raising those issues are prepared to fight the newspaper war in terms of the practical reasons why we, all of us, benefit, from the constitutional rules. If we are prepared to fight the media war then we may be prepared to explain the ways that such public displays subtly alter and even secularize and trivialize Christianity on the one hand, while conveying a message of unwelcomeness

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20 H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985).

21. *See, e.g.*, H. Jefferson Powell, *The Founders and the President=s Authority over Foreign Affairs*, 40 WM. & MARY L. REV. 1471 (1999).

to others at the same time. But if we are not prepared to fight the media war, the lesson that the public will learn is that the First Amendment as written and interpreted is against God, religion, and Christianity, far though that may be from the intentions and understandings of all of those involved in the bar and on the bench. If we cannot explain religious non-establishment in northern New York, Kentucky, or in West Virginia, will it mean much whatever the Constitution says? Will, indeed, the Constitution continue to say that? Similarly, if Canadians cannot explain bilingualism in Manitoba, will Quebec stay in Canada? [22] Constitutions live only in the ways that they are etched in people=s hearts.

VII. THE PEOPLE, THE EXPERTS AND PROPER CONSTITUTIONAL ARGUMENT

If the Constitution is going to live for the people, it is going to live because the people see the Constitution as important to them. James Wilson has provided a wonderful and rich description of the founders= understanding of the centrality of public opinion for democracy and for the meaning of the Constitution.[23] We have come to think of popular views of the law as irrelevant. My own teacher of constitutional law at Yale scoffed at my concern about popular attitudes. It is more chic to think about Coke standing up to the King of England and defying him with the ?artificial reason of the law.@

Any attempt to draft or interpret constitutions merely by polling will yield grotesque results.[24] There is no substitute for enlightened and public spirited leadership. But, in a democracy, when the people do not understand, their representatives have a good incentive to appeal to them to change the

22. See the materials collected in VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 792-825, 889-925 (1999).

23. James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1048-1104 (1993).

24. *See* ROBERT WEISSBERG, PUBLIC OPINION AND POPULAR GOVERNMENT (1976) (discussing the difficulties of measuring and translating public opinion and public values into public policy mandates).

Constitution with, for example, amendments to the First Amendment to change the religion and speech clauses. No doubt there can also be amendments to the Fourth and Fifth Amendments. The point here is about the nature of constitutional argument, not the shape of constitutional law or claims; it is about the rationales, not the substance. There may be times when true statesmanship requires compromise with the inevitable. What cannot be explained, however, may ultimately have to be altered.

Nor can we rely on the Court itself to resist the public. As Hamilton pointedly commented: "[W]hatever fine declarations may be inserted in any constitution . . . must altogether depend on public opinion, and on the general spirit of the people and of the government. And here . . . must we seek for the only solid basis of all our rights."[25]

Indeed that view, that constitutional rights depended on the public, was fairly generally held. James Madison went a step further, arguing that it was appropriate that the meaning of the Constitution should be fixed by the public, not by draftsmen or specialists.[26]

But what makes that constitutional discourse? Doesn=t that in fact cheapen the meaning of the Constitution if it is always up for grabs? That=s Scalia=s argument. It is, I think, our challenge to lead people back to timeless constitutional values through constitutional discourse. But it cannot be done by ignoring their concerns. Against that understanding of the power of public opinion, it is striking that there is little public support for our lawyers= Constitution.[27]

VIII. CONCLUSION

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25. THE FEDERALIST No. 84, at 514-15 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

26. Donald Dewey, *James Madison Helps Clio Interpret the Constitution*, 15 AM. J. LEGAL HIST. 38 (1971).

27. The seminal study is SAMUEL A. STOUFFER, COMMUNISM, CONFORMITY, AND CIVIL LIBERTIES:

Finally, does the people's relationship to their constitution matter? That depends. Not if you think constitutions are purely expressive. Vicki Jackson and Mark Tushnet include that perspective in their book on comparative constitutional law.[28]

But if constitutions matter, if they have consequences -- intended or otherwise -- and many political scientists believe they do,[29] then it may matter considerably whether ours changes, particularly if it changes because the people who hold its life in their hands cannot grapple with its meaning.

A CROSS-SECTION OF THE NATION SPEAKS ITS MIND (1955).

28. JACKSON & TUSHNET, *supra* note 23. The theme runs throughout the book. For a couple of examples see *id.* at 1247 (questioning whether some relationships between church and state can be described as historically specific or universally proper). *See also id.* at 1116 (excerpting MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA (Rajeev Dhavan ed., 1989)).

29. *See, e.g.*, G. BINGHAM POWELL, JR., CONTEMPORARY DEMOCRACIES: PARTICIPATION, STABILITY, AND VIOLENCE (1982); DOUGLAS W. RAE, THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS (rev. ed. 1967).