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# Constitutional Scholarship: What Next?

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*Schor* shows; shooting this particular fish involves making fun of the fact that *Schor* and *Bowsher v. Synar* were decided on the same day) when such formalism is not apparently as attractive elsewhere in the law? The project would involve trying to figure out the relationship between formalism-pragmatism and conservatism-liberalism (not meaning to suggest by this construction that the parallelism is accurate) in the present period.

The overall difficulty for constitutional law scholarship is that its producers, by our specialized training and our inclinations, are much better at dealing with Supreme Court cases than we are at doing anything else. Perhaps people with interdisciplinary training—in philosophy, political science, or history—will come up with some novel perspectives on constitutional law. Yet I note a structural impediment to the realization of that possibility: With rare exceptions, interdisciplinarians at or near the top of their other disciplines are unlikely to want to teach in a law school, preferring the company of those immersed in the other discipline. That means that, again with rare exceptions, people who do constitutional law scholarship and have interdisciplinary training or interests are unlikely to produce truly provocative work drawing on that training or interest.

In my view, the lines of analysis of the cases have just about played themselves out. Maybe the time has come to start doing something else. (Of course, I may be willing to say that because I have just published a book on constitutional theory that I unsurprisingly but undoubtedly erroneously regard as the last word on the subject, and maybe all that I mean is that the time has come for me to start doing something else.)

#### CHARLES A. LOFGREN<sup>9</sup>

In view of the past fifty years of history under the Constitution, I find it difficult to think of many—if any—areas of American life *not* open to further examination by constitutional scholars. Certainly historians, whose domain is perhaps broader than that of their constitutional cousins in other disciplines, should greet the Bicentennial with renewed appreciation for Andrew McLaughlin's vision in 1935: "Constitutional history . . . , when viewed in its entirety, is of almost limitless extent, because to comprehend it fully one must have in mind social and industrial change and movement." Indeed, recent decades have suggested that McLaughlin

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9. Roy P. Crocker Professor of American Politics and History, Claremont McKenna College, and member of the Graduate Faculty in History of the Claremont Colleges.

was overly cautious when he opined that "actual social need and . . . imperative adjustment" made their impressions "even though the waves of time often seem to dash in vain against the walls of habit and of established practice." The "waves of time" have had a generous assist from the nation's judges, giving new force to Tocqueville's insight about the penchant of Americans to turn political questions into legal ones.

Practically speaking, that is, more and more stories wait to be told. Cases in their multitudinous dimensions; organizations that pushed litigation; judges and "courts"; the real effects of and reactions to judicial activity in various areas—these are some of the most obvious foci for attention. And the riches are more striking when one takes account of activity at the state level. (As a California resident, I can't resist pleading for someone to take on a history of the Rose Bird years, which, I suspect, would offer a wonderful opportunity for a microcosmic examination of concerns about judicial "activism.")

Yet the profession—and I write here with an eye primarily on historians, leaving it to others to offer prescriptions for their own fields—should keep in mind the potential for breadth in constitutional studies. The sexiness—not to mention the relative manageability—of case- and court-related issues can easily lead to slighting other areas. Even if the commerce clause has ceased to be on the cutting edge of constitutional law, for example, its significance in what I like to call the *de facto* constitution of government in America continues unabated. We need studies from a constitutional perspective of state-federal relationships and influences comparable to Harry N. Scheiber's investigations into the nineteenth century economy.<sup>10</sup> The activities of state and federal regulatory bodies of all sorts also deserve attention.

Nor should the richness of the recent past blind us to earlier periods. I was struck, while doing my book on *Plessy v. Ferguson*, by how little we really know about civil rights in operation in the late nineteenth century. Although I dealt with about two dozen state appellate and federal cases on transportation segregation, I barely probed the law in action at the local level. Even one of the major cases, *Hall v. DeCuir* (1878), still awaits a historian, despite its pivotal importance for both the constitutional and private-law aspects of race relations, and despite an immensely rich case his-

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10. Indeed, Scheiber's own assessment of the challenges in constitutional history deserves attention from anyone wondering about what needs doing. See Scheiber, *American Constitutional History and the New Legal History: Complementary Themes in Two Modes*, 68 J. AMER. HIST. 337 (1981).

tory. J. Morgan Kousser, it needs noting, is working on what promises to be the definitive study of school segregation in the period, but schools hardly exhaust the realm of social intercourse.

Nor, to shift areas, is the "original intent" vein played out. Whatever the outcome of current political and theoretical controversies, the subject offers almost endless historical fascination. (My Claremont colleague, Leonard Levy, will satisfy some of our curiosity when he soon completes his comprehensive book on the intentions behind the Constitution's leading clauses. From a peek at several of his chapters, I can attest that the book is worth waiting for.) Then, too, a historian might try his or her hand at offering a broad interpretation of shifts in approaches to constitutional interpretation over the last century, by both judges and academicians. Here I do not mean to downplay G. Edward White's contributions, but only to suggest the usefulness of a synthesis sweeping from the late nineteenth century to the current interpretivist/non-interpretivist debate.

I must confess, however, to having lately yielded to the charms of the recent past by beginning a constitutional history of the Vietnam War, which is now somewhere between the prenatal and natal stages. As I struggle with a conceptual framework for it, I find myself wishing for a sure guide to the boundaries connoted by "constitutional." That, of course, is wishing for what never will be, but my experience may suggest that even workaday historians could benefit from still more discussion of the meaning of constitutions and constitutionalism within an American framework—yet at a level that stays beneath the clouds. Court cases, pronouncements from the executive branch, congressional debate, actual interbranch relationships, inflation, domestic spying, stolen documents, crunched heads, parading workers, destroyed files, disrupted lives, death—the question is where to draw the line. A history of everything becomes a history of nothing.

But I conclude on a more pedestrian note—yet one warranted I think by *Constitutional Commentary's* admirable concern for teaching as well as research. We need a good source book for undergraduate constitutional history courses. Stanley Kutler's casebook is useful, but unless one defines the field as exclusively a history of what the United States Supreme Court has done, it is incomplete. One approach might take its cue from Stephen Presser and Jamil Zainaldin's collection in American legal history. My own preference, however, would be for something with a less elaborate editorial apparatus and fewer (if any) secondary readings, but including both cases and *other* primary materials; such a book could

be used in conjunction with a text, paperbacks, assigned chapters and articles, or some combination thereof. My mind runs fondly back to the collection (now out of print) edited by James Morton Smith and Paul Murphy, perhaps because it helped introduce me to the field nearly three decades ago.

#### MICHAEL ZUCKERT<sup>11</sup>

A preliminary comment. In most fields there is a range of opinion among competent practitioners as to what constitutes the current agenda for the field. In that, I feel safe in predicting, this symposium will prove constitutional studies to be no exception. Yet constitutional studies differs from many other disciplines, e.g., biochemistry, in that in the latter all competent observers share a fairly common picture of where the field currently is, and of what the major unsettled issues are. There may be disagreements over priorities among the important questions, or over the proper leads to follow in examining them, or at worst, a fairly well-structured set of alternative conceptions of the current state and agenda for the field resting on what have come to be called "competing paradigms." But constitutional studies is not so well-structured as that, with the result that any attempt to speak of a current agenda is rather personal. That at least is true of my comments.

Today constitutional scholars face two tasks: to repoliticize the Constitution and to depoliticize constitutional law. The Bicentennial season has encouraged many of us to pay close attention to constitutional history, and especially to the doings of the founders. One of my most abiding conclusions is how different our approach to the Constitution is from that of the founders. We are far more legalistic than they—witness the fact that most scholarly discussions of the Constitution occur in law journals. But the founders, though many were trained as lawyers, and a few even practiced law, approached the Constitution not in a legalistic but in a political manner. I do not mean, by the way, to endorse the view of, e.g., John Roche, that the founders were merely local pols cutting deals, but rather to insist that they saw the Constitution preeminently as a part of political science, as a way of structuring political life. The kinds of argument and reasoning one finds in the Constitutional Convention or *The Federalist* have, for the most part, much more in common with the kinds of questions political scientists ask than those lawyers ask. The question about representation, for example, is not the abstract one about rights, but rather the political one of

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