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# Constitutional Scholarship: What Next?

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cial justification. It would probably be more accurate to say that some form of judicial review is now the norm in democracies.

There are a lot of interesting things for constitutional scholars to look into. Unfortunately (given its prominence in recent years), grand theory doesn't seem to be one of them.

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The other day I received, as an alumnus, a message from Dean Vorenberg of Harvard Law School. Listing some of the school's achievements, he related that Harvard now has "13 courses and seminars in constitutional law, in addition to five sections of the basic 'second-year' course," plus "six courses in the field of international human rights." If this issue of *Constitutional Commentary* survives until the twenty-fifth century, I suspect that the dean's revelation will be interesting to students of twentieth-century American culture.

As Americans, as lawyers, and as constitutional scholars, we take rights very seriously indeed. In a citizen this is sometimes a virtue, but in a scholar it is more often a vice. Many of our readers have never studied the history of liberty except in a constitutional law course. For this and other reasons, they are in perpetual danger of equating the progress of liberty with the progress of law, and the progress of law with the progress of constitutional rights.

We begin with cases; almost inevitably we often treat doctrine as an end in itself, a tendency that is reinforced by normal human laziness as well as the quest for maximum scholarly output. Although we know better, we habitually imply—if only by our silence—that if the Court hadn't acted nothing would have been done about a problem, and that the Court's decision had important consequences. Prior to *Muller*, we imply, working hours were not growing shorter except under statutory compulsion; after *Muller*, our readers are left to infer, the problem was solved. *Miranda*, we presume, created dramatic new realities in the interrogation room. *Griswold*, some imply, was a landmark in the evolution of sexual liberty; I doubt that most law students could even begin to describe the origins—mostly non-legal—of privacy in the home. *Roe* was necessary, says popular mythology, because legislatures weren't reforming abortion laws; and if it is overruled abortion "will be illegal." Such assumptions are often half-truths at best. Left unchallenged, they fortify the American tendency to over-glorify

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the Supreme Court, and correspondingly to deprecate democratic politics.

Rights are inspiring, and that's important, but the old ladies on the city bus have less need of new constitutional rights than of lower prices and safer neighborhoods. Glorification of rights tends to entail neglect of interests that cannot easily be enforced by litigation and overreliance on the Supreme Court to solve the country's problems. It isn't just a question of "legitimacy"; it's also a question of realistic expectations. In the 1960s many liberals looked to the courts to restore environmental quality. They won some important victories, but on the whole they vastly overestimated what could be achieved by creation of new environmental rights. Now feminists are making the same mistake in their quixotic effort to stop pornography through suits by rape victims and their unrealistic faith in the liberating power of an Equal Rights Amendment. The ghost dance of litigation also appeals to the Right: many conservatives, while sincerely deploring judicial *usurpations*, want a Balanced Budget Amendment, so that the judges can *legitimately* stop deficit spending! The same mentality is reflected in Harvard's constitutional curriculum.

Even in the areas where rights work best their importance is usually exaggerated by hyperbole from both sides as well as the media. Remember, we aren't talking about the rack and the screw; we're talking about whether kids may wear arm bands to an arithmetic class. Our "fundamental" rights cases now often involve rights that are nowhere near being fundamental. In America today, the important restraints on liberty are not due to lack of legal rights, and they are therefore not removable by creation of new rights. For example, there is virtually unlimited legal freedom of speech on our campuses. The Constitution in its majestic equality allows both George McGovern and Jeane Kirkpatrick to speak at Berkeley. But the informal constraints on the exercise of that freedom are extremely powerful, whenever the speaker's position is unpopular within the university community, which is to say whenever freedom of speech matters. That, it seems to me, is a much more important problem than the constitutional status of sound trucks and dirty monologues. It's not "law," but if we don't study it, who will?

We might give our readers and students a better perspective on the Court's role if we addressed "constitutional problems" instead of "constitutional law": freedom of expression during World War I, for example, instead of just *Schenck* and *Abrams*. We would then view the Court as one of the forces—sometimes major, more often minor—that has affected social progress. Of course, this ideal isn't

wholly attainable; we are, after all, specialists. But our specialty is not like music or ceramics, subjects best taught by someone on fire with the delusion that a concerto or a vase is the center of the universe.

Perhaps an infusion of comparative law would help to illuminate the role of doctrine. I've always thought it strange that we put legal history and comparative law in special courses, as esoteric, optional subjects, taught by isolated professors. This is done, presumably, because the mainline teachers don't wish, or don't feel able, to incorporate comparative perspectives in their courses. As a result, we never ask some of the most basic questions about the Constitution. For example, what (tangible or intangible) difference does it make to an atheist, or a Jew, Methodist, or Catholic to live in England rather than in the United States? How much of the difference is due to the established church, or other practices that our Constitution has been interpreted to prohibit? Does the degree of actual freedom of speech in a democracy correlate closely with the degree to which its constitution appears to guarantee such freedom? Or the degree to which its courts have a role in enforcing its constitution? Is judicial review more necessary here than in some other countries? How much political freedom is compatible with socialism? Those questions are more fundamental than most of the ones that we ask in our required Constitutional Law courses. The answers—however inexact they may be—belong in the literature of constitutional law.

Constitutional scholarship furnishes many illustrations of Nietzsche's dictum that "convictions are more dangerous enemies of truth than lies." The legal mind tends to characterize decisions as simply "right" or "wrong"; so does the partisan political mind. In some fields, that doesn't trouble me, but in constitutional law, where the problems are often polycentric, that sort of thinking is inadequate. Our treatment of pre-1937 economic regulation cases, for example, is often crudely biased. Most histories of the *Lochner* and New Deal eras are full of innuendoes to the effect that the corporate side represented an outmoded "individualist" or "Social Darwinist" ethic, while the government side represented the interests of the common man. No complexities, nuances, or imponderables—just Good versus Evil. This is not so much argued as taken for granted, like the superiority of democracy to dictatorship. Yet the *Lochner* era was more than *Lochner*; it was also hundreds of cases—*Euclid*, *Adkins*, and *Blaisdell*, for instance—in which it's not at all clear that the law was beneficial to the poor. I'd like to see more dispassionate analyses of these cases, including their place

within the general evolution of the economy, by scholars with fewer preconceptions.

One needn't be nihilistic about constitutional meaning to recognize the obvious fact that the Constitution is a wonderful political Rorschach test. Sometimes, to be sure, the ink blot does look like a bat. When it does, let's say so. But if we've got bats on our mind, let's talk about them now and then. Too often, constitutional debates are disguised political debates. It might be helpful to put the legal issues aside occasionally and engage in some frankly utopian thinking about the composition, selection, duties, and methods of the Supreme Court, as well as the language of the Constitution. These utopias would not necessarily be unrealistic except in the sense that any sudden and radical change in our political system is unrealistic. A single author might draft a series of alternative utopias, one of which might call for a totally political "Court" while at the other extreme another utopia might try to confine the Court's discretion by eliminating some of the ambiguities of our present Constitution, just as the Canadians have done. I envision these utopias not as practical proposals but as pedagogic and analytical tools that might help to sharpen some of our discussions of constitutional jurisprudence. For example, instead of straining to prove that the real Constitution authorizes (or doesn't authorize) substantive economic due process, let's discuss whether an ideal Constitution would do so. Instead of limiting ourselves to the question whether this or that decision converts the Court into a Council of Revision, let's discuss whether we want a Council of Revision. Might it not be preferable in some ways? In short, let's spend more of our time discussing first principles.