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Constitutional Scholarship: What Next?

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lican character of our Constitution, we should see this neo-Kantian proposition not as the underlying principle of our Constitution, but (to borrow from Justice Black) an “incongruous excrescence” on it.

A third area that scholarship needs to address is the authority of the Constitution. For its original claim to authority, the Constitution itself tells us that ratification by conventions in nine states is sufficient. What is the political philosophy that can explain how that act can provide authority then or now for the Constitution? The answer to this question would help shed light on the meaning of the more controversial portions of the Constitution. But the endeavors to address it are woefully inadequate. Some would emphasize a theory of actual consent, and thus favor the “original intent” of those writing and ratifying the document; but they fail to consider how the founding generation extends its authority to future generations. Others would emphasize tacit consent; but they fail to consider the implication for constitutional interpretation. With the theory of tacit consent, the Constitution becomes whatever you can get away with saying it is; the only limits are those of imagination and manipulative rhetoric. Abandoning hope of finding meaning in actual or tacit consent, the Law and Economics school looks to maximization of social wealth, but forgets the importance of the individual, while the neo-Kantians, purporting to remember the individual, forget what it is that makes him or her human. And finding no authority in any of this, Critical Legal Studies looks for a poetic voice to re-enchant the Constitution, unmindful of the nihilistic premises of its position.²² Obviously, a bit more thought to the authority of the Constitution would be helpful.

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In a judicial era that symbolically, if not actually, commences with *Brown v. Board* some students of law and politics have seen a drastic transformation of the role of courts in America. The change is apparent in what Owen Fiss has described as “institutional suits” and in what Abram Chayes welcomed in a widely cited essay as “public law litigation.” In the 1970s some erstwhile advocates of judicial activism frightfully warned against the “imperial judiciary” that seemed increasingly and arrogantly to assault democracy with nearly absolute and unaccountable discretionary power.

Judges have become “managers” and “overseers” of complex and extensive governmental operations commonly wielding equity

22. See, e.g., F. NIETZSCHE, *BEYOND GOOD AND EVIL* sec. 211 (W. Kaufman trans. 1966).

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powers that used to be invoked only in "extraordinary" situations. In an award-winning book Donald L. Horowitz argued that courts were institutionally incompetent to handle these new and non-judicial assignments.

Courts, as political creatures, undoubtedly are adjusting to and reflecting the success of legitimate demands now being made by previously inactive or ignored elements of the political system. These demands often are converted into sweeping but not always specific national legislation which courts, sometimes by default, must implement. The demands also have been obviously fulfilled through new aspirations found among the many folds of the American Constitution, which judges must match against the realities of contemporary American life. In the midst of these accelerating changes in the judicial process, we still hear from high ground the totally unrealistic plea for "strict construction" and federal judges "who don't make the law; they just interpret it."

Are we really witnessing a fundamental abuse of the judiciary? If such a change has occurred, is it frequent and widespread enough to justify a conclusion that the judicial process itself has undergone drastic modifications? And if so, are judges less capable than other governmental officials in the difficult process of delivering the promises of rights and privileges that have found their way into American law? If there has been a profound change in the process, are judges themselves responsible for that change?

Much of the disgruntlement about the new role of judges stems from opposition to the general libertarian direction of "institutional suits" and "public law litigation." Some of it, too, derives from the unsettling recognition that law is not the body of rules that law professors used to teach in law schools; with the intellectual threat of the Critical Legal Studies movement, this uneasy feeling intensifies and breeds negative reactions to the assertedly novel uses and alleged abuses of the judicial power.

If basic changes are working their way through the judicial process itself, are they simply consequences of a natural judicial evolution that parallels perhaps profound changes in American law? I sense that most of the writings critical of the new role that some courts have assumed are rooted in the ideological conservatism of the critics. Their reactions seem to be sporadic reactions to large-scale equitable remedies and based on a notion that the judicial process itself, unlike that of the other political institutions, is fixed.