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Constitutional Scholarship: What Next?

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Similarly, we need studies of presidential constitutional politics and not only of presidential war power and emergency power. Harry Truman's expansion of the "imperial presidency" has really not been carefully assessed from a constitutional standpoint. Neither has Lyndon Johnson's, or for that matter Richard Nixon's or Ronald Reagan's, except, of course, when the courts rapped their knuckles. The constitutional cavalierness of Reagan administration leaders is highly suspect. We need a scholarly assessment of it and hopefully before minor bits and pieces of it hit the courts.

Constitutional behavior occurs in all three branches and at both the federal and state level. We, the People also impact constitutional processes—or at least are supposed to. We need to know about all this—when it happens, how it happens, why it happens, and its results. A step out of our Supreme Court's Constitution fixation would, I think, serve us all well.

JOHN P. ROCHE³

Our first priority must be to recover from the Bicentennial. I knew it was going to be bad when in 1985 a staff member of the commission in Washington wrote to suggest that I organize a costume party for television which would feature leading framers interviewing "Lock, Hobbs, and Montesque" (*sic*). But even my worst-case view was overwhelmed by the blast which followed as forests were felled to provide paper for God only knows how many books and articles, seemingly on any topic that an ingenious author could link to the Constitution and its authors.

Basically I am a tolerant soul. Having grown up listening to oracular great aunts tell how Irish-Americans won the Battle of Bunker Hill, or Gettysburg, or the Argonne Forest, I could chuckle compassionately when various writers ascribed the Constitution's organizing principles to the Torah, the "Great Peace" of the Iroquois Confederacy, the Koran, or old Norse customary law. And, as Madison once noted, turning to Locke or Montesquieu was "a field of research which is more likely to perplex than to decide."

However, what led me to call Leonard Levy and a couple of other old friends and suggest a year in Australia was the onslaught of the political theologians. One might have thought that the Convention was a Great Council of the Church comparable to Nicea or Chalcedon and the framers, like the Church Fathers, animated solely by the Paraclete. While I yield to no one in my respect for the "Republican Virtue" of the framers, my forty years in the pri-

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mary sources indicate that—like able politicians of every era—they could on occasion “rise above principle.” Moreover, they did not confuse politics with religion. I’m not certain they would have gone as far as Winston Churchill, who allegedly observed of a petition protesting the morality of one of his wartime policies, “Send it to the Archbishop—morality is a Church of England matter,” but in my judgment few lost any sleep over, say, the slavery compromise.

Then, just to make life more chaotic for us pedants with our addiction to primary sources, Attorney General Edwin Meese threw a grenade into the duck pond, calling for a “Jurisprudence of Original Intent.” Thus psychoanalyzing the dead became a growth industry. Not only were the actual participants at Philadelphia put on the couch, but some attempted to read the minds of the 1700+ delegates who participated in the ratification process. The last stage was missed—trying to discern the intent of the voters who chose the delegates; perhaps by this time the money (estimated at over fifty million dollars!) that was being ladled out by the Bicentennial Commission, the NEH, private corporations, and various foundations ran out? Yet this cornucopia provided great fun while it lasted: as the sardonic Charles Pinckney is said to have remarked when Robert Morris was tossed in jail for debt, “a fool and his money are some party.”

This may seem like an uncharitable approach to our sacred heritage of constitutionalism, but in justification let me note that I decided not to be the skunk at the garden party, specifically, not to bring out my long-threatened work: *The Constitution as a Failure*. The Constitution was, of course, a flop unless you are prepared—as a number of historians have been—to write off the Civil War as a sort of “boys will be boys” affair. A document whose ambiguities led within seventy-five years to a hecatomb in which well over half a million young Americans lost their lives (a higher percentage of our population than the British, French or Germans lost in World War I) hardly created a *Novus Ordo Seclorum*.

Be that as it may, I fully share the view of James Hutson that the search for original intent is a snipe hunt. We can discover the intent of delegate A on issue Y, of delegate B on issue Z, *ad infinitum*, but when you put the pieces together they do not add up to probative evidence of collective intent. We know the framers wanted to create a strong free republic (except for slaves) which would be capable of surviving in the state of nature known as international relations. But when it comes to the question, “Does the first sentence of article II vest the president with Locke’s ‘federative

power,' i.e., prerogative jurisdiction in the conduct of foreign affairs?" we hardly have a clue.

In *The Federalist* No. 64 John Jay, Secretary of Foreign Affairs under the Confederation, hinted that the president was not simply a legislative tool, but Jay was not a delegate—and the perennial shortage of money to pay interest on our debts was enough to make him, and founding "uncles" Jefferson and Adams in Paris and London, vigorous opponents of legislative supremacy. In short, anyone who claims to know that the framers would have considered the War Powers Resolution of 1973 constitutional, or unconstitutional, is an astrologer, not a scholar. I happen to *think*, based on broad contextual evidence such as the general revulsion that Americans felt toward "monarchical usurpations," that the odds are they would support it—just as I believe on the same basis that judicial review of congressional acts was part of the background music—but my hunches, however well-informed, would be thrown out by any court in the country for lack of proof.

So where do we go from here? Now that the party is over, the first thing to do is get the children off the streets. To put it another way, we must reclaim the Constitution from the mystery-mongers and restore it to its central position in American political culture. It was first and foremost a political document—not a Decalogue, Nicene Creed, or Thirty Nine Articles. Its authors were a singularly talented group of experienced politicians who had emerged from the most participatory society in Western history, but they failed to square the circle that led to disaster in 1861, namely, the relationship of states to nation (or "general government" as they would have put it).

Instead of reading the mystery story backwards, we must continue—in Maitland's luminous phrase—"to think ourselves back into a twilight," and eschew the temptations of retrospective symmetry. And above all, we should be grateful that nobody had a telephone—such fascinating byplay as Jefferson's discussion with Madison on the proposed scope of first amendment protection would surely have been lost rather than in the archives.

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For several reasons the subject of constitutional law tends to be submerged in my mind by the subject of the Supreme Court as an institution. For some time now I have felt uneasy about the direction many of our courts seem to be taking. My hunch is that the

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