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Constitutional Scholarship: What Next?

Kirk Emmert

Antonio Metropolitan Transit Authority should have overruled *National League of Cities v. Usery*.

Despite general talk of a "new federalism," we have heard little from law professors about how, and within what legal framework, powers, resources and activities should be divided among federal, state, and local authorities so as best to serve the diverse needs of our people.

I also think that constitutional scholarship commands a disproportionate share of scarce, intellectual resources in the law schools. After all, the Supreme Court is not the most important maker of public policy. The legislatures that created the welfare state and protected civil rights have done more to promote equality than even the Supreme Court. Too little attention, relatively speaking, is being paid to their work or the political processes that account for it. For example, there is much more writing urging the Supreme Court to read an economic bill of rights (not President Reagan's version) into the Constitution than about the legislation and administrative structure that would be needed practically to guarantee to all people jobs, health care, education, and the other necessities that the advocates of an economic bill of rights have in mind. It is a shame, too, that the debate about the social functions of private law has been left almost entirely to the adherents of Law and Economics and Critical Legal Studies.

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It is difficult, if not impossible, to foresee the issues, political configuration, and constitutional direction which will dominate the Supreme Court in the next decade or more. But there is little doubt that one of the most important questions underlying the activities of the Court, and scholarship about it, will be its role in our constitutional liberal democracy. In recent years this question has been explored in greater depth than at any other time in our history, with the exception perhaps of the New Deal, the Civil War, or the Founding. Among the more immediate causes of this are the nomination or appointment of controversial Justices, interest in our institutions kindled by the Bicentennial, increased scholarly concern during the last two decades, particularly among political scientists and historians, with American political thought and institutions, and widespread public and scholarly questioning of the dominant, liberal consensus regarding the rule of the Court and the nature of constitutional jurisprudence. But whatever the immediate causes

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of heightened interest in these matters, these are for us questions which are perpetually arising, for they reflect the fundamental tension between the dominant principles of our liberal democracy, a tension with which we have struggled since we became an independent nation.

The Declaration of Independence proclaims that governments are instituted to secure rights and that they derive "their just powers from the consent of the governed . . . ." The tension between these principles of liberty and consent—of natural justice and majority rule—permeates American political life and is at the center of different views regarding the proper role of the Supreme Court. Those who advocate an activist, interventionist Court stress the importance and precariousness of liberty or rights in liberal democracy. In their view, the Court's political independence and status as the authoritative interpreter of the Constitution particularly fit it to be the protector of the people's liberties against the actions or inaction of governmental officials and of the majority acting through government. Those who advocate a more restrained, deferential Court stress the threat to self-government and majority rule posed by an activist Court which is not electorally accountable. In their view, the Court should be restrained by strict adherence to the words of the Constitution and the intention of the framers. Otherwise adjudication gives way to policymaking and judges substitute their own political preferences for the dictates of the Constitution.

The libertarian and majoritarian views are both insufficient, in my view, because each tends to resolve the tension inherent in liberal democratic principles by denying the legitimacy of the principle opposed to the one they embrace. Thus the majoritarians or interpretivists tend to deny that our liberal democracy is grounded in enduring, transcendent principles of moral right. For their part, the libertarians or non-interpretivists are inclined to deny the moral status of majority rule, although it, like the human rights they advocate, is also a necessary implication of human equality. Moreover the rights jurisprudence, as formulated by scholars such as Ronald Dworkin, is grounded in a radical equalitarian reformulation of American political and constitutional principles. Under this dispensation the undemocratic court becomes the vanguard of reform rather than the articulator of our enduring principles and the adjudicator of their unavoidable tensions.

Constitutionally, the majoritarian, interpretivist advocates of restraint have failed to present a coherent, convincing jurisprudence of original intent. Similarly, the libertarian non-interpretivists have not shown how their jurisprudence of rights can be sufficiently

grounded in the Constitution so that judges do not become indistinguishable from legislators, thereby undermining the legitimacy of, and public respect for, the Court.

Unavoidably, the Supreme Court is a political institution. The Constitution points to broad objects which cannot be adequately encompassed within a legalistic-historic formulation such as the search for original intention. Nor does the Constitution make an exception of the Supreme Court: as with the other two branches, its independence can and should be politically restrained by the other branches. As Tocqueville noted, in America Supreme Court judges must be statesmen. But they must also be judges, whose training and important, but not exclusive, responsibility for interpreting the Constitution make their work significantly different from that of the other two branches.

Thus the most significant task for scholarship on the Court is, it seems to me, to articulate an alternative jurisprudence to the too narrow, restrictive view of the interpretivists and the open-ended, unrestrained approach of the non-interpretivists. Such a jurisprudence would be grounded in a sufficiently broad understanding of constitutionality to allow the Court ample scope for protecting liberty. At the same time, it would be informed by the broad clauses and objects of the Constitution and the political thought which supports it, including the recognition that the Supreme Court itself embodies, while it is also responsible for helping to resolve, the inherent tension in a liberal democracy between popular government and liberty.

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While there are exceptions, most of the major scholarship in the past ten years has focused on constitutional theory. We have seen endless debates about the role of text, original intent, and political philosophy in constitutional law. Yet we seem to have learned little that is new about how to decide constitutional issues.

The originalism debate is a good example. The originalist view is supposedly that the meaning of the Constitution is completely determined by the views of its framers. It is relatively easy to show that if "original intent" is supposed to be a matter of historical fact, it is difficult to define its meaning, ascertain its content, or explain why it should be determinative. (The basic error, of course, is taking "the consent of the governed" to be a matter of simple historical

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