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Constitutional Scholarship: What Next?

Mark Tushnet

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mind not so much substantive issues as the Court's oversight role in insuring the administration of justice in the lower courts. Although the Court's mandate is to decide real cases involving real parties, issues—not always of overwhelming importance—appear to determine case selection at the expense of opportunities to correct occasionally egregious errors by lower federal courts in cases that may have unexciting, narrow, or non-constitutional issues, but are, for the parties, once-in-a-lifetime experiences in the federal courts.

My final suggestion is in a different vein. We need more analytical and empirical scholarship on punitive damages. Such damages affect several of our most cherished ideals: a government of laws not of men; equal justice under law; procedural fairness in the administration of the law, especially in its punitive aspects; and accountability of governmental institutions.

MARK TUSHNET⁸

For over a decade constitutional law scholarship has been living off the remains of the Warren Court. Liberals nostalgic for the era of Supreme Court assistance in the promotion of their political programs grasp at anything that demonstrates the Court's present inclination to continue providing such assistance. Conservatives parade the bogey-man of "judicial activism"—such as invalidating the death penalty—as if the Court had not "deregulated" the field, in Professor Weisberg's apt phrase. The incarnation of Justice Lewis Powell, a very conservative judge, as a judicial moderate upon his retirement is symptomatic—and not a little embarrassing when it turned out that the views of his designated successor, who was attacked as an extreme conservative, were not that different from Powell's.

Of course people can delude themselves indefinitely, and scholarship about constitutional law that treats Warren Court decisions as canonical and later ones as aberrational may well persist. There are sociological reasons for that to occur as well. The legal academy is likely to remain dominated by liberal scholars, whose political inclinations will lead them to define their field in politically congenial ways. That's because the opportunity costs for conservatives who go into academic life are much higher than the opportunity costs for liberals: put bluntly, I'd have to take a substantial cut in pay to do the kind of legal practice that I would be inclined to do, but conservatives have to take substantial cuts in pay when they leave the kind of legal practice that they are inclined to do.

8. Professor of Law, Georgetown University Law Center.

My utopian aspirations for the academy make me want to hope that reality will at some point intrude on constitutional law scholarship. What will happen when people realize that the Warren Court ended a while ago?

The most likely result is that the same kind of scholarship will be produced, with people simply switching sides. Liberals will start chastising the Supreme Court for failing to take serious account of the historical background of various constitutional provisions, for disingenuously dealing with precedents, for promoting its political agenda under the guise of enforcing the Constitution—all the things that conservatives have been attacking the Court for doing. And conservatives, few though they may be, will start saying that, although the Court's precise reasoning may have been somewhat inadequate, the result it reached can be defended along different lines.

This prospect is deeply depressing. Part of the problem is that the critiques of liberal decisions are so well-developed, and so obviously correct, that they can be deployed against *any* decision invalidating legislation. If conservatives were willing to follow through on their inconstant commitment to a populist majoritarianism, only one such critique would be available—that populist majoritarianism is inconsistent with the idea of constitutionalism. But the moment that they invalidate a statute—campaign finance regulation, affirmative action programs, legislation aimed at restricting the mobility of capital (plant-closing statutes)—conservatives are just as bad off as liberals, because everything they have said about liberals in the past can then be said about them.

There are already indications that this is going to happen. One would not have thought it possible for conservatives to rely on a worse historical understanding of the free exercise and establishment clauses than liberals have, but they have managed to apply their jurisprudence of original intent to the religion clauses in just that way. And Laurence Tribe would have no difficulty in agreeing with the assertion that television broadcasters and other commercial speakers are protected by the first amendment because we have to understand the purposes of the amendment on the right level of generality. Those who contend that affirmative action programs are unconstitutional sound like Ronald Dworkin in asserting that we have to interpret the equal protection clause in light of the concept of racial equality that it embodies, not in terms of the particular conceptions of equality held by its framers (who, after all, supported quite race-specific laws such as the Freedmen's Bureau statutes).

This prospect is depressing because it is not a lot of fun watch-

ing people shoot fish in barrels; indeed, one sometimes begins to develop sympathy both for the fish, who are doing the best they can in trying circumstances, and for their pursuers, who are doing the only thing they know how to do. In addition, it may be difficult to sustain the enterprise over the long run. We have already experienced the extrusion of certain subtopics from the field of constitutional scholarship: criminal procedure first, followed by a large part of the law of justiciability. I am told that many people already have abandoned teaching about the powers of Congress and federalism more generally. Oddly, the first two areas have been eliminated from the constitutional law course because there is too much law, while federalism may go because there is too little law about Congress's powers and too much law about the negative commerce clause and preemption. (You would have to be a pedagogical genius to be able to teach an introductory class the *CTS* case.)

If federalism were extruded from the constitutional law course, constitutional law as an academic field would consist of civil rights and civil liberties. (I haven't done the necessary research, but I do note that 1102 of the 1536 pages in the constitutional law casebook of which I am a co-author—about 72%—deal with those issues, and would bet that if one looked back a decade or two one would find that percentage substantially lower in the casebooks then in use.) But constitutional law isn't very interesting when the Court routinely upholds legislation; I suppose that is one of the reasons why *National League of Cities v. Usery* gave federalism as a field of study a shot in the arm, and why *Garcia v. San Antonio Metropolitan Transit Authority* is likely to deaden the field again. Given the likely composition of the Court in the future, civil rights and civil liberties cases will probably begin to resemble today's federalism cases—routinely upholding legislation. (There is one exception: the Justices, no fools about public relations, will occasionally uphold claims under the first amendment, to get the plaudits of the press that such decisions inevitably generate.) If that happens, constitutional scholarship focused on the Supreme Court will have to deal with presumptively uninteresting subjects—the cases.

Are there any alternatives to this grim picture?

One possibility is that constitutional law scholarship might turn away from its obsession with the Supreme Court. I think this is unlikely and perhaps even unwise.

Paul Brest and Sanford Levinson have been arguing for years, without substantial success, that constitutional law is made elsewhere than in the Supreme Court or even in the courts at all. The area of separation of powers seems to me a prime candidate for a

study of constitutional law in which the courts figure not at all. (Do you think that your students are fairly equipped to write a memorandum to a conscientious Senator describing how the principle of ambition counteracting ambition applies to her consideration of a nominee for the Supreme Court?) Yet, the market is quite resistant to suggestions that *Youngstown*, *Chadha*, and the like are really not the best way to learn the constitutional law of separation of powers. Honestly, do you really think that you would assign and be capable of teaching from a constitutional law casebook that didn't include *Youngstown* as the heart of its presentation of separation of powers? At present I have no substantial thoughts on how the law of civil liberties and civil rights could be studied and written about without a focus on the Supreme Court, but I bet it could be done.

Perhaps, though, it should not be done. In recent years scholars of constitutional law have produced a substantial body of work in which the Supreme Court doesn't really play much of a role. I have in mind the application of moral philosophy to constitutional law. This body of work does not encourage one who thinks that lawyers should look elsewhere than the courts for enlightenment about constitutional law. The difficulty is that legal academics think that you can throw a little "equal concern and respect," a little Wittgenstein, a little whatever-else, into the pot, stir carefully, and come up with something that we should regard as real philosophy. This is the current version of what I once called the "lawyer as astrophysicist" assumption: We are people who have a generalized intelligence, and can absorb and utilize the products of any other discipline in which we happen to become interested. One has to read no more than the work of serious philosophers like Thomas Nagel in *The View from Nowhere* or Derek Parfit in *Reasons and Persons* to appreciate how embarrassingly amateurish our pseudo-philosophical efforts are.

What follows should perhaps be taken with some suspicion, given my preceding comments about the use of philosophy in recent constitutional scholarship. It may be that a useful terrain for constitutional scholarship would retain the focus on the Supreme Court, but begin to treat the cases as empirical phenomena rather than normative statements. This is, in my view, a job for intellectual historians, and maybe we will be as incompetent at intellectual history as we have been at philosophy. Still, I wonder who else might address a question like this one, which has puzzled me recently: How come the Supreme Court has become attracted to relatively formalistic analyses of separation of powers questions (but not entirely so, as *Commodities Futures Trading Commission v.*

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. LOFGREN⁹

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

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.