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Constitutional Scholarship: What Next?

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be used in conjunction with a text, paperbacks, assigned chapters and articles, or some combination thereof. My mind runs fondly back to the collection (now out of print) edited by James Morton Smith and Paul Murphy, perhaps because it helped introduce me to the field nearly three decades ago.

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A preliminary comment. In most fields there is a range of opinion among competent practitioners as to what constitutes the current agenda for the field. In that, I feel safe in predicting, this symposium will prove constitutional studies to be no exception. Yet constitutional studies differs from many other disciplines, e.g., biochemistry, in that in the latter all competent observers share a fairly common picture of where the field currently is, and of what the major unsettled issues are. There may be disagreements over priorities among the important questions, or over the proper leads to follow in examining them, or at worst, a fairly well-structured set of alternative conceptions of the current state and agenda for the field resting on what have come to be called "competing paradigms." But constitutional studies is not so well-structured as that, with the result that any attempt to speak of a current agenda is rather personal. That at least is true of my comments.

Today constitutional scholars face two tasks: to repoliticize the Constitution and to depoliticize constitutional law. The Bicentennial season has encouraged many of us to pay close attention to constitutional history, and especially to the doings of the founders. One of my most abiding conclusions is how different our approach to the Constitution is from that of the founders. We are far more legalistic than they—witness the fact that most scholarly discussions of the Constitution occur in law journals. But the founders, though many were trained as lawyers, and a few even practiced law, approached the Constitution not in a legalistic but in a political manner. I do not mean, by the way, to endorse the view of, e.g., John Roche, that the founders were merely local pols cutting deals, but rather to insist that they saw the Constitution preeminently as a part of political science, as a way of structuring political life. The kinds of argument and reasoning one finds in the Constitutional Convention or *The Federalist* have, for the most part, much more in common with the kinds of questions political scientists ask than those lawyers ask. The question about representation, for example, is not the abstract one about rights, but rather the political one of

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the consequences for the operation of legislative bodies of different systems of representation. The founders always took their bearings from the principle, "We must always remember it is a political society we are shaping" as more primary than, or as the real meaning of, John Marshall's more famous maxim in *McCulloch v. Maryland*.

This is not to say that constitutional scholars ought to start reading the *American Political Science Review* more often; it is remarkable how small a part constitutional studies play in contemporary political science. This contrasts markedly, not only with the age of the founding, but with the situation at the time of the Centennial of the Constitution one hundred years ago, when the leading constitutional scholars were the same people as the leading political scientists. One might think of John W. Burgess. Political science, for the most part, has also moved away from the perspectives of James Madison and company. How that happened is a very long story, having to do with the great watershed of the Progressive Era, which reshaped both political science and the dominant scholarly view of the Constitution.

Both political science and constitutional scholarship suffer from this depoliticization of the Constitution. The Constitution is too often seen in a merely legalistic manner, or simply as the occasion for an exercise in one or another new scheme of moral theory—abstract, moralistic pronouncements with little thought for the broad political meaning of a constitution. And political scientists too often lose the benefits of the institutional or structural insights that the founders' constitutionally based political science provides—although it is heartening to note that within political science there has appeared a movement called "the new institutionalism," which takes the political science of *The Federalist* very seriously.

Paradoxically, the depoliticization of the Constitution has contributed to the politicization of constitutional law. A properly political understanding of the Constitution would stand as a guard against the now open and almost unabashed effort to use the Court as a vehicle for furthering political interests and moral preferences which cannot be or cannot so easily be furthered in the normal political ways. As I write, the debate over the nomination of Judge Bork to the Supreme Court has only begun. It is still some weeks before the Senate hearing, but the signs are already clear that the debate is and will be openly political in a way that appears unprecedented, at least in modern times. I think, for example, of the confirmation hearing of Louis Brandeis. Political concerns, that is, concern for the likely direction of Brandeis's votes on important constitutional questions surely animated many of the participants in

those hearings—Brandeis had been very outspoken, controversial, and partisan in the years before his nomination, but all parties showed a reluctance to address these political concerns openly and candidly. Instead people spoke of Brandeis's character and temperament first and of the nature of the Constitution and the judicial order second. That is, the criteria brought forward in the discussion of Brandeis were noticeably different from the criteria that would be brought forward to discuss a candidate for the Senate or presidency. But in Judge Bork's case it seems that this will not be so. Judge Bork is opposed, for example, because he is said not to favor the interests of blacks or women; or favored because he opposes abortion. It has already been noticed that the Bork nomination has led to the mobilization of interest groups on an unprecedented scale.

To some degree the difference is merely one of openness and candor, but that is not the whole of it, and even that difference is significant. The openly political terms of the discussion reflect a number of developments—some deriving from the Supreme Court's well-documented political activism of the past few decades, and some deriving from changes in the way scholars have come to conceive of law, of constitutions, of courts, and of interpretation. I take as an unargued premise that in the long run the Court will be unable to make any positive contribution to American political life if the open politicization of constitutional law continues. As others before me have wondered, would the American people retain their confidence in the Court if they came to understand the Court in the way that legal scholars do? The Bork debates may begin to supply an answer to that question.

Depoliticizing constitutional law surely cannot be the accomplishment of constitutional scholarship alone—the Court itself has very much to do with it. But constitutional scholarship has its part to play. The part-in-chief, I am inclined to think now, is to work toward transcending the current terms of discussion of the Court's role: interpretivism vs. non-interpretivism. Neither pole of this bipolarity is a sensible way to discuss what courts do and should do. Many efforts are afoot to move beyond these alternatives, the most important of which probably is the considerable corpus of Ronald Dworkin. But Dworkin's is not altogether satisfactory—in his own hands at least, his position becomes manifestly political. Other recent works that come to mind which contribute in a positive way are Gary Jacobsohn's *The Decline of Constitutional Aspiration* and Christopher Wolfe's *The Rise of Modern Judicial Review*. It seems to me that within constitutional studies, narrowly defined, this is

the kind of work that must go forward. It can and must go forward in a number of different ways—through historical studies, especially of the founding and the fourteenth amendment, through studies of the contemporary Court, and through more philosophic investigation into the nature of interpretation of the sort Dworkin has so interestingly undertaken.

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The Bicentennial has come and gone, and like other such great national anniversaries it has produced a legacy of both popular schlock and scholarly substance. Recently, we have seen published several new books on events at the Philadelphia Convention, a wonderful (if windy) work by Michael Kammen on the cultural history of the Constitution, Forrest McDonald's breathless (and sometimes historically controverted) examination of the intellectual roots of the document, Philip Kurland and Ralph Lerner's poorly organized *The Founders' Constitution*, and a badly needed edition of Herbert Storing's *The Complete Anti-Federalist*. There have also been numerous special issues of history, political science, and law journals devoted to some aspect of the constitutional order. Project '87, under the relentless leadership of James McGregor Burns and Richard B. Morris, succeeded in typical academic fashion in plodding in dull ways over mostly arid scholarly ground, although it did manage, through *This Constitution*, to persuade academics to produce clearly written articles shorn of the usual mumbo-jumbo trappings that accompany so much scholarly writing about the document.

The times being such as they were, the political Right had the good fortune of being able to make its arguments about original intent during a year when public and scholarly attention was already given over to what the framers intended. The Straussians have enlivened recent constitutional debate, although their pretensions to revealed historical truth have a hollow ring. Moreover, we should be glad, as scholars, for Attorney General Edwin Meese, since he provided such a convenient target for attacking much of the simple-mindedness that surrounded the Bicentennial. The anti-Meese literature has grown apace, and with it has come a new appreciation for the indeterminacy and ideological cast of so much of the scholarship on the Constitution. Given the nature of our polity, it is probably a healthy sign that scholars of all political persuasions believe that they are right about the Constitution's meaning, even if

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