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CONSTITUTIONAL SCHOLARSHIP: WHAT NEXT?

As a belated contribution to the Bicentennial, we offer this symposium on the state of constitutional scholarship. Instead of a few long articles, we decided to solicit a relatively large number of shorter responses. We told each contributor that his evaluation of constitutional scholarship could be general or specific but in either case should be brief and informal.

RICHARD A. POSNER¹

Constitutional scholarship is a weak area of academic law, despite the prominence and prestige of its leading figures. Most of what passes for constitutional scholarship is heavily tendentious commentary on recent decisions by the Supreme Court. If the scholar agrees with the political thrust of the decision, he will go easy on its failings of craft; if he disagrees with the political thrust, he will not only expose but, more likely than not, exaggerate those failings.

What passes for "theory" in constitutional scholarship is a tired debate nominally among different schools of constitutional interpretation, but actually among just two groups, the free interpreters and the loose interpreters, both of which come in left-wing and right-wing versions.

As is now obvious to just about everyone in and out of the legal profession, the Supreme Court is a political court, at least so far as constitutional law is concerned. Most Justices feel only moderately constrained in the constitutional area by text, history, and precedent. They operate most of the time in that area as political actors, not as judicial craftsmen in anything like a conventional sense.

One might therefore think that constitutional scholarship would be heavily infused by political science, but one would be in error to think so. With rare exceptions such as the late Alexander Bickel, constitutional scholars bring to their work the skills and experiences of lawyers, nothing more. Occasionally these scholars nevertheless manage to produce remarkable work; an example is

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John Hart Ely's justly famous book on judicial review. But the occasions are rare, considering the vast spillage of ink every year on constitutional commentary. Some constitutional scholars have plunged in recent years into the murky depths of moral and political philosophy and literary theory, with generally dismal results. So protean are these fields of learning in relation to constitutional law that each scholar's "theory" is a faithful rendition of his personal political values.

How might the situation be improved? I have only one suggestion, and that is a shift in emphasis from normative to positive analysis. Instead of endless debate over the soundness of recent Supreme Court decisions, I recommend disinterested research on constitutional law conceived of as a social phenomenon to be studied, not necessarily to be criticized or changed. Here are some examples of the type of research that I have in mind:

1. Studying the effect of the separation of powers on the cost and output of public services, the rate of public policy change, and the turnover of government officials. Is separation a splendid innovation, or (as the refusal of most foreign nations to imitate it suggests) a hindrance?

2. Studying the impact of Supreme Court decisions on state and local government, on political parties, and on campaigns for public office; on the number of defamation suits; on religious diversity; on the crime rate; and on other public and private phenomena that constitutional decisions affect. International comparisons might be feasible in some cases. For instance, one might compare the level of free speech in the U.S. and in Western Europe, and consider what this comparison might suggest for the actual effects of the free speech clause of the first amendment. The broad question at which these examples (and those in paragraph 1) hint is, just what *difference* has our vaunted constitutional system made? Are other countries at our level of economic development plagued by cruel and unusual punishments, *ex post facto* laws, bills of attainder, etc.?

3. Analyzing how important it is to have judicial review of the constitutionality of legislation. If there were no judicial review of federal statutes, would a significant number of unconstitutional federal statutes be passed? The experience of England suggests that the answer is no. And what about state statutes? Would we have a national common market without the "negative" commerce clause?

4. Explaining the growth in the fraction of cases on the Supreme Court's docket that are constitutional cases.

5. Exploring the impact of Supreme Court constitutional de-

cisions on public opinion. Did *Brown v. Board* lead to greater or less tolerance of blacks by whites? Did *Roe v. Wade* reduce or increase public hostility to abortion? Does the Court form or follow the values of the public or particular segments of the public? Has the Court a constituency to which it caters in its constitutional decisions? Are its decisions at a particular slice in time politically coherent, like the platform of a political party? Political scientists have paid some attention to these questions; legal scholars, very little.

These and many other questions that could be put are designed to draw attention away from endless inconclusive debating over the pros and cons of particular decisions and toward a study of constitutional law as a social institution having causes and effects. The serious pursuit of these questions would require constitutional scholars to equip themselves with new analytical tools, to take a less tendentious and political view of their subject, to become more—scholarly.

PAUL MURPHY²

I have been reading a doctoral dissertation which one of my Ph.D. advisees is completing and was intrigued with a statement by a Kentucky judge, William W. Blair, in 1822:

Judges . . . do not sound the alarm upon any supposed violation of the constitution; nor do they claim the right to issue their injunction to arrest legislative proceedings. . . . They do not undertake to declare any statute unconstitutional which can be carried into execution without their intervention. . . . It is only when the aid of judges is called in to assist in executing (statutes) that they claim the privilege of examining into the constitutionality of such enactments. They refuse to lend their assistance and to become *participes criminalis* in a violation of the constitution; they deny to the legislature the power to compel them to become agents in the perpetuation of a crime. Surely this is not an assumption of superiority, but rather an assertion of equality

Looking at constitutional scholarship from the perspective of a constitutional historian, the quote suggests a number of needs. Since the “constitutional revolution” of the late 1930s and especially since the mandate of Harlan Fiske Stone to the Court in his famous footnote 4 in the *Carolene Products* case of 1938, to focus upon the “care and feeding” of the rights of “discrete and insular minorities,” constitutional historians have tended mainly to follow the Court in its gradually reoriented concern for civil liberties and civil rights. All to the good. But as a result there have been some casualties of underemphasis and underconcern. Stone, as you will recall, urged

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