
Some Thoughts on Political Structure as Constitutional Law

The Honorable John J. Gibbons *

Certainly I am going to endorse everything that Professor Levinson has said about Professor Lynch's wonderful book. It establishes beyond question that there was no real consensus among the so-called founders about what the Constitution meant and thus, Professor Levinson is undoubtedly right that constitutional law should be taught as an ongoing negotiation.

I will add one more reason why this must be the case. We talk about constitutional law, but law divorced from sanction is not law at all. It is perhaps scholarship, but unless constitutional law has a sanction it is nothing more than rhetoric; the ability to sanction a judgment depends completely on the will of the current political majority. The courts have no power to enforce a judgment absent that will. And thus, the very question of intentionalism in constitutional law seems to me to be a bit illogical.

During the five decades I have been a lawyer, original intent, or strict construction, has been advanced—primarily by critics of the federal judiciary—as the only sound constitutional doctrine. In particular, critics of an allegedly activist Supreme Court have most frequently taken umbrage at the Supreme Court's recognition of certain individual autonomy interests as constitutionally protected from regulation by the democratically elected branches of federal or state government.

Perhaps the most influential of them has been Judge Robert H. Bork, whose nomination to the Supreme Court in 1987 produced extended hearings by the Senate Judiciary Committee on the appropriate interpretive posture of judges faced with a constitutional law argument. With considerable erudition, Bork passionately espoused the view that any approach other than the search for original intention of the constitutional draftsmen was illegitimate because it placed judges in the role of lawmakers rather than neutral arbitrators.¹

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¹ See *Nomination of Robert H. Bork to be the Associate Justice of the Supreme Court of the United States: Hearings Before the Sen. Comm. on the Judiciary*, 100th Cong. 103-04

Bork and others before him objected to interpretive approaches that permit judges to look beyond original intent—principally on the ground that judicial review, the authority of the court to declare enacted legislation unconstitutional, is severely undemocratic. *Marbury v. Madison*,² decided in 1803, was criticized by Thomas Jefferson and members of his party almost as soon as it was announced. Scholarly commentary about the unique American contribution to political science—an independent judiciary exercising the power of judicial review—has been the mainstay of law reviews since their invention in the late nineteenth century.

Professor Lynch's book, *Negotiating the Constitution: The Earliest Debates on Original Intent*,³ looks at original intent from a different perspective. As Professor Levinson observed, Lynch's study covers the period in the nation's history prior to *Marbury v. Madison* and thus, prior to the establishment of the Court's role as the unique and final expositor of the meaning of the written Constitution. His study begins with the compromises made during the Philadelphia convention.⁴ It explores the arguments made during the state ratifying conventions.⁵ It ends with Jefferson's designation as President by the House of Representatives in March of 1801.⁶

Thus, it covers the uses made of constitutional argumentation by members of the federal executive and the federal legislature during the three terms of the Washington and Adams presidencies. In those twelve years the role of the Article III courts in the formation of the new national government was less significant than the role of the two political branches.

One interesting point about the pre-*Marbury v. Madison* period is the relative paucity of legislative activity compared to later periods. Lynch identifies six enactments that raised issues of constitutional interpretation:⁷ a law imposing on state officers a uniform oath of allegiance to the Constitution; the law recognizing the President's power to remove incompetent department heads in the executive branch; the law establishing a national bank; laws appropriating federal funds for the general welfare; the Alien Act;⁸ and the Sedition Act.⁹ Each of these laws presented the question whether, because their subject matter was not specifically

(1987) (statement of nominee Judge Robert H. Bork).

² 5 U.S. (1 Cranch) 137 (1803)

³ JOSEPH M. LYNCH, *NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT* (1999).

⁴ *See id.* at 8-30.

⁵ *See id.* at 31-49.

⁶ *See id.* at 216-17.

⁷ *See id.* at 2-3.

⁸ 1 Stat. 570 (1798) (expired 1800).

⁹ 1 Stat. 596 (1798) (expired 1801).

enumerated in the list of federal legislative powers in Article I, Section 8, they were beyond the political power of the national government.

With the exception of the Sedition Act, which restricted expression and thus presented a First Amendment issue, none of the six enactments presented what we would today identify as a human rights issue. Whether or not the Necessary and Proper Clause¹⁰ authorized congressional legislation on each of these other subjects, obviously some political organization could legislate most of them without infringing the human rights of individuals affected by the law. For example, states could, and indeed did, prescribe oaths, charter banks, and appropriate funds for general welfare. Which political body, state or federal, could regulate with respect to immigration (the Alien Act) was a matter related quite closely to the importation of slaves. But clearly, some political organization could legislate to control the borders. These were all what we who write about constitutional law refer to as federalistic questions. The dispute over the presidential removal power was, in contrast, a separation of powers dispute between branches of a single political organization, the federal government. Thus, except for the Sedition Act, all of the disputes over legislative authority in the first twelve years of the national government were over matters of political power, not matters of individual liberty or autonomy.

What Professor Lynch's study makes perfectly clear is that the politicians in the executive branch and the federal legislature used the rhetoric of strict construction when it suited their political purposes and abandoned that rhetoric when it did not. James Madison, in particular, advancing the interests of the Virginia planters who were his political power base, said different things at different times about the limits of federal government power and about the respective roles of the federal executive and the federal legislature.

Each of the six pieces of legislation that were enacted during the first three presidential terms resulted from a give and take in the political branches of the federal government. The federal courts were simply not involved.

That, I suggest, is precisely how federalism issues and separation of powers disputes should be resolved. They should be resolved by our chosen representatives, in the executive and legislative branches of the federal government, in place at that particular time. The great advantage of recognizing the authority of the political branches to determine such political issues is that their decisions are not final. Because of the periodicity of representation in the Senate, the House of Representatives, and the Presidency, those participants in the legislative process cannot bind

¹⁰ U.S. CONST. art. I, § 8, cl. 18.

their successors.

Thus, to use an example from the first Congress, the decision to create a federally-chartered central bank was reconsidered when a later Congress refused to re-charter it. That decision was in turn reconsidered in the aftermath of the War of 1812 when Congress once again re-chartered a federal central bank. The Jacksonian Democrats later put the second bank of the United States to death in 1832, and federal central banking was not restored until the Federal Reserve Bank was created in 1913.¹¹

Today, basking in the glow of an unprecedented period of strong economic growth and limited inflation, most of us wonder how anyone could doubt the constitutional authority of Congress to authorize regulation of the nation's money supply by a central bank. The legislative decision to charter the first and second banks look not only constitutional, but much wiser than the decisions that had put them out of business. Leaving the control of the money supply in the hands of state-controlled institutions was never a sound policy. However, at various times the representatives in control of the federal legislative process thought that it was. They were free to act on that insight or lack of insight until their successors thought better of it.

That is why Justice Marshall's opinion in *McCulloch v. Maryland*¹² is so sound. Justice Marshall did not suggest that the nation must have a central bank, although he probably thought it would be hard to prosper without one. Rather, he recognized that the elected representatives of the people could decide such a policy issue from time to time, and that once those representatives had spoken, no state could frustrate their decision by hostile legislation.¹³

This same recognition of the periodicity of representation appears in Marshall's opinion in *Gibbons v. Ogden*.¹⁴ That opinion dealt not with the power of the federal government, but with the power of the states to regulate interstate commerce, despite the grant to Congress of an express constitutional authority to do so. It was argued that the existence of this express grant meant that there was no state power to regulate interstate commerce.¹⁵ Justice Marshall was careful, however, to rest the holding on the Licensing and Enrollment Act, a federal statute. Thus, the court was

¹¹ See Richard A. Givens, *The Banking and Currency Power, Technology, and the Future of the Market Economy*, 12 *COMPUTER & HIGH TECH. L. J.* 381, 390 (1996) (citing Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. §§ 221-522)) (noting that "[a] central banking structure was not recreated until the Federal Reserve system was established in 1913").

¹² 17 U.S. (4 Wheat.) 316 (1819).

¹³ See *id.* at 324.

¹⁴ 22 U.S. (9 Wheat.) 1 (1824).

¹⁵ See *id.* at 189-91.

deferring to the political branch's decision as to the ultimate reach of state power.

Five years later in *Wilson v. Black Bird Creek Marsh Co.*,¹⁶ what was implicit in *Gibbons v. Ogden* became explicit. Where Congress had not legislated, Delaware's regulation of interstate commerce on a navigable stream was valid.¹⁷ In 1946, the Supreme Court in *Prudential Insurance Co. v. Benjamin*¹⁸ confirmed that the political branches of the federal government have the final say on state power to regulate interstate commerce.¹⁹ Nothing that the court has said since 1948 casts doubt on that eminently sound proposition. The court, however, did take a wrong turn with respect to the equal protection clause in *Metropolitan Life Insurance Co. v. Ward*.²⁰

Unfortunately, the Supreme Court's recent approach with respect to federal legislative power has not been as enlightened as that of the majority position in the political branches during the first three presidential terms. In *National League of Cities v. Usery*,²¹ a narrow majority held that Congress lacked the power to require state municipal corporations to comply with the Fair Labor Standards Act, which was garden-variety federal economic legislation that had been routinely upheld for over four decades.²² That radical departure from prior deference to decisions of the political branches on federalism questions was short-lived. It was overruled nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*.²³

The return to reason in 1985, when Justice Blackmun changed his position, proved not to be permanent either. An activist majority in *United States v. Lopez*²⁴ invalidated a federal statute prohibiting the possession of firearms in a school zone on the ground that the statute invaded the reserved powers of the states. The court refused to defer to the determination of the political branches as to what was necessary and proper to protect interstate commerce from firearms.

In *Printz v. United States*²⁵ the court invalidated a federal statute imposing on state officials the duty to register firearms, again relying on the absence of federal authority to affect the reserved political powers of

¹⁶ 27 U.S. (2 Pet.) 245 (1829).

¹⁷ *See id.* at 252.

¹⁸ 328 U.S. 408 (1946).

¹⁹ *See id.* at 423.

²⁰ 470 U.S. 869 (1985).

²¹ 426 U.S. 833 (1976).

²² *See id.* at 851.

²³ 469 U.S. 528 (1985).

²⁴ 514 U.S. 549 (1995).

²⁵ 521 U.S. 898 (1997).

the states.

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,²⁶ the Court held that Congress lacked the power to require the states to comply with the United States patent laws. This, despite the fact that congressional authority to award patents is expressly enumerated in Article I, Section 8, Clause 8, and that patents are a federally created property interest. According to the majority, neither the Commerce Clause²⁷ nor the Enforcement Clause²⁸ of the Fourteenth Amendment authorized that legislation.²⁹

Now, none of the cases I have just mentioned involves any human rights issues. In each instance, some political power could, without unduly invading individual autonomy, lay down a rule of decision. What the court did in each case was take sides in what was, at most, a political dispute among competing groups over the appropriateness of a given policy. That taking of sides in a political dispute is illustrated graphically in *National League of Cities* and in *Garcia*, where the issue was whether or not the court would take away from labor unions the lobbying victory that they had won in the Congress.

As Justice Blackmun observed in *Garcia*, the principal and basic limit on the federal commerce power is that which is inherent in all congressional actions;³⁰ the built-in restraint that our system provides is through state participation in federal governmental action. The political process insures that laws that unduly burden the states will not be promulgated. Furthermore, if they are, the people who voted for them will be replaced in the next election.

Thus, Justice Blackmun in *Garcia* heeded the wise counsel of Professor Jessie H. Choper³¹ and others that the court should defer to the political branches the constitutional issue of whether federal action is beyond the authority of the central government and thus violates state's rights.

This is as true of Patent Clause legislation as of Commerce Clause legislation. It is as true today as it was during the pre-*Marbury v. Madison* era when Hamilton's vision of the powers of the central government prevailed.

In the final sentence of his marvelous book, Professor Lynch observes

²⁶ 527 U.S. 627 (1999).

²⁷ U.S. CONST. art. I, § 8, cl. 8.

²⁸ U.S. CONST. amend. XIV, § 5.

²⁹ See *Florida Prepaid*, 527 U.S. at 639.

³⁰ See *Garcia*, 469 U.S. at 552.

³¹ See *id.* at 555 (citing J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 177-78 (1980)).

that it is Hamilton who deserves the title “Father of Constitutional Law.”³² The anti-Federalist activists on the Supreme Court today must have poor Alexander Hamilton spinning in his grave.

³² See LYNCH, *supra* note 3, at 227.