

Liberal Constitutional Theory at the Cross Roads:
Or, Out with Judge Hercules, In with Judge Milquetoast
Or, Going the Whole Hog: Court Curbing As Civic Virtue

My charge today is to discuss Nancy Malveety's judicious essay "The Rehnquist Era and the Court's Commentators." To do so, I want to pair her essay with another, penned by my good friend and NYUSL colleague Barry Friedman. Barry's essay, entitled "The Cycles of Constitutional Theory," appeared in 2004 in *Law and Contemporary Problems*.

The reason why I wish to pair the two essays is straightforward: first, they address essentially the same issue and make somewhat similar points. Nancy provides more details and nuance, esp. for the Rehnquist period. But Barry's adds historical perspective and sweep. And, his portrait of constitutional theory is painted in somewhat bolder colors and thus makes a more dramatic backdrop for my discussion.

Thus, Nancy concludes that a legacy of the Rehnquist Court is an alteration in tone or a shift in the balance of opinion within the community of constitutional scholars. Barry simply begins with the assertion (or admission), "Constitutional scholarship is inevitably a reaction to what is occurring today in constitutional law."

And, he quotes Richard Posner:

"Constitutional theorists are normativists; their theories are meant to influence the way judges decide difficult constitutional cases; when the theorists are law-trained, as most of them are, they cannot resist telling their readers which cases they think were decided consistently with or contrary to their theory. Most constitutional theorists, indeed, believe in social reform through judicial action."

Now, Barry is careful to state clearly that constitutional theory is not *just* ideologically driven, results-oriented, advocacy scholarship. Constitutional theory, he states, is "still very scholarly. Events may dictate what is written about, and ideology may influence the perspective taken by each individual author, but the output is a genuine contribution to thought about constitutional law."

Still, the fact that constitutional theory either sets itself against recent decisions, or attempts to justify them, means that one's ideological stance is substantially determined by the polarity of the Supreme Court. Consequently, the constitutional position of liberals and conservatives flip-flops in very predictable fashion, depending on the winds blowing from the Court.

Barry cites chapter and verse to chart these flip-flops over the 20th century. The history is so familiar that recapping it is hardly necessary:

Pre 1937 Court: Economically Conservative Liberals favor judicial restraint,
conservatives favor substantive due process

Warren Court: Socially Liberal Liberals favor “living constitution”, conservatives favor judicial restraint

Rehnquist Court: Moderately Conservative Liberals begin to move to judicial restraint, conservatives toward judicial activism

Show picture

This moderate move to conservatism stimulated liberals to temper their activism:

See, e.g., Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 302 (2002) (finding that “[t]he current Court increasingly displaces Congress's view with its own without much more than a passing nod to Congress's factual findings or policy judgments”); *id.* at 319-35 (arguing for revival of the political question doctrine and deference to Congress);

Stephen M. Griffin, *Judicial Supremacy and Equal Protection in a Democracy of Rights*, 4 U. PA. J. CONST. L. 281, 281 (2002) (“Even before the controversy stirred by *Bush v. Gore*, a number of scholars had initiated a debate concerning the long-term viability of judicial supremacy. Post-*Bush*, these arguments may well receive a more respectful hearing.”);

Larry D. Kramer, *The Supreme Court 2000 Term-Foreword: We the Court*, 115 HARV. L. REV. 4, 14 (2001) (“We have moved from a world in which the interpretive authority of the political branches was clear and that of the Supreme Court questionable and uncertain, to one in which the Court's authority stands unchallenged while that of everyone else is under siege. . . . [N]othing similar [to the original and historical reasons for judicial review] justifies the drift to judicial sovereignty-which appears to be based on a fundamental misunderstanding of constitutional history, fortified by the displeasure some of the Justices feel with Congress's performance.”);

Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 444 (2000) (“We question the court-centered model of constitutional interpretation that these decisions assume. . . . We argue that this history [of the relationship between Congress and the Court in shaping Equal Protection] justifies a continuing role for democratic vindication of equality values.”).

Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2599 (2003) (sketching “an understanding of constitutionalism and judicial review that rests upon popular acquiescence, and is more strongly tied to democratic electoral processes than most legal scholars acknowledge or believe to be the case”); Friedman, *supra* note [31](#), at 1387 (“[T]he work of constitutional judges

must have both 'legal' and 'social' legitimacy. . . . ?If those familiar with the Court's decisions do not believe those decisions to be socially correct, the work of judges will be seen as illegitimate.").

What happens next?

Picture again . . . if we are soon to face a pre-1937 Court, then predictably liberal constitutional theorists will, and will feel compelled, to go much farther than the mere hurumphing we've seen so far. Or the mild shift in tone noted by Nancy.

Back to the future

Picture of court – curbing

Tushnet shows the way . . .

Quotes Lincoln favorably: “the Constitution belongs to the people. Perhaps it is time for us to reclaim it from the courts.”)

This shift may be a little embarrassing for liberal constitutional theorists who will have to stand everything they've said for the last 40 years on its head. Intellectually, they will find themselves in strange company:

Bork in 1968: ("What, after all, justifies a non-elected committee of lawyers in overriding the policies of the elected representatives of the people?").

However, embarrassment probably won't stop judicial conservatives from reviving substantive due process if the Congress becomes Democratic again.

To help liberals overcome their understandable embarrassment, I offer the following Ten Step Program for Recovering Liberal Constitutionalists (actually, its only 8 steps, which should make it easy).

Ten (8) Step Program for Recovering Liberal Constitutionalists

1. Get social scientific

Attitudinalism/legal realism is now OK

See, e.g., FRANK J. GOODNOW, *SOCIAL REFORM AND THE CONSTITUTION* 247 (1911) ("What the courts actually do in cases in which they declare a law of this sort unconstitutional, is to substitute their ideas of wisdom for those of the legislature, although they continually say that this is not the case."); L.B. Boudin, *Government by Judiciary*, 26 *POL. SCI. Q.* 238, 267 (1911) ("Each case is supposed to stand 'on its own merits,' which . . . simply means that each law is declared 'constitutional' or 'unconstitutional' according to the opinion the judges entertain as to its wisdom."); W.F. Dodd, *The Growth of*

Judicial Power, 24 POL. SCI. Q. 193, 195 (1909) ("The courts seem now to have reached the point of treating as unconstitutional practically all legislation which they deem unwise."); Eaton S. Drone, *The Power of the Supreme Court*, 8 FORUM 653, 657 (1889) ("Consciously or unconsciously, honestly or otherwise, judges on the supreme bench have been controlled or influenced by their political beliefs, by partisan bias, by public sentiment . . . [by] the theories of the party with which they have acted or may sympathize."); Learned Hand, *Due Process of Law and the Eight-Hour Day*, 21 HARV. L. REV. 495, 501 (1908) ("A vote of the court necessarily depends not upon any fixed rules of law, but upon the individual opinions upon political or economic questions of the persons who compose it . . ."); William M. Meigs, *The Relation of the Judiciary to the Constitution*, 19 AM. L. REV. 175, 191 (1885) (concluding that a judge's decision in a case "depends as a matter of fact upon his pre-conceived views of the political history and tendency of his country; and these, again, have been enormously influenced by what may be his theory and belief as to the best and most advisable form of government"); Theodore Roosevelt, *Nationalism and the Judiciary*, 97 OUTLOOK 532, 534 (1911) ("But in the concrete there has often been much ingenious twisting of the Constitution, doubtless entirely unconscious, in order to justify judges to their own conscience in deciding against a given law."); *Judges as Statesmen*, NEW REPUBLIC, Sept. 12, 1923, 62, at 63 (asserting that the Supreme Court "will have earned its own downfall by attempting to read the personal and professional sympathies and antipathies of its members into the law of the land").

2. Rediscover democratic theory

Vox populi – hey, its not so bad, according to plenty of big-shot normative theorists.

3. “Deliberation” means legislatures, not courts

Legislatures can be virtuous centers of deliberation and representation, not (just) sinkholes of vice.

4. Study history selectively

Judicial review = Dred Scott

Progressives Are Good

5. Step into the giant shoes of Edward S. Corwin

But this time: court curbing rather than court packing

Write the court curbing bills for congressional liberals – show them how to do it.

Then, explain why court curbing represents civic virtue.

6. Save the Court by scaring the hell out of the court

7. Prepare for court packing

“The Frankfurter Society” rather than the “Federalist Society”

8.

9.

10. If you win

Remember that consistency is the hobgoblin of little minds. Viva Earl Warren!

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