EDWARD J. ERLER[24]

There can be little doubt that the central question confronting students of the Constitution has undergone a radical transformation in recent years. Pundits are fond of remarking that the Constitution has been taken out of constitutional law. Indeed, the main question agitated by constitutional scholars is no longer *how* the Constitution should be interpreted but *whether* it should be interpreted. The current debate over constitutional interpretation divides the universe between "interpretivists" and "non-interpretivists." The use of these terms alone is almost sufficient evidence that constitutional studies have reached—if not their lowest point of declension—then certainly a very low point indeed.

No clearer example can be found of how the Constitution has disappeared from constitutional debate than Justice William Brennan's October 1985 speech at Georgetown University, entitled "The Constitution of the United States: Contemporary Ratification." His argument is a less sophisticated—and therefore more revealing—version of the regnant orthodoxy shared by the leading academic interpreters. Brennan scornfully rejects the argument that the Constitution must be understood in light of the intent of its framers as "facile historicism." The most that can be said in this regard is that "the Constitution is a sublime oration on the dignity of man, a bold commitment by a people to the ideal of libertarian dignity protected through law." And since "the demands of human dignity will never cease to evolve," the Constitution itself must continually evolve to meet these new demands—demands that, for the most part, will be articulated by the courts. The courts thus serve as speech writers continually updating the "sublime oration" symbolized—and only symbolized—by the Constitution. According to Brennan, the courts are best placed to spell out the progressive demands of human dignity because—unlike the elected branches of government—the courts are not responsible to what Jesse Choper has termed the "self-absorbed and excited majoritarianism" that dominates the more political departments.

There is, however, one "fixed and immutable" demand of "human dignity" that does not evolve—that "capital punishment is under all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments." Curiously, the one "fixed and immutable" demand in the universe of otherwise constantly evolving demands flies in the face of the literal language of

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the Constitution itself.[25] It is almost embarrassing to point out that the fifth amendment was ratified contemporaneously with the eighth. The fifth amendment not only refers to "*capital* or otherwise infamous crime," but also provides that no person shall "be deprived of life, liberty, or property, without due process of law." The clear meaning of the latter phrase is that *with due process of law* persons *can* be deprived of life.[26] Since the only "immutable" point in Brennan's universe of constitutional values contradicts the clear and unequivocal language of the Constitution, we are forced, not indeed to ask the somewhat more sophisticated question of whether we have an unwritten constitution, but the much more simple-minded one of whether we indeed have a *written* Constitution!

Chief Justice Marshall noted in *Marbury* that Americans deemed "a written constitution" as "the greatest improvement on political institutions." The Constitution, Marshall continued, was an act of the "original right" of the people "to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness." This "is the basis on which the whole American fabric has been erected," and the "principles . . . so established are deemed fundamental . . . and are designed to be permanent." Thus, for Marshall, the Constitution, as a written declaration of the people's "original right"—"a very great exertion; nor can it, nor ought it, to be frequently repeated"—to secure their safety and happiness, establishes the fundamental and permanent principles of constitutional government. A scholarship that takes constitutional government seriously must therefore be one which intends to elaborate and apply those permanent and fundamental principles in the spirit of the "original and supreme will" of the people which established the Constitution.

The Constitution is organic law and the attempt to translate it into an open-ended text which must continually evolve in response to the demands of various "interests" (albeit disguised as demands of "human dignity") will transform it into mere positive law. As

25. Brennan prudently does not attempt to explain the unexplainable: how it is possible for one "fixed and immutable" point to exist in a universe of constant change and evolution.

26. Brennan's argument is also vulnerable in terms of his own vision of human dignity. A nation that honors those who, by their actions, have demonstrated no regard for human dignity dishonors human dignity itself. If the Constitution stands for the ultimate human dignity of the individual, as Brennan insists, then according honor to those who refuse—by murder or other acts—to recognize the dignity of others would simply convert the Constitution into a "suicide pact." A true regime of human dignity honors those who demonstrate a regard for human dignity by honoring the laws and the Constitution and dishonors those who are either incapable or unwilling to recognize the human dignity or human rights of others. The test of humanity must surely be the *mutual* recognition of human dignity.

Lincoln argued in his debates with Douglas, a constitution based on interest is not a constitution of a free people.

Constitutional scholarship, if it is to be serious scholarship, must be the scholarship of freedom. It must seek, above all, to elaborate the fundamental and permanent principles of the organic will of the people. The permanent principles of the Constitution must, of course, be adapted and applied in different ways in order to meet changing exigencies. But this adaptation and application does not alter or change the principles themselves. There must, therefore, be an element of statesmanship in constitutional studies if those studies are to serve constitutional government. But a scholarship that cannot unashamedly serve the ends of constitutional government—human freedom—does not deserve to be taken seriously. There is a real question as to whether the regnant scholarship of today deserves to be taken seriously.

RODNEY A. SMOLLA[27]

I got the Ollie No-orth
Bob Bo-ork
Bye, Bye, Bye Centennial Blues . . . .
—To Be Played Blues Style, Sung in a
Bob Dylan Nasal Twang

A distinguished professor of constitutional law, from one of the nation's best law schools, recently shared with me, in a candid moment over drinks at a conference, his thoughts on the current state of constitutional law scholarship. He was depressed about it, and he depressed me. I'm now in a constitutional crisis of my own. I suspect I was depressed primarily for two reasons: his diagnosis of the disease rang true, and I saw my own scholarship as dominated by its symptoms.

So, I turn to my colleagues
for what it's all about
Please tell me, John Nowak,
please lay it all out
What were they really thinking,
and why should we care?
What should we be thinking, and
where should we go from here?

I got the Ollie No-orth
Bob Bo-ork
Bye, Bye, Bye Centennial Blues!

The discipline of constitutional law scholarship, it seems, has

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