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JUDGING THE CONSTITUTION

Critical Essays on Judicial Lawmaking

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CRITICAL ESSAYS ON JUDICIAL LAWMAKING

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Scott, Foresman/Little, Brown Series in Political Science
SCOTT, FORESMAN AND COMPANY
Glenview, Illinois Boston London

Library of Congress Cataloging-in-Publication Data

Judging the Constitution.

(Scott, Foresman/Little, Brown series in political science)
Includes index.
1. United States—Constitutional law. I. McCann, Michael W., 1952– II. Houseman, Gerald L. III. Series.
KF4550.A2J83 1989 342.73 88–18590
ISBN 0–673–39897–8 347.302

1 2 3 4 5 6 7 8 9 10—MVN—95 94 93 92 91 90 89

Printed in the United States of America

Acknowledgments

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Judging the Constitution

Dedicated to our families ——————————•

Preface

This book project was conceived in the fall of 1986 from our common interest in several different but overlapping developments. First, it quickly was becoming clear to us that officially sponsored Bicentennial events would do little to generate serious reflection regarding our nation's constitutional legacy. Second, we agreed that the evolving Critical Legal Studies movement had succeeded in catalyzing much interesting intellectual inquiry regarding many aspects of our legal system, but we also recognized that only a few of these scholars focused their study directly on constitutional issues. Finally, we sensed that much similar critical analysis on constitutional lawmaking was emanating from social science departments, but we were frustrated that most of this work was scattered about in academic journals or conference papers that were known only to a limited audience. Hence, there seemed to exist both demand for and supply of scholarship for the collection of critical, progressively oriented perspectives regarding judicial constructions of the Constitution that this book has become.

From the start, this book has been a collective endeavor in every way. The actual shape and substance of the project emerged from discussions between the two of us over many months. From there, many minds have been enlisted in a host of important ways, and our accumulated debts have been many. First, we must thank the specific authors of chapters in the collection for their cooperation and contributions. All these scholars developed new papers, or adapted previous work, specifically for this volume. Moreover, these original drafts were subjected to numerous interventions and requests for changes—sometimes involving as many as five stages of review and revision—from us, the co-editors. These requests for further work were accepted in all cases with admirable professionalism, commitment to the project, and even good cheer—and almost always in expeditious fashion. And, of course, we in turn have learned through these exchanges much more about the nature of lawmaking and constitutionalism than could ever be conveyed in the essays alone.

Second, we would like to thank those who have shared their ideas and judgments on various aspects of the project, from overall design to choices

of contributing authors to the content of specific papers. This includes again the extraordinary services rendered by several of our authors, including most importantly Stuart Scheingold, Lief Carter, and Bill Haltom. We also owe considerable debt to the outside reviewers selected by the publisher, among them especially to Austin Sarat, whose extensive commentary at different stages was invaluable.

We also enthusiastically acknowledge our great appreciation for the efforts made by John Covell, our editor at Scott, Foresman/Little, Brown. He responded to our initial proposal quickly and enthusiastically; he pushed us at every point to rigorous rethinking of our goals; he solicited critical commentary from numerous outside reviewers; and he supported us when we and his supporters doubted the project. Much of what is best about this volume grew from John's suggestions, and he has shown great patience with our inability to fully incorporate or realize other equally sound ideas.

Finally, we want to thank our families, who supported us spiritually and materially as we gave far more of our time to this project than we initially thought would be necessary. We hope that it was worth the sacrifices.

Given the strong supporting cast noted above, we admit that there is no plausible excuse for errors or deficiencies in this volume. We thus have agreed in advance simply to blame each other for those flaws in the book that surely will be identified by some of our readers.

Michael McCann
Gerald Houseman

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Introduction: Constitutionalism and Critical Scholarship

MICHAEL W. McCANN AND GERALD L. HOUSEMAN

The bicentennial celebration of the U.S. Constitution was a bust. Despite the well-meaning efforts of many individuals and groups, the planned events simply failed to generate much enthusiasm.

Such public indifference to constitutional birthday parties is not entirely new or surprising, but specific events in 1987 especially seemed to dampen the celebratory spirit.[1] For one thing, the crass commercialization of the commemoration manifest in tacky television spots, printings of the legal text on cereal boxes, and glitzy ceremonies hardly encouraged reverence among the citizenry. Moreover, the growing list of investigations, indictments, and convictions that riddled the Reagan administration surely nurtured pessimism about claims that our constitutional government is either accountable to the people or bound by the rule of law. Finally, the controversy generated by the nomination and defeat of Robert Bork as Supreme Court justice revealed an all too human reality behind the prevailing myths celebrating an apolitical judicial interpretation of constitutional truths. Judge Bork's impassioned arguments for limiting legal constructions to those consistent with the intentions of the constitutional framers supported mainstream ideals, to be sure. However, his lengthy televised testimony tended to raise more questions than it answered about the actual nature of legal constraints on judicial decision makers, the substantive agenda behind arguments for judicial restraint, and the politically charged character of modern judicial lawmaking activity generally.[2]

This book has developed from the conviction that our constitutional legacy is better served by frank inquiry into these questions than by the formal rituals and patriotic platitudes recycled in most bicentennial events. Specifically, this collection of original essays offers a variety of critical views concerning the character and implications of constitutional lawmaking by the Supreme Court in contemporary American public life. These inquiries are "critical" in several senses. First, most of these authors share the assumption that constitutional lawmaking is an important dimension of our political leg-

acy. In particular, they assume that inherited constitutional discourses play significant roles in structuring, reforming, and legitimating—that is, in "constituting"—both the organizational forms and substantive values that dominate our political system. At the same time, the essays in this collection express parallel critical judgments that prevailing judicial constructions of the Constitution are highly problematic at best, radically deficient at worst, and in any case in need of fundamental reconceptualization. For some authors, the legacy is incomplete or requires only minor adjustments; others urge more systematic transformation. All agree, however, that the status quo is unacceptable and that change within and through the courts can be a resource for the achievement of greater justice and freedom in our society.

THE CRITICAL TRADITION AND LEGAL SCHOLARSHIP

The critical understandings and spirit expressed in this book build upon a long tradition of debate and dissent concerning American constitutionalism. After all, the very idea of a written constitution that exists independent of government itself was a radical departure from inherited European traditions. The actual constitutional document was forged out of considerable debate and disagreement at the Philadelphia Convention and was subjected to even greater criticism, abuse, and rejection by a great many early Americans. Moreover, even many of those who approved the document defended it as a limited instrument deserving neither "sanctimonious reverence" nor immunity from revision by future generations of citizens. As Thomas Jefferson and others argued, a truly democratic nation has both a right and an obligation to "reconstitute" itself continually through principled organizational changes informed by past experience, new challenges, and changing circumstances.[3]

Equally important is the fact that frequent invocations of natural law and natural rights traditions have provided an enduring source of critical dissent and creative departure *within* routine judicial practices of constitutional lawmaking. Indeed, our entire constitutional system from the beginning has displayed a curious mix of formal routines and pragmatic instrumentalism, which has allowed almost ceaseless adjustment in response to changing social conditions and values. For every affirmation of Chief Justice John Marshall's claim that "Courts are the mere instruments of the law, and can will nothing," there are abundant testimonies to the contrary.[4] Some judges have echoed William O. Douglas's comment that he simply favored the underdog whenever possible, while many others have instead cast their votes consistently for the privileged—yet few can contest that such political factors have considerable impact on lawmaking activity.

It was not until early in the twentieth century, however, that critical recognition of these factors was openly voiced, systematically developed at the level of theory, and linked to progressive conceptions of social change in which the political character of judicial lawmaking was acknowledged. The

vanguard of this movement, the so-called "legal realists," played a pivotal role, above all in challenging the formalist and conceptualist pretenses that long had guided law school teaching and scholarship.[5] At the level of method, the realists drew heavily on pioneers of sociological jurisprudence such as Roscoe Pound, Louis D. Brandeis, and Benjamin N. Cardozo to debunk the canon that reasoning from rules and precedents alone determines judicial decision making in some mechanical and nondiscretionary manner. Focusing on what judges "do" rather than on what they "say," realist leaders such as Oliver Wendell Holmes, Karl Llewellyn, and Jerome Frank worked to demonstrate that formal judicial opinions thus are not objective or neutral in any meaningful sense but typically are only rationalizations for judgments reflecting a host of largely arbitrary personal, social, and political factors. Such assumptions further led the realists to provide compelling critiques of the prevailing formal doctrinal logics themselves and to demystify the social relations they governed. In particular, scholars such as Morris Cohen and Robert Hale focused their critical attacks on the prevailing private law logic, which served to insulate capitalist property relations from democratic public control. There can be little doubt, moreover, that these critical contributions were politically as well as academically motivated. In particular, most realist scholars and activists aimed not so much to undermine the traditional authority of judges and law as to encourage and justify more flexible, pragmatic, and responsible judicial action consistent with New Deal liberal social engineering commitments and statist obligations.[6]

The 1930s witnessed a parallel development in more radical Left legal activism as well. Not content merely to theorize about law or to assume a role in the liberal state, many lawyers took up difficult and often futile cases for oppressed citizens in arenas of civil rights, free speech, tenants' rights, unorganized farmworker, and organized labor union (especially CIO) struggles. Some activists worked on their own from both within and without law schools, but most were affiliated with groups such as the National Association for the Advancement of Colored People (NAACP), The Civil Rights Congress, the American Labor Party, the American Civil Liberties Union (ACLU), various labor unions, and especially the National Lawyers Guild.[7] Often working within climates of hostility, intimidation, and even violent opposition, such lawyers worked courageously to build the foundations of precedent and debate that still undergird civil rights, civil liberties, labor, and administrative law today.

Although highly influential, the views of realists and leftists did not succeed in supplanting traditional understandings of law in the academy or the profession. Indeed, during the postwar years a variety of postrealist schools attempted to strike a middle ground and managed to salvage at least some semblance of older formalist convictions about the inherent continuity, neutrality, and objectivity of legal constraints on judicial lawmakers. In most cases, they achieved this by emphasizing the integrity of the judicial process

rather than substantive content.[8] But the collapse of the New Deal consensus and the explosion of challenges to government-supported injustices during the 1960s again exposed the illusory nature of such claims to legal objectivity.

This in turn sparked several new turns in critical legal thought. On the one hand was the founding of the Law and Society movement in 1964. Reformist in its political bent and guided by the dual social science models of behavioralism and realist-inspired political jurisprudence, this movement expanded serious scholarly inquiry into the interpenetration of legal practice and the broader society within which it takes place.[9] On the other hand, another group of advocates revived perspectives far more radical in substance if notably less disciplined in method. Deriving to a great extent from New Left origins and centered to a large degree in the National Lawyers Guild, such activists painted a far grimmer picture of liberal law as the very cornerstone and source of legitimation for an essentially repressive classist, racist, and patriarchal state.[10] Much as during the New Deal era, both developments in legal scholarship were paralleled by, and closely connected to, expanding ranks of activist lawyers. These new legions of radical and "public interest" lawyers identified with a wide range of progressive political commitments and played a crucial role in offering legal assistance to the primary social struggles of the period—the civil rights, welfare reform, anti-war, feminist, consumer, and environmental movements.[11]

Once again, these trends produced countertrends and new attempts at synthesis. The most important of the former has been the conservative Law and Economics movement. Centered at the University of Chicago, this movement has been the source of many books, articles, and briefs that have influenced both judicial policy and judicial appointments (including Richard Posner on the Seventh Circuit) in the Reagan era. Its twin intellectual foundations have been the ethical conservatism of Straussian political philosophy and neoclassical economics. Beginning from the premise that wealth maximization is a cardinal human desire, the movement's leading theorists have advocated ambitious schemes for limiting legal interventions into marketplace exchanges to those which support the marketplace itself. In short, it is argued that microeconomic calculations of optimal efficiency in allocating social goods offer a compelling objective foundation for constraining otherwise discretionary legal decisions about citizen rights claims. Although this position has been widely criticized with regard to its underlying assumptions about human rationality and its frankly inegalitarian normative biases, such simple schemes for normative restructuring of law have greatly influenced both legal practice and scholarship in recent years.[12]

Not surprisingly, this resurgence of conservative jurisprudence provided impetus to yet another emerging left-oriented movement, that of the Critical Legal Studies movement (the crits).[13] CLS developed from a 1977 meeting of various political activists and sympathizers from the 1960s who convened to pool thoughts on mainstream legal ideas, legal education, and legal practice. Although they undeniably owed much to both the Law and

Society movement and earlier radical views, the crits quickly charted a path of their own. At the level of method, much of their work has pointed toward a more sophisticated version of realist demystification, demonstrating the inherent indeterminacy of law as a constraint on judicial practice. Invoking the technique of so-called "trashing," crit scholars have showed how legal decisions often contradict their stated premises, exclude consideration of plausible alternatives, or lack justifiable or coherent ethical premises at all. Unlike most realists, however, most crits do not assume that legal practice is wholly arbitrary or without pattern. Rather, CLS scholars have tended to emphasize the existence of persistent ideological biases built into the structures of legal action, which thus must be "deconstructed" to reveal their contradictory or objectionable character as well as to offer alternative legal constructions.[14]

At the substantive level, crits again have tended to follow the realist lead in attacking privileged legal principles, such as the distinction between public and private spheres in corporate capitalist society. From this general perspective, they have aimed their critical fire at a host of traditional legal arrangements in the areas of criminal law, tort doctrine, contract theory, and free speech policy. The key difference, however, is that the crits share few of the illusions about New Deal liberalism that guided the realists and instead draw on a host of more radical, New Left–inspired normative perspectives—including neo-Marxist, feminist, and populist stances—in criticizing existing areas of liberal public law and pointing toward new directions of progressive legal activity. Indeed, critical evaluations of the variously cooptive, contradictory, and depoliticizing character of many modern welfare state legal forms—such as labor relations law, welfare administration, social regulatory practice, and antidiscrimination policy—have been a staple contribution of CLS scholarship and practical activism.

CONTEMPORARY CONSTITUTIONAL CRITICISM: A THEMATIC OVERVIEW

The essays on constitutional lawmaking in this book owe much to all of these dissenting traditions in American legal history and, not surprisingly, mostly to CLS. All of the authors here express much the same critical temperament as the crits. All owe the same debt to earlier realist, radical, and Law and Society contributions. Moreover, all of the authors reflect a faith in law as a resource for democratic social change—an attitude that again parallels that of the crits.

Some important differences also deserve mention, however. First, most CLS works have focused on the politics and history of private and statutory law rather than on the primary concern of this book, that of constitutional law. This book thus can be understood as an effort to help fill an important gap in the corpus of contemporary critical discourse about law.

Moreover, this collection offers analyses by authors who are not only formally unaffiliated with the crits but who also draw far more from social science and political philosophy backgrounds than from law schools and who do not consider themselves to be part of a unified movement at all. Thus, both the methodological and substantive perspectives in this book range more widely than do crit studies. Finally, this book includes several essays that directly challenge some views most commonly associated with the crits. Rogers M. Smith's provocative critique regarding some strains of CLS thought ("After Criticism") is the most direct example of such a challenge, but more subtle departures are apparent elsewhere as well.

Given the relative independence of authors in this book, it seems worthwhile in this introduction to provide some further general observations about the particular themes and perspectives common to most of these essays. These essays tend to follow the realists and crits in assuming that rules and principles—whether rooted in the written text, the framers' intent, standing precedents, or ethical arguments—neither determine constitutional lawmaking in any mechanical sense nor impart to it any universal claims of ethical objectivity. Rather, as the initial chapters by Lief Carter and John Gilliom and Judith A. Baer contend, judicial decisions are understood as inherently creative and highly discretionary activities of legal construction influenced by a diverse range of factors; thus, law is seen as an essentially plastic medium subject to numerous internal tensions, conflicts, and change over time. As such, one concern of many contributors to this collection is simply to explore the often contradictory, inconsistent, or simply undesirable aspects of those legal constraints crafted by judges over time in different areas of constitutional concern.

Contrary to the realists and some strands of CLS, however, most authors here still assume that normal constitutional lawmaking practices remain substantively "bounded" or constrained in important ways. These loose constraints derive from both the internal conventions of learned legal practice (the modes of argument, procedural rituals, and professional norms that constitute legal "ways of being and doing" in the world) and external contextual or institutional factors (including sensitivity to specialized audiences—such as other government actors, law scholars, and the media—as well as to more general mainstream cultural values). Such constraints, it is assumed, impose at least some general structure of familiar logics and meanings that contain diversity and conflict within constitutional lawmaking discourses over time. One important implication of this principle, as Carter and Gilliom's essay points out, is that the legitimacy of judicial lawmaking derives not from any singular correctness of "right" decisions but rather primarily from the ability of judges to make at least plausible arguments justifying their often controversial and contestable decisions in terms of familiar legal conventions.

It further follows that not only are individual decisions assailable in terms of their own legal premises and logics, but also that the broader con-

ventional constraints of logic, principle, and language within which law is formulated deserve direct critical analysis as well. Here the focus of authors in this collection converges closely with many crits in emphasizing larger "ideological" biases of law. Like the crits, many of the authors in the following pages seek to expose the often unarticulated premises, to examine their contradictions and limitations, to demonstrate their exclusion of alternative understandings, and to evaluate critically their implications for addressing fundamental social problems. In particular, many authors focus on the general but indeterminate role of traditional "liberal" ideas that continue to justify constitutional indifference to, or protection for, the racial, gender, and class inequalities that pervade American society.[15]

Although this common critical perspective toward mainstream liberalism unites this collection and parallels CLS studies, we want to emphasize that the range of substantive ethical and political values that inform these analyses is rather broad. Some essays here draw on neo-Marxist (Radin, McCann), feminist (Rhode, Copelon), populist (Brigham, Shockley, Simpson) and progressive reform (Scheingold, Adler) traditions that are influential among the crits, it is true. But these essays also reflect other vibrant critical traditions in contemporary scholarship not readily identified with CLS. For example, Rogers M. Smith's frank advocacy of reconstituted liberal theory and Donald A. Downs's provocative challenge to libertarian values are good examples of arguments with which many crits probably would disagree. Conversely, Lief Carter and John Gilliom, Judith A. Baer, William Haltom, and Ronald Kahn provide conceptual frameworks, raise questions, and offer insights that are compatible with a host of potentially competing ethical orientations. But even though the potential political implications of these essays are diverse or indeterminate, we believe that all of them make important contributions that deserve attention from legal scholars and activists alike.

Finally, we have already noted that, while they are critical of the status quo, all of the authors echo the CLS hope that legal criticism and advocacy can offer important resources to campaigns for progressive social change. Some differences of emphasis again should be noted, however. First, many of the essays here arguably are more self-conscious about the promises and limits of attempts to mobilize liberal legal principles as a lever for political transformation than often is the case in much of CLS scholarship. Moreover, as Stuart Scheingold's thoughtful discussion well exemplifies, many of these essays (especially by the social scientists) reflect somewhat less optimism about the potential of legal institutions and lawyers to achieve significant change in American public life than is expressed by many reform-minded scholars in law schools. In sum, most of the authors included in this book reflect the view that taking judicial constructions of constitutional law seriously requires frank recognition of the important limits to law as a force within society.

THE ORGANIZATION AND USE OF THIS BOOK

The organization of this book is quite simple and straightforward. Part One contains four chapters that address the character of constitutional lawmaking in general terms. The first two of these focus on the inherently discretionary and creative character of judicial decision making; the other two address issues concerning the uses of law and legal criticism as a resource for social change. Part Two through Part Five include chapters on various key areas of modern constitutional debate—including separation of powers, property regulation, equal protection, and freedom of speech, press, and religious practice. The authors of these chapters attempt to summarize the evolution of major decisions, to discuss their historical social significance, and to critically analyze and evaluate their implications for the legal structuring of American life in their respective areas of concern.

We have aimed for a sophisticated level of analysis throughout; as such, the authors have presumed at least some familiarity with both the general character and specific doctrinal areas of constitutional law. At the same time, most discussions focus on broad political issues, questions, and implications surrounding contemporary constitutional lawmaking rather than on doctrinal intricacies. The result is that the analyses should be of interest to a broad range of scholars, students, and citizens not ordinarily interested in the technical aspects of law. We hope that this latter characteristic renders the book a useful text for a wide range of advanced undergraduate and graduate classes in legal philosophy, law and public policy, and political theory as well as in U.S. constitutional law.

NOTES

1. On the first bicentennial celebration, see Michael Kammen, *A Machine That Would Go of Itself: The Constitution in American Culture* (New York: Vintage, 1987).
2. For critical evaluation of Judge Bork's substantive arguments about the character of legitimate constitutional lawmaking, see Judith A. Baer's chapter in this book, "The Fruitless Search for Original Intent."
3. For example, see Jefferson's letter to Samuel Kercheval, in Adrienne Koch and William Peden, eds., *The Life and Selected Writings of Thomas Jefferson* (New York: Modern Library, 1944), pp. 673–676.
4. Marshall in *Osborn v. Bank of the United States,* 9 Wheat. 738 (1824).
5. See Wilfred W. Rumble, Jr., *American Legal Realism* (Ithaca, N.Y.: Cornell University Press, 1968); Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana, 1951); Jerome Frank, *Law and the Modern Mind* (New York: Coward-McCann, 1930). For an excellent brief overview of the various critical trends in jurisprudence referred to in this introduction, see Harry M. Stumpf, *American Judicial Politics* (San Diego: Harcourt Brace Jovanovich, 1988), Chapter 1.