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American Constitutional Law

Selected Essays

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Foreword

John Marshall long ago observed that a "contrariety of opinion on [a] great constitutional question ought to excite no surprise." Constitutional law is no simple exercise in lawyer's logic, at least not in controversial matters: "The judgment is so much influenced by the wishes, the affections, and the general theories of those by whom any political proposition is decided" that disagreement is almost inevitable. Constitutional questions are questions of *law*, but they are (or can be) matters of *political* judgment as well.[1]

Chief Justice Marshall was apparently willing to work within the tension between the legal and the political elements in constitutional law, between the judge's duty to law and the judgment's inescapable debt to political and philosophical convictions that transcend the law. His current-day successors on the bench and in the academy, on the other hand, regularly deny the inevitability of the tension. Either we ought to purify our legal judgments from the taint of our political convictions, or we ought to discard the methods of the law as outmoded limitations on the achievement of political good. Marshall would have warned us that the former is impossible, and the latter a confession that constitutional law is a failure, but the current in contemporary constitutional thought is running strongly against Marshall.

Henry Monaghan has never shown much interest in swimming with the current. I suspect he regards the fourth-century church father Athanasius as a patron: *Athanasius contra mundum* it was said because of the saint's defense of truth against widespread error, and for half a century Professor Monaghan has stood against the world of constitutional law thinking. He has insisted, against all forms of constitutional skepticism, that constitutional law can and should be *law*, practiced in disciplined and principled terms that can and should be shared by constitutional lawyers with very different "wishes, affections, and general theories." At the same time, Monaghan has never countenanced any retreat from engagement with the reality of Supreme Court decisions and American political history despite the conflicted relationship between that reality and his (or anyone else's) understanding of decision-making according to law.

The current volume presents Professor Monaghan's own selection of the articles and essays that best present his understanding of constitutional law as a field of study and his practice of constitutional law as the *lex legum*, the law governing the laws, of

1. *See* 4 Marshall, Life of George Washington 243 (Chelsea House 1983) (originally published 1805).

American governance. Many of the entries specifically address questions about justiciability, judicial review, and the specific role and behavior of the Supreme Court of the United States. Federal courts law is an area for specialists, and Monaghan's command of the technical details is superb, but his interest is not only that of a great craftsman: details in the law of Article III, he repeatedly shows, reveal fundamental assumptions about the role of the courts and of constitutional law in the American political order.

Another overarching theme in this book is the relationship between stability and change in constitutional law. Professor Monaghan is minded to view a broad version of originalism as, in principle, the appropriate perspective from which to make decisions applying the federal Constitution. He is *not* willing to ignore, or delegitimate by academic fiat, the great swaths of modern constitutional law that fit uneasily within an originalist model: constitutional scholarship in the Monaghan mode addresses the world as it actually is, although his work also exemplifies that central role of the scholar as critic of our practices in light of what should be our principles. For Monaghan, the authority of the written Constitution, a text that does not change except through formal amendment, is axiomatic, but a responsible judge or lawyer cannot simply dismiss the claims of *stare decisis*, or the effects of historical change on the context in which responsible constitutional decisions must be made.

Many of the articles in this volume belong, beyond any doubt, on the short list of academic studies that every constitutional lawyer ought to read, yet Professor Monaghan's *oeuvre* is far more than a set of creative but discrete contributions to our understanding. Taken as a whole, what he has constructed is a brilliant apologia for American constitutional law, an exposition of its structure and basic features that convincingly refutes the fashionable skepticisms of his contemporaries. And he has done so with the sharp wit and effortless erudition that all of us who know him personally treasure. Henry Monaghan's work is as timeless in its importance as it is individual in its voice: a gift to the Republic of whose law Henry is a matchless expositor.

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