

# CONSTITUTIONAL SCHOLAR: IDEAS AND INITIATIVES

**“FROM DRAFTING** to teaching them, constitutions frame his world.” That’s how a Virginia newspaper headlined a profile of A. E. Dick Howard. Howard, the article went on to say, “has made a career of thinking about constitutions, how they work, and how they affect the day-to-day lives of the people who live under them. He has passed his ideas to others—teaching constitutional law to thousands of students at the University of Virginia, helping to draft Virginia’s 1971 Constitution, and consulting in the drafting of more than a dozen constitutions worldwide.”

When he is asked which aspect of his work he especially enjoys, Howard is quick to say that he is never happier than when engaging with his students—in the classroom, in seminars, in consultation on independent research projects. But he also embraces opportunities outside the academy, believing that what he does in the world enlarges and informs his teaching and scholarship. Howard has made his mark not only by analyzing and commenting upon his principal interests—the Supreme Court of the United States, the Constitution of Virginia, Anglo-American constitutionalism and civic education, constitution-making in other countries, and comparative constitutionalism—but also by actively participating in them.

## **SUPREME COURT OF THE UNITED STATES**

After graduating from the University of Virginia School of Law, Howard began his career in the law as an associate at a Washington, D.C., law firm, Covington & Burling. A close friend and Law School classmate, John Rhinelander, was clerking for Supreme Court Justice John Marshall Harlan. Inspired by his friend’s example, Howard decided to apply for a clerkship at the Court. That initiative paid handsome dividends when

Justice Hugo L. Black offered Howard a clerkship. History also intervened. Between the time Howard was offered the job and the date he began work, Felix Frankfurter left the Court, and Arthur Goldberg took his place. The balance on the Court tipped toward the liberal side, and the Warren Court came into full flower. After years of memorable dissents, Hugo Black was writing some of the Warren Court's great opinions. Howard found himself at Black's elbow when that Justice penned such important decisions as *Gideon v. Wainwright* and *Griffin v. School Board of Prince Edward County*.

Howard recalls that working with Justice Black left an indelible impression—on Howard's passion for constitutional law, on his ongoing fascination with the Supreme Court and its processes, and even on his way of using the English language. The day Howard began work, Black admonished him, "When you are working on opinions in these chambers, write not in the language of Oxford, but in the language of your country's forbears." At Black's invitation, Howard served a second year as his clerk, making a rich experience even more abiding. It was during his time at the Court that Howard, responding to a call from University of Virginia School of Law Dean Hardy Dillard, accepted a place on the school's faculty.

A glance over a list of Howard's publications will reveal how often he has turned his attention to the Supreme Court, its decisions, and its justices. Sometimes he has focused on individual justices. One of his early articles, in the *Virginia Law Review*,<sup>1</sup> used the direct action cases (such as those involving sit-ins) arising out of the 1960s civil rights movement as an occasion for exploring Hugo Black's jurisprudence. Casting his eye back over Black's decades on the Supreme Court, Howard offered a rebuttal to those who saw Black in his later years on the Court as drifting away from the liberalism of his earlier years. In Black's opinions Howard found a core belief in the rule of law or, as Howard put it, in three "rules of law"—a rule of law guiding judges in deciding constitutional cases (as in Black's famous dissent in *Adamson v. California*), a rule of law for the people at large (hence his opinions in the direct action cases), and a rule of law for the body politic—"an open, free society in which people speak their mind, vote their preferences, seek legislative reforms, and have access to the courts to air grievances."

In a conversation with a *Washington Post* reporter, Black said that Howard's article came as close to capturing the Justice's beliefs as anything written to that time.

<sup>1</sup> "Mr. Justice Black: The Negro Protest Movement and the Rule of Law," 53 *Va. L. Rev.* 1030 (1967).

Subsequent articles have sought to cast light on other justices. Having gotten to know Lewis F. Powell, Jr., when he was a member of Virginia's Commission on Constitutional Revision, Howard was well placed to predict what the country might expect of Powell when he was confirmed to the Supreme Court. Writing in the *Michigan Law Review*,<sup>2</sup> Howard remarked that "Powell's work habits and temperament—conscientiousness, thoroughness, craftsmanship, and sheer capacity for hard work" were strikingly like those of Justice Harlan, whom Powell admired. Howard predicted that it would be in supplying "reasoned and genuinely principled" opinions that Powell "may provide his best service to the Court." Readers of Powell's opinions during his years on the Court are indeed likely to find just such qualities.

Howard has been a close student of the Court through the tenures of successive Chief Justices—Warren, Burger, Rehnquist, and Roberts. *The MacNeil/Lehrer NewsHour* called upon Howard for gavel-to-gavel commentary on the memorable confirmation hearings on Robert Bork. The Court itself, on the initiative of Justice Sandra Day O'Connor, asked Howard to do extensive interviews with the justices for a film that was then put on view for visitors to the Supreme Court building.

In addition to his articles on individual justices, Howard has sought to interpret the Court as it has evolved from one era to another. Recalling one of Sir Edward Elgar's most famous compositions, Howard chose a musical metaphor to characterize the Burger Court (1969-86) in *Law and Contemporary Problems*: "A Judicial Nonet Plays the Enigma Variations."<sup>3</sup> The Burger Court's record, Howard thought, was essentially ad hoc and episodic. It was a Court "in which no one ideology or philosophy" held sway. Notwithstanding President Nixon's hopes when he put four justices on the Court early in his presidency, the Burger Court's fluid voting pattern emphasized "the competition between the voices of caution and the neo-Warren bent for action." It was distinctly not a Court of "counter-revolution."

For years, Howard has organized a review of the Supreme Court's most recent term for the Fourth Circuit Judicial Conference, offering his own observations and moderating a panel of informed commentators such as Akhil Amar, Jan Crawford, Linda Greenhouse, and Ted Olson. C-SPAN regularly carries those discussions to a national audience. With the advent of the Roberts Court, Howard has written articles<sup>4</sup>

2 "Mr. Justice Powell and the Emerging Nixon Majority," 70 *Mich. L. Rev.* 445 (1972).

3 43 *Law & Contemp. Probs.* 7 (1980).

4 "Out of Infancy: The Roberts Court at Seven," 98 *Va. L. Rev. In Brief* 76 (2012) and "Now We Are Six: The Emerging Roberts Court," 98 *Va. L. Rev. In Brief* 1-13 (2012).

in the online *Virginia Law Review* taking stock of the Court's most recent term. At the conclusion of the Roberts Court's sixth year, he recalled the days when presidents were often disappointed by their nominees to the bench (recalling President Eisenhower's dismay at his "damn fool" mistake in putting Earl Warren on the Court). "Today," Howard said, "justices' positions are more in line with the politics of the appointing president's party. In the Court's conservative ranks, we are seeing the fruits of the agenda launched by the Reagan administration's Justice Department and other critics of the Warren Court." Commenting on the Roberts Court's seventh year, he asked, "Can the Roberts Court be said to be pro-business? In the 2011-12 term, it certainly looked that way." As one benchmark, Howard cited the U.S. Chamber of Commerce's being on the winning side of every case in which the Court addressed issues on which the Chamber had taken a position.

In his recent commentary, Howard continues to pay close attention to the opinions and views of individual justices. Thus, in his reviews of the Roberts Court, he saw Chief Justice Roberts' vote to uphold the Patient Protection and Affordable Care Act—a vote distressing to many conservatives—as a "considered move to protect the Court's legitimacy and to enhance its capital in the country's affairs." Howard underscored Justice Kennedy's replacing Justice O'Connor as the Court's pivotal figure, regularly being in the majority more than any other justice (Howard pointed to a *Time* magazine cover declaring Kennedy to be "The Decider"). Believing that Justice Alito is emerging as "a distinctive voice on the Court," Howard called attention to Alito's interesting opinions (such as that in *Snyder v. Phelps*, the funeral protest case) balancing First Amendment claims against competing interests and giving more weight to legislative judgments than does the Court's majority. As for President Obama's appointees to the Court, Howard remarked that "it is in oral argument that one realizes the firepower the newest Justices, especially Sotomayor, bring to the Court." And he asks, "With Sotomayor and Kagan's brisk beginning, might in time they become the twenty-first century versions of Thurgood Marshall and William Brennan?"

Ultimately, Howard has a special interest in how political forces in the country at large intersect with the work of the Supreme Court. In 2012, the *Charleston Law Review* and Furman University's Institute of Government organized a symposium on "The Role of Government." They invited Howard to give the conference's keynote address, which he then adapted into an article for the *Review*.<sup>5</sup> In that article, Howard examined the ways in

<sup>5</sup> "The Constitution and the Role of Government," *6 Charleston L. Rev.* 449 (2012).

which conservative critics of the Warren Court have sought to move the Court in particular and constitutional law more generally in a different direction. Those vehicles include heightened scrutiny of judicial nominees in Senate Judiciary Committee confirmation hearings, the rise of originalism as a mode of constitutional interpretation, the advent of conservative public interest law firms, and networking by such conservative groups as the Federalist Society. Looking to the larger context, Howard further observed how developments in American politics and society since the 1960s “have reinforced the efforts of conservatives to dismantle the legacy of the Warren Court era.” Those developments include the striking polarization of American politics, the outbreak of hyperpartisanship in Congress, the birth of the Tea Party, the return of anti-Federalism, and a surge in popular constitutionalism.

#### THE CONSTITUTION OF VIRGINIA

Thomas Jefferson believed that Virginia’s Constitution should be revised at intervals “so that it may be handed on, with periodical repairs, from generation to generation....” Good fortune presented Howard with the opportunity to be a key figure in the most recent revision of that constitution. Virginia Governor Mills E. Godwin, Jr., appointed the state’s Commission on Constitutional Revision. Its eleven members included some of that era’s most distinguished Virginians, among them future United States Supreme Court Justice Lewis F. Powell, Jr., UVA Law School Dean Hardy Cross Dillard, and Oliver W. Hill, Virginia’s leading civil rights lawyer. The commissioners, in turn, appointed Howard as their executive director. In that capacity, he was the commission’s draftsman, earning the title, accorded by *The Washington Post*, of “chief architect” of the Virginia Constitution. When the Commission submitted their recommendations to Virginia’s General Assembly, Howard served as that body’s general counsel. Godwin’s successor as governor, Linwood Holton, then tapped Howard to head the statewide campaign for the new constitution’s ratification. After a vigorous campaign, 72% of Virginians who voted said “yes” to the new constitution—a remarkable mandate considering proposed constitutions in some other states, such as New York and Maryland, were being defeated at the polls. In doing so, Virginians scrapped the notorious 1902 constitution—an unhappy relic of post-Reconstruction populism and racism—in favor of a new fundamental law putting education in the Bill of Rights, spurning the machinery of “massive resistance,” enabling a

modern judiciary, and adding a new article on the environment.

Howard saw his experience in helping shape the Constitution of Virginia as the opportunity to write extensively about that document, its history, and its meaning. He began by writing the revision commission's 542-page report to the governor and General Assembly. The spirit of that report is reflected in its introduction. Howard wrote that Jefferson's views on constitutional change "might well be taken as the text for the Commission's proposals," emphasizing the balance—essential in orderly constitutional development—between tradition and change. To preserve the best of Virginia's constitutional heritage while responding to new problems is the twin thrust of Jefferson's letter of 1816, and it is the twin objective of the Commission's recommendations." It is this notion, Howard added, that led the British statesman Macauley, during the debates on the Reform Bill of 1832, to say "Reform, that you may preserve." And reaching back to the Commonwealth's founding era, Howard characterized the Commission as seeking to be faithful to the injunction in Virginia's original Declaration of Rights of 1776 (and still in Virginia's Constitution): "That no free government, or the blessings of liberty, can be preserved to any people, but by ... frequent recurrence to fundamental principle."

Once the new constitution had gone into force, Howard then turned his scholarly efforts to an even more ambitious project—a set of commentaries on Virginia's Constitution. Commentaries are a familiar feature of the Anglo-American legal tradition. Sir Edward Coke's *Institutes of the Laws of England* reinterpreted the ancient heritage of the British Constitution, William Blackstone's commentaries were the cornerstone of legal reasoning on both sides of the Atlantic, and William Story's commentaries on the United States Constitution are a landmark of constitutionalism in this country. Explaining his own intentions, Howard declared, "No document of American constitutionalism, save the Federal Constitution itself, draws so deeply on the great themes of American constitutional and legal development as does the Virginia Constitution." The result was two volumes, 1,207 pages in all, in which Howard explored in depth the history of Virginia's Constitution, its political setting, its judicial interpretation, comparative data from other states, and its intersection with federal constitutional law. Harvard Law School's Paul Freund declared that, in his *Commentaries on the Constitution of Virginia*,<sup>6</sup> Howard's subject had found "its ideal expositor," one who brought to the study "the expertness of an active participant and the perspective of an honored scholar." UCLA's

6 (University Press of Virginia, 1974).

Kenneth Karst said that “the history that Professor Howard recounts is background not merely for the Virginian experience, but for our whole national history of constitutional liberty. Accordingly, Professor Howard’s *Commentaries* deserve a national audience.”

#### ANGLO-AMERICAN CONSTITUTIONALISM AND CIVIC EDUCATION

Throughout his career, Howard has had a deep interest in the history and traditions of Anglo-American constitutionalism. In 1965, when Magna Carta marked its 750th anniversary, Howard persuaded Virginia Governor Albert S. Harrison, Jr., to create the Magna Carta Commission of Virginia. (Magna Carta was not actually written in Virginia, but never mind.) Howard wrote a monograph, *Magna Carta: Text and Commentary*,<sup>7</sup> still in print as the Great Charter approaches its 800th anniversary. Drawn into the subject, Howard then decided to write a book, *The Road from Runnymede*,<sup>8</sup> tracing the influence of Magna Carta on constitutionalism in America. Harvard Law School Professor Arthur E. Sutherland called the book “a welcome contribution to the literature of constitutionalism.” He said that its author had given “the idea of Magna Carta a kind of personal history” and had perceived the charter’s “potential for great growth”—growth so drastic as to make its original version “an ancestor surprised to see what his progeny have become.”

Tracing the course of Anglo-American constitutionalism has drawn Howard into civic education—efforts to nurture a better understanding of constitutional government among citizens of this and other countries. In 1985, the General Assembly of Virginia created the Virginia Commission on the Bicentennial of the United States Constitution. Governor Charles S. Robb appointed Howard as the commission’s chairman. The commissioners found they had their work cut out for them. They conducted a public survey in which 57% of Virginians identified Jefferson as the “Father of the Constitution”—4% correctly named James Madison. Enabled by state appropriations and private funding, the commission undertook an ambitious program of public education. Initiatives included the public opening of Madison’s home at Montpelier, radio and television spots, programmatic content suggestions for schools and communities, publications, and the creation of more than seventy local bicentennial commissions.

7 (University Press of Virginia, 1964).

8 (University Press of Virginia, 1968).

In an address at the National Archives in Washington, D.C., Howard posed the question: “Why Celebrate the Constitution Today?” He saw the Constitution as being the vehicle for “a continuing seminar in government.” How do we accommodate values which, while complementary, sometimes seem to compete—liberty and equality, stability and change, government’s role and that of the private sector, “the tension between heritage and heresy”? The Constitution, he maintained, inspires a dialogue between the government and the people and among the people themselves. It is a dialogue “about the nature and ends of government institutions—a debate over the effective means of living together under conditions of ordered liberty.”

#### CONSTITUTION-MAKING IN OTHER COUNTRIES

In 1988, the year before the Berlin Wall came down, the U.S. Department of State asked Howard if he would receive a delegation of Hungarian parliamentarians charged with revising Hungary’s constitution. That country’s communist leaders, apparently sensing change in the air, proposed adopting constitutional reforms that might help those leaders ride out whatever upheavals might be coming. Howard spent two days with his Hungarian visitors, undertaking a series of discussions on the making of constitutions. Subsequently, Howard was invited to Budapest for further conversations about Hungary’s constitutional future.

In 1989, the Berlin Wall came down, and the communist era in Central and Eastern Europe came to an end. Howard was watching history unfold. He was invited to compare notes with constitution-makers in Prague, Warsaw, Tirana, Bucharest, and other capitals in the region. Sometimes, as in Czechoslovakia, his host was the president’s office. Other times, as in Poland and Romania, it was a chamber of the country’s parliament. He was, of course, not the only advisor invited to consult with makers of the region’s new constitutions; other Americans, as well as scholars from Western Europe, gave advice and counsel. His own role, he is quick to insist, was not that of a drafter. Instead he saw his best service as being simply to bring the insights of comparative constitutionalism to bear upon the local drafters’ projects. He thought it naive to suppose that drafters in the emerging democracies only needed to look to the American model. It is true, of course, that constitution-makers can profit from the experience of other countries, especially established constitutional democracies. And there are international norms, especially those

regarding human rights, which should be respected. But ultimately, Howard believes, a constitution must be grounded in the history, culture, and traditions of the country and people for which it is crafted.

The Office for Democratic Institutions and Human Rights (ODIHR) of the Conference for Security and Cooperation in Europe asked Howard to share his impressions of the process of achieving constitutionalism in Central and Eastern Europe. In the ODIHR *Bulletin*, Howard observed that the road to constitutionalism in the region “has proved a good deal more rutted and uneven than the initial enthusiasm had supposed.... Significant political and practical problems have strewn the path of drafters” in the post-communist world. Politics and the aspirations of political leaders (such as those that led to the dissolution of Czechoslovakia) inevitably were factors. Other factors infected the whole region. As Howard noted, “Some countries in Central and Eastern Europe had never had a full-blown democratic experience. Whatever their fortunes before World War II, the countries of the region were deprived, for half a century after that war, of the opportunities to develop the political practices and the civic culture in which constitutionalism flourishes.”

In 1991, the editors of *Problems of Communism* convened a fortieth anniversary conference in Washington. In his remarks, published in the conference’s proceedings, Howard offered his thoughts about the relation between constitutions and constitutionalism: “Drafting a constitution is but a first step in achieving constitutionalism. Other fundamental institutions must be developed—a multiparty system with free and fair elections, an independent judiciary, an independent bar.... Creating the institutions of democracy is not a weekend’s work. In many cases, it will be the work of a generation. Establishing a lasting democracy will require something our founders understood—civic virtue, civic education of a kind that brings people to understand both the rights and the obligations of citizenship.”

In 1996, the Union of Czech Lawyers, citing Howard’s “promotion of the idea of a civil society in Central Europe,” awarded him their Randa Medal—the first time this honor had been conferred upon anyone but a Czech citizen. In 2013, the Virginia Holocaust Museum and the Virginia Law Foundation bestowed on him their Legacy of Nuremberg Award, citing Howard’s “contribution to global standards for the rule of law and the prevention of crimes against humanity in the shaping and drafting of constitutions in many lands.”

**COMPARATIVE CONSTITUTIONALISM**

A major focus of Howard's current teaching and writing is comparative constitutionalism. That interest has been fueled in good part by his hands-on experience comparing notes with constitution-makers in other countries, both in post-communist Central and Eastern Europe and in other parts of the world. As Howard puts it, he found himself meeting with Hungarian or Czech draftsmen, asking himself, "What am I doing here? What does an American constitutional law professor, with all his cultural baggage, bring to the table?" Given those questions, it has been natural for him to ponder the cultural and historical dimensions of constitutionalism as it has evolved in countries around the world. For years, Howard taught the Law School's course in jurisprudence—a course he inherited from Hardy Dillard when the latter left the academy to become a judge of the World Court at The Hague. After Howard's enlightening experiences in other countries, he decided to move in a direction combining his interests in constitutional law and in jurisprudence. So he embarked on teaching and writing about comparative constitutionalism—its historical roots, its major thinkers, its contemporary challenges.

One may fairly say that Howard's early interest in state constitutions planted an instinct for comparisons. After Virginia's adoption of its new constitution, Howard was invited to consult with legislators and others in states where constitutional revision was being contemplated—Alabama, Oklahoma, and New Jersey among them. Howard has written a number of articles exploring various aspects of American state constitutions. For example, in the *Virginia Law Review*, he examined ways in which state constitutions have been used to elevate the quest for environmental protection to constitutional status<sup>9</sup> (Howard taught the first environmental law course offered at the Law School). Environmental quality was but one area in which, lacking a federal constitutional right, state constitutions became more important. Howard has been a vocal advocate for state courts' developing a body of state constitutional law independent of the United States Constitution—a thesis also urged by Supreme Court Justice William J. Brennan, Jr.

In an article, "The Renaissance of State Constitutional Law,"<sup>10</sup> Howard suggested that state constitutions define "a people's aspirations and fundamental values." He argued that the study of constitutionalism in the United States "is incomplete if one considers only the federal

9 "State Constitutions and the Environment," 58 *Va. L. Rev.* 193 (1972).

10 1988 *Emerging Issues St. Const. L.* 1-15.

Constitution.” Those who drafted that Constitution “understood that an enduring and viable federal system rested as well on the pillars of the state constitutions.... Pluralism and a dispersal of power are among the buttresses of our free society. Maintaining the state constitutions in good repair, and understanding their postulates, are important in carrying forward a system of government that has served us well for two centuries and gives hope and promise for the next century and beyond.”

Turning to comparative constitutionalism, Howard has helped nurture interest in that subject in the American academy. In 2009, the editors of the *Virginia Journal of International Law* invited Howard to contribute an essay to the journal’s fiftieth anniversary issue. In his article, “A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism,”<sup>11</sup> Howard found that, in the years since World War II, “comparative constitutionalism has come into its own, both in the classroom and in the journals.” In an informal survey of fifty of the top American law schools, he found that at least forty had a course in some version of comparative constitutional law or comparative constitutionalism. He noted, as well, the enormous growth in scholarship in the field, in legal journals and elsewhere. Howard then went on to identify and discuss factors that, in the postwar period, have driven a heightened interest in comparative constitutionalism. Among these are the increase in the number of countries that are genuinely democratic (and thus bring the corollary of genuine constitutions), the surge in concern about protecting human rights (exemplified by the United Nations Charter and the Universal Declaration of Human Rights), the spread of judicial review, experiments in various versions of federalism and devolution, and the sharp debate in this country over whether Supreme Court opinions should cite foreign and comparative data.

Howard summed up his musings on the growth of interest in comparative constitutionalism in these words: “Comparativism in constitutional law serves many purposes. It enriches one’s study of American constitutional law by adding another dimension to our critique of what the Supreme Court does. It heightens our sense of the world beyond our national boundaries, useful to lawyers whose firms and clients operate on the international scene, but also to lawyers as world citizens. Ultimately, comparative studies can also nourish our search for principles of ordered liberty and for theories of a just society.”

Whether teaching, writing, or consulting, Howard sees his view of the

<sup>11</sup> 50 *Va. J. Int’l L.* 3.

law as grounded in the liberal arts and humanities. As he told a convocation at his undergraduate alma mater, the University of Richmond, it was the liberal arts curriculum “that provided the foundation for a lifetime of studying democratic values. A liberal education teaches us to be skeptical of the claims of the authoritarian mind.” A newspaper profile observed, “Ideas matter to Dick Howard.” And the paper quoted him as declaring his personal belief: “One should always be an advocate for the best that has been thought and imagined in a civilized society.”

## EXCERPTS

## 1. ON THE CONSTITUTION OF VIRGINIA.

**THE CONSTITUTION OF VIRGINIA:  
REPORT OF THE COMMISSION ON  
CONSTITUTIONAL REVISION**  
(Michie, 1969)

## CONSTITUTION OF VIRGINIA

**C. GENERAL PRINCIPLES AND OBJECTIVES WHICH HAVE GUIDED THE  
COMMISSION IN ITS WORK.**

In 1816 Thomas Jefferson wrote to a friend on the subject of revising the Virginia Constitution:

*I am certainly not an advocate for frequent and untried changes in laws and constitutions. I think moderate imperfections had better be borne with; because, when once known, we accommodate ourselves to them, and find practical means of correcting their ill effects. But I know also, that laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.*

This might well be taken as the text for the Commission's proposals, for it emphasizes the balance—essential in orderly constitutional development—between tradition and change. To preserve the best of Virginia's constitutional heritage while responding to new problems is the twin thrust of Jefferson's letter of 1816, and it is the twin objective of the Commission's recommendations. The British statesman Macaulay once said, "Reform, that you may preserve." It is in this spirit—of proposing constitutional revisions, the better to preserve the best traditions of Virginia's constitutional history—that the Commission has come to the following views.

(1) The Commission has proceeded on the belief that the people of Virginia do not want sweeping, fundamental changes in the basic outline of government as created by the Virginia Constitution. In particular, the Commission believes that Virginians would oppose changes altering checks and balances among the three branches of government or sub-

stantially altering the Bill of Rights. But the Commission believes that the people would appreciate and welcome revisions which, while retaining the fundamental values and heritage of the Virginia Constitution, would strengthen that document by taking account of current problems and expectations.

(2) In keeping with the belief above, the Commission has neither created a new constitution unrelated to the old nor has it merely kept the old with a few minor changes. It is proposing a number of significant revisions designed to make the present Constitution more responsive to contemporary pressures and probable future needs.

(3) A constitution embodies fundamental law. It follows that a constitution is not a code of laws and that unnecessary detail, not touching on fundamental matters, ought to be left to the statute books. Above all, the Constitution should protect basic individual rights, create the frame of government, allocate powers and duties among the branches of government, and put essential limits on the exercise of such power. Once the fundamentals have been provided for, most other matters, especially those of detail, can safely be left to the political and legislative process.

(4) In saying that a constitution should not be a code of laws, one is also saying that a constitution should be brief and to the point. In 1776 Virginia's Constitution was but 1500 words; today it is almost 35,000 words. Most of the verbiage crept in during the latter part of the nineteenth century, when detail which should have been left to general law became imbedded in the Constitution. The revised Constitution proposed by the Commission numbers about 18,000 words. The Commission believes that Virginia's Constitution would be the better for being more concise. Nothing of substance would be lost in the process; much would be gained by way of clarity and intelligibility.

(5) The Constitution should be written in simple, intelligible language, so that a layman can read the document and have a basic grasp of the character of the government it creates. The fundamental law of Virginia should not be a mystery to those living under it simply because they are not lawyers. At the same time, the Commission is not proposing changes for the sake of style in instances where the present language, by usage or judicial decision, has come to have special meaning. This approach recalls that of Jefferson, who, sending his draft of a bill on criminal law to George Wythe, observed,

In its style I have aimed at accuracy, brevity and simplicity, preserving however the very words of the established law, wherever their mean-

ing had been sanctioned by the judicial decisions, or rendered technical by usage. The same matter if couched in the modern statutory language, with all its tautologies, redundancies and circumlocutions, would have spread itself over many pages, and been unintelligible to those whom it most concerns.

(6) The Constitution should be characterized by coherence and consistency. Therefore the Commission, in studying one part of the Constitution and recommending revisions, has reflected, on the relation of that part of the Constitution to other parts. Patchwork or piecemeal revision could easily, in the Commission's judgment, be worse than no revision at all.

(7) A constitution should be, in the judgment of the Commission, more than simply a statement of law. Our Constitution, from the outset in 1776, has also contained statements of values which, technically speaking, are not legal rules. The Commission disagrees with those observers who would strip a constitution of all language which is not judicially enforceable. Since it believes that the Constitution should reflect, not only the present state of things, but also Virginia's aspirations, the Commission would not tamper with the classic hortatory language of such parts of the Constitution as sections 1-4 of the Bill of Rights, even though some of that language might not be judicially enforceable.

(8) The Commission has proceeded on the assumption that the people of Virginia want to shape their own destiny, that they do not want to abdicate decisions to others, such as to the Federal Government, and that therefore they want a constitution which makes possible a healthy, viable, responsible state government.

(9) In view of the pace of modern technological and other developments, and the impossibility of predicting what changes in society and government may take place in the coming decades, the Constitution should not attempt to envision every such development. Instead, the Commission believes that, to avoid rigidity and early obsolescence, the Constitution should, while protecting the rights of the people, create a government which can deal with unforeseen problems of the future as they arise.

(10) The Commission has kept in mind that it is recommending revisions for a constitution for the particular circumstances of Virginia. As Delegate Thomas R. Joynes said at the Constitutional Convention of 1829-30, "A constitution, to be of any value, must be adapted to the par-

ticular circumstances of the country for which it is intended. That Government which would be best for one country might be worst for another." So that the Constitution might reflect the values of Virginia and her people, the Commission has taken care, through public hearings and the solicitation of written statements, to gather views from the people of Virginia to assist the Commission in its work.

(11) The Commission has not tried, through its proposals, to create an "ideal" new constitution. It has simply tried to propose a good revision of an existing constitution which has served Virginia well through the years. As Philip Barbour said at the 1829-30 Convention, "If I am right, we must discard mere theory, adopt nothing on the ground of mere speculation, but proceed to men and things as they are. In the language of Solon, we must establish not the best possible, but the best practicable Government." In this spirit, the Commission, in weighing possible proposals, has sought to consider whether a proposal, whatever its theoretical merits, could not under any circumstances be expected to be adopted by the General Assembly and the people of Virginia. On the other hand, the Commission is not the place where the ultimate political judgments are to be made. The Commission has been charged with the duty of using its best judgment in making recommendations to the Governor and Assembly. Thus the Commission has by no means confined itself only to proposals which it thinks certain of adoption. The final word, after all, on what should be proposed to the electorate rests with the Governor and General Assembly, and the Commission sees its role as laying before the Governor, the Assembly, and the people the Commission's best thinking and advice.

In general, the Commission has sought to make its study and shape its recommendations faithful to the injunction first included in Virginia's Bill of Rights in 1776 and still to be found there: "That no free government, or the blessings of liberty can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality, and virtue, and by frequent recurrence to fundamental principles."

## 2. ON THE PROSPECTS FOR CONSTITUTIONALISM IN POST-COMMUNIST CENTRAL AND EASTERN EUROPE.

### CONSTITUTIONALISM AND THE RULE OF LAW IN CENTRAL AND EASTERN EUROPE

in H-J Cremer et al, ed. *Tradition und Weltoffenheit des Rechts: Festschrift für Helmut Steinberger 755* (Springer, 2002)

#### THE LEGACY OF COMMUNISM

From a Western perspective, it is natural to assume that the 1989 revolutions represented a conscious effort to have the people of Poland, Hungary, Czechoslovakia, and other lands not simply join, but rather to rejoin, Europe. François Furet has characterized developments in Central and Eastern Europe since 1989 as marking the end of a long and tragic deviation which had begun in 1917. The notion that the post-communist countries are rejoining their western cousins in a family dedicated to democracy, the rule of law, and an open society is reinforced by the stated goals of the reformers of 1989 and by such documents as the new constitutions in the region. Indeed, Furet's thesis may provide a founding premise for the new democracies.

Half a century of totalitarian rule and a command economy, however, has inevitably left a deep mark, both on individuals' mentalities and on the potential for economic growth. Most people in the region, of course, did not consent to live under communism. But the habits and mentality inculcated by communist ideology and practices are part of social reality in Central and Eastern Europe. No effort to establish a liberal constitutional democracy can reckon without this residue of the communist era.

Among those legacies from the years of communist rule are (1) the weakness of civil society, (2) cynicism and a distrust of laws and institutions, (3) weakened economies, (4) the place in the new societies of those who were privileged under the old, and (5) corruption.

#### THE WEAKNESS OF CIVIL SOCIETY

When the communists took power, whether in Russia in 1918 or in Central and Eastern Europe after 1945, the new masters set out to

destroy those institutions associated with earlier regimes, especially those which might in any way contest the Party's claim to unquestioned rule. Competing political parties were, of course, banned, and dissenters arrested or executed. But the communists sought more than this; they set out to eradicate the very fabric of non-communist life, like Romans salting the ruins of Carthage. Ideas, values, institutions, loyalties—anything competing with the communist vision had to go.

An important task confronting leaders and people in post-communist Europe, therefore, has been to construct a civil society out of the ruins of the communist era. Vaclav Havel has been especially astute in seeing the importance of civil society as creating an essential buffer between the individual and the state, a “social space” in which to cultivate a sense of community. It is interesting that efforts to restore civil society to the region have not been without their critics. Vaclav Klaus fears that proponents of civil society would create new layers of bureaucracy, thus slowing economic reform. This debate suggests a split between those who would identify civil society with NGOs and those who would redefine civil society as identified with a market economy.

Closely allied to the debate over civil society is the effort to create viable local governments in the post-communist countries. Under communism, local units were essentially organs of central administration and certainly not local governments as understood in western discourse. Real power at every level, local or central, was in the Party. As communism collapsed, the creation of local self-government became a central plank in the reformers' platforms, for example, in the demands of Solidarity in Poland. Vaclav Havel sees an intimate connection between vigorous local government and the prospects for democracy, hoping to see the Czech Republic as a “highly decentralized state with confident local governments.” Resistance to devolution, however, is not unique to a communist perspective. National ministries, ever protective of their turf, still prefer centralized power to devolution, despite the arguments that nurturing democracy at the local level heightens a sense of civic participation.

#### **CYNICISM AND A DISTRUST OF LAWS AND INSTITUTIONS**

Life under communism bred a sense of loneliness, of distrust of one's neighbors, leading to a Hobbesian disengagement from reliance upon laws and institutions. In the economic realm, shortages of goods and

services, made more offensive by favoritism to Party elite, led to the bypassing of institutions and official procedures. Who you knew, your ability to network, became a part of daily life. In the legal realm, ordinary people came to understand that laws and courts served the Party's purposes. Everyone knew about "telephone justice"—the procurator's picking up the telephone to tell a judge how to decide an important case. "Socialist legality"—law's submission to Party dictates—reigned; one could not speak, save in irony, of a "rule of law." Skepticism—of government, of parties, of courts, of institutions generally—has carried over into the post-communist era. Even those institutions meant to be representative—political parties, trade unions, parliament itself—are viewed with suspicion. Richard Rose, surveying attitudes in the region, reports that political parties command the trust of only 5% of those polled, and trade unions, 9%. Likewise, judges and courts must work hard to win the confidence of litigants and others. During the communist era, as in pre-revolutionary France, judges were seen to be spokesmen for the regime, hence discredited and, even after 1989, slow to stir trust and confidence.

The fashioning of new institutions—for example, parliaments and courts—can be accomplished in a relatively short time, as developments in Central and Eastern Europe confirm. But changing popular attitudes, deeply entrenched after decades of communist rule, is a far more daunting task. It is work requiring vigorous civic education and measured, not so much by years, as perhaps by a generation or two.

### **ECONOMIC PROBLEMS**

In the years after World War II, the Soviet Union imposed its economic model on its satellite countries in Central and Eastern Europe. The result was a distortion of those countries' economies. Industrialization was pursued, whether it made economic sense or not. Meanwhile, encouraged by the Marshall Plan, Western Europe prospered. Germany rose from defeat to become an economic giant.

As the years passed, the communist countries lagged further and further behind. In 1938 Czechoslovakia had been one of the world's rich countries in per capita terms, ahead of its neighbor, Austria. Fifty years later, Austria was far more prosperous than Czechoslovakia. Similarly, comparing Spain and Poland, in the 1950s the two countries had fairly similar per capita incomes. By the late 1980s, just before the communist regime collapsed, Poland had a per capita income (around \$1,900) only a

quarter of Spain's (\$7,700). The story in the communist world was one of lost opportunities—the failure to adjust economies to a changing world.

The new democracies have, of course, fallen heir to the enormous economic problems created by their communist predecessors. Early efforts at reform, especially when it took the form of “shock therapy,” often created as much misery as prosperity; certainly the benefits of those early years were spread quite unevenly, some individuals (including many of the former *nomenklatura*) doing very well, many others (especially pensioners or others living on limited means) finding life worse than before. Moreover, new regimes faced the task of weaning individuals from their dependence on the state and encouraging them to behave as autonomous economic entities.

Now that over a decade has passed since communism's demise, economic transformation has begun to pay dividends in the region, although not uniformly. The Visegrad countries (Poland, Hungary, the Czech Republic, Slovakia, and Slovenia) lead the way, while other countries, including Bulgaria and Romania, lag behind. Domestic policies (such as radical market reform versus gradualism or the postponement of reform) explain part of the difference. Advantages of geography (especially proximity to Germany), the pace of foreign investment (Hungary has been a particular object of such investment), and other factors have also played their part.

It would be a crude form of determinism—an odd variation on a Marxist theme—to suppose that a country must be rich to be a successful constitutional democracy. But poverty and economic distress surely make the road to political and constitutional success rockier. As a Filipino peasant once commented to me, when I asked him about the proposed new constitution for his country, “Will it put food on my family's table?”

#### **THE ROLE OF COMMUNIST-ERA ELITES**

In most of the first free elections in post-communist Central and Eastern Europe, new faces—democrats, nationalists, anti-communists—replaced the former communist rulers. (There were exceptions, such as Romania, where the old elites, without Ceaușescu, continued in power.)

Hard times, however, brought former communists (newly styled as social democrats or the like) back to office in subsequent rounds of elections in several countries in the region.

Whether in power or not, the former nomenklatura enjoyed enormous advantages. In government administration, especially at the middle and lower ranks, it was hard to replace managers and workers who often had a vested interest in the old order. In the emerging private sector, the nomenklatura had marked advantages; insiders became the new capitalists. To move out of the stultifying grasp of command economies, privatization of many state-owned enterprises was essential. But where, especially in the poorer countries, were the private savings which individuals might use to buy shares? Foreign investment might be forthcoming, but it aroused political fears of foreign ownership. The nomenklatura used this opportunity to put assets in their own hands, often in dubious ways that provoked cynics to speak of the emergence of a new social class—the “kleptoklatura.” Born of privilege, and nurtured in old ways of thinking, this new class would not be the best vehicle for encouraging creative thinking or competing effectively with western enterprises.

#### **CORRUPTION**

During the communist era, economic hardships, favoritism, and a cynical disregard of such rules as there were led to bargaining, barter, and layers of corruption. Preferring individual interest to the greater good became the norm. It is hardly surprising that such habits, deeply entrenched, have persisted to undermine efforts to establish a rule of law in the post-communist era. Building faith in the democratic process requires belief in the fairness of government agencies and officials, for example, in the providing of social services. Building a market economy similarly requires a level of trust in those with whom one is dealing. Foreign investors, in particular, are slow to go forward with projects if they cannot be confident that contracts will be honored and that their local counterparts are not simply lining their own pockets. Problems of corruption are made more troublesome when organized crime comes on the scene, as it has in some places in the region. The impact of corruption and crime varies, of course, from one country to another. But it is another reminder of the ways in which the legacy of the communist era can make the road to constitutionalism, democracy, and the rule of law more difficult.

## 3. ON COMPARATIVE CONSTITUTIONALISM.

## A TRAVELER FROM AN ANTIQUE LAND: THE MODERN RENAISSANCE OF COMPARATIVE CONSTITUTIONALISM

50 *Va. J. Int'l L.* 3 (2009)

### EPILOGUE: BRATISLAVA

I was talking with some Czech and Slovak judges in Bratislava. The time was after the Velvet Revolution but before the divorce that saw Czechoslovakia split into two countries, the Czech Republic and Slovakia. Our conversation turned to judicial review. The local judges were curious about American practices—such things as the selection of judges, jurisdiction, certiorari review, political questions, and enforcement of a court's mandate. I commented that I assumed that a constitutional court for Czechoslovakia would have jurisdiction to review and overturn decisions of the high courts of the two constituent regions—the Czech and Slovak lands. A Slovak judge, rather large and formidable, banged his fist on the table and said, “That would never do! That would violate our sovereignty!” I was startled for a moment. But reflection brought to mind the U.S. Supreme Court's decision in *Martin v. Hunter's Lessee*. Judges of Virginia's Supreme Court of Appeals had declared that “the appellate power of the Supreme Court of the United States, does not extend to this court...” and that therefore the provision of the Judiciary Act of 1789 purporting to grant such jurisdiction was unconstitutional. In the Supreme Court's opinion, Justice Story rejected Virginia's argument and affirmed the Court's authority to review the state court's judgment. Having been born and raised in Richmond, the home town of Spencer Roane, the most prominent of the Virginia judges in the *Martin* case, I had reason to understand (even if not to agree with) the Slovak judge's reasoning. I can imagine the conversation he and Roane might have had.

Johann Wolfgang von Goethe is quoted as having said, “A man who has no acquaintance with foreign languages knows nothing of his own.” I would make the same argument about constitutional law. A person who would suppose that, by knowing something about the American Constitution, he or she knows all one needs to know, misses the treasure trove that comparisons offer. One who cares nothing for the experience

of other constitutional systems rejects the insights available to James Madison and James Wilson at Philadelphia, to Benjamin Franklin and Thomas Jefferson in Paris, to Woodrow Wilson at Princeton and in Washington.

Given the developments in the postwar world sketched in this Essay, it is small wonder that comparative constitutional law has been a growth industry in American law schools. Comparativism in constitutional law serves many purposes. It enriches one's study of American constitutional law by adding another dimension to our critique of what the Supreme Court does. It heightens our sense of the world beyond our national boundaries, useful to lawyers whose firms and clients operate on the international scene, but also to lawyers as world citizens. Ultimately, comparative studies can also nourish our search for principles of ordered liberty and for theories of a just society.

## 4. ON THE RISE OF CONSERVATIVE PUBLIC INTEREST LAW FIRMS.

### THE CONSTITUTION AND THE ROLE OF GOVERNMENT 6 *Charleston L. Rev.* 449 (2012)

#### 3. CONSERVATIVE PUBLIC INTEREST LAW FIRMS

Public interest law firms advancing progressive causes have existed since the early 1900s. The National Consumers' League began using litigation to improve the working conditions of women and children, bringing test cases and employing the now familiar "Brandeis brief." In 1920, the American Civil Liberties Union was formed. Having participated sporadically in litigation since 1915, the National Association for the Advancement of Colored People (NAACP), in 1940, formed its Legal Defense Fund. A principal objective of the Fund was to use litigation to end segregation in housing and public schools.

The 1960s, an era of activism on many fronts, saw public interest law gather force. A key figure was Ralph Nader, whose "Nader's Raiders" went to court to seek social change, especially the reform of corporate practices. Environmentalists began to look to the courts, and in 1967 the

Ford Foundation began channeling millions of dollars to various groups litigating in the public interest. By 1976, over ninety public interest law firms employed over 600 attorneys—many of them recruited from elite law schools.

Public interest litigation achieved substantial impact on public. Among these were welfare reform, a suspension (albeit temporary) of executions, prison reform, and, in *Roe v. Wade*, abortion rights. When the proposed Equal Rights Amendment faltered, groups such as the ACLU's Women's Rights Project were able to use the Equal Protection Clause to constitutionalize claims of sex discrimination. Public schools, whose administrators once exercised largely untrammelled discretion in such matters as student discipline and school newspapers, became the common target of litigation. Thus were vast areas of American life brought under the sway of the courts.

The successes of liberal public interest law firms alarmed business interests. In California, members of Governor Reagan's administration were angry at the lack of conservative groups to counter liberal public interest firms, which were challenging welfare reforms in that state. On the other coast, Lewis F. Powell, Jr., former president of the American Bar Association (and soon to sit on the Supreme Court of the United States), in 1971 wrote a now-famous memorandum to the United States Chamber of Commerce proposing the creation of an activist conservative legal movement. The time had come, he said, "for the wisdom, ingenuity, and resources of American business to be marshaled against those who would destroy it."

Conservatives soon responded to Powell's call. In California, individuals and businesses associated with the Reagan administration and the Chamber of Commerce created the Pacific Legal Foundation. Similar firms soon appeared elsewhere, headed by prominent conservatives and usually based in the interests of a particular region. Perhaps the most conspicuous was the Mountain States Legal Foundation, funded by beer baron Joseph Coors. These new firms spoke mainly for business—framing their arguments in terms of free enterprise and property rights.

Religious conservatives also entered the fray. At first somewhat reluctant to involve themselves in secular legal disputes, they moved in the 1970s to create such groups as the Catholic League for Religious and Civil Rights, Americans United for Life, and the Christian Legal Society. The pace picked up as religious conservatives mobilized to fight abortion and to push for greater religious expression in the public sphere, espe-

cially in public schools.

The early conservative public interest law firms were largely reactive. They were more inclined to participate in the adversarial process through the medium of amicus briefs. Because of their regional base, conservative firms tended to be more geographically diffused than their liberal counterparts, which were more often based in Washington, D.C., and were less specialized. Conservative public interest law firms, again unlike the liberal firms, had weak relationships with law schools. The conservative firms were heavily dependent upon business interests for their funding, leading some critics to question their independence and their integrity. In 1980, Michael Horowitz, a conservative activist, wrote a scathing report for the Scaife Foundation, which funded conservative public interest law firms (just as the Rockefeller and Ford Foundations funded liberal groups). Horowitz declared that the conservative public interest movement “will make no substantial mark on the American legal profession or American life so long as it is seen as and in fact is the adjunct of a business community possessed of sufficient resources to afford its own legal representation.”

Conservative trends since the 1980s have nurtured a more favorable climate for conservative public interest law firms. At the level of theory, conservative developments in the intellectual realm, such as Robert Bork’s originalism and Richard Epstein’s libertarian constitutional theories, have provided conservative firms with what Jeffrey Rosen called a “sophisticated jurisprudential framework” within which to build their arguments. Republican victories at the polls have brought judges to the bench who are more receptive to conservative arguments. Those same victories have opened government jobs to ambitious young conservatives, who are able to acquire experience and credentials. This cadre creates a more “elite pool” of attorneys for conservative public interest law firms.

The newer conservative public interest law firms have learned lessons from the most successful liberal firms. Mimicking their opponents’ experience, conservative firms have fashioned long-term strategies, including detailed litigation campaigns. Moving beyond the agendas of their conservative predecessors, these firms wish to advance more plausible claims to represent underrepresented constituencies. Thus, rather than simply filing amicus briefs, conservative public interest law firms are now more likely to represent real clients. Moreover, they shape arguments grounded in a larger conservative ideology, not just in the inter-

ests of big business. As Clint Bolick, a cofounder of the Institute for Justice, one of the “second generation” conservative law firms, has said, he and his colleagues discovered that “there is a world of difference between an organization that is pro-business and an organization that is pro-free enterprise.”

For conservatives to use the courts to bring about social change, they had to abandon their adherence to “judicial restraint.” When the Justices of the Warren Court set about “doing the right thing”—reforming criminal justice, advancing civil rights, nurturing social justice—conservatives decried “judicial activism.” To those critics, judicial activism was inconsistent with democratic principles. But a philosophy of judicial restraint came to be less attractive, and conservatives rediscovered what their predecessors had understood in the early decades of the twentieth century—that courts could be seen as bulwarks against progressive legislation. Conservatives began to look to the courts to protect private property and individual enterprise and to contest centralized power.

One can see the new strategy at work in the activities of the Institute for Justice. Founded in 1991, the Institute focuses, above all, on litigation. Through lawsuits, the Institute seeks to influence not only what the courts do, but also politics and public opinion. A good example is the Institute’s invocation of the Fifth Amendment’s takings clause in the litigation that led to the Supreme Court’s decision in *Kelo v. New London*. Beset by the economic difficulties so common in older, declining industrial cities, New London sought to use its power of eminent domain to condemn private property, mostly residential, to make possible a research facility of the Pfizer Corporation. Thus, property would be taken from one private party for the ultimate use of another private party.

The Institute’s strategy—highlighting the plight of mostly modest homeowners—paid early dividends when groups hardly thought to be conservative, such as the NAACP and the Southern Christian Leadership Conference, filed amicus briefs in *Kelo*, as did the American Association of Retired Persons. In the technical legal sense, the Institute lost the case. By a five-to-four vote, the Supreme Court rejected the argument that the taking violated the Fifth Amendment. But *Kelo* proved to be the “sleeper” of the Court’s Term, provoking the kind of public outcry one usually associates with decisions concerning abortion or school prayer. The Institute launched a “Hands Off My Home” campaign, taking the fight to the state level. The Supreme Court’s decision does not preclude states from amending their constitutions or enacting statutes placing limits on

eminent domain beyond those flowing from the Fifth Amendment. And, indeed, a number of states have taken steps, mostly in the form of legislation, to give property owners greater protection against condemnations.

Thus do conservative lawsuits become part of public discourse. In bringing cases like *Kelo*, the Institute for Justice seeks to reach beyond the traditional conservative constituency—certainly beyond business interests (it was, after all, a corporation that was the city’s partner in the redevelopment effort in New London). The filing of amicus briefs by liberal groups in *Kelo* suggests bridge-building to groups outside the conservative world. By coming to the aid of “little people,” including racial minorities, a conservative public interest law firm can stake out a moral case. In doing so, as the Institute did in *Kelo*, the conservative firm can engage in political mobilization, attracting public attention and forging a political and legislative agenda.

## 5. ON CHIEF JUSTICE ROBERTS IN THE HEALTH CARE CASE.

### OUT OF INFANCY: THE ROBERTS COURT AT SEVEN 98 VA. L. REV. IN BRIEF 76 (2012)

No case in the 2011-12 Term was more eagerly awaited than *National Federation of Independent Business v. Sebelius*, in which the Court reviewed challenges to the constitutionality of the Patient Protection and Affordable Care Act. Not only was it, by all odds, the Term’s most important case, but it bids fair to be the most historic decision to date from the Roberts Court—being to the Roberts Court what *Bush v. Gore* was to the Rehnquist Court. One recalls how, in 2000, the Court stepped directly into the hotly disputed presidential vote count and, in its decision, split in such a way that much of the country labeled the Court’s behavior as manifestly partisan.

With so much resting on the outcome of the health care case, much of the country was likely, no matter what the Court ruled, to view the decision through political lenses. That being so, Chief Justice Roberts’ vote in the case had an element of drama about it. Roberts joined the

Court's more conservative justices, as well as Kennedy, in declaring that the individual mandate could not be justified by Congress's commerce power. Like six other justices (all but Ginsburg, Sotomayor and Breyer), Roberts held that the Act's Medicaid expansion exceeded Congress's spending power by unduly coercing the states to accept new conditions for existing Medicaid funds. In neither vote was there much real surprise in Roberts' position. The surprise came when Roberts joined the Court's more liberal members in holding that the individual mandate could be upheld as resting on Congress' taxing power. Roberts found it constitutionally irrelevant that the mandate was not labeled as a tax. (A lay person might find it mildly puzzling that, while treating the mandate as a tax for the purposes of the taxing power, the majority opinion held that the litigation in *Sebelius* was not precluded by the Anti-Injunction Act because the health care act labeled the mandate as a "penalty" and not as a "tax.")

How should one interpret Roberts' vote in the health care case? Prior to the 2011-12 Term, only once in his seven years on the Court had Roberts been in the majority in a five-to-four decision joined by the Court's more liberal justices. When the Court has divided along ideological lines, we have become accustomed to Roberts being in the more conservative camp. Yet the 2011-12 Term gave us not only *Sebelius*, but also *Arizona v. United States*, in which Roberts joined the four more-liberal justices in finding federal preemption of most sections of Arizona's controversial immigration law. Conservatives were quick to voice bitter disappointment with Roberts' votes. Clint Bolick, writing in the *Wall Street Journal*, said that no longer was Roberts a "solid conservative" and he even wondered whether Roberts was now a "swing justice."

There were reports, from within the Court, that conservative justices felt disappointment, even betrayal, by Roberts' vote in *Sebelius*. Jan Crawford reported the discord within the Court to be "deep and personal" and likely to last for a long time. Lyle Denniston, a veteran Court-watcher, characterized the leaks from the Court as being more than a breach of confidentiality; they could be seen as a public rebuke and a challenge to Roberts' leadership of the Court. Judge Richard Posner wondered if the episode could drive a wedge between Roberts and his conservative colleagues. "[W]hat do you do [when your friends turn against you]?" asked Posner. "[B]ecome more conservative? Or do you say, 'What am I doing with this crowd of lunatics?'"

Such predictions of a lasting rift among the Court's conservatives

are surely overblown. One recalls reports of angst within the Court after the decision in *Bush v. Gore*. Whatever bad feelings there might have been at the time of that decision, it was not long before the air cleared. It is difficult to suppose that *Sebelius* has created any sort of cloud over Roberts' place at the Court. Those who follow royal courts, such as Buckingham Palace, find discord more interesting than harmony. Similarly, speculation about rifts at the Court often outstrips reality. Moreover, the notion that Roberts has morphed into a liberal lacks a credible basis. It is always risky to take one Term in isolation. That is as true of individual Justices as of the Court at large. John Roberts has been Chief Justice for seven years. He is, by the conventional yardsticks, a conservative jurist and likely to remain one.

How, then, to explain Roberts' voting to uphold President Obama's signature legislative achievement—a measure for which Roberts must surely have little sympathy? If Roberts had joined the Court's conservatives in striking down the mandate altogether, one can imagine how quickly pundits, politicians, and much of the wider public would castigate the decision as being partisan. Like critics of *Bush v. Gore*, those anguished by the Court's invalidating “Obamacare” would see the Court as thrusting itself into the heart of a highly politicized issue—and in a presidential election year, at that. Whatever Roberts' own reasoning, the decision in *Sebelius* can be seen as a considered move to protect the Court's legitimacy and to enhance its capital in the country's affairs. Might it be that John Roberts was thinking about John Marshall, who carefully wrote *Marbury v. Madison* in such a way as to deny Marbury the writ he sought while at the same time establishing the Court's power of judicial review?

Viewed through a conservative lens, might Roberts' vote in the health care case embolden him to join conservative colleagues on the Court if they decide, in the new Term's case involving affirmative action at the University of Texas, to curtail or end the use of race as a factor in government decisions such as in a state university's admissions process? Might Roberts help move the Court toward overturning the Voting Rights Act?

What will his role be when the Court is asked to decide on same-sex marriage? Indeed, if *Sebelius* itself is considered, is it not more significant that Roberts joined the conservatives in uniting Congress's commerce power (thereby requiring law professors and students to revisit widely held post-New Deal assumptions about the era of *Wickard v. Filburn* and

the reach of the Commerce Clause)? Moreover, what about the Court's holding limiting Congress's spending power? Conditional spending statutes are an important aspect of the modern regulatory state. Until *Sebelius*, the Court had been markedly deferential to Congress in the rare instances when the Court had even seen fit to review conditional spending. Should the Court in future cases give broad sweep to *Sebelius's* coercion analysis, the result could be to unsettle a range of programs, such as those affecting education, social welfare, highways, energy, and the environment. One scholar argues that the Medicaid expansion at issue in *Sebelius* was sui generis and concludes that "the coercion inquiry is unlikely to jeopardize other major spending programs...." That may well be, but *Sebelius's* discovery of limits on Congress' spending power is bound to quicken the hopes of conservative critics of the regulatory state and to encourage litigation hoping to enlarge the reach of the coercion analysis.

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