

## Symposium

### **Fresh Considerations on Federalism and Separation of Powers Suggested by Joseph Lynch's *Negotiating the Constitution: The Earliest Debates Over Original Intent***

#### OPENING REMARKS

*John B. Wefing, Moderator\**

We have today a remarkable panel of experts in constitutional law and legal history.

Yesterday, I was speculating about the influence of this panel. Between them, the members of this panel have probably taught over 20,000 law students, and through their books and articles—and in the case of Judge Gibbons, through his numerous opinions for the Third Circuit—they have undoubtedly influenced hundreds of thousands of others.

Today the panelists will celebrate and critique Professor Lynch's new book, *Negotiating the Constitution: The Earliest Debates Over Original Intent*, and discuss the implications of his meticulous research upon future decisions by the United States Supreme Court, and other courts as well. As for my reaction to Professor Lynch's book, it helped to resolve some issues that have bothered me since I began teaching constitutional law.

As I read Supreme Court decisions in which the Court relied upon the intent of the authors of the Constitution, I often found myself thinking that there were supporting arguments on both sides, and that both sides seemed to make sense such that the Court could have legitimately guided the outcome in either direction. This was certainly true in the cases dealing with the scope of federal power and the meaning of the Necessary and Proper Clause. So my intuitive judgment was that there were no clear answers. That judgment seems to be confirmed by the intensive scholarship

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of Professor Lynch. In one clear sentence he states:

All the evidence points to the conclusion that in composing the Necessary and Proper Clause, the Committee of Detail crafted a compromise, a masterpiece of enigmatic formulation, so artfully phrased that after the convention each side could argue its version of the clause: either, as Virginia and the South would have it, that Congress could merely approve measures incidental to the execution of the enumerated powers or, as those in the North would say, that Congress could enact laws in the general interest of the country.<sup>1</sup>

There were, in fact, no victors in the dispute over the extent of Congressional power. The debate was merely deferred, and continues to this day.

My other concern as a new constitutional law teacher was the apparent deference given by so many people to the authors of the Constitution, as if they were extraordinary individuals devoted to the common good without parochial or political interests. While I recognize that these individuals played a vital role in our nation's history, I could not help but believe that in every era, politics plays a role. As Professor Lynch says, "[p]olitics, the desire to attain or maintain control of the Government and to set its policies, personal rivalry, and rivalries of state and region all played an integral part in the construction of the Constitution."<sup>2</sup>

This recognition of the realities of the creation and interpretation of the Constitution may make it even harder to interpret the Constitution but may make it a more realistic process.

Our first speaker is Professor Sanford Levinson. Professor Levinson is one of the leading scholars in the area of constitutional interpretation. He is the author, co-author, or editor of a number of books on constitutional law, including *The American Supreme Court* and *Responding to Imperfection* as well as a nationally recognized case book, and well over a hundred law review articles. A graduate of Duke University, he received a Ph.D. from Harvard and his J.D. from Stanford University. Professor Levinson currently holds the W. St. John Garwood and W. St. John Garwood, Jr. Regent's Chair at the University of Texas School of Law. He has taught at Princeton University, Harvard, Ohio State, and Hebrew University, and is currently a visiting professor at New York University School of Law. I am excited to welcome him to Seton Hall.

Judge John J. Gibbons is a familiar face at Seton Hall Law School. A graduate of Holy Cross College and Harvard Law School, he has been connected in to Seton Hall for many years. While serving on the United

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<sup>1</sup> See JOSEPH M. LYNCH, NEGOTIATING THE CONSTITUTION: THE EARLIEST DEBATES OVER ORIGINAL INTENT 4 (1999).

2000]

*OPENING REMARKS*

17

States Court of Appeals for the Third Circuit, Judge Gibbons taught at Seton Hall as an adjunct professor. He spent twenty years on that court, writing some eight hundred opinions, a number that makes him one of the most prolific jurists in the history of the Third Circuit. After his retirement from the bench, Judge Gibbons joined Seton Hall as a full-time member of the faculty as the Richard J. Hughes Professor of Law. Judge Gibbons is currently the senior partner at Gibbons, Del Deo, Dolan, Griffinger and Vecchione in Newark. It is my pleasure to introduce Judge Gibbons.

Our next speaker is Professor Eugene Gressman. Professor Gressman holds the William Rand Keenan, Jr. chair at the University of North Carolina School of Law, emeritus. He too is the author of a nationally recognized case book, and has published the seventh edition of his book *Supreme Court Practice*, which is considered the bible for those who appear before the Supreme Court. In addition, he has written many other books and articles. Professor Gressman received both his undergraduate and law degrees from the University of Michigan. After law school, he clerked for Justice Murphy of the United States Supreme Court for five years. Professor Gressman has taught for many years, including five years as a Distinguished Visiting Professor at Seton Hall Law School. It is my pleasure to welcome Professor Gressman back to Seton Hall.

Finally, it gives me great pleasure to introduce Joseph Lynch, Professor Emeritus here at Seton Hall. He and I were colleagues together at Seton Hall Law for many years until his retirement. It appears that he retired not to rest, but rather to create this wonderful book we celebrate today. He is also the author of numerous law review articles. Professor Lynch is a graduate of St. Peter's College and Harvard Law School, and serves as a trustee of the Stanley J. Seeger Foundation of Princeton University. In addition to teaching at Seton Hall for many years, he served as the Academic Dean and was a major player in the development of the law school. It is my honor to welcome him back.