Why Professor Lynch Asks the Right Questions

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I think it is fair to say that one of the reasons I was invited here today is because I reviewed Professor Lynch's book for the History Book Club. My wife, among other people, asks me why, after twenty-five years, I still review books for the Club. Twenty-five years ago, when I was a young, underpaid assistant professor at Princeton, the prospect of getting some free books and fifty dollars for a review was quite enticing. Fortunately, my station in life is better today so I am no longer as motivated by crass economic incentives. The explanation, I think, is that I love coming across interesting, scholarly manuscripts, such as Professor Lynch's, that would not necessarily reach a general audience without a boost. Professor Lynch's manuscript is a wonderfully written book that makes its argument in a very compelling way. It is a valuable book for both professional academics and general readers of American history who reflect about past events and their implications for the future. I was, therefore, especially pleased to play some role in its being offered to the 200,000 members of the History Book Club.

Today, I would like to explain my enthusiasm for this book and why I think it is so important.

I will begin with the title, *Negotiating the Constitution*. It seems to me that much too often we pretend that the Constitution is a given, and that there is a magic interpretive path to the one true understanding of the Constitution. For some, it is originalism, for others, it is doctrine or, for yet others, fundamental values. But the shared assumption seems to be that the Constitution is a basically completed object, and the task of the interpreter is to understand it and apply it.

This is false. It is certainly empirically and historically incorrect, and I think that this book focuses our attention on the extent to which the Constitution was, is, and always will be a negotiated—rather than merely an interpreted—document. Professor Lynch reminds readers that there were a number of very important episodes in the first decade of the United

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States dealing with fundamental questions of American federalism and the structure of the national government for which there was certainly no consensus on what the Constitution really required. Instead, the solutions were negotiated. The solutions depended not only on who had the better arguments, but also, inevitably, on who had the votes. What is crucial, as well as radical, is that Professor Lynch's book is not about courts. It is about debates in Congress, or debates between Congress and the executive branch.

My own interest in the topic of constitutional negotiation is evident in the casebook that I had the privilege to co-edit, first with Paul Brest and now, the most recent edition, with Jack Balkin and Akhil Amar.[1] The casebook begins with James Madison's speech before the 1791 House of Representatives on the unconstitutionality of the Bank of the United States.[2] Madison's speech is followed by Edmond Randolph's Opinion as Attorney General,[3] Thomas Jefferson's memorandum to George Washington,[4] and Alexander Hamilton's well-known memorandum on the constitutionality of the bank.[5] Finally, there's a brief discussion on James Madison's "statement" on the Bank's constitutionality[6]—a statement, *not* a change of mind, because Madison never conceded he was mistaken in opposing the Bank on constitutional grounds.[7]

Only after this background do students read *McCulloch v. Maryland*.[8] *McCulloch* is followed by Andrew Jackson's veto of the bank renewal in 1832 in which Jackson says that opinions of the Supreme Court are entitled to only so much respect as their reasoning deserves.[9] Jackson's action reveals his belief that there is no real theory of precedent, because what is interesting about precedent, what makes precedent *precedent*, is that you

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[1] *See* PAUL BREST, SANFORD LEVINSON, J.M. BALKIN, & AKHIL REED AMAR, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 140-43 (2000) [hereinafter BREST, ET AL., CONSTITUTIONAL DECISIONMAKING].

[2] *See id.*at 8-11 (discussing James Madison's Speech to the House of Representatives (1791) *reprinted in* JAMES MADISON, WRITINGS 480-90 (Jack Rakove ed., 1999)).

[3] *See id.* at 11-12 (discussing H. JEFFERSON POWELL, THE CONSTITUTION AND THE ATTORNEYS GENERAL xv (1999)).

[4] *See id.* at 12-13 (discussing THOMAS JEFFERSON, OPINION ON THE CONSTITUTIONALITY OF THE BILL FOR ESTABLISHING A NATIONAL BANK, *reprinted in* 19 PAPERS OF THOMAS JEFFERSON 275, 279-80 (1974)).

[5] *See id.* at 13-16 (discussing 8 PAPERS OF ALEXANDER HAMILTON 97 (1965)).

[6] *See id.* at 16-17 (discussing BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR 233 (1957)).

[7] *See id.* at 17. In 1816 he signed the second bank renewal, stating that there had been a settlement of the issue as to the constitutionality of the bank and he would accept that settlement though it ran contrary to his own views. *See* HAMMOND, *supra* note 6, at 227-33.

[8] 17 U.S. (4 Wheat.) 316 (1819).

[9] *See* BREST, ET AL., CONSTITUTIONAL DECISIONMAKING, *supra* note 1, at 51 (discussing 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576-89 (Richardson ed., 1897)).

feel an obligation to follow it even if you think the prior decision was wrong, stupid, or pernicious. Indeed, if you follow a previous decision because you think they got it right, you are not adhering to precedent. Rather, you are applauding a court for having the wisdom to get it right.

It seems to me that one of the very worst things that we, as teachers of constitutional law, do to our students it to teach them that the Constitution is simply what the Supreme Court says it is. A course that begins with *Marbury v. Madison*, and then marches through fifty, sixty, ninety (or even more) cases from the Supreme Court, will leave any rational student believing that the Constitution is simply what the Supreme Court says it is. In contrast, the message of Professor Lynch's book, and I think it is absolutely crucial, is that the Constitution is not only what the Court says, but what each branch of the federal government says. Just as it is foolish to say that courts have no role in interpreting what the Constitution means, it is foolish to say that only courts issue authoritative opinions.

My view is that all three branches of government are constantly negotiating with one another as to what the Constitution means. Sometimes courts play an active part in the negotiating process. Sometimes they really take a pass. For example, who knows exactly what powers the President of the United States has to wage war on foreign countries without congressional consent? Or whether the President may wage war with the kind of "bare bones" congressional consent falling far, far, short of a formal declaration of war? The one thing we can be relatively confident about is that the Supreme Court of the United States has had nothing useful to say about this issue, and will continue to say nothing useful, because they have decided, rightly or wrongly, to take a pass.

The most important lesson to learn from reading Professor Lynch's book is that members of the first several Congresses never really thought that it was important to try to predict what courts would say. None of them, to my knowledge, ever said, 'we shouldn't be having this debate because courts will tell us.' This is a very important lesson to learn, because we ought to expect more constitutional seriousness than we sometimes get from members of Congress and the executive branch. One of the ways that constitutional irresponsibility has become legitimized is through acceptance of the view that the Constitution is simply what the Court says it is. Such irresponsibility essentially means that what members of Congress and the executive branch thinks about constitutional matters is beside the point.

For example, members of this panel discussed the relevance of

presidential "signing statements,"[10] and Judge Gibbons mentioned that when he recently argued before the Supreme Court, Chief Justice Rehnquist asked "what deference do we give to [the] signing statement by the President?"[11] The correct empirical answer to that question is "none," but one might ask why not? Why does the Court disregard the thoughtful opinion of the President of the United States, especially if the opinion is crafted after consultation with the head of the Office of Legal Counsel or the Solicitor General? Why is that not worth taking seriously?

One of the things I am most dismayed about regarding the current Court is a kind of megalomania in claiming sole authority to interpret the Constitution. This is seen most dramatically in *City of Boerne v. Flores*.[12] In *Boerne*, the Court treats an almost unanimous vote of both houses of Congress as absolutely irrelevant, and it similarly dismisses the opinion of the President of the United States regarding the free exercise of religion.

We constantly need to be reminded, as Professor Lynch's book most notably does, of the necessity to look beyond the courts. Consider, for example, the events of 1803, a few years after the close of Professor Lynch's book. The most important constitutional event in 1803 was the Louisiana Purchase.[13] It was not *Marbury*. The Louisiana Purchase fundamentally changed the entire character of the United States of America.[14] President Thomas Jefferson had good reason to believe that the Purchase was unconstitutional without a constitutional amendment.[15] But again, our students are never taught about the Louisiana Purchase and its constitutional complexities because the debate took place entirely outside the courts. Instead, we teach them in effect that constitutional law begins in 1803 with *Marbury*. I think that is utterly wrong.

As somebody who begins my course with an extended treatment of

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[10] *See id.* at 55-58. "At least since the time of Woodrow Wilson's presidency, presidents have on occasion issued 'signing statements' explaining that they regard certain parts of legislation they are signing as unconstitutional and indicating their intention not to comply with the statutory language." *Id.* at 55-56. For a recent analysis of the legal significance of Presidential signing statements by a member of the executive branch see Memorandum for Bernard N. Nussbaum, Counsel to the President, from Walter Dellinger, Assistant Attorney General in charge of the Office of Legal Counsel, Nov. 3, 1993, *reprinted in* 47 ARK. L. REV. 333 (1995).

[11] *See* Oral Argument on Behalf of the Petitioner, Williams v. Taylor, 1999 U.S. Trans. LEXIS 73, at *10-11 (Oct. 4, 1999).

[12] 521 U.S. 507 (1997). The Court similarly disregarded the opinion of the Congress in *Kimel v. Florida Board of Regents*, and held the Age Discrimination in Employment Act exceeded Congressional authority under the Fourteenth Amendment. *See* 528 U.S. 62 (2000).

[13] *See* BREST, ET AL., CONSTITUTIONAL DECISIONMAKING, *supra* note 1, at 73 (citing EVERETT S. BROWN, THE CONSTITUTIONAL HISTORY OF THE LOUISIANA PURCHASE (1920)).

[14] *See id.* at 73-75.

[15] *See id.* at 74-75.

the Bank of the United States, it seems very, very difficult to reject Professor Lynch's view. Professor Lynch's book provides an argument that illuminates certain episodes in our past. If taken seriously, his work requires rethinking the way that we present the entire subject of constitutional law to our students, to lawyers and ultimately, to a public that hopes to learn what it means to take living under a constitution seriously.