1998

Introduction: Symposium on Constitutional Elitism

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In recent years the perennial debate about the judiciary's role in interpreting the Constitution has taken on a new tone and emphasis. Despite the fact that it has been almost three decades since the end of the Warren Court's period of flamboyant creativity, the Supreme Court has continued to produce surprisingly "progressive" decisions on freedom of speech, separation of church and state, equal protection, and privacy. Because this record cannot be attributed either to ordinary partisan loyalties or to respect for precedent, the recognition has begun to set in that more fundamental institutional and cultural forces may be at play.

One diagnosis is that the Justices are giving expression to the moral and political views of a certain social class. This view was given vivid expression in Justice Scalia's dissents in *Romer v. Evans*,[1] the case that invalidated Colorado's anti-gay rights initiative, and *United States v. Virginia*,[2] which ordered the Virginia Military Institute to admit women. Scalia charged that these decisions represent nothing more than the prejudices of the educated class and that the Court had become an active participant in the "culture wars." Partly as a consequence of the blunt forcefulness of these dissents, similar criticisms were soon getting widespread attention in wider intellectual circles.[3] Some serious observers even called for the consideration of "possible responses to [decisions] that cannot be obeyed by conscientious citizens."[4]

This Symposium is an effort to evaluate the accusation that constitutional law has become a vehicle for implementing the dogmatic beliefs of an educated elite. Interestingly, not one of the participants is satisfied with the terms of Scalia's critique. Steven Smith suggests that the Court's apparent elitism might be a by-product of an effort to give expression to the Framers' commitment to government based on rational deliberation or reason, a commitment that naturally coincides with the proclivities of many educated people.[5] He notes, however, that the Framers'

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1. 517 U.S. 620 (1996).
2. 518 U.S. 515 (1996).
3. *See, e.g.*, Robert P. George, *Justice, Legitimacy, and Allegiance: "The End of Democracy?" Symposium, Revisited*, 44 LOY. L. REV. 103, 118-23 (1998) (recognizing the view that judicial activism often runs contrary to majoritarian politics). Professor George develops his thesis by using historical examples, such as abortion, which the Court found to be a protected constitutional privacy interest despite strong grassroots disapproval. *Id.*
4. *Id.* at 120-21.
5. Steven D. Smith, *The Constitution in The Cave*, 30 MCGEORGE L. REV. 97 (1998).

version of reason was premised on the existence of a providential natural design; current uses of constitutional law, in contrast, rest on the modern worldview that rejects the idea of a divinely ordered universe. While this secular position may be held disproportionately in the educated classes, it is a widespread and profound aspect of modernity. Therefore, if the Court is taking sides in the culture wars, that is less because of the Justices' class-identification than because of their commitment to modern rationalism.

Jeremy Rabkin, even more than Smith, denies that the Justices' membership in the "educated elite" is the primary explanation for the Court's record.[6] His review of that record indicates that the Court is "a systematic partisan" for liberal values and an opponent of the values of social conservatives, including highly educated social conservatives. Sometimes, says Rabkin, contemporary liberalism is populist and social conservatism is elitist. The real dividing line, he argues, is between those who favor traditional moral norms and those who favor liberation from those norms. To the extent that traditional morality is based on belief in an objective and divinely ordered universe, then, Rabkin's highly political diagnosis of the Court's insistent progressivism tracks Smith's more philosophical explanation.

Pamela Karlan and Daniel Ortiz think that Scalia's charge is true only in a trivial sense and is "uninteresting."[7] They argue that modern constitutional law is at base dogmatic in the same way that all social beliefs and practices must rest on unquestioned premises. The interesting question for them is whether constitutional law is more smug and intolerant than political decision making. On this they profess to be agnostic, although they do note that courts are sometimes dogmatic of intolerant political acts and that some judicial decisions promote an inclusive politics. Moreover, while acknowledging that judges are inevitably a part of the educated elite, Karlan and Ortiz (like Rabkin) assert that political outcomes can also reflect elitism of various kinds. They conclude that the antidote to elitist dogma is "careful and open-minded thought" about the meaning of the Constitution and of democracy. Karlan and Ortiz do not, however, comment on the possibility, raised by both Smith and Rabkin, that the very kind of intellectual process they are recommending is hostile to traditionalists.

The contributions to this Symposium evaluate Justice Scalia's accusation from three strikingly different perspectives—that of the philosopher, the political scientist, and the constitutional theorist. Perhaps it is not surprising that the first is somber, the second angry, and the third complacent.

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6. Jeremy Rabkin, *Partisan in the Culture Wars*, 30 MCGEORGE L. REV. 105 (1998).

7. Pamela S. Karlan & Daniel R. Ortiz, *Constitutional Elitism? Some Skepticism About Dogmatic Assertions*, 30 MCGEORGE L. REV. 117 (1998).