6-12-1987

A Response to Professor Robert E. Park's "Giving Meaning to the Constitution: Competing Visions of Judicial Review"

J. Clay Smith Jr.

A Response to Professor Robert E. Park's "Giving Meaning to the Constitution: Competing Visions of Judicial Review"

By

J. Clay Smith, Jr.*

Professor Park has provided us with a provocative and enlightened exposition in his paper entitled, "Giving Meaning to the Constitution: Competing Visions of Judicial Review."

The question is: What theme has been offered by the speaker for intellectual consumption?

One theme is central to Professor Park's presentation: that there ought to be a nexus between the will of the people and the disposition of case and controversies decided by the United States Supreme Court.

Professor Park names this theme, or describes this theme as "super-majoritarianism ..., a new standard for validating or legitimatizing constitutional interpretations" during judicial review. ¶176

I will return to the nexus between the will of the people and judicial review shortly after I hopefully, properly summarize how Professor Park arrives at "super-majoritarianism" as a legitimate standard for judicial review.

Professor Park attempts to lay the foundation for "supermajoritarianism" by commenting on Mr. Justice Thurgood Marshall's Mauri, Hawaii, speech, in which Marshall concluded that the Constitution, when adopted, made it an imperfect, indeed, a flawed document.

---

*Following Professor Robert E. Park's paper presented at the Twelfth Annual Meeting of the District of Columbia Court of Appeals Judicial Conference on June 12, 1987, J. Clay Smith, Jr., Dean of Howard University School of Law, responded. Professor Park is a member of the law faculty at George Washington University School of Law.

Professor Park concedes that "Justice Marshall did the nation an important service in reminding [the nation] that the treatment of slavery by the founding fathers constitutes a continuing blot on the history of the constitutional convention. ¶8

Professor Park then closes in on Marshall's language that "The Constitution [is] a living document" interpreting Marshall's criticisms as substantial justice. As a matter of substantive justice, Professor Park has no objection to Marshall's speech.

However, as a matter of "constitutional analysis, constitutional reasoning," Professor Park, recognizing that other distinguished scholars -- indeed the majority of them -- hold Marshall's "popular" view, says that Marshall presents a "highly controversial theory of how we should interpret the Constitution." ¶9

Throughout his paper, Professor Park stalks the question: "do we have a living Constitution?" He pokes and tugs at the question because, from my point of view, he is very uncomfortable with all standards of judicial review accepted as legitimate by the majority of jurisprudents today.

Professor Park is very deferential to his peers and bends over backwards not to offend. However, like an ordinary scholar in the jungle of ideas, his intellectual guerilla warfare results in casualties. Word has it that three theoretical standards of judicial review have fallen in Professor Park's classroom of ideas at George Washington Law School, where he teaches.

Casualty One. Original Intent.

This theme emphasizes that the Constitution is a legal document, and analogizes it to other legal documents, like contracts and wills. Professor Park aims his intellectual gun at original intent and strikes a telling blow to this theme because he believes it has "severe constraint upon the

use of judicial power." ¶83.1 Rather, Professor Park suggests that "the original language must become increasingly merely a starting point." ¶137 Not without reservations, he concludes that "the evidence of [original] intent is ... fragmented [even] thin ..." ¶140

Casualty Two. The Instrumental (or Political) Constitution.

This theme, he says, uses constitutional law for a judicial political agenda; it is not neutral, but result-oriented. ¶83.3 Why doesn't Professor Park like this one? He says that the Instrumentalists "bring to constitutional law ... a ... set of preferred outcomes ... and [their] values are bent to serve these outcomes." ¶149

Casualty Three. The Moral Constitution

The moralist barely escapes the academic machine gun of Professor Park. The moral Constitution "treats consitutional inquiry as moral inquiry:" a moral mandate, and discounts procedure, legal coherence, precedents and logic, and stands as a bare assertion, says Professor Park. ¶¶83.4, 123

Surviving: The Living Constitution

The only surviving prisoner of Professor Park's academic war is the Living Constitution, the one that Mr. Justice Thurgood Marshall referred to in his Mauri, Hawaii, speech. ¶13 The Living Constitution emphasizes the inescapability of change, and perceives the Constitution as the focal point of what is, at least by analogy, a continuing constitutional convention. ¶83.2 Professor Park also draws on the words of Mr. Justice William Brennan as falling under the Living Constitution umbrella. ¶12

Let's return to the standard of judicial review offered by Professor Park. In reading his paper, one must constantly keep their eyes on the noble objective of its author: he seeks a new standard of judicial review termed "super-majoritarianism of American Sovereignty" involving the interpretation of the United States Constitution. ¶41

What method or logic does Professor Park utilize to reach his conclusion that there should be a nexus between court decisions and the will of the people?

First, he points our attention to the fact that some of the Framers of the Constitution such as Randolph, insisted that the ratification should be referred to the people (¶15), as opposed to Congress or the state.

Secondly, he points to the Tenth Amendment that the implied sovereignty resides in the states, the political unit nearest the people.

Thirdly, he points to the Amendment Process which requires ratification by 3/4 of the states.

These references to constitutional history seem to be the gravamen of Professor Park's theory of "super-majoritarianism."

Professor Park points his magnifying glass at the Constitution and concludes that the Constitution is a body of words from which few rules can be drawn without interpretation. He rightly concludes that much of the constitutional law is unwritten.

The people live by and are affected by the unwritten Constitution. Park asks: How can the gap, the ambiguities, the meaning of the words in the Constitution, be made legitimate to the people of the nation? Indeed, how can our instrument of rule, the Constitution, be authoritative?

The answer is that the language of the Constitution, its words and

phrases, its dashes and dots, are authoritative, if their interpretation is canalized, within bounds of legitimate interpretation.

Again, I remind you that Professor Park has a stated goal in his paper and that beckons us to consider "super-majoritarianism" as a standard for judicial review of constitutional claims. I get the feeling, even with the deference paid to traditional, or popular standards of judicial review, that such standards do not satisfy Professor Park's test of legitimacy, or authenticity. (¶44) In fact, the unstated rumblings in his paper may even suggest that modern standards of judicial review of constitutional claims are authoritarian. These rumblings are heard via his words which indirectly ask where do judges get the power, if there is any, to reinterpret, to recast and to reform the Constitution of the United States? ¶138 It sounds like an Edward Meese or Judge Robert Bork question, but Professor Park would assure us, I think, that he is not in that analytical camp.

What then is the vision of Professor Park concernig judicial review? What makes the analysis of constitutional interpretation authentic to or legitimate for him?

Professor Park could be satisfied with the following six criteria:

> 1) It should be plainly grounded in the constitutional text. 2) It should set limits to judicial decisions. 3) It should not frustrate the need for legitimate constitutional adaptation and innovation. 4) It should be consistent with the democratic values and the scheme of federalism implicit in the Constitution. 5) It should be usable by judges deciding real cases on real facts over genuine and heated constitutional controversies. 6) It should constitute a plausible use of the Constitution to the legal profession and to the people of the United States. (¶46, ¶128) (emphasis added)

On its face, the test suggested by Professor Park is neither new or novel, except, consistent with his general theme of "super-majoritiarianism"

he adds, in criteria six language which states that the standard of judicial review is legitimate if it "constitutes a plausible use of the Constitution ... to the people of the United States." (¶46)

I sense another rumbling from Professor Park: the people of the nation must believe that the analytical process used by the Federal Courts is plausible to them as opposed to "a professional elite". (¶56) Hence,the judicial review becomes legitimate only if accepted by the people, the "super-majoritarians."

Pursuing his theme of "super-majoritarianism," Professor Park argues that the issue of legitimacy would be not an issue at all if the analytical meaning of the Constitution came from the people. In fact, he "implies that the meaning of the document comes from outside the Constitution..." From whom does analytical meaning come? Again, Professor Park responds: the people. Apparently, he thinks that the judiciary should be as accountable to the people as is the executive and legislative branches of government. (¶¶63-66) But, doesn't such a notion collide with Hamilton's Federalist Paper No. 78, calling for an independent judiciary? The Federalist 502, 504 (The Modern Library Ed. n.d.). I think it does. Hamilton would, I am sure agree with me. Professor Park disagrees. ¶¶180, 181

I think that we should press Professor Park for an answer to this question: How many people in the nation are qualified to provide the U.S. Supreme Court with analytical advice in deciding cases?

Under the "super-majoritarianism" standard of judicial review, prior to a vote on a case, should the Court ask the pollster what the views are of the super-majority? Should what the people say matter to the Court?

Professor Park himself is sensitive to a criteria for judicial review

that is so restrictive that the courts employ pollsters as law clerks to analyze a decision prior to its release. ¶70

Professor Park justifies his thesis by an analogous reference to the requirement of 3/4 of the states to ratifying the Constitution.

I think we've determined exactly what Professor Park is after by his analogy: 3/4 of the people must constitute a national super-majority to validate, authenticate and legitimize a "plausible use of the Constitution" by the Courts. (¶46, ¶47)

I'm sure that my interpretation of Professor Park's thesis is correct because he wants his position understood. Using Brown v. Board of Education as an example, Professor Park states that the constitutional analysis and reasoning of Brown was supported by a changing national value as to equality." (¶67) He states that the majority of the people were willing to accept racial equality as a national value; hence, the decision was a "plausible use of the Constitution." Professor Park validates the public's acceptance by referring to Chief Justice Earl Warren's memoirs "that the Court received relatively little mail after the Brown decision, in contrast to some other cases." (¶67)

The people may have accepted the principle of equality in the abstract, but certainly not in the appliciation of Brown. Professor Park doesn't provide much guidance on the difference between "plausible use of the Constitution" as opposed to application. (¶186)

For many Americans, equality in the abstract is akin to Kirkegaard's analogy of giving a cookbook to a hungry man. I submit that the legion of cases following Brown, among them Cooper v. Aaron, 358 U.S. 1, 18 (1954) fully support my view.

I think that we owe Professor Park's offer that we consider another element of judicial review serious consideration: if not for to praise him for his assertions than for to bury him for making them.

Before closing, as Professor Park himself has pointed out: as a populous he can live with the Living Constitutionalist. Their reasoning is "attractive" to him as a matter of judicial governance. (¶170) But Park remains skeptical. Why? He wants the judge's presumption as to constitutional values to be at least three fourths of the values of the people. If that quota isn't reached -- under the super-majoritarianism standard of judicial review -- the decision of the court is not legitimate.

I commend Professor Park for his thought-provoking paper.

Ladies and gentlemen! I now return the podium to the people of the United States -- Professor Robert E. Park.