THREE TRIBES

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Reviewing
KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY
(Princeton 2007)

THE *GREEN BAG* IN ITS MODERN FORM, being the source of such wonders as judicial bobbleheads, seems an appropriate place to embark upon an unusual course. Although trained as a historian, I will play amateur anthropologist (apologies to actual anthropologists). For I realized that there are at least three tribes writing on legal history: the law professors, the historians, and the political scientists. My purpose is not only to review Keith Whittington's book, but to consider the value of what they say for one another.

I finished reading Keith Whittington's book on the way to a symposium on judicial reputation at Vanderbilt Law School. There, I observed two tribes in dialogue: the law professors and the historians. As always, I was impressed with the ease with which case names tripped off the tongues of the law professors, at the facility with which they could trace the development of a legal principle forwards and backwards from case to case, and at the minute doc-

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trinal technicalities which they could debate with vigor. I offered them what historians do best: the surrounding story and the places where more of it might be found. After some discussion of Justice Pierce Butler who dissented in 1927 from *Buck v. Bell*, the compulsory sterilization case, for example, I suggested that the Catholic journals and newspapers might be worth taking a look at for a reaction to the case and his dissent. When I mentioned that there was a book on religious leaders who embraced genetics and told the story of one who pointed out the excellent genetic background of Jesus Christ according to the Gospels, they all appeared intrigued.

But I did leave people slightly aghast when I called *Church of the Holy Trinity v. United States* a "great" case. You see, law professors reserve the word "great" for a decision the presents an unassailably superior interpretation of the law. A law professor asks, is this good law? Can it be cited? A great case sets forth a rule, and a rule is what a lawyer cites in court in order to show that the law is on the side of his or her client. This is an instrumentalist view of the law. For the legal historian, a great case is something else. It is a wonderfully rich and detailed expression of a judge's thoughts even if it's essentially a silly rule. *Holy Trinity* is great to me because it articulates Justice David Brewer's view of the relationship between law and religion in 1892. Much of what he wrote has been dismissed as dicta by law professors, although I disagree. But even if it were all dicta, I would still be happy because I love dicta. Ignoring the constraints of a discourse limited to legal rules, judges pour forth their thoughts in dicta. This is the story I want to know. This is the context I need to explain what the judge was doing.

Because the legal historian is interested in many things besides the rule, I may be accused of taking an illegal or even an amoral position when it comes to the law. History is amoral in its methodology. In order to understand people whom I don't like, whose ideas I may even think dangerous, I must understand their experience and how it creates their legal logic. My job is to make strange people make sense. In the end, the historian may offer a lesson, but is often limited to asking people to stop and think about what they are doing. We do not give people a rule to live by or sue by. We merely

indicate what might happen if they acted as someone did in the past. As a result, historians tell complicated and intriguing stories. But our vices are our virtues: we know too much, we want to know even more, we nuance too much, and it all takes far too long to write.

Looking about the room, and these two friendly tribes, I came to a conclusion. Law professors want the rule, historians want the story. These are simplifications, of course. My own professional circle is full of people who embody two tribes as they have doctorates in law and in history. But each of these tribes has a different way of looking at the law and a different way of writing about it. And what do political scientists want? It seems they want a theory. I am not sure if the theory must predict the future, like the rule found in a great case, but for Whittington it must explain the past. Historical actors or institutions are not reduced to a rule, but to an element of the theory. So, what is Whittington's theory? What is he trying to explain with it? Whittington's ultimate purpose is to use history in order to build "a coherent theory of judicial supremacy" (p. 10).

Whittington asks why politicians, presidents in particular, sometimes chose to defer to judges, the United States Supreme Court in particular, as interpreters of the U.S. Constitution and at other times chose to challenge the judges. The short answer is simple: the presidents do so in order to serve their own purposes. The long answer is more complicated. Whittington is curious as to why the Jeffersonian ideal of departmentalism – the three branches of government all able to claim equal authority to interpret the Constitution – has given way to a general deference to the Court. He looks to American history in order to understand how and why that has happened. By doing this, he challenges what he calls the "*Marbury* myth" which "asserts the judicial supremacy has been with us from the beginning" (p. 9). This myth involves the case of *Marbury v. Madison* in 1803 when Chief Justice John Marshall refused to force James Madison, Secretary of State under Thomas Jefferson, to give to one William Marbury the commission signed earlier by President John Adams that would have made him a justice of the peace. Mar-

bury's commission was one of many made under the Judiciary Act of 1801 by Adams who wanted to fill up the judicial benches and administration with his Federalist Party's cronies. Chief Justice Marshall, a Federalist, declared that the Court had no jurisdiction because an earlier act of Congress, a section of the Judiciary Act of 1789, was unconstitutional. It was a stunning maneuver. Marshall claimed the Court's power to pass on the constitutionality of congressional statutes while leaving Jefferson with little apparent cause to complain. According to the *Marbury* myth, ever since then, presidents have not challenged the Court as the ultimate arbiter of constitutional meaning.

Whittington identifies several types of presidents. The reconstructive president, like Jefferson, Andrew Jackson, Abraham Lincoln, Franklin Roosevelt, and Ronald Reagan, wanted to see major changes in the Court's personnel and jurisprudence, and, in the meantime, challenged the Court's claims to supremacy. Then, there are affiliated presidents who agreed with the general way the Court was treating the Constitution and who had less interest in and less ability to challenge it. Oppositional presidents would have liked to force some rethinking of constitutional interpretation, but didn't have enough popular or political support to do it.

Why have there been few reconstructive presidents? That is, why have there been few politicians who did not merely complain about the Court's decisions, but challenged its claim as the supreme interpreter of the Constitution? Apparently, political scientists don't ask this question much because they assume that it is best if the Court is supreme. But the Court has been neither the reliable defender of the rights of minorities, as some political scientists have claimed, nor just another representative of the political powers that be, as Robert Dahl argued (p. 42). So why did it happen? Whittington points us to "political time," which means the political situation at the time, or "the pattern formed by the presidential relationship to political authority, the intersection of the vitality of the regime and the president's relationship to it" (p. 50). Political time gave reconstructive presidents the opportunity to change the way government functions by setting forth a new vision of the Constitution.

So Jefferson wanted to undo the Federalist Party's efforts at centralizing power, for example. And FDR wanted to increase federal power in order to take charge of the economy. Reconstructive presidents condemned the Court as so politicized that it no longer interpreted the Constitution correctly.

Affiliated presidents like James Madison, who followed Jefferson, were likely to inherit benches of judges who were named by earlier reconstructive presidents, so they didn't need to worry about the claims of the Court to supremacy. They could encourage the power of judges since they expected the judges to agree with them. Other times, politicians found it easier to have the Court do certain kinds of constitutional interpretation, so that they didn't have to. When President Dwight D. Eisenhower sent troops to Little Rock, Arkansas to enforce desegregation after *Brown v. Board of Education* in 1954, he explained that he did so in order to do his constitutional duty as directed by the Court's interpretation of the Constitution. When the Court announced that the states had to reapportion their legislative districts when they became so skewed in population size so as to violate the Equal Protection clause in *Baker v. Carr* in 1962, the Kennedy administration approved.

Andrew Johnson, Lincoln's vice president, was an oppositional president who tried to appeal to the Court, but mostly just got squished by Radical Republicans in Congress (who would have squished him even harder if they had known that he'd invited General Ulysses S. Grant to help him stage a sort of coup). Johnson wanted to interpret the Constitution for himself, and also called for the supremacy of the Court. Richard Nixon tried some similar maneuvers. Oppositional presidents all seem to have been desperate presidents.

Now, to the tribe of historians, the *Marbury* myth doesn't seem all that powerful as we can readily think of incidents of politicians sparring over the Court's supremacy throughout the succeeding centuries. Reading the term, I was reminded of my graduate student's reaction to Rogers M. Smith's book on equality and citizenship which dwells on the effects of racism. We KNOW all this, they said impatiently. Indeed, historians of the 19th century have been

obsessed with race for years. But Whittington's *Marbury* myth appears to have power in the minds of political scientists who have imbibed a simplified view of the judicial past. He writes in his concluding chapter that political scientists believe "that the judicial authority to say what the Constitution means is absolute, intrinsic to the constitutional design and evident from the origins of the republic," and attributes this idea to no less than Ronald Dworkin, someone of whom even my tribe has heard (p. 285).

Has Whittington succeeded in his use of history? Do his attempts at generalization from historical examples work? To my tribe, his historical efforts appear both limited and strange. They appear limited in their scope and detail. For example, when he writes that reconstructive presidents are strengthened by opposition, I thought of Lincoln's plight. He only got elected because it was a 4-way race, the Union then fell apart, the Democrats never stopped attacking him nor clamoring for peace throughout the entire war, and without a couple of military victories, he would have been defeated in 1864. Lincoln had already prepared a memo for his cabinet on the need to bring the war to a satisfactory end before the inauguration of his rival. When Whittington writes that "there could be no question that Lincoln stood for inviolable union and the end of chattel slavery," I thought of how Lincoln carefully distinguished the preservation of the Union as his sole and overriding goal when pushed by anti-slavery man Horace Greeley to make emancipation a war goal in 1862 (p. 82). The historian's idea of context is one of enormous detail.

Using history to test a theory is strange to the mind of a historian. When Whittington writes of the limitations of another political scientist's theory, that "none of these simple predictions is borne out in the historical practice," it leaves a historian puzzled (p. 165). Theories appear to have their predictions tested by the past. But, why start with a prediction? We already have the past. Why not start with that?

But before I descend into a tribal one-up-man-ship, let me make clear that historians should not dismiss the efforts of political scientists who turn to a study of the past. They are paying a compliment

to our tribe by noting the usefulness of what we study. Whittington uses his examples in order to try to convince political scientists that they should pay more attention to history: "constitutional theory must be made more dynamic in order to take into account the historical operation of political institutions" (p. 76). From the point of view of historians, the more the political science tribe learns about the past, the better their theories must be. We may still not appreciate why they are up to what they are up to, but we must applaud any attempt to make more use of the great cases and the complexity which swirled around them.

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