

EDITOR'S BRIEF

How is the Constitution meant to be understood? This fundamental question remains overlooked in American legal education, unless we are to accept the explanation that the Constitution "is whatever the Court says it is." Constitutional law is taught by the case method, which allows for the fundamental constitutional principles to be disregarded. Instead, students are presented with crafty legal arguments and novel bases for constitutional interpretations. Constitutional law should at least allow students to question whether there exists a Constitution that is fundamental law and not a fuzzy charter for social activism and judicial governance.

Re-evaluating constitutional law in the law school curriculum has particular contemporary significance in that public dissatisfaction has greatly increased with controversial Supreme Court decisions on abortion, busing and school prayer. These relatively recent holdings ignore hundreds of years of precedent and appear to be based upon personal policy preferences on the High Court rather than the basic principles of republican liberty embodied in the Constitution. Yet students are presented with such cases as the gospel, not as creative jurisprudence where various approaches have been exploited to reach specific ends. The framers' intent, the legislative history, and, most of all, the actual language are often ignored.

Studying the documentary wording and the constitutional history is certainly not an illogical legal approach. In contracts law, for example, we are taught that proper enforcement should be based upon the language of the instrument and, if necessary, an examination of the intent of the parties. While the Constitution may be based upon jurisprudential principles that are not always clear, this is not a reason to shun constitutional principles, discard the intent of the framers and blindly accept the Court's bizarre reworking of the document. Constitutional law should focus upon distinctions between the wording and intent of a particular clause and novel Supreme Court interpretations. Instead, legal curricula employ the case method, where students are presented with judicial assaults on their intelligence—where the Court finds that limits imposed on the federal government can be transformed into federal power over state governments, and the Court discovers "penumbras" and "emanations" floating around specifically enumerated rights regardless of what the framers' intended. In "The Birth of the 'Living' Constitution," Professor Eugene W. Hickok, Jr. questions the basis of a "living" Constitution. This article helps contribute to the contemporary debate by recognizing that the study of constitutional law is inseparable from an understanding of fundamental constitutional principles.

One particular area where the Supreme Court has exhibited confused and inconsistent precedents has been where state practices have been challenged under the Establishment Clause of the first amendment. In "The Creche, the Cross and the Establishment Clause," Tim Shelly discusses how, in *Lynch v. Donnelly*, the Supreme Court squeezed the case into a "surrounding circumstances" analysis in order to uphold a forty-year old municipal practice of displaying a creche during the Christmas season. That government has a duty to promote religion in general and encourage morality among the people has been a fundamental principle of American political tradition since the birth of the Nation. Not until the 1960's, when the federal judiciary first implemented a policy of rigid separation of church and state, did this tradition meet with federal opposition. *Lynch* may signal an about-face in judicial policy. It remains to be seen how far the Court will allow the judicially-imposed barriers between church and state to be broken down. Regardless of the correctness of the *Lynch* result, this case illustrates the ease with which the Court creates a particular analysis to reach a desired result.

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This issue of *The Colonial Lawyer* also includes a tribute to the late Professor William F. Swindler by Chief Justice Warren E. Burger. The staff of *The Colonial Lawyer* would like to express its sincerest appreciation to Chief Justice Burger for providing this tribute to a man who was both a scholar of the Constitution and an inspiration to his students.

Finally, this edition presents a description of the Institute of Bill of Rights Law at the Marshall-Wythe School of Law. This Institute serves as a center for learning and research on the historical significance and contemporary application of the Bill of Rights.

Gordon J. Schiff