Courts & Congress: America's Unwritten Constitution

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Book Review

COURTS & CONGRESS: America’s Unwritten Constitution. By William J. Quirk*

Reviewed by Charles D. Kelso** & R. Randall Kelso***

I. Introduction

Professor Quirk has a theory about how the federal government works, and he has devoted this book to explaining that theory, showing its unfortunate consequences, and calling on the American people to do something that might improve the situation. Quirk’s theory is that in order not to risk incombancy the members of Congress have abandoned to the President their responsibilities for matters relating to war and peace, and have allowed the Court to be the final word on the most important cultural and social controversies - even though Congress could control the Court by using the Exceptions and Regulations Clause. An unfortunate consequence, says Quirk, is that the people are not controlling policy through their representatives in Congress, as was intended by the framers. Instead, foreign affairs are largely in the hands of one person, and domestic affairs are left to unelected Justices. Thus, the American people are governed by an unwritten Constitution, which Quirk calls “The Happy Convention.”

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1 Quirk explains that “The new, unwritten constitution is called here the Happy Convention. The Happy Convention is an informal rearrangement of government powers by which each of the three branches assigns many of its constitutional responsibilities to other branches.” William Quirk, Court & Congress 2 (2008).
II. Summary of the Book

Professor Quirk is concerned that our society, whose Constitution assumes that sovereignty is in the people, is becoming “the first historical example of a majority of self-governing people voluntarily turning over their power to some guardians” - the guardians being the President and the Supreme Court rather than the Congress, which was intended to be the main outlet for the people’s power.\(^2\) The main goals of Quirk’s book are (1) to alert the people to the great power they were intended to have in Congress, and then (2) to suggest means for bringing about a better separation of powers so that Congress is not left to concentrate on its favorite power - spending money.\(^3\)

Quirk explains that since Congress has been so quiescent, even on wartime issues, the political struggle over those and other foreign policy matters has become largely a struggle between the President and the Court. The latest round has gone to the Court, which held 5/4 that aliens charged with being enemy belligerents and detained at Guantanamo are entitled to bring habeas corpus in the federal courts because the military commissions set up by Congress, at the request of the President, did not provide procedures adequate to be a substitute for habeas corpus in the judicial system.\(^4\)

Quirk suggests several interpretations of the Constitution that would help make it easier for the federal government to overcome the Happy Convention. To begin with, the Supreme

\(^2\) Id. at 31.

\(^3\) Quirk summarizes his theme as follows: “Congress, under the Convention, gives the Court the last word on the country’s cultural, social, and moral issues. It gives the President a largely free hand in foreign affairs, going to war, and national security. The Court and president are happy to take on additional power. Congress retains the powers it wants, e.g., spending, which help keep its members in office - but it outsources its responsibilities.” Id. at 101.

Court opinion in *Marbury v. Madison*\(^5\) should be understood, as it was by President Lincoln,\(^6\) as establishing that in a case before the Court it has the duty and power of deciding what was constitutional. However, the other branches are not bound by that decision.

Next, Quirk suggests that Congress should feel free to strip the Court of appellate jurisdiction in many situations. In three Appendices he tells the story of a number of strippers that were enacted by Congress and upheld by the Court. As for *United States v. Klein*,\(^7\) which some have interpreted as holding that the Exceptions and Regulations Clause must be accommodated with other provisions in the Constitution to insure that Congress, by stripping the Court of jurisdiction, does not deprive some persons of a constitutionally protected right, Quirk appears to approve a statement by current Chief Justice Roberts, who, while serving as a special assistant to the Attorney General, wrote that the Act in *Klein* “was unconstitutional because it granted the Court jurisdiction but then limited the Court’s consideration of the relevant law.”\(^8\) As thus interpreted, the decision would have little relevance to the usual stripper bill.

III. Evaluation

The book is an interesting read because Professor Quick supplies so much historical evidence in support of his conclusions. For those who demand thoroughly balanced presentations on political issues, there will of course be disappointment. On the other hand, for

\(^{5}\) 5 U.S. (1 Cranch) 137 (1803).

\(^{6}\) “[T]he candid citizen must confess that if the policy of the government upon vital questions affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, in ordinary litigation between parties in personal actions, the people will have ceased, to be their own rules, having, to that extent, practically resigned their government into the hands of that eminent tribunal.” First Inaugural Address, March 4, 1861, in 4 Basler, *The Collected Works of Abraham Lincoln* 262, 268 (1953).

\(^{7}\) 80 U.S. (13 Wall.) 128 (1871).

\(^{8}\) Supra note 1 at 288.
those who want to see what can be said in favor of a change in relationships between Congress and the Court and, as well, the President, and to what substantive policies this might lead, there is much to enjoy. For example, Quirk states flatly that, “The Happy Convention’s debt habits will bankrupt the country.”\(^9\) Again, “The Happy Convention didn’t invent the basic deceptions built into the Social Security system, but it transformed a middle class irritant into a major hit.”\(^10\)

Despite all of Quirk’s talk about the need for change, one senses that Quirk does not feel that he is beginning a movement with any chance for success in modifying the Happy Convention.” In the most poignant paragraph in his book, which opens Chapter 6 on “Life under the Happy Convention,” he says this:

> A citizen living under the Happy Convention leads a life of frustration. The Court has no respect for the majority’s values so culture war issues explode like roadside bombs. The citizen might well prefer not to hear about homosexual rights, flag burning, Ten Commandment plagues, abortion, atheist rights, and the death penalty for minors. But the citizen has no choice. The press, full of volatile, intemperate debate, intrudes on his life. This is not only distasteful but pointless, considering that the citizen, if he doesn’t like what the Court has done, can’t do anything about it. The electoral process, under the Happy Convention, is next to useless. The constitutional amendment process, under the Convention, is dead as a doornail. The Court’s rulings, under the Convention, cannot be changed.\(^11\)

Since the modern era of Supreme Court activism was inaugurated by Brown v. Board of Education in 1954,\(^12\) Quirk’s concern has been echoed by a number of other writers,\(^13\) including

\(^9\) *Id.* at 135.

\(^10\) *Id.* at 139.

\(^11\) *Id.* at 129.


Professor Louis Lusky in a 1993 book, *Our Nine Tribunes: The Supreme Court in Modern America*. As Professor Lusky indicates in his book, the debate began even earlier in 1938 in the famous footnote 4 in *United States v. Carolene Products, Inc.* In this famous footnote, the Supreme Court sketched three types of situations in which the normal presumption of constitutionality and deference to the legislature might not be appropriate:

1. There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within specific prohibitions of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth...

2. It is unnecessary to consider now whether legislation restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation.

3. Nor need we enquire whether . . . statutes directed against particular religious . . ., or national . . . , or racial minorities . . . [or] prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

As Professor Lusky has pointed out, paragraph one of footnote 4 in Justice Stone’s opinion in *Carolene Products* was added at the suggestion of Chief Justice Hughes, and rests on different premises than paragraphs two and three. Paragraphs two and three of footnote 4 affirm “self-government” principles: paragraph two affirms a commitment to government “by the people[,]” and paragraph three focuses on government “by the whole people[,]” which includes discrete and insular minorities. Paragraph one's commitment to specific protections in the Constitution, particularly the first ten amendments that focus mostly on protecting individuals

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15 304 U.S. 144, 152 n.4 (1938).

16 *Id.*
from the government, and which are applicable to the states through being incorporated into the 14th Amendment Due Process Clause, is based more on “individual autonomy” concerns, not “self-government.”17

From this perspective, Professor Quirk’s and Lusky’s concerns really come down to whether one thinks the framers and ratifiers were more concerned only about the Court interpreting the constitutional to advance self-government, and deferring to the other political branches in other cases (and thus support heightened Court scrutiny only based on Carolene Products footnote 4 paragraphs two and three), or whether the framers believed individuals had natural law autonomy rights to be free from government regulation which they expected the Court to protect (as in Carolene Products footnote 4 paragraph one). Judges, and commentators, who believe the former tend to share Justice Oliver Wendell Holmes’ strong posture of judicial deference to government, reflected on the recent Supreme Court in opinion by Chief Justices Rehnquist and Roberts. Judges, and commentators, who share the latter premise, tend to approach constitutional doctrine more from the natural law perspective of Chief Justice John Marshall and Justice Story, reflected on the recent Supreme Court in opinions by Justices O’Connor and Kennedy.18

Since Brown v. Board of Education in 1954, the Court had adopted more the natural law approach, rather than the Holmesian approach, to constitutional interpretation. By so doing, the Court has increased autonomy rights for individuals from government, including rights of

17 Lusky, supra note 14, at 123-30.

minorities not to suffer pervasive discrimination; have better assured individuals of their freedom to speak; and have provided criminal defendants with some rights to protect them from unjustified convictions. In our view, the book would have been a better source for thoughtful appraisal of the current governmental situation in the United States if Quirk had presented arguments “the other way” regarding some of these consequences of modern Supreme Court decisionmaking with as much detail and gusto as he presented his own views and the historical events he believes show support for those views. On the other hand, the author has shown that he is not intimidated by political correctness or by the aura of respectability associated with many organizations.\(^{19}\) He has called the shots as he sees them. And, had he engaged in such a detailed presentation of opposing views, his book would have been a tome instead of a readable collection of generalities plus historical support that now appears in its relatively short 211 pages of main text (followed by 83 pages of historical appendices on stripping legislation).

The bottom line is that a reader already tending to believe Quirk’s main thesis will have that belief strengthened by this book. However, a reader tending the other way will not likely be persuaded to change his or her mind because the arguments which might be used to evaluate, qualify, or weaken Quirk’s positions, are not dealt with in this book. However, even disbelievers or doubters still might enjoy reading about what can be said against the “Happy Convention” by a talented writer who enjoys dealing with history.

\(^{19}\) He asserts, for example, “The ABA and the rest of the legal establishment have not helped the public understand the Constitution.” Quirk, supra note 1, at 106.