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Introduction

Robert J. Spitzer

Louis Fisher's prolific body of writings about the American Constitution, institutions, and the law stands as an enormous contribution to the study and appreciation of American politics from a modern institutionalist perspective. It has accomplished this goal in part because Fisher's writings are central to political science's contribution to these respective fields of study. Yes, many in political science study constitutional law, Congress, the presidency, the courts, public law, and other related subfields. Fisher's distinctive mark has come not only from his versatility with all of these subfields, but with his integrative study of their intermix, interaction, and balance. As Fisher has written, "To study one branch of government in isolation from the others is an exercise in make-believe."¹ His contributions are both all the more impressive, and underappreciated, because his professional life has simultaneously straddled two disciplines, political science and law. For this fact alone, a book honoring Fisher's body of work is a timely testament to the power and scope of his writings.

Yet Fisher's work has served at least two other important contributions. A second contribution has been to pioneer the much-vaunted return to institutions that has swept political science in the last two decades. For his part, Fisher has received disproportionately little credit for his work as a pioneer of the return to institutions, beginning as it did with the 1972 publication of his first book, *President and Congress*.² In this book, Fisher examined

the two branches of government pertaining to legislative power, spending power, taxation, and war power. At a time when most political science was obsessed with political/behavioral dynamics behind formal power (following, for example, Richard Neustadt's paradigm from *Presidential Power*),³ here was Fisher urging his readers to return to the Constitution, the Federalist Papers, and the legal-structural arrangements that gave rise to these institutions and therefore to modern policy disputes. Admittedly, Fisher's institutionalist orientation is reminiscent of the "old institutionalism" of the late nineteenth and early twentieth centuries by virtue of what Fisher's work does not do; in particular, it does not reflect the drive to generate grand theory buttressed by close empiricism; it does not embrace an all-encompassing definition of institutions, extending to any "sets of relationships" or even "informal networks"; and it does not flee from normative concerns.⁴ These latter traits, however, compose only a subset of modern institutionalism.⁵

The core of the new institutionalism recognizes that the key unit of politics is the institution; it incorporates special attention to historical analysis and context; it emphasizes the interplay of forces rather than the isolated study of single institutions; it understands the importance of particular cases, but reaches for generalizability; and it seeks to explore the interplay of interests, ideas, and institutions by understanding that institutions are the fountainheads of political decision making and choice.⁶ These are all values that identify Fisher's work.

A third contribution of Fisher's work emanates more directly from his career path than from his publications, in that his career represents a vanishing breed—the symbiosis of career government service and significant scholarship. Following the pattern of other disciplines, political science has become increasingly specialized, compartmentalized, empirical, and abstractly (some might say obtusely) theoretical. Practitioners and theorists continue to share some common ground and common resumes, especially in fields like international relations. Yet the prevailing trend has been toward progressive bifurcation of the academy and the political world.

Fisher's writings are not those of the self-serving memoirist or the petty bureaucrat. They grapple with issues of great consequence, including such specific matters as budgeting, executive reorganization, impoundment, the veto power, and executive privilege. These practical governing problems are then framed in larger constitutional terms as they pertain to the separation of powers, institutional power, democratic values, and the express normative question

of what constitutes good policy and good governance. In his award-winning book on budgeting,⁷ for example, Fisher chronicled the history and modern consequences of the federal budget process by examining statutory shifts in budget authority. The tale of shifting budgetary authority is interesting and valuable in its own terms. Yet its consequences for presidential power and interbranch relations do not escape Fisher's eye. Nor does the lesson that politics not only drives, but is driven by, institutional change. Fisher has dealt with these issues as an expert attached to the Library of Congress who is called upon by Congress to explicate key issues and offer sound judgments. Despite the dictates of an occupation that encourage a narrow policy focus, Fisher's writings match, if not exceed, those of any emanating from the academic/scholarly community. Political scientists who train and teach in the academic world, as well as those found in government service, would do well to appreciate Fisher's leadership-by-example in his lifelong devotion to the intersection of government service and the scholarly enterprise.

Based on Fisher's prodigious scholarly contributions, this book stands on at least two vital principles. The first is that modern politics is as firmly rooted in timeless constitutional principles and institutional procedures today as it was one or two centuries ago. From federalism to foreign policy, constitutional meaning sheds a bright and vivid light on modern political dilemmas. This observation is readily accepted as a truism, yet it is too often absent, even shockingly absent (aside from obligatory bows) from contemporary political analysis.

The second principle upon which this book stands is that the evolution, interpretation, and meaning of the Constitution, and the doctrine that flows from it, is not the sole province of the courts (or of lawyers). Rather, it arises from all the branches of government. This observation is by no means new. For example, a study appearing in the *Harvard Law Review* in 1958 chronicled twenty-one instances between 1945 and 1957 when Congress acted to reverse court rulings.⁸ Writing a few years later, Alexander Bickel noted that constitutional meaning and interpretation may arise from "fruitful interplay between the Court and the legislature or the executive. . . ."⁹ Writing more recently, Fisher has stated in definitive terms that "The Supreme Court is not the sole or even dominant agency in deciding constitutional questions. Congress and the President have an obligation to decide constitutional questions."¹⁰ Still, the idea that the legislative and executive branches contribute to

constitutional law operates, for the most part, below the radar screens of most constitutional scholars and the analysis they generate. Fisher's important (and also award-winning) book, *Constitutional Dialogues*, establishes the point, yet his continues to be a nearly lone voice. Part of the reason for this is reflected in the attitudes of courts themselves, the nature of their opinions, and the vast legal profession that stands behind the courts. For example, in the important 1997 Supreme Court case of *City of Boerne v. Flores*, a case that receives treatment in more than one chapter in this book, Justice Anthony Kennedy wrote in the majority opinion that Congress lacks the power "to determine what constitutes a constitutional violation" and that the power to interpret the Constitution "remains in the Judiciary."¹¹ Without denying the courts' central role in constitutional interpretation, to accept without question or analysis Justice John Marshall's *obiter dictum* that the courts alone are "to say what the law is"¹² (which Kennedy approvingly quotes in *Boerne*) is to commit two errors.

The first is to deny the just-stated fact that constitutional interpretation can and should involve all of the branches of government. The second, and more subtle error, is that it accepts and perpetuates a false dichotomy between law and politics. This false dichotomy operates as a dividing line between the executive and legislative branches, on the one hand, and the courts on the other. Even if we agree that the executive and legislative branches are the "political" branches, it surely does not follow that the judicial branch is not also a political branch. One can acknowledge that court politics and behavior, broadly defined, are different from the other branches. Nevertheless, the courts are political, as is the law itself. Some within the legal community have sought to advance the proposition that courts and the law are more than grand legal edifices. Notably, the school of legal realists defines law as the product of "the behavior patterns of judges and other officials"¹³ rather than as an abstract, olympian ideal.

A clear evidence of the legal/judicial community's desire to cling to the law-politics dichotomy as a way to minimize, if not deny the political quality of law is reflected in law school training that continues to downplay the inherently political nature of the law, constitutional interpretation, and judicial behavior, a fact long acknowledged by critics of legal education from Jerome Frank¹⁴ to Ralph Nader.¹⁵ On court application of judicial review to constitutional interpretation, Frank is blunt in asserting that the entire process is "a peculiar kind of political agency" and that the "judicial

veto [his name for judicial review, a process he viewed as akin to legislative law-making] is basically political."¹⁶

One may argue, contrary to Frank, that the "law-and-courts-as-above-politics" paradigm is a necessary, even justifiable conceit, in order for courts to retain their institutional legitimacy. I do not quibble with this need, but I do quibble with the analytical backwash that results from the perpetuation of this defective paradigm. To its credit, political science has provided a key corrective. David O'Brien, among many political scientists who study the courts and the Constitution, has stated the matter succinctly, noting that "The [Supreme] Court stands as a temple of law," but also that "it remains a fundamentally political institution."¹⁷ Political science has properly and correctly identified the political nature of the courts, and the political consequences of the law. What it has mostly overlooked, however, is the political nature of law itself. In part, this is because the courts, the Constitution, and the law continue to be viewed mostly through the eyes of the legal profession which, despite the efforts of some in political science and law, perpetuates the fictions that law is not political, and that politics and law are separate and distinct. As to the former assertion, some students of public policy have noted that law, as the expression of the coercive power of the state, coincides precisely with the definition of public policy. Theodore J. Lowi has summarized the paradox this way:

Anyone who studies political systems today must be struck by the presence of the state in all avenues of life. . . . Although political science is rich in theories that help give meaning to political experience, none of these has tried to construct a politics on the basis of the state and its functions.¹⁸

Lowi understands that law and policy are synonyms and that they are authoritative expressions of the state. The analysis of state structures and power is a fitting and sufficient definition of politics. Even viewed from the legal community, one can discern acknowledgement of the inherently political nature of law. Robert S. Summers and his colleagues describe five qualities of law: law as a grievance-remedial instrument, as a penal-corrective instrument, as an administrative-regulatory instrument, as an instrument for organizing and conferring public benefits, and as an instrument for facilitating private arrangements.¹⁹ All encapsulate policy objectives, just as all are political. The foremost political scientist/

constitutional-legal scholar of our century, Edward S. Corwin, stated the appropriate goal for his time and ours:

The real destiny of political science is to do more expertly and more precisely what it has always done; its task is criticism and education regarding the true ends of the state and how best they may be achieved.²⁰

This is where institutionalists of the Fisher tradition come in. In the tradition of Corwin, institutionalists (as I have discussed in connection with Fisher's work, and therefore as applicable to the contributors to this volume) understand that politics arises from law, and that law is also political. Further, they appreciate the interactive institutional process that produces modern constitutional meaning. The Constitution created the branches of government; the branches, in turn, continue to vest meaning in the document. These new institutionalist perspectives are themes that guide this book.



The distinguished contributors to this volume are uniquely situated to analyze these questions. As devoted institutionalists, all study and value court rulings, legal standards, precedent, and institutional analysis. Yet they also understand and appreciate politics. The confluence of these analytic values is uncommon, a fact that adds insight and import to this book. While the chapters to come are not designed to cover every element of Fisher's work, they all arise from, or respond to, Fisher's perspectives as seen in the scholarship of the respective authors.

The question of who gets the last word, constitutionally speaking, is one that pervades most of the chapters in this book. In his chapter, Neal Devins turns the standard argument concerning judicial exclusivity on its head. The common defense of judicial exclusivity is that this branch is best positioned and disposed to preserve and defend core constitutional values. Yet such an assumption, Devins argues, actually marginalizes the Constitution because the document benefits from the energetic buffeting of political and social forces articulated through the executive and legislative branches. This process makes the Constitution both more durable and more relevant.

In opposition to Devins, and in part to Fisher, Michael J. Glennon squarely confronts the question of "coordinate review"—

that is, the degree to which the other branches of government possess a right to determine constitutional meaning—by according it a lesser status. By considering coordinate review among the branches in the realm of foreign affairs, Glennon argues that the “political” branches do have such a power, especially when the courts are silent on constitutional issues, but that the executive and legislative branches do take a back seat in the matter in instances when the courts assert doctrine. Beyond the matter of who may interpret the Constitution, Glennon also examines the “what” of interpretation; that is, what sources of information provide the wellspring for interpretation?

The idea that the Constitution is, and should be, the product of coordinate construction among the three branches is Nancy Kassop’s point of departure. This approach not only widens the scope of who interprets the Constitution, Kassop argues, but sensitizes us to emphasize constitutional accommodations rather than higher profile, but more corrosive, controversies. Further, it reminds us that judicial independence is both indispensable and fragile. Beyond this, the courts are no less prone to error than the other branches. Since they do “get it wrong” at least sometimes, the other branches, as well as the states, complement what must ultimately be an incremental, modest, stepwise process of constitution building.

David Gray Adler complements this theme by examining some of the misbegotten constitutional doctrine surrounding the exercise of the war power. Beginning with a discussion of the related concept of judicial finality, which largely owes its existence to court trumpeting and legal community dogma, he proceeds to analysis of executive warmaking. Adler’s analysis would seem to undercut the wisdom of involving the other branches in a constitutional dialogue, considering the extent to which modern presidents have asserted fictional Constitution-based war powers. Yet the larger lesson is that the best hedge against constitutional error is greater, not lesser, involvement.

Undergraduate students of American government often consider federalism to be a tedious, arcane, even archaic concept little connected to modern politics. As Dean Alfange Jr.’s chapter on the Supreme Court and federalism reveals, nothing could be further from the truth. In a sweeping historical survey of court treatment of federalism as it has affected congressional power, Alfange levels a severe, even damning appraisal of recent Supreme Court cases that have sought to rob Congress of what he argues are reasonable, proper, and otherwise settled congressional exercises of power over

the states. This judicial “arrogance of power,” pivoting in recent cases on the votes of five justices, turns on its head the otherwise reasonable proposition that Congress has, by Constitution, law, and history, every reasonable right to assure the effectiveness of its legislation over matters of national policy (while also recognizing the propriety of state autonomy).

In a democracy, governmental secrecy is a paradoxical concept. Writing in *The Federalist Papers*, John Jay noted that “perfect secrecy and immediate dispatch are sometimes requisite.” Writing in the same set of essays, Alexander Hamilton identified the incompatibility of democracy and secrecy as applied to the House of Representatives—the governing body closest to the people—when he noted that the very idea of “secrecy, and dispatch, are incompatible with the genius of a body so variable and so numerous.”²¹ While undoubtedly necessary for the conduct of (especially foreign) policy, secrecy is also inimical to bedrock democratic values of accountability and openness. In his chapter on secrecy, Loch K. Johnson argues forcefully that the balance scales have too much and too far favored needless secrecy over democratic values and practices. Unsurprisingly, the chief culprit has been the executive; since the early 1970s, “evasion and duplicity” have been the norms of Executive branch behavior not only in war consultation, but in a wide panoply of executive-led foreign policy ventures. That pragmatism, or a just outcome, fails as justification is seen in a lengthy pattern of failed policies marked by embarrassment and unpopularity. Johnson is unblinking in his solution—honoring of “original constitutional boundaries.”

If the courts are not entitled to a monopoly over constitutional interpretation, neither are lawyers. Robert J. Spitzer takes the legal profession’s near monopoly over constitutional interpretation as his point of departure. The study of the Constitution and law are bedrocks of political science, and political scientists continue to make important contributions to this field. Nevertheless, the legal profession is typically viewed as that which is most well situated to offer legal interpretation and meaning, especially with regard to constitutional questions. Spitzer cites two disparate areas of constitutional interpretation—pertaining to an interpretation of the president’s veto power in Article I and pertaining to the Second Amendment of the Bill of Rights—to show that legal analysis in these two areas, as developed by lawyers in law journals, can too easily produce alarmingly flawed analysis, as is true in both of these cases. Worse, this defective analysis too easily serves as a primary buttress for way-

ward public policy. Spitzer concludes with an appeal to political science to renew its commitment to constitutional-legal analysis.

The voluminous and important writings of Louis Fisher inform the analysis of this book's contributors, and therefore bring the volume's contributors together. It is fitting, therefore, that he provide summative and analytic comment on some of the many strands of analysis spun by the foregoing writers.

Finally, I note that the present work began when most of these authors assembled for a panel organized and held to honor Fisher's work at the 1997 Annual Meeting of the American Political Science Association (APSA). The contributors thank the APSA for authorizing the panel.

Notes

1. Louis Fisher, *The Politics of Shared Power: Congress and the Executive*, 3rd ed. (Washington, D.C.: CQ Press, 1993), p. ix.

2. Louis Fisher, *President and Congress* (New York: Free Press, 1972).

3. Richard E. Neustadt, *Presidential Power* (New York: Wiley, 1960).

4. These particular elements of the new institutionalism are discussed in Philip J. Ethington and Eileen L. McDonagh, "The Common Space of Social Science Inquiry," *Polity* 28 (Fall 1995): 85–90; Theda Skocpol, "Why I am an Historical Institutionalism," *Polity* 28 (Fall 1995): 105; Morris Fiorina, "Rational Choice and the New(?) Institutionalism," *Polity* 28 (Fall 1995): 108.

5. Hugh Hecló discusses the enduring debate between the positivists (or empiricists, for lack of a better term) and the contextualists (or qualitativists), arguing that the extreme positions of both offer unproductive resolution. Instead, Hecló asserts that "It is squarely in the Weberian spirit to stake out an intermediate epistemological position where we expect accounts and explanations to be relative to context but leave ourselves ample room for exposing more general processes and historical types." This resolution serves equally well as a summary of Fisher's work. "Ideas, Interests, and Institutions," in *The Dynamics of American Politics*, ed. by Lawrence C. Dodd and Calvin Jillson (Boulder, Colo.: Westview Press, 1994), p. 370.

6. See Dorothy Ross, "The Many Lives of Institutionalism in American Social Science," *Polity* 28 (Fall 1995): 117–123; Karen Orren and Stephen Skowronek, "Beyond the Iconography of Order: Notes for a 'New Institutionalism,'" in *The Dynamics of American Politics*, pp. 311–330; Skocpol, "Why I am an Historical Institutionalism"; Hecló, "Ideas, Interests, and Institutions."

7. Louis Fisher, *Presidential Spending Power* (Princeton, N.J.: Princeton University Press, 1975).

8. "Congressional Reversal of Supreme Court Decisions: 1945–1957," *Harvard Law Review* 71(1958): 1324–37. The article noted that six of the twenty-one instances were not the result of direct confrontation between the branches, but rather occurred because "Congress was able to take into account policy factors that the Court could not properly have considered." (1326)

9. Alexander M. Bickel, *The Least Dangerous Branch* (Indianapolis, Ind.: Bobbs-Merrill, 1962), p. 206.

10. Louis Fisher, *Constitutional Dialogues: Interpretations as Political Process* (Princeton, N.J.: Princeton University Press, 1988), p. 5.

11. *City of Boerne v Flores*, 138 L Ed 2d 624 (1997), at 638, 641.

12. *Marbury v Madison*, 1 Cranch 137 at 177 (1803).

13. Lon L. Fuller, *The Morality of Law* (New Haven, Conn.: Yale University Press, 1964), p. 191. Fuller concludes his book with a plea for "an analysis of the social processes that constitute the reality of law." (p. 242) A classic expression of legal realism is Jerome Frank, *Law and the Modern Mind* (New York: Tudor Pub. Co., 1936). For more on this and other theories of legal philosophy, see Surya Prakash Sinha, *Jurisprudence: Legal Philosophy in a Nutshell* (St. Paul, Minn.: West Pub., 1993).

14. Jerome Frank, *Courts on Trial* (New York: Atheneum, 1970), Chap. XVI. Frank's criticism echoes his broader critique of law, known as legal realism, which seeks to demythologize and demystify law, emphasizing instead the social, psychological, and political forces that explain judicial decisions.

15. Ralph Nader, "Law Schools and Law Firms," *The New Republic*, 11 October 1969, p. 21. See also Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System* (Cambridge, Mass.: Afar, 1983).

16. Frank, *Courts on Trial*, p. 311.

17. David M. O'Brien, *Storm Center: The Supreme Court in American Politics* (New York: Norton, 1990), p. 13.

18. Theodore J. Lowi, "The State in Politics," in *Regulatory Policy and the Social Sciences*, ed. by Roger G. Noll (Berkeley, Calif.: University of California Press, 1985), p. 67.

19. Robert S. Summers, et al., *Law: Its Nature, Functions, and Limits* (St. Paul, Minn.: West Pub., 1986), p. 27.

20. Edward S. Corwin, "The Democratic Dogma and the Future of Political Science," *American Political Science Review* 23(August 1929): 592.

21. Alexander Hamilton, James Madison, and John Jay, *The Federalist Papers* (New York: New American Library, 1961), #64, p. 392; #75, p. 452.