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Constitutional Scholarship: What Next?

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possible, perhaps inexorable, changes in the structure of courts. Specifically, studies of court-ways need to pay more attention to the following:

1. The effects of the size of an appellate bench and how the number and rotation of judges affect law and decisionmaking.

2. The housing and geographical location of appellate courts as related to collegial interaction. One thinks, for example, of the differences between the Ninth Circuit Court of Appeals and that for the District of Columbia Circuit and how important those differences are for collegial decisionmaking.

3. The rise of what some judges lament as "bureaucratic justice"—how the increase in the number of law clerks and staff attorneys affects collegial decisionmaking, the traditional role of negotiation and compromise, and opinion writing.

4. Finally, a related issue, the consequences of introducing modern office managerial practices and equipment during the last ten to fifteen years. How are "court ways" changing due to the greater reliance on modern office technology?

From my perspective as a political scientist, such empirical research deserves as much (if not more) attention as that presently given to normative debates over theories of judicial review.

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1. It used to be that big shot legal academics wrote casebooks and treatises when they tired of writing for the law reviews. They now do books for university presses. There are many reasons for this. Treatises are out of fashion because there is too much law and it has lost its structure. Scholars are interested in either "deconstructing" or "rethinking" the law. Neither of these enterprises appeals to law firms, which buy a large fraction of the law reviews. Such writers are also often big thinkers (like treatise writers in their own way) and their oeuvre is too big for periodicals. Too, footnotes are less important for deconstructors and rethinkers, and the law reviews' addiction to them is annoying. (For shorter pieces such people flee to *Constitutional Commentary, Ethics, Nomos, Philosophy and Public Affairs, Social Philosophy & Policy*, etc., where citation obligations are more relaxed.)

I have several reflections about this change in the form of scholarship. One is that these books are hard for law library patrons to find. If I'm doing research on judicial review or equal protection I can't find books on the subject through the Index to Legal

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Periodicals or the Current Law Index. Just book reviews. I can use the card catalogue of the main library to locate authors and titles, but the subject indexes are no good for lawyers. The copyright laws and the market have inhibited libraries from putting the full texts of books on computers for Boolean searches, as Lexis and Westlaw have done with cases and statutes. Books In Print has a fair subject guide, but it drops titles after about four years. The best bet for those near a university library is to hook up by modem with the National Union Catalogue. If they have at least one title already they can do the electronic equivalent of looking at books on the same shelf in the Library of Congress. But that won't help most lawyers, and the system is at the mercy of nonlawyers who do the cataloguing. Perhaps something could be done to make this kind of writing more accessible.

And speaking about accessibility, I think it would do marvels for the popularity of the genre if it were all written in English. People don't have to *sound* like Kant, Hegel, Heidegger, Habermas, and Derrida in order to talk about them. There is an analogy to this in the way first-year law students talk. Jargon has a peculiar fascination for those who don't quite know what it means; but good lawyers can make hard things clear. Perhaps it is conceit, but I have reached the stage in my life where I think that if I can't understand what you are trying to say, it's *your* fault.

2. Interpretation problems have been the rage for ten years. They now get some notice in the casebooks, and have even made TV
in the Bork hearings. We have articulated a range of interpretive principles. From right to left they cover intent, text, structure, precedent, tradition, process, conventional morality, emerging "traditions," moral theory, and power. I have two complaints about this brand of scholarship. One is the tendency (especially on the left) to be disingenuous about the subject of intent. The other is the failure (more noticeable on the right) to address issues of justification.

As to intent, the left perceptively has noted real problems of ambiguity and just plain indeterminacy that any such theory faces. Whose intent? At what level of generality? Is the idea of a group intention meaningful? Can we retrieve it even if it is? But it is odd that these questions are raised about constitutional interpretation yet ignored in the reading of statutes. We are willing to make historical group intentions the key to unconstitutionality under the establishment clause (*Wallace v. Jaffree*) and the equal protection clause (*Hunter v. Underwood*). The left on the Court would like to do the same even in "old" equal protection cases (*Railroad Retire-*

ment Bd. v. Fritz; Schweiker v. Wilson). Here the problems of ascertainability are also grave. This leads me to believe that people have other reasons for rejecting intent as a tool in constitutional interpretation.[30]

There are good reasons for doing so, and this leads me to my second point. By and large we have treated the issue of interpretation as a problem of meaning and have neglected the related problem of justification. Suppose we could determine the framers' group intention about the first amendment. We still need to explain why we should prefer that understanding of the text over other plausible candidates. We need to explain why the thoughts of a few people long dead should govern our behavior today. These are issues of political morality, but they enter into the conventions that govern our understanding of texts like the Constitution.[31] (Think about the interpretation of wills. There too we use conventions that often ignore the author's intentions in order to serve a moral theory about the distribution of property.)

3. Here is a more concrete problem. People who do constitutional interpretation in the manner of Justice Black are unfazed by technological change. I am not one of them, and I think that cable television could change the way we think about the first amendment. At present most of us subscribe to the notion that government can regulate the market for goods but should stay out of the market for ideas. We are free speech marketeers. The FCC thinks that changes in communications technology now give us more reason than ever to feel this way. So it has dumped the fairness doctrine and revised the rules requiring cable operators to carry broadcast signals. Lower courts recite the virtues of competition as a reason for loosening the strings that cities have used to tie up cable operators. These include rules about franchising and rules about access to the medium. I think this may all be a mistake. Cable is both a great picture and a natural monopoly, and the result of a laissez-faire approach may be that in ten years there will be only one speaker in town. This will matter a lot at election time because winning is tied to a candidate's TV budget. The cable operator could become the twenty-first century version of the political boss. I would like to see more writing about cable, and about how we could understand the first amendment in a regulated market.

30. I should add that conservative members of the Court feel *less* bound to intent in statutory cases (Flemming v. Nestor; Michael M. v. Superior Court). They too are affected by other norms in their theories of interpretation.

31. *See* Lyons, *Substance, Process, and Outcome in Constitutional Theory*, 72 CORNELL L. REV. 745 (1987); Lyons, *Constitutional Interpretation and Original Meaning*, 4 SOC. PHIL. & POL'Y 75 (1986).

(We might apply this understanding to the problem of campaign financing too.)

4. First-year constitutional law courses spend a lot of time on questions of federalism, and the chief concern in those discussions is whether there are limits to the federal government's power. I often wonder whether we are wasting our time in these debates. The most interesting development along these lines is Congress's increasingly common use of "crossover conditions" on government spending. These are conditions that have nothing to do with how federal money is spent. Congress has tied highway funds to the minimum drinking age (*South Dakota v. DOT*), education aid to draft registration (the Solomon Amendment), and sewage treatment grants to clean air (Clean Air Act). The proposed Civil Rights Restoration Act will impose new nondiscrimination obligations on recipients who get any kind of federal money. One can imagine connections between these grants and their conditions but it's getting hard. A lot of state and local officials and a handful of academics have pointed out the problem. No one has proposed a natural stopping place. Is there no limit to regulatory uses of the spending power?

5. I wish somebody not teaching at Chicago would write about the contracts clause.

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I was browsing recently in an obscure Ph.D. thesis on free speech theory, when the following sentence leapt out at me: "What are the obligations owed between persons who cannot agree on fundamentals?" The young George Will was reflecting on the agonies of the pre-Civil War generation, but the questions strike me as precisely relevant today. A year of Bicentennial debating and paneling has convinced me of what I had suspected for some time—that there is deeper disagreement over the "fundamentals" of the Constitution of the United States, over its substance understood as the meaning of its provisions, than at any time since the 1850s.

There is decreasing common ground between the variety of interpretivists (who argue that if a reasonably clear, historically-grounded content cannot be found in a provision of the Constitution then the party relying on the Constitution fails) and those who would apply the "open-ended" and "majestic" phrases of the Constitution according to our own best lights in an effort to vindicate the general values thought to have been subscribed to by the fram-

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