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A Heterodox Catechism.

Paul Campos

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> Let me try to state in a nutshell how I view the work of judging—my approach, I believe, is neither liberal nor conservative. . . . As Justice Oliver Wendell Holmes counseled, one of the most sacred duties of a judge is not to read her convictions into the Constitution. I have tried and I will continue to try to follow the model Justice Holmes set in holding that duty sacred.
>
> Ruth Bader Ginsburg

What did Judge Ginsburg promise the assembled multitudes?

That she would judge rather than legislate; that her views on all matters pertaining to the meaning of the Constitution would not affect her views concerning the Constitution's meaning; that this paradoxical task was not only possible but indeed a sacred trust best illustrated by the restrained judicial activism manifested in the constitutional jurisprudence of that Nietzchian Christian, or pacific warrior, Oliver Wendell Holmes, and that she was not liberal nor conservative but would be both or neither, as her oath of service to the law required.

What reaction did these promises elicit?

Universal cries of hallelujah, unto us a judge is given.

Is it possible to enumerate the sources of this splendid unanimity?

Such sources included, but were not limited to, the judge's gender, which elicited from that mostly male consortium a chivalrous reserve reminiscent of bygone days of errantry; the still-fresh recollection of similar proceedings involving then-Judge now-Justice Clarence Thomas and then-Professor now-Saint Anita Hill, and the concomitant unhappiness which resulted from that less than optimal display of what might charitably be characterized as the tangled passions of a human heart, and the feminine reticence or even revulsion with which that display was

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met; the even more distasteful memories of the unforgettable *auto-da-fé* featuring then-Judge now-iconic victim of an unscrupulous smear campaign Robert Bork; the tedium which any examination of questions of constitutional practice and theory naturally generates in everyone associated with or subjected to such questions; the certain knowledge that the principled distinction between law and politics was fully appreciated by the guest of honor; and (not least) the power that wishful thinking always exercises over the affairs of men.

Did certain questions germane to the issues at hand then go unasked?

They did.

What examples come most readily to mind?

First, some inquiry into the ontological status of that object of veneration yclept *The Constitution,* to which everyone (Senators, Judges, Presidents, Popes, Emperors, Antichrists) must swear a most solemn oath to uphold, come hell or high water, subject, it goes without saying, to those procedures for amendment exhaustively described in Article V of that self-same document, and to no other earthly or infernal power world without end amen.

What makes such an inquiry desirable?

The confusion resulting from an inability or unwillingness to identify the meaning of that document with some set of semantic intentions emanating from an identifiable agent.

Does not the text of the document provide an adequate source of emanating signification?

No.

Why not?

Because of the perverse semantic plurality of natural languages, which provide an infinite play of signifiers to which more than one meaning may always be attached.

Does the attribution of meaning through the act of identifying that meaning with the semantic intentions of a particular author or group of authors adequately specify the meaning of the text in question?

Yes. However, the functional inadequacy of intentionalist accounts of constitutional interpretation are too well known to suffer repetition.

What assertions will be made in the course of suffering that repetition?

That among the innumerable sins of originalism might be counted: the epistemological breakdown almost certain to occur when future generations attempt to determine just what someone meant or did not mean when employing human speech across the unbridgeable chasm of the obscuring centuries; the interpretive crisis occasioned by the ineluctable modality of human experience, to wit, the unimpeachable fact that the authors of that cryptic document failed to consider such cultural and technological wonders as wiretaps, interstate telephone lines, facsimile machines, condoms, the inflammable nature of national symbols, and the secularization of Christian holidays via the implacable logic of consumerism, not to mention the unforeseen consequences flowing out of an ever-broadening stream of interstate commerce that would come to include (among other things) cows, wheat, lottery tickets, slaves, compact disc players, certificates of deposit, greeting cards, treasures from furthest Araby, financial quotations, photographs of naked women engaged in crimes against nature, electronic signals bearing discrete parcels of information amenable to interpretation via a binary code as first envisioned by that enigmatic genius of the cryptographic art, Alan Turing, baseball gloves, Japanese ceramics, sheet music, the unwritten history of the future, and the tangled passions of a human heart (see infra); the conceptual impossibility of reconciling the various conflicting intentions of the Framers, the Ratifiers, and the People Themselves; the natural repugnance felt by all at being forever within the clammy grasp of the past's dead hand; the obvious reluctance of the contemporary American public to accept what would then be the inescapable truth that the state of Connecticut was not constitutionally prohibited from violating the sacred precincts of the marital bedroom; and the simple yet embarrassing fact that no one whose opinion in these matters counted had given sustained attention to what the problematic authors of the Constitution, however defined, had meant by the words of that document since *Marbury v. Madison* or time immemorial, whichever came first.

Do the previous decisions of the United States Supreme Court, ennobled by the ineffable dignity that the principle of stare decisis lends to these fragments we have shored against our ruin, provide, in and of themselves, an authoritative source of constitutional meaning?

No, because this Court always stands ready to correct its errors, even though of long standing, those errors being all but incorrigible to legislative remedy.

To what additional sources of signification did Judge Ginsburg allude, given the evident failure of constitutional text, authorial intention, and judicial precedent to provide adequate sources of contemporary constitutional meaning?

She alluded to a jurisprudential method.

How will this method affect her constitutional practice?

Evidence can be adduced from the judge's own opinions, produced via the Federal Circuit Court for the District of Columbia.

What evidence does a cursory examination of this jurisprudential product yield?

That the then-Judge now-Justice will employ the procrustean methods of her generation's jurisprudential mentors Henry Hart and Albert Sacks, progenitors of *The Legal Process* (tentative draft, 1958) in order to better achieve the aspirational goals of our constitutional order through a scrupulous interpretation of an infinite variety of ambiguous legislative acts, conflicting lower court rulings, and (especially) the complex directives of administrative agencies, so as to lend formal certainty to social interactions of every kind, do what substantial justice requires, and, in general, make the world safe for bureaucracy.

What judicial procedures do these methods involve?

They involve, firstly, a careful not to say exhaustive review of all the relevant legal materials whose meaning, properly interpreted, might throw light on the proper resolution of the sorts of cases and controversies that courts display a special institutional competence toward resolving; secondly, the formulation of various complex interlocking directives by means of which the properly interpreted meaning of the materials may be made synonymous with those interpretations that flow from the proper deployment of those interpretive methods which give the meaning of those materials a public and formal character, thereby making that meaning accessible to everyone who has undergone a socialization process resembling that to which students at elite American law schools were subjected, circa 1958; thirdly, the acceptance of the pragmatic yet principled dictum that law is a purposive activity which continually strives to solve the basic problems of social living; fourthly, the full recognition of the indispensable role played by that most lawyerly virtue, procedure, in assuring a kind of objectivity to what would otherwise degenerate into an unconstrained act of judicial fiat; fifthly, the establishment of the principle or public norm that decisions which are the duly arrived at result of duly established procedures for mak-

ing decisions of this kind ought to be accepted as binding on the whole society unless and until they are duly changed; and sixthly, the sobering realization that the only alternative to regularized and peaceable methods of decision is a disintegrating resort to violence.

Can an example be given of a methodological directive which these methods presume to compel?

That a statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably.

What does the substance of this particular conclusion indicate?

That the methods propounded by *The Legal Process* (tentative draft, 1958) are heavily dependent on the tautological or even shamanistic invocation of the signifier *reasonable*; that reasonable men will seem reasonably reasonable only under conditions that generate sufficient ideological consensus as to what reason requires; that the elite American law school circa 1958 was indeed such a place; that the now-mind of the then-student Ruth Ginsburg appears to represent a paradigmatic product of that environment; and that this mind's subsequent legal career provides a performative demonstration of the almost fanatical worship of technocratic rationality which that environment apparently induced.

What is the central tenet of this form of worship?

That law is a rational self-conscious activity.

What heretical suspicion must then be suppressed at all subsequent costs, intellectual, psychological, and economic?

That we have no idea what we are talking about.

How is this suppression achieved?

Through the painful evocation those fine and careful distinctions that mark the work of the legal craftswoman as she pursues with an almost Sapphic passion a jealous mistress along those well-trodden paths formed by the thrilling tradition of Anglo-American law, as this law strives to fulfill that glorious destiny foreordained by its place in the structure of American institutions as a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law.

What other phrase describes this activity?

Boring your audience into submission.

What jurisprudential virtues did Judge Ginsburg's testimony exemplify?

Powerful intelligence, as demonstrated by her manipulation of many a Solomonic puzzle prepared for her by the Judiciary Committee staff; great patience, as manifested by her willingness to stoically endure the torrent of verbal nonsense issuing forth from the Committee's chair, the honorable Joseph Biden of Delaware; surprising candor, in regard to her answers concerning the constitutional status of abortion rights, whether located, as we feel they are, in the general vicinity of the Fourth, Ninth, and Nineteenth Amendments, or alternatively, as suggested by the Judge herself, in a dynamic reinterpretation of the Equal Protection Clause; and political acumen, as illustrated by her deft deflection of various potentially problematic questions regarding the practice of judicial review.

What jurisprudential vices did that same testimony point toward?

A certain rigidity of intellect, displayed, for example, in Judge Ginsburg's willingness to assert that her personal views on capital punishment would not influence her judicial evaluation of that practice; a powerful ability to tolerate cognitive dissonance, as evidenced by such assertions; an evident failure to comprehend that the sacred text of her generation of academic lawyers, *The Legal Process*, (tentative draft, 1958) signaled the arrival of the characteristic crisis of modernism into the cathedral of American legal thought; and a resultant uncritical manifestation of the cognitive style exemplified by the substance of that text.

In what way does Judge Ginsburg's jurisprudential Ur text, *The Legal Process* (tentative draft, 1958) indicate the arrival of the characteristic crisis of modernism in the history of American legal thought?

In its eternal status as a tentative draft, rather than a published text.

What does this tentative status signify?

That God is dead.

How does the failure to publish one's work in any way indicate the necrotic condition of the erstwhile Almighty Creator of heaven and earth?

By signaling a sudden realization on the part of various erstwhile subcreators, including, but not limited to, novelists (Kafka), philosophers (Wittgenstein), architects (Gaudi), and legal process scholars (Hart & Sacks) that this (their work) is as good as it is going to get, and that the sudden exaltation of human creative labor into the sphere of the quasi- or psuedo-divine implicitly requires of that work nothing less than perfec-

tion, despite the overwhelming evidence that perfection is not, has not been, and never will be a human attribute, and that therefore their appointed task is impossible, absurd, and yet absolutely necessary.

What does this realization generate?

A kind of paralysis.

What is the source of this paralysis?

A neurotic compulsion to devote one's life to the attainment of an unattainable goal.

Such as?

Creating sacred texts in an irremediably secular world, solving the fundamental mysteries of human existence, designing places of worship that will adequately honor a being who does not exist, and discovering the meaning of the Constitution.

With the help of?

The best minds of my generation.

Including?

Ackerman's paradigms, Bollinger's tolerance, Chemerinsky's anger, Dellinger's doctrines, Ely's democracy, Freeman's delusions, Grey's pragmatism, Halberstam's sister, Idolatry's cousin, Jacob's ladder, Komesar's politics, Levinson's theory, MacKinnon's machismo, Nagel's unhappiness, Omnipotence's blessing, Peller's critiques, Q's weapons, Regan's philosophy, Sandalow's skepticism, Tushnet's diatribes, Unger's priesthood, Van Alstyne's disease, Weschler's principles, Xerxes's divisions, Yudof's lucre, and Zeno's last paradox.

What then does the practically unanimous ascension of Judge Ginsburg portend for the next decade of constitutional commentators?

That the more it changes the more it stays the same.

What emotions attend this realization?

Anger, frustration, resignation.

Why anger?

Because an increasingly meaningless bureaucratized discourse will continue to become ever more obscure, complex, and indeterminate.

Why frustration?

Because a surfeit of cultural angst will impel lawyers and, especially, legal academics to proclaim with increasing fervor and decreasing conviction that everything is for the best in this, the best of all possible jurisprudential worlds.

Why resignation?

Because of the evident absence of that instrumental power of reason over the course of human events which an age of reason believes rationality by its very nature must manifest.

Why is this instrumental power absent?

Because the falcon cannot hear the falconer.

What then is the answer?

To begin to question the instrumental power of rationality.

How well has this particular attempt succeeded?

Less than hope allowed, more than fear permitted.

What parable sums up the essence of our constitutional condition?

> They were offered the choice between becoming kings or the couriers of kings. The way children would, they all wanted to be couriers. Therefore there are only couriers who hurry about the world, shouting to each other—since there are no kings—messages that have become meaningless. They would like to put an end to this miserable life of theirs but they dare not because of their oaths of service.
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> Franz Kafka