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Constitutional Scholarship: What Next?

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(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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ers. In area after area, from federalism to church-state relations, and from affirmative action to due process privacy rights, we are at loggerheads.

Ironically, the Bicentennial observation has had the effect of making this gulf more visible to specialists and non-specialists alike. Thus, one conference or symposium will celebrate the genius of the framers and their new science of politics, while the next will stress the essentially flawed, or incomplete, or even vicious nature of the original Constitution until it was supplemented by the fourteenth amendment, the election of Franklin Roosevelt, *Brown v. Board*, or any number of innovations from the 1960s and 1970s. I remember one distinguished law professor arguing earnestly that the standard oath of office (to "support and defend the Constitution of the United States") was incoherent because there is so little agreed-upon, substantive content to the Constitution. And then there was the casual remark of another eminent professor that the government of the United States could not be regarded as legitimate until passage of the civil rights legislation of the 1960s. And finally, I remember Lincoln Caplan's *New Yorker* pieces of last summer in which he vilified the Solicitor General and Justice Department for disrespect for "the law," without, apparently, the slightest realization that however wrong-headed Charles Fried and Brad Reynolds may be, they are acting precisely to combat what *they* regard as "lawlessness" and "disrespect for the law." The whole increasingly desperate combat is about what "the law" is and who speaks it authoritatively to whom.

The struggle over the Bork nomination swirls arond me as this is written, and the prospect for reestablishing an interpretive community in America seems, frankly, remote. But perhaps this is just the time to force ourselves to think about what kinds of constitutional scholarship might contribute to that end. If the constitutive act of civilization is reasoned conversation with other persons, and if scholarship is the most advanced, disciplined, and focused form of conversation, then surely it has something to contribute to the creation of common ground between the traditionalists and the radical innovators. Here are my suggestions.

1. *A Pox on Abstraction.* Let us cultivate a healthy skepticism toward the manufacturing of new and more abstruse "comprehensive theories" of constitutional law. Let scholarship refocus on the American tradition to see what options it, in fact, makes available to those who must construe the Constitution today. Let us get Hercules a job preparing nineteenth century state legislative histories. Particular attention should be paid to the lost significance of the

privileges and immunities clause. It strikes me as likely that a case can be made out that the fourteenth amendment extended to the states substantive restraints beyond those embodied in the Civil Rights Acts of 1866. In other words, there is grounding in tradition for positions between Raoul Berger and the contemporary followers of Horace Flack.

2. *Rehabilitate John Marshall.* This will bear most heavily on the left in contemporary constitutional politics. Surely we can get nowhere without restored agreement on what justifies judicial review. We need no plurals here—definite articles are the thing! Constitutional review can only be justified as the enforcement of a past extraordinary majority against a majority of the moment. Legislative victories yield to those anterior agreements that we made with ourselves in the mode of We The People. This is the justification for judicial review of *The Federalist* No. 78, James Wilson's law lectures at the College of Philadelphia, and *Marbury*; it is the only one that will do. Not only do history and convention exclude substitute justifications, they are logically excluded—no other justification can be reconciled to the primary commitment to self-government on which our constitutional edifice rests. This leaves plenty of room for argument over the quality of what it was that a past constitutional majority thought it won; maybe that majority did think it was constitutionalizing a general principle. But let's have a reality constraint on the debate.

3. *Develop a Doctrine of Relative Outrageousness of Past Errors.* This requirement will bear principally on the right. It requires traditionalists to ask what it means to pursue a jurisprudence of original intention in a context in which original intention has been flouted in the past. Or, to put the matter differently, what nontraditional outcomes in constitutional law must now be regarded as traditional? For defenders of Warren-era activism to talk solemnly today about respect for precedent and settled law represents what can only be called an exercise in the higher chutzpah—soaring far beyond the boy who kills his parents and asks pity as an orphan. Yet it is equally strange for conservatives to treat precedents casually; the avoidance of radical discontinuity in constitutional law is something they should care about. And those who inveighed in the wilderness against the light-heartedly innovative judicial styles so praised in the 1960s and 1970s should hardly want to initiate them.