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Constitutional Scholarship: What Next?

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power,' i.e., prerogative jurisdiction in the conduct of foreign affairs?" we hardly have a clue.

In *The Federalist* No. 64 John Jay, Secretary of Foreign Affairs under the Confederation, hinted that the president was not simply a legislative tool, but Jay was not a delegate—and the perennial shortage of money to pay interest on our debts was enough to make him, and founding "uncles" Jefferson and Adams in Paris and London, vigorous opponents of legislative supremacy. In short, anyone who claims to know that the framers would have considered the War Powers Resolution of 1973 constitutional, or unconstitutional, is an astrologer, not a scholar. I happen to *think*, based on broad contextual evidence such as the general revulsion that Americans felt toward "monarchical usurpations," that the odds are they would support it—just as I believe on the same basis that judicial review of congressional acts was part of the background music—but my hunches, however well-informed, would be thrown out by any court in the country for lack of proof.

So where do we go from here? Now that the party is over, the first thing to do is get the children off the streets. To put it another way, we must reclaim the Constitution from the mystery-mongers and restore it to its central position in American political culture. It was first and foremost a political document—not a Decalogue, Nicene Creed, or Thirty Nine Articles. Its authors were a singularly talented group of experienced politicians who had emerged from the most participatory society in Western history, but they failed to square the circle that led to disaster in 1861, namely, the relationship of states to nation (or "general government" as they would have put it).

Instead of reading the mystery story backwards, we must continue—in Maitland's luminous phrase—"to think ourselves back into a twilight," and eschew the temptations of retrospective symmetry. And above all, we should be grateful that nobody had a telephone—such fascinating byplay as Jefferson's discussion with Madison on the proposed scope of first amendment protection would surely have been lost rather than in the archives.

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For several reasons the subject of constitutional law tends to be submerged in my mind by the subject of the Supreme Court as an institution. For some time now I have felt uneasy about the direction many of our courts seem to be taking. My hunch is that the

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Supreme Court during the last twenty-five years or so has had something to do with this that goes beyond the binding force of its precedents.

The Bork hearings have dramatized the schism concerning the mandate and role of a Supreme Court Justice.[5] Oversimplified and roughly defined, this schism divides those who insist on a Justice's seeking to find his "polestar" of decision in a legal text, constitutional or statutory, and its history, all as informed by (sound) precedent, from those who applaud finding the polestar in more subjective sources. It is reflected in constitutional scholarship. But what was apparent during the Bork hearings may well be true among constitutional scholars: the adherents—in fact or according to self-description—of one camp tend to turn a deaf ear to those in the other camp. (Of course some will keep one foot in each camp, defending the polestar that for the moment advances their personal agenda.)

It is, of course, a question of degree. Even so, the schism I have crudely defined does exist within the Court. With some help from scholars the Justices have confused society about the place of the Court in our government. The unanimous result is still more common than the unanimous opinion, but both seem to have been headed toward extinction during the last twenty or so years. The flip-flop products of the swing vote phenomenon, parented by and giving birth to additional 5-4 outcomes; the proliferation of concurring opinions in which the Justices seem compelled to register every nuance of disagreement with their fellows; the shrillness with which they attack each other; and the refusal by some Justices to quit dissenting, long after they have failed to have their way on an issue, contribute to an impression that they write on a clean slate.[6]

Coupled with life tenure, that impression should lead to widespread unease about the Court. Instead, it seems to have shifted the predominant measurement of a Justice's performance from evaluation of the Justice's bottom lines (results), in light of his supporting

5. While I use the Bork hearings as a convenient frame of reference, my comments are not prompted by those hearings but trace back to seeds planted long ago. *See, e.g.*, Lewis, *Consumer Picketing and the Court—The Questionable Yield of Tree Fruits*, 49 MINN. L. REV. 479 (1965).

6. Professor Easterbrook properly notes that division among the Justices is inevitable, even assuming that each Justice reaches a conclusion based on a process of reasoning deemed legitimate by traditional standards. And such divisions are on the increase at least in part because of the larger number of "hard" cases reaching the Court. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982). This does not say, however, that division and hard cases are not increased when some Justices rather consistently follow their personal conceptions of the good society without respect to the presence of contrary traditional indicators.

opinions, to an evaluation of or reaction to his bottom lines, period. Indeed, the behavioralists of the academic political science fraternity are so convinced of the legitimacy of this measure—or perhaps just of the reality of its validity—that they refrain from reading opinions and simply categorize results and then count votes. (It would be interesting to see a study of any correlation between the growth cycles of this movement and the composition of the Court.)

I am not here concerned with results of particular cases; rather, I am concerned about the fall-out or ripple effects of a method of judging that, whether employed in areas where judges have a good deal of latitude, or in areas where there is fairly clear governing constitutional or statutory text, leads to excessive judicial creativity. And since a judge cannot admit that the driving force of his result is his own sense of fairness, his opinion will manipulate obstacles to the result, such as the standard of review, governing text, or precedent. When the method is broadly used, the fallout includes a quantum jump in the complexity and prolixity of the law, a proliferation of rights, and a diminished ability or willingness of judges to check the tendency of "all rights . . . to declare themselves absolute to their logical extreme."

I have referred to judges rather than to Justices, because the phenomena that I think I observe are national in scope and relate to state as well as federal courts. A movement, which I would roughly describe as one toward arbitrary standards of perfection, is underway, though it is much further along in some states and circuits than in others. As a people, our threshold of indignation seems to be at an all-time low.

What does all this have to do with the Supreme Court? I think most scholars would agree that the Court has been unusually creative during the last two or three decades. With respect to the Court's precedents, as played out by the lower courts, I suggest, without pausing over the validity or value of specific results, that there are hidden costs that we need to think about and study. I suggest also that the Court has effects far beyond the binding force of its precedents. It is hardly novel to observe that the Court, as the most authoritative, visible, and written-about court in the land, is teacher to the country and teacher and model to the lower courts. I suggest that the methods of some Justices, perceived as appropriate, stimulate emulation by other judges. It has been suggested that the Court follows the mood of the country. I suggest that the Court has a great deal to do with establishing the mood of the country. In any event the hidden costs of overly creative courts relate to much more than the Court's own precedents.

With respect to the Supreme Court specifically: we have had plenty of scholarship devoted to 1) probing the meaning of constitutional language, including lengthy and sophisticated rationalizations of "wished for" meaning; 2) disclosing through philosophical discourse the whole meaning and applications of various constitutional provisions; and 3) describing, prescribing or rationalizing the Court's role in constitutional judicial review. Much of this is valuable, some extraordinarily so, but this type of scholarship will flourish without added encouragement. What different kind of scholarship is needed? In this age of accountability the aim should be to keep pressure on the accountability of the Court to the country, more particularly, the accountability of the Justices to the Court as an institution. Because the scholarship described above provides so much point and counterpoint, providing rationales for about anything a Justice might do, it does not meet this specific need. But what might? One modest suggestion: a renewed emphasis on the "micro" critique of opinions of the Justices. I have in mind critiques that would seek to isolate the values underpinning an opinion. Do they fairly derive from constitutional or statutory text? Text interpreted in light of original purpose and history? Are they an adaptation of original values, restated to fit modern times? Are they values drawn largely from the Justice's personal conception of what is good for society? If the values seem to fit one of the last two categories, how widely and by whom are the values shared? (Bearing in mind that law governs, and generally should be understandable by, ordinary people, are the values evident or, once discovered, apt to be regarded as sensible in light of their common experience?) How do the values actually fit in with existing precedent? As we imagine lower courts administering resulting doctrine what difficulties and results can be anticipated? One goal of the sort of critique I am suggesting would be to determine what it is we are applauding or condemning as we react to a Justice's work.

When I scanned the opinions of the Court's last term to find a case that might warrant the sort of critique I suggest, I stopped within the first ten opinions issued, on *Colorado v. Connelly*. Respondent, following the "voice of God," insisted on confessing a murder to Denver police, saying that he had come all the way from Boston to confess. He led police to the exact location of a body he claimed as his victim. The issue was the voluntariness of the confession; its reliability was not questioned. A majority held that coercive police activity is a predicate to finding that a confession is involuntary and therefore the confession was admissible. The majority also disposed of an issue involving burden of proof and *Miranda* rights respecting a second confession by the respondent after

he was taken into custody. Justices Blackmun and Stevens dissented on the second issue on the ground that it was not before the Court and had not been briefed or argued. Justice Brennan dissented on both issues, for himself and Justice Marshall, saying with respect to the voluntariness issue, "This holding is unprecedented: 'Surely in the present stage of our civilization a most basic sense of justice is affronted by the spectacle of incarcerating a human being upon the basis of a statement he made while insane . . . .' *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960)." What is the source of this conclusion? The seven other Justices did not think it was to be found in *Blackburn* or other precedents or in their civilized sense of justice. (*Blackburn*, by contrast, carried the agreement of eight Justices, and the ninth concurred in the judgment without opinion.) Why did the majority insist on ruling on the second issue when the opinions of Blackmun and Stevens, on their face anyway, clearly show that the issue was not properly before the Court? And on that issue, as between the majority and Justices Brennan and Stevens, where would a fair reading of the precedents lead?

Another valuable type of project would be an empirical assessment of the costs and effects of particular doctrines. An illustrative candidate is the expectation of employment as a "property right." The pretermination hearing right, *properly understood*, that attaches to the property interest does not appear to amount to much. Denial of the right warrants only nominal damages unless it is found that granting the right would have affected the employer's decision, or other actual damage is shown. (Where lawyers are forced to rely on "other" damages, a current fad is to seek damages for mental anguish suffered by the plaintiff as a result of being denied the barest, and by hypothesis an inconsequential, procedural right.) Is the Court aware of the costs associated with judicial administration of this doctrine? The issues are many and difficult. A case may string out over many years. Judges have had great difficulty working over the meaning of the doctrine and appropriate remedies. This says nothing of the settlements that occur, straying sometime from the merits, or of attorneys' fees in relation to the scope of the underlying substance.[7]

There are other aspects of the Court's accountability that have not been adequately explored. For example, who (among the Justices and clerks) from year to year mans the gates to the Court? In relation to the cases to which the Court does devote its energies, what important cases are rejected? In this connection I have in

7. An instructive study of the phenomenon of settlement as a case management device is Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

mind not so much substantive issues as the Court's oversight role in insuring the administration of justice in the lower courts. Although the Court's mandate is to decide real cases involving real parties, issues—not always of overwhelming importance—appear to determine case selection at the expense of opportunities to correct occasionally egregious errors by lower federal courts in cases that may have unexciting, narrow, or non-constitutional issues, but are, for the parties, once-in-a-lifetime experiences in the federal courts.

My final suggestion is in a different vein. We need more analytical and empirical scholarship on punitive damages. Such damages affect several of our most cherished ideals: a government of laws not of men; equal justice under law; procedural fairness in the administration of the law, especially in its punitive aspects; and accountability of governmental institutions.

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For over a decade constitutional law scholarship has been living off the remains of the Warren Court. Liberals nostalgic for the era of Supreme Court assistance in the promotion of their political programs grasp at anything that demonstrates the Court's present inclination to continue providing such assistance. Conservatives parade the bogey-man of "judicial activism"—such as invalidating the death penalty—as if the Court had not "deregulated" the field, in Professor Weisberg's apt phrase. The incarnation of Justice Lewis Powell, a very conservative judge, as a judicial moderate upon his retirement is symptomatic—and not a little embarrassing when it turned out that the views of his designated successor, who was attacked as an extreme conservative, were not that different from Powell's.

Of course people can delude themselves indefinitely, and scholarship about constitutional law that treats Warren Court decisions as canonical and later ones as aberrational may well persist. There are sociological reasons for that to occur as well. The legal academy is likely to remain dominated by liberal scholars, whose political inclinations will lead them to define their field in politically congenial ways. That's because the opportunity costs for conservatives who go into academic life are much higher than the opportunity costs for liberals: put bluntly, I'd have to take a substantial cut in pay to do the kind of legal practice that I would be inclined to do, but conservatives have to take substantial cuts in pay when they leave the kind of legal practice that they are inclined to do.

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