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Judicial Power and Mobilizable History

The concern with juristocratic power is usually conceived as a matter of the extent of judges' power to declare the law, thus concretely directing the government to conduct its business in particular ways. These concrete manifestations of judicial power, however, are not the only form of judicial influence over national affairs or constitutional meaning. In addition to establishing the law, courts also shape the ways in which the legal community thinks about constitutional issues. This paper is about the judicial influence over historical modes of constitutional interpretation. Its basic argument is that the vast expanse of possible historical arguments offers courts (and especially the Supreme Court) an opportunity not just to decide what constitutional history will mean but also to shape the availability heuristics that limit other actors' ability to mobilize alternative historical accounts in support of other constitutional meanings. I do not wish to overstate the proposition: judicial accounts of history and its meanings are not hegemonic, and counterhistories can and sometimes have been successfully deployed against prevailing doctrine. Nonetheless, the dynamic is worth noting. I suggest that awareness of this dynamic should prompt law professors to see the nurturing of alternative "mobilizable histories" as one of their responsibilities.

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In addition to deciding cases, judges also instruct wider audiences in how to think about the issues and authorities of constitutional law. Judicial opinions are in part instruments of that instruction, an instruction that is carried out both by unmediated transmission from judges to readers of opinions and also, on a larger scale, through the mediating retransmission of agents like casebooks and law professors.¹ These influences are more subtle and diffuse than the direct consequences of judicial holdings, but they are sufficiently significant that several leading constitutional theorists have emphasized this aspect of the judicial role in their defenses of the practice of judicial review. For example, Frank Michaelman and Christopher Eisgruber, among others, have argued that Supreme Court decisionmaking in constitutional cases has the distinctly beneficial effect of modeling principled decisionmaking for the wider public, providing an object lesson in how to think seriously about important and contested issues in the American polity.²

But the judiciary's modeling of constitutional argumentation also has a darker side. When a court engages in constitutional interpretation, it construes sources of constitutional authority. If another interpreter understands the

¹ See J.M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 Harv. L. Rev. 963, 973-74 (1998).

² See, e.g., Frank Michaelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 73-76 (1986); Christopher Eisgruber, *CONSTITUTIONAL SELF-GOVERNMENT* (2001).

authorities differently, he or she or it may have the opportunity to push back, offering a rival interpretation. The dynamics by which the contest between such rival interpretations would resolve in practice are the subject of a large scholarly literature, as is the normative question of whether there is an institutional reason why the judicial interpretation ought to prevail by reason of its being judicial. Sometimes, a court adjudicates a constitutional question in a way that leaves the underlying constitutional discourse relatively unchanged. But sometimes, a court's construction of a kind of authority (or a consistent construction of that authority by several courts over time) does more than stake out the judicial position. It also alters the underlying resources that could be used to argue against that position, thus tilting the balance yet more heavily toward the judiciary's own view.

Consider the judicial use of history as a source of constitutional reasoning. Without a doubt, the narrative of American history is an important source of authority in constitutional argument. Prevailing understandings of the Founding era help shape the prevailing interpretations of many rules and principles of constitutional law, and the prevailing understandings of the Civil War and the Reconstruction period shape others. Other periods of history are also part of the mix, and often historical authority is constructed (consciously or not) as a synthesized story about multiple periods of history. Standing alone, an interpreter's view of American history may not be sufficient to resolve a difficult issue: most of the time, most interpreters reach their conclusions through a mix

of different kinds of authority rather than on the basis of a single type.³ But different understandings of history will yield different ranges of conclusions that constitutional interpreters are willing to accept.⁴

³ See, e.g., Richard Fallon, *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 Harv. L. Rev. 1189 (1987).

⁴ This is a feature of constitutional discourse despite the fact that there is no general agreement among constitutional interpreters about exactly how or why history should matter in constitutional interpretation. Different practitioners of constitutional interpretation hold rival theories about the relevance of history, see, e.g., Amy Kapczynski, *Historicism, Progress, and the Redemptive Constitution* (forthcoming Cardozo Law Review 2005), and constitutional interpretation as a practice muddles through without settling the contest among them. It is probably inevitable that history will supply some kind of basis for constitutional reasoning: without a sense that history provides some kind of constitutional authority, it might not be possible to make sense of an inherited constitutional system at all. It does not follow, of course, that any given normative theory of history's force in constitutional law is correct, and it may not even follow that some such particular theory must be correct if only we could figure out which one. It may be the case instead that what constitutional discourse requires is simply some kind of

engagement with history on which we can make sense of the constitution's persistence as more than a brute fact of power, in which case multiple forms of historical engagement could coexist and do the job perfectly well even in the absence of any particular theory's being acceptable to the community of constitutional interpreters as a whole. These important questions are beyond the scope of this paper.

History is not unique in this respect. Similar things could be said about other major sources of constitutional interpretation, including the text of the written Constitution. There is an important respect, however, in which text and history are differently susceptible to the power of judicial construction. When the Supreme Court decides a case in a way that seems to be in tension with the text of the written Constitution, the text survives as an argumentative resource that can be mobilized against the Court's decision in the future. The Court does not rewrite the document to conform better to judicial doctrine. Instead, there comes to be a gap between judicial doctrine and constitutional text, and the gap is visible to observers who read both the text and the judicial opinions.

This is not to say that the words of the document have permanently stable meanings, nor is it to deny that the Court's own interpretations often shift our "common-sense" understandings of what a word in a legal document might mean. Nonetheless, many a law student wrinkled his nose at the Court's expansive construction of "interstate commerce" even when *Wickard v. Filburn*⁵ had been the law for decades and *United States v. Lopez*⁶ was not yet decided, just as many law students today see that the text of the Eleventh Amendment will not support what the Supreme Court does with Eleventh Amendment doctrine.⁷ The potential and sometimes highly visible gap between judicial doctrine and

⁵ *Wickard v. Filburn*, 317 U.S. 111 (1942).

⁶ *United States v. Lopez*, 514 U.S. 549 (1995).

⁷ A point that the Court itself is often willing to admit. See, e.g., *Alden v. Maine*, 526 U.S. 706, 727 (1999) (Eleventh Amendment immunity is not demarcated by the text).

constitutional text is what enabled Attorney General Edwin Meese to insist on his distinction between “constitutional law” and “the Constitution,” and over a period of years he and others used that gap to advance a set of arguments against then-current doctrine, ultimately achieving notable if partial success in altering constitutional law.⁸ As long as the text of the Constitution is unaltered and highly visible, many readers will experience a tension between that text and a variety of judicial decisions. For them, as it was for Meese, the text is then a mobilizable resource that can be used to argue against prevailing judicial doctrine.

⁸ See U.S. Department of Justice, Office of Legal Policy, *Guidelines on Constitutional Litigation* (1988); *id.* at 54 (characterizing *Wickard* as inconsistent with sound interpretation of the Commerce Clause). *Lopez* can be seen as an eventual victory for Meese’s campaign.

The situation is not exactly the same when the Supreme Court declares the meaning of some aspect of constitutional history. There are important similarities, of course: judicial decisions in constitutional cases construe the meaning of history as well as the meaning of text, and persuasive or long-lasting constructions of either history or text can prompt the community of lawyers to approach the relevant text or the relevant history in the way that the Supreme Court has taught them to do so. But for interpreters seeking to contest a juristocratic domination of constitutional meaning, history is often a less mobilizable resource than text is.⁹ In part, history may be less mobilizable than text because Supreme Court decisions interpreting the meaning of constitutional history can do something closer to rewriting the underlying object of interpretation than decisions interpreting the meaning of text can. To be sure, the Court does not dispatch the marshals to burn history books with contrary interpretations of the American past. But given the vast range of possible histories from which to draw meaning, and given also the influence of court decisions in legal discourse,

⁹ I do not mean here that arguments based on history may be less effective or less persuasive than arguments based on text. That may or may not be true. I mean to say that whatever the possible range of persuasive arguments based on one or the other of these modalities of argument (See Philip Bobbit, *CONSTITUTIONAL FATE* (1982)) may be, it may be harder to marshal the full potential (or any given proportion of that potential) of historical argument against judicial doctrine than it is to marshal the full (or the same proportion of) potential

the Supreme Court's decisions can and often do obscure aspects of history other than those emphasized in the Court's own opinions.

of a textual argument.

This dynamic is a matter of availability heuristics. Unlike the constitutional text, which every lawyer knows where to find and can read in less than an hour, the full corpus of American constitutional history is not knowable to lawyers or indeed to anyone else. This is not just a matter of the indeterminacy of historical meaning: text, too, has indeterminate meaning, even if not in all of the same ways. It is also because there is just too much constitutional history for it all to be held in anyone's head, let alone to be held in anyone's head from all plausible perspectives. It certainly cannot be presented in a few pages, pages that—like the Constitutional text—are highly portable and highly visible elements of American constitutional culture. To be sure, even within those few pages of constitutional text, there are parts that are more visible than others to the community of constitutional interpreters, or to different interpreters within that community.¹⁰ The text of (some parts of) the Fourteenth Amendment is more familiar to most of us than the text of the Twentieth (or indeed other parts of the Fourteenth), and we more readily make arguments based on what is familiar. Nonetheless, a constitutional argument can draw nontrivial support from a less familiar part of the text, once someone draws our attention to it, because there is at least a default presumption—what we might call the “surplusage instinct”—that

¹⁰ See Sanford Levinson, *The Embarrassing Second Amendment* 99 Yale L.J. 637 (1989) (imagining how two different constitutional interpreters, one from the left and one from the right, would draw cognitive maps of the Bill of Rights on the model of Saul Steinberg's famous conceptual depiction of the New Yorker's view of the world: the former draws a large Establishment Clause, a large Fourth Amendment, a large Fifth Amendment except for the Takings Clause, a large Eighth Amendment, and a large Ninth Amendment, keeping the other parts small, while the latter draws a large Free Exercise Clause, a large Second Amendment, a large Takings Clause, and a large Tenth Amendment, keeping the

all parts of the text have meaning.¹¹ Given the lesser availability of deemphasized history, as well as the need to argue about whether history not made authoritative by prior Court decisions has any kind of authority in the first place, the universe of historical narratives that support argument in constitutional law can be powerfully narrowed by what the Court makes visible or less visible.¹²

other parts small.

¹¹ See *Marbury v. Madison*, 5 U.S. 137, 174 (1803).

¹² This is so both because the Court's simple power within the judiciary will prompt litigants to argue in terms compatible with the Court's interpretations and because its broader influence in legal discourse will familiarize the legal community with some narratives rather than others.

The limitation of historical narratives is not only a matter of what incidentally becomes more and less visible as a result of which narratives a court tells. It is also a matter of the Court's power when it overtly adopts some meanings of history rather than others. Consider, as one recent example, a passage from *United States v. Morrison* about the authority of history, a passage pregnant enough to have attracted the attention of a handful of leading constitutional scholars.¹³ In the relevant passage, Chief Justice Rehnquist explains the limited scope of congressional power to enforce the Fourteenth Amendment by characterizing Reconstruction as a limited reform rather than a fundamental reworking of the American polity. To support this historical interpretation, the Chief Justice notes that the Supreme Court of the 1880s adopted that view in cases like *United States v. Harris* and the *Civil Rights Cases*. He also specifies the modality of constitutional argument that he means to be making, saying that the weight of that earlier Court's view is partly a matter of their authoritative historical understanding. The judges of the 1880s lived through the events, he says, and knew what those events really meant.¹⁴ If one

¹³ See Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 Yale L.J. 441, 481 (2000); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 Harv. L. Rev. 26, 104-05 (2000).

¹⁴ See *Morrison*, 529 U.S. at 622 ("The force of the doctrine of stare decisis behind these decisions stems not only from the length of time they have been on the books, but also from the insight attributable to the Members of the Court at that time. Every Member had been appointed by President Lincoln, Grant, Hayes, Garfield, or Arthur—and each of their judicial appointees obviously had intimate knowledge and familiarity with the events surrounding the adoption of the Fourteenth Amendment.") Rehnquist's argument about the 1880s Court's special authority to construe the meaning of Reconstruction history is not original to *Morrison*: Justice Jackson made the same argument, in basically the same

looks at the history of Reconstruction and of the 1880s through a wider frame, of course, it becomes clear that the meanings of the relevant constitutional events were deeply contested. But if a later Court can say that historical events mean what a particular subset (here, a judicial subset) of its contemporary observers said that those events meant, the Court has a significant chance of obscuring other readings of history that could be mobilized to support a contrary set of meanings. In that way, judicial attempts to settle historical interpretation by virtue of their decisional authority can be profitably compared to attempts to rewrite the constitutional text to eliminate tension between text and doctrine.

I do not mean to say that the two enterprises are fully analogous. As noted earlier, the Court does not dispatch the marshals to change the history books. Moreover, the Supreme Court is only one of many forces shaping people's background understandings of American history. Even if the Court said "only this history shall count," the legal community's familiarity with history would never be confined to that or any other static set of information and understandings, and the tension between other things that lawyers know and the rulings of the courts could be a mobilizable resource when people contest established doctrine.

words, almost fifty years earlier. See *Collins v. Hardyman*, 341 U.S. 651, 657-58 (1951).

That said, the history that forms the basis for constitutional argument is heavily shaped by caselaw, meaning both that Supreme Court decisions are taken to represent the narrative of history and that the history that judges purvey in their opinions powerfully shapes (and limits) the history that legal discourse will deploy.¹⁵ As a practical matter, judicial decisions construing the import of constitutional history do not merely establish one or another reading of that history as authoritative. They also exercise an important influence on the visibility of different elements of constitutional history, thus shaping which elements of the past become historical narratives that will support arguments about constitutional law. Only those aspects of history that will support such arguments are worth contesting in constitutional discourse. Accordingly, past events and historical accounts that are not made visible within constitutional discourse are likely to be excluded from the set of tools that can be mobilized by people who wish to check or critique exercises of judicial power. The object of historically oriented constitutional interpretation thus itself changes based upon what the judges say. This is true to some extent of all modalities of constitutional

¹⁵ As a matter of legal craft, there are arguments weighing in favor of letting prior cases establish a relatively settled set of historical meanings rather than permitting a constant contest about the valence of competing historical narratives. Among other things, the former alternative increases stability and consistency in legal interpretation. See, e.g., Thomas Merrill, *Bork v. Burke*, 19 Harv. J.L. & Pub. Pol'y 509 (1996). Moreover, some constitutional scholars have argued that judges are actually pretty good synthesizers and interpreters of history, so it makes sense to let them do it. See Barry Friedman and Scott B. Smith, *The Sedimentary Constitution*, 147 U. Penn. L. Rev. 1, 88 (1998). But there are also negative consequences. Judicially synthesized history will systematically flatten the past by rejecting or at least obscuring many historical understandings other than the few that are chosen as official meanings, and stability achieved by making a few strains of history authoritative will limit not just

argument, but the extent must be greater when the potentially available arguments from that modality are more diffuse, less codified, and less visible. When judges tell certain stories and not others, they affect not only how we will understand those particular stories but also the universe of stories of which we are aware, and can contest, in the first place.¹⁶

In this respect, historical argument in constitutional law is less analogous to textual argument than it is to arguments from principles like federalism, the separation of powers, or the proper functioning of democratic politics. Constitutional history, like federalism or political democracy, is a substantive feature of the constitutional system. In a way comparable to the way in which constitutional decisionmaking is partly about choosing which of several federalisms we should have, it is also partly about choosing what our history should be—which includes not just what the history means but also which elements of history should be the subject of interpretive consideration. Perhaps to make sense of ourselves as the inheritors of a particular constitutional system, or to explain why we recognize the practices and decisions of prior generations as having some sort of authoritative status in our decisionmaking, or perhaps

uncertainty in the law but also the possibility of critique.

¹⁶ To borrow Robert Cover's language in describing the relationship of law and stories, we might say that all judicial authority is jurispathic, but it can kill some kinds of alternative argument deader than others. Robert Cover, *Foreword: Nomos and Narrative*, 97 Harv. L. Rev. 4 (1983).

simply to shape a national narrative or a national identity in which we take pride and satisfaction, one of the desiderata of constitutional argument is that it should establish American history as having developed this way instead of that way, or as illustrating this set of ideals instead of that one. This desideratum does not merely push different constitutional interpreters to to interpret a fixed stock of historical data in different ways. It also affects which elements of the constitutional past different interpreters will want to foreground as meaningful constitutional history, thus shaping the choice of what our history will be.

We all form our notions of the core commitments of constitutional law—what Mark Tushnet calls the “thin Constitution”¹⁷--partly under the influence of a superstory about American history, just as our notions of that superstory are formed partly through the influence of what we think the core commitments of constitutional law should be. To sit comfortably within the rubric of constitutional law, a rule or an idea must cohere tolerably with the content of constitutional history. What constitutional history is or means is a central element of what is contested in constitutional law. When the Supreme Court articulates a view of constitutional history that foregrounds some elements of that history and not others—as any view of history must—there is a risk that the elements of history it neglects will disappear from the view of the legal community. In other words, the juristocratic control of historical meaning is supported by the juristocratic influence over what history is visible. The possibility of healthy continuing contest over what history we should have, and what range of constitutional law it will

¹⁷ See Mark Tushnet, TAKING THE CONSTITUTION AWAY FROM THE COURTS 9-14

support, requires that non-judicial interpreters of the constitution—including law professors—ensure that other parts of history are also visible and discussed. That visibility is a prerequisite for history's being mobilizable against as well as for prevailing judicial doctrine.

(1999).