

**AALS 2008 Mid-Year Conference on Constitutional Law**

**Friday, June 6, 2008 – Outline of Luncheon Remarks**

***Constitutional Law and Constitutional Scholarship:  
Recent Developments and Future Paths***

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I. Trends in Constitutional Law

Let's look at the long stable Rehnquist Court (1994—2005) and the early Roberts Court (2005—2008) by issue:

1) The Rehnquist Court began a “**federalism revolution**” that, by the end of this period, had moved the law in important but largely symbolic ways, and which had run out of steam as even some of its leaders balked at the sort of radical change advocated by Justice Thomas and some attorneys appearing before the Court. (*Raich, Lane, Hibbs*, earlier: *Reno v. Condon*).

2) The Court remains sharply divided over its role in recognizing and protecting **unenumerated rights**. In *Glucksberg* (1997), the Court tried to declare “this far and no further,” which was largely but not entirely an accurate statement of what was to come.

- *Troxel v. Granville* showed that it was possible to go further simply by characterizing a rights claim as an application of an “old” right rather than a “new” one.

- *Lawrence v. Texas* showed that it was possible to accept rights claims without speaking the language of fundamental rights.

- The persistence of disagreement over abortion—extending into the Roberts Court—showed that the “*Glucksberg* settlement” included a tacit exception for abortion anyway.

3) If the triumph of **color-blindness** in the Rehnquist Court was a somewhat pyrrhic victory because of the moderating effect of Justice O'Connor's fifth vote (at least in *Grutter*), *Parents Involved in Community Schools* shows how what begins as a rhetorical move can take on doctrinal bite. The debate over the constitutionality of affirmative action is now conducted as a debate over the meaning of strict scrutiny, not its applicability. The long-term practical importance of that debate is open to question, however, as the public's appetite for affirmative action is greatly diminished. California, Michigan and Washington are all liberal states that voted to eliminate it.

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4) The Rehnquist Court succeeded in shifting the meaning of the **Establishment Clause** from a “separation” paradigm to a “neutrality” paradigm.

5) The Court’s **death penalty** jurisprudence nibbled around the edges—invalidating executions of the mentally retarded and minors, even as it upheld (this Term) lethal injection—while the real action has been mostly legislative. AEDPA greatly restricted the ability of federal courts to grant relief, but meanwhile two factors have slowed the pace of executions: revelations of innocent people on death row; and decline in violent crime from the peaks of the early 1990s. As crime has begun to increase again, the landscape may shift once more.

6) The early Rehnquist Court offered the promise of a revival of **economic rights**, mostly under the Takings Clause, but for the most part, this has not materialized. The Court has limited punitive damages; however, *Lochner* revivalists are not wrong to refer to their vision as “the Constitution in exile.”

7) If there is any single success story of the last century of Supreme Court jurisprudence, it is the migration of a commitment to **freedom of speech** from the fringes (Brandeis dissents), to the liberal wing of the Court, to a position held unanimously. Credit here goes to parts of the political left, which made the fight against “political correctness” a cause of the right, and thus created a stable consensus for free speech across the ideological spectrum of the Justices.

8) Prior to 9/11, when I taught separation of powers, the focus was largely on the limits imposed by Article I, § 7 and the Appts Clause on Congressional power to make law and to restrict the President. (E.g., *Chadha*, *Bowsher*, *Morrison*.) Today, the most salient cases involve the President’s ability, as Commander in Chief, to exercise power either not conferred by Congress or expressly forbidden. It remains to be seen whether the cases coming out of the **military detention and trial policies** of the Bush Administration achieve long-term canonical status, or retreat once more into the background. The inauguration of the next President—whether a Democrat or a Republican—will likely result in some substantial change in those policies.

- However, on most other issues, a great deal will likely depend on the outcome of the next Presidential election. The accession to the Court of a conservative majority for another generation will mean that the important disputes for the Court going forward will be intra-conservative ones. By contrast, should a Democratic President name the next new Justice or Justices to the Court, the familiar battle lines will likely persist.

## II. Trends in Constitutional Scholarship

- Trends in constitutional scholarship run parallel to trends in legal scholarship more broadly: Less doctrinal analysis; less focus on normative questions from the perspective of a “shadow Court”; more “sociological”; more inter-disciplinary; more fragmentary.

- Two sorts of questions dominated constitutional scholarship during roughly the first half of the post-*Brown v. Board* era:

- 1) What is the best resolution of constitutional case X?

- 2) What is the best method of constitutional interpretation?

- Works like Laurence Tribe’s treatise—and countless law review articles—are examples of efforts aimed at answering question 1.

- Answers to question 2 typically provided reasons that sought to justify judicial review and thus answer Bickel’s counter-majoritarian difficulty.

- Examples of work in the vein of answering question 2 are: Alexander Bickel’s *Least Dangerous Branch*, John Hart Ely’s *Democracy and Distrust*, Ronald Dworkin’s *Freedom’s Law*, and Robert Bork’s *The Tempting of America*.

- Much work in constitutional law and constitutional theory—including much excellent work (and including much of my own work, the quality of which I won’t venture an assessment)—continues to address these questions.

- But recent years have also seen expansion of constitutional scholarship in a number of directions. A non-exhaustive list of prominent questions investigated by current constitutional scholarship is:

- 1) How does and should the Constitution function outside the courts?

*Popular constitutionalism* can be offered as an alternative to judicial review—as in the work of Jeremy Waldron, Mark Tushnet, and arguably Larry Kramer (depending on how one understands departmentalism) or as a *supplement* to it—as in the work of Robert Post and Reva Siegel or my own work in collaboration with Barry Friedman.

- 2) What light does political science shed on our understanding of the Supreme Court, the practice of judicial review, and constitutional issues more broadly (including the appointments process)? Constitutional scholars have long been aware of legal realist and other critical modes of analysis, but the last decade has witnessed a greater effort to integrate the analysis of political science—including the so-called “attitudinal model”—than previously.

3) What insights can we glean about the practice of U.S. constitutional law from comparative studies with other constitutional systems? Relatedly, though distinctly, how does U.S. constitutional law fit into the scheme of international law?

4) What is the best account of originalism? Here we see a fairly decisive rejection (subject to important exceptions) of the equation of constitutional meaning with the subjective intentions of the Framers and in favor of original-public-meaning textualism. In addition, while many constitutional scholars (including yours truly) continue to reject the originalist enterprise, no matter how conceived (even as we acknowledge that original understanding usually has some relevance as one factor among others in constitutional interpretation), there is a growing list of scholars who accept the premise that the Constitution consists in the original understanding but then offer reasons why originalism may be consistent with evolution. (E.g., Ackerman, Balkin, Barnett, Rubinfeld, Whittington).

- Note what's absent from the list. Even as economic analysis of law has become dominant or at least very important in many other fields, one encounters very little *constitutional law & economics*. There is a substantial body of work analyzing constitutional law from the perspective of various successor movements to critical legal studies (e.g., critical race theory, critical feminism) but I do not sense any recent increase in such scholarship.

- Here is a hypothesis: The four sets of questions above have surprisingly little overlap with the two sets of questions that, I claimed earlier, dominated constitutional scholarship in roughly the previous generation—namely, the resolution of concrete cases and the development of a normatively justified theory of constitutional interpretation. Consider:

1) Popular constitutionalism is expressly about how the Constitution should function outside the courts, and thus has nearly nothing to say about constitutional doctrine; it can be accompanied by a theory of interpretation to be deployed by the judiciary, but to the extent that popular constitutionalism addresses such matters, it focuses more on what the proper scope of the Supreme Court's interpretive authority should be—call that the *Cooper v. Aaron* problem—than on how the Court should interpret the Constitution in contested cases.

2) Integration of the insights of political science into the study of constitutional law does not tell us how cases should be decided or, more broadly, how the Constitution should be interpreted. It is useful for constructing, in H.L.A. Hart's terminology, an *external* account of law, not an internal one.

3) In principle, comparative and international law insights could be internal, and in many other countries, comparative and international materials play an important role in resolving concrete cases. At this point, there is a lively debate within the U.S. Supreme Court over *whether* to rely on comparative and international materials, but even those who champion expanded reliance on such materials would give it a

modest role. Moreover, much of the comparative constitutional law scholarship is descriptive and analytic rather than normative.

4) One might expect that the various strands of originalism would have substantial overlap with the work of the Court, at least the work of the Justices who most vigorously espouse originalism. However, the debate over nuances that characterizes the academic literature—e.g., original public meaning or original intent?—is not closely all connected to the debates on the Court. All of the Justices accept some substantial role for the original understanding; sometimes they emphasize it; other times they downplay or ignore it. *DC v. Heller* could be a case in which these debates surface, but even if so, that would not signal a dramatic departure because the Second Amendment is an area in which there is unusually little in the way of a developed body of doctrine.

- How do we account for the apparently growing divide between the interests of scholars and the questions with which the Supreme Court struggles? Here are two factors:

1) During roughly the period I'm describing, the Court has become more conservative, whereas legal academia has remained relatively liberal. A project of justifying judicial review, or justifying the work of the Rehnquist and Roberts Courts, is unappealing to most liberal legal academics. Meanwhile, telling the Court how to decide cases is an odd exercise if one doubts (as legal academics have excellent reason to doubt) that the Justices care what we have to say. To work as a causal hypothesis, this theory must accept substantial lag: Liberal academics only began to turn on the Court after many years of conservative rulings, perhaps enticed by the fact that the Court has not—even today—fully turned its back on the liberal precedents of the Warren Court or its methods.

2) The internal standards of legal scholarship have changed as law schools have become more like other university departments. Legal academia values traditional scholarship less than it used to—or at least values the external perspective to a much greater degree than it used to.

- Future directions

1) A change in the Court's jurisprudence could bring academics either closer to the Court, or could drive us even further away. Much could depend on the outcome of the November Presidential election.

2) The changes in the nature of the legal academic enterprise are part of an ongoing long-term process, but are not necessarily irreversible, at least in the long run.

a) There are many fewer "bar schools" now than in the past. Entry-level appointment standards and tenure standards are high just about everywhere. This is a long-term trend.

b) The existence of the State bar as a credentialing cartel has insulated law schools from the forces that have been roiling undergraduate education in recent decades. (See November NY Times story). Increased reliance on adjuncts will not necessarily have an impact on legal scholarship because most adjuncts do not produce legal scholarship. Thus, traditional academics—whose absolute numbers, even in the arts and sciences, are not shrinking—can continue to produce scholarship according to their own standards.

c) However, the long-term trend is uncertain. The university as we know it dates to medieval Europe but there is no guarantee that it will continue to exist. Its replacement by other modes of education would have dramatic effects on scholarship. (In many ways, it's a miracle that we have the system we do.) Nonetheless, I'm confident that the university will persist until at least the next AALS Constitutional Law Conference.