The Constitution Outside the Supreme Court

AFTER THE DISPUTED PRESIDENTIAL ELECTION OF 2000, commentary poured out from constitutional law scholars. John Harrison wrote about one aspect of the problem in a short article called Nobody For President, J. Law & Politics (forthcoming 2001). Like much of Harrison’s writing, it is informed by history, here the problem presidential elections of 1800 and 1876, and relies on a close reading of the Constitution. And like most of his work, but unlike the vast bulk of what has been written about the 2000 election, the article is not concerned with Supreme Court cases. Harrison wrote about Bush versus Gore without writing about Bush v. Gore.

Instead, he wrote about a question the Supreme Court never has faced and likely never will: whether Congress, when it meets in joint session to count electoral votes, has the constitutional authority to resolve disputes conclusively. In 2000 the apparent consensus among politicians, pundits, and scholars was that Congress has that power. The issue was not academic. At one point it seemed possible that the Florida Supreme Court would order the certification of a slate of Gore electors at the same time the Florida legislature selected Bush electors under a federal statute of doubtful applicability. That statute provides that when two sets of electoral votes have been received from a state, the set certified by the governor shall be counted unless both Houses of Congress
decide to the contrary. With Jeb Bush as governor of Florida and the Republicans in control of the House of Representatives on electoral count day, so talking heads pointed out, things looked bleak for Gore.

According to Nobody For President, however, the premise of the whole debate was flawed, because Congress is not the final judge of presidential elections. No one is, Harrison says. Central to his argument is the familiar lawyer's principle, expressio unius est exclusio alterius. Article I, Section 5 of the Constitution explicitly makes each House of Congress the judge of disputed elections to that House. But while the Eleventh Amendment provides that the electoral votes shall be counted by the vice president in the presence of the Senate and House of Representatives, it does not make that joint session—nor any other officer or institution—a final arbiter. This may be an error of constitutional design or a brilliant stroke that forces ad hoc political compromise when presidential elections go awry, but it is the import of the Constitution's text, structure, and history, says Harrison.

Most constitutional scholarship is about Supreme Court cases. Scholars criticize the Court's decisions, attempt to devise a theory to explain them, or develop legal arguments based on them as would practicing lawyers. Harrison's work, by and large, is not like that. His first major article, Reconstructing the Privileges or Immunities Clause, 101 Yale L.J. 1185 (1992), is about the Privileges or Immunities Clause of the Fourteenth Amendment. Although the amendment's authors thought the clause central to their work, the Supreme Court construed it so that it had negligible practical significance, thus there is almost no case law about it. Harrison argues that the Privileges or Immunities Clause, and not the Equal Protection Clause, was originally designed to be the Fourteenth Amendment's primary ban on race discrimination. That is a fairly radical claim, but it does not say any-

thing about existing precedent—except that it got off on the wrong foot.

In similar fashion, Harrison's recent article, The Lawfulness of the Reconstruction Amendments, 68 U. Chi. L. Rev. 375 (2001), addresses an issue the Supreme Court studiously avoided when it arose and has said almost nothing about since: whether the coercive measures Congress used to obtain ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments were so extreme as to make those amendments invalid. Although the question has little practical significance today, it is back on law professors' agendas because constitutional theorist Bruce Ackerman of Yale has based his theory of American constitutional development on the thesis that the Reconstruction Amendments were illegally adopted, and thus represent a piece of extra-constitutional political change just as revolutionary as the adoption of the Constitution itself.

Harrison's article, the first detailed examination of the topic, concludes that the amendments were validly ratified despite severe irregularities in the process. He points to the familiar principle of international law according to which the actions of a de facto government legally bind the country in question, whatever doubts there may be about that government's de jure status. When Cromwell's forces executed King Charles I and instituted the Commonwealth, the crowned heads of Europe looked on in horror, but they treated the new government as if it had full legal authority. Harrison points out that this principle was well known to Americans at the time of the framing and afterwards, and has some manifestations in American domestic law. Because the southern state governments that ratified the Reconstruction Amendments were de facto in command, he maintains, they had the power to act in the Article V amendment process.

Harrison explains that his approach to constitutional law has both some systematic and some accidental origins. One serendipitous
aspect is that Harrison came to law at a time of renewed interest in the original understanding of the Constitution. Indeed, as a student and then a law clerk for Robert Bork, and a staffer for Reagan's Attorney General Edwin Meese, he was close to the epicenter of that renewed interest. Harrison explains, "Whatever one makes of the normative claim that constitutional doctrine should be measured against the original understanding of the text, recovering that understanding is independently interesting."

Another partly accidental explanation, Harrison suggests, comes from another phase in his government experience. From 1989 to 1993, he worked in the Department of Justice's Office of Legal Counsel, which advises the President, the Attorney General, and the rest of the executive branch on sensitive legal issues, particularly constitutional issues. That office specializes in constitutional topics that rarely come to the courts. A leading example is the constitutional allocation of the war power between Congress and the President. The courts have been extremely reluctant to touch that issue, even though presidents have frequently waged war with limited authorization from Congress. But the Office of Legal Counsel must confront the issue and has developed its own body of legal doctrine on that all-important topic.

Beyond the biographical accidents, though, Harrison finds more fundamental reasons for his orientation away from constitutional case law. "One of the main attractions of being an academic is the opportunity to develop a more comprehensive understanding of whatever you're thinking about. If you're interested in the Constitution and constitutional law, having a more comprehensive view involves thinking about the constitutional system as a whole, and judicial doctrines are only part of the larger system. Americans now have a better feel for that than they did ten years ago, I suspect, because they've seen a presidential impeach-ment. Crucial constitutional questions were debated in non-judicial fora. We were all reminded about the rest of the system."

"Interesting legal scholarship often tries to explain legal doctrines. But in a lot of constitutional law, explanations are either too easy or not intellectually exciting and often both. That's because a lot of constitutional law, especially the kind of constitutional law that gets written about the most, just reflects the individual attitudes of judges and especially Justices. Chief Justice Rehnquist thinks states should have a lot of autonomy relative to Congress, so he believes in state sovereign immunity. Justice Souter disagrees. So they voted differently in Seminole Tribe, and Rehnquist won because he had four more votes and Souter only had three. So Seminole Tribe is too easy to be worth explaining. On the other hand, why did the Court reject the argument for state autonomy in the U.S. Term Limits case? Because Justice Kennedy switched sides and voted with Justices who take a less expansive view of state autonomy. That may be hard to explain, but it's not interesting, at least for a law professor as opposed to a psychologist."

Does that mean Harrison thinks that there's nothing to be gained by trying to explain constitutional doctrine? "No, it means that I don't think there's much to be gained from trying to explain the parts that reflect the particular views of particular judges. But there are regularities in judge-made constitutional law that seem not to reflect individual attitudes because the judges don't disagree about them. Those regularities are worth explaining."

Of course, any principle held in common by Justices across the ideological spectrum might be so obvious as not to need explaining. Harrison, though, thinks that at least some of those shared assumptions are worth puzzling over. An article he's working on now tries to unravel one of those shared assumptions, an assumption so basic that it is easy
to overlook. A familiar concept in constitutional law is “facial invalidity,” meaning that a legal rule is wholly unconstitutional and may not be applied to any situation. In the past few years law professors have debated how widespread that phenomenon is, and whether constitutional limitations like the First Amendment usually or even always result in the facial invalidity of the laws to which they apply.

“When I started thinking about that problem,” Harrison said, “it occurred to me that it is an aspect of a basic feature of constitutional law, one of those pervasive principles on which the judges don’t differ. It’s true that some rules are invalid on their face. A classic example, from some famous cases about ten years ago, is a ban on flag burning. A statute that bans flag burning may not be applied, even if the flag was stolen. The flag burner could be punished for theft, but not for flag burning. That’s the standard configuration. Other rules, though, are invalid in some instances but not all. Recently the Court held that the First Amendment gave the Boy Scouts an exemption from the New Jersey law that forbids discrimination on the basis of sexual orientation. But while the Boy Scouts get an exemption, most groups don’t. Businesses don’t. So some rules are partly constitutional and partly unconstitutional. Finally, just as some rules are invalid per se, some rules are valid per se. The central example of the latter is the law of private property. If you’re arrested for trespassing, it’s no defense that you were holding a political rally. Hold your rally on your own lawn, not your neighbor’s. All this is well established, a matter of consensus among judges of very different views. They may disagree about which cases fall into which box, but they agree implicitly (no one notices it) that there are three boxes.”

“Why is that? I’m trying to find out.”

one such occasion, Harrison was recruited to be the property master. “When I was in the Office during the first Bush administration, the Supreme Court invalidated a Texas statute that banned flag desecration. The Administration was supporting a constitutional amendment in response. At the Senate Judiciary Committee’s hearing my boss, Bill Barr [later Attorney General] used me as his prop easel. The alternative to a constitutional amendment was a statute; in an attempt to make it constitutional, the statute’s supporters made it very broad, so that it would forbid any physical destruction of a flag, whatever message was being conveyed. Bill wanted to make fun of that approach. So he had me holding up the plastic case containing the flag that went up San Juan Hill with the Rough Riders while he went on about how under such a silly law you couldn’t make a movie of that, because you couldn’t show the flag getting shot full of bullet holes.”

During Harrison’s tenure the Office was involved in supporting the Administration’s efforts to have its Supreme Court nominees confirmed. “David Souter’s big friend of Warren Rudman, then a Senator from New Hampshire. Some of us were stationed in a tiny room in Rudman’s offices that one OLC lawyer called the ‘war closet.’ We watched the hearings on TV. For some reason the room had a chalkboard. At one point a senator asked a question that I thought was so stupid I threw a piece of chalk at
judicial independence itself. In one sense that phrase can be used simply to label the fact that judges appointed pursuant to Article III may be removed from office only by impeachment and conviction. In that sense, though, to speak of judicial independence adds nothing. It is more interesting to talk about judicial independence in the sense that refers to the ability of the courts to operate without being subject to the control of the other branches of government. That is a guideline for design.

Guidelines for design are more abstract and general than concrete constitutional provisions. The principle of judicial independence is more abstract than the protected tenure that actually appears in the Constitution. The result of this conceptual relationship is that guidelines for design . . . do not determine the content of the rules. Rather, there usually will be various potential implementations that are all consistent with the same principle. Different sets of rules will achieve the goal of the principle in different ways and to different degrees. Judicial independence, for example, is consistent with the Constitution as we have it, with one in which a simple majority vote of the Senate is sufficient for conviction upon impeachment, and with one in which a three-fourths vote is required for conviction. . . . Nor is long tenure with difficult removal the only way to ensure decisions by courts will be free from executive or legislative influence. Juries also serve that end, but do so through their brief tenure. The desideratum of independence does not dictate the manner in which it is pursued any more than it dictates the extent to which it is pursued.

Design principles underdetermine structural rules. Indeed, most of the hard work in constitutional design comes not in identifying the appropriate principles, but in deciding precisely how and to what extent to implement them. . . . As the proceedings of the Federal Convention demonstrate, the crucial question usually is not whether, but how and how much. One question the Convention had to address repeatedly was whether to implement a principle by putting a rule about it into the document or by giving Congress the power to make a decision.

Article I, Section 10 contains examples of both approaches. [For example,] Section 10 forbids any State from entering into a treaty, alliance, or confederation, while leaving to Congress the decision whether States may enter into agreements or compacts with foreign powers.

In drawing the fine distinction between a treaty and a compact, the Federal Convention was not simply applying the principle that relations between States and foreign countries are a federal concern. It was also making nice judgments of policy on other grounds, drawing distinctions beyond the resolving power of the general principle, and perhaps recognizing that many principles have exceptions that cannot be foreseen in advance.

The principle of coextensiveness, if it is to be attributed to the Constitution, is no different from the principle that state relations with foreign sovereigns raise federal-level issues: it could be implemented either with a constitutional requirement that the federal courts finally resolve all questions of federal law, or with a power in Congress to provide that they shall do so. Which implementation is better depends on additional considerations not contained in the principle itself.

To take what may be the most common phenomenon, the principle must compete with others, such as the notion that the government should not make the citizens’ lives inconvenient. The latter guideline underlies the reason most frequently given during the ratification debates for allowing Congress to curtail federal jurisdiction: the inconvenience, particularly for those of ordinary wealth, of protracted litigation. Especially if there were only a few federal courts, all of them appellate, it might not be worth the parties’ money to have every case with a

dedicated and sophisticated people are engaged in trying to figure out what the law requires. The Office’s authority depends in part on its credibility, which means that it can’t be completely result-oriented. Once you’ve seen that happen, it’s very hard to go back to the easy assumption that the rule of law is just the rule of courts.

But doesn’t OLC have substantive biases, depending on the views of its head and the Attorney General, on the President’s policies and partisan identification, and based on the executive branch’s distinctive interests? “Sure. No doubt about it. But that’s only part of the story. Just as it’s only part of the story that federal courts decide in part because of the personal views of the judges and, frankly, the political party of the President who appointed the judges.”

“You can play out the analogy. The courts have a pretty strong bias in favor of their own power. Tell an American federal judge that they do not always have the last word about the law, and reactions generally will range from anger to incomprehension. And no doubt for similar reasons, OLC has a bias
federal question decided in federal court. This possibility suggests why the Constitution might implement the principle of coextensiveness in a way that gives Congress substantial discretion over the actual jurisdiction of the federal courts.

Principles interact and they compete with one another. . . . Virtually every principle, every desideratum, of constitutional design is subject to limitation on the basis of the master principle of constitutional design: power is dangerous. For this reason, Presidents and Article III judges have fixed terms, except that they are subject to impeachment, conviction, and removal. Similarly, Representatives and Senators are free from arrest during their session, but only to a limited extent. And the President appoints officers, with the advice and consent of the Senate. And so on and so on. From the standpoint of any principle, checks inserted because of the possibility of abuse will seem incongruous. Judicial independence is not furthered by the possibility of impeachment and removal, but through that process certain forms of judicial misconduct can be checked. The presence in the constitutional mix of a design principle therefore tells us almost nothing about the extent to which its implementation will be limited because of possible abuse of power.

The application of this fundamental meta-principle (a principle about the implementation of principles) to Congress’s power over jurisdiction is plain enough. That power is, among other things, a check on the judiciary. Whether such a limitation on judicial authority should be in the Constitution is a question of design on which commentators differ. Whether it is in the Constitution, however, cannot be answered by the observation (itself doubtful) that the Constitution reflects a design that federal jurisdiction extend as far as federal legislative power. . . . [Arguments based on general design principles are alluring in favor of the President’s power, especially when it comes to war and foreign affairs. In January 1991, on the evening the air phase of Operation Desert Storm began, a number of us were in Mike Luttig’s office (he was then head of OLC, now on the Fourth Circuit). The phone rang and someone said, ‘If it’s the President, tell him the answer is yes.’ Of course, when there’s a war on, that’s also what the courts tend to say.”

HARRISON BIBLIOGRAPHY


