Mr. Jones & the Supreme Court

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What's happening to constitutional law? Everyone who pays attention to the Supreme Court knows that something's going on, but it's hard to pin down exactly what.[1] Some justices hear echoes of the world before 1937, when the Supreme Court invalidated state and national laws in the service of a vision of restricted, almost libertarian government.[2] Describing the Court's work as pre-New Deal libertarianism seems wildly to overstate what the Court has actually done. Consider a series of decisions:

The scope of Congress's powers. Striking down the Gun Free School Zones Act and a portion of the Violence Against Women Act, a narrow majority affirmed that there were areas of private activity that the national government could not regulate even though state governments could. But the Court made little progress in telling us what those areas were. The Court made gestures in the direction of saying that Congress tried to regulate private activity in areas like ordinary crime and relations among intimates that had traditionally been left to state regulation. Those categories are so clearly overbroad that they can't provide serious guidance to figure out where Congress can and cannot regulate. The Court's major point seems to have been a negative one: In both cases the Court emphasized that the government, defending Congress's action, had failed to articulate a theory that would identify any area of private activity that the national government could not regulate. On the Court's view, there had to be some areas free of such regulation. The government's failure to provide a coherent theory gave the Court the chance to strike down particular statutes without itself developing much of an account on its own.

The Court's official theory is that Congress may not regulate non-commercial activity on

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1 "Something is happening here, but you don't know what it is, do you, Mr. Jones," from *Ballad of a Thin Man*, by Bob Dylan.

2 Even the Court's support for abortion rights, and its enthusiasm about free expression, are consistent with a certain kind of libertarianism.

the ground that the interstate economic effects of such activities, taken in the aggregate, are substantial.[3] The Court's next task as it develops doctrine limiting congressional power will be to define more clearly than it has so far the distinction between commercial and non-commercial activity. But, whatever the Court says about the distinction, it seems clear that we are quite unlikely to return to the pre-1937 regime in which only the states were authorized to regulate a wide range of clearly commercial activities, from the extraction of natural resources and manufacturing at the front end of the economic chain to retail sales near its far end.

This branch of the Court's new federalism doctrine, then, is different from what existed between 1937 and the late 1990s, but it is also different from what existed before 1937.

State immunity from monetary liability. According to the Court, states may not be forced to pay money damages when they violate national wage-and-hour laws, or when they discriminate on the basis of age. These decisions are of course related to the decisions about the scope of Congress's power to regulate private parties. Both sets of decisions promote one vision of federalism. But the decisions on state immunity from suit, like those on the scope of Congress's power to regulate private activity, have a limited reach.

Perhaps the most obvious point is that the decisions deal only with state immunity from monetary liability in private lawsuits. So far at least the Court has said nothing to cast doubt on the proposition that state governments must comply with laws applicable to other actors in the economy: They must not discriminate in employment on the basis of age even though they cannot be held liable for damages in a discrimination lawsuit brought by a private party; they must pay the minimum wage even though they might not be liable for wrongfully withheld payments.

Of course the Court's decisions on state immunity from suit limit the remedies available after the state has violated national law. Other remedies remain available. The Court has mentioned the possibility that the U.S. government might sue state violators. More important, though, are private lawsuits seeking injunctions against continued violations of national law. Justice Kennedy and the Chief Justice suggested a sharp limitation on the availability of such suits, but their suggestion was strongly rejected by the rest of the Court. Of course, limiting remedies does reduce the incentives state governments have to comply with national law. And yet, as long as injunctions against continuing violations are available, it's hard to get too exercised about decisions whose effect is simply to reduce the effective enforcement of national law while preserving the principle that state governments do have to comply.

Economic rights. If anything truly characterized constitutional law before 1937, it was not really federalism doctrine but the protection of economic rights pursuant to a version of libertarian theory. The modern Court has dabbled with developing constitutional protections of economic liberty, but hardly with the vigor that earlier Courts displayed.

In early forays, the modern Court invalidated state laws retrospectively altering obligations to holders of state bonds and changing the terms of private pension systems. These decisions have had essentially no progeny.

3 The Court's dissenters have responded, in effect, that this theory gives us everything but the why: If the Constitution gives Congress the power to regulate private activity that has substantial interstate economic effects, on the ground of such effects, why does the origin of those effects in commercial or non-commercial activity matter? The Court's answer appears to be that some line has to be drawn to ensure that some area of private activity be free from congressional control, and that the line between commercial and non-commercial activity is as good as any other.

Later decisions uphold state laws changing contract terms that a Court dedicated to reviving constitutional protections for economic liberty would have easily found impermissible.

The Court's recent cases finding unconstitutional some state regulations as takings of private property are more promising vehicles for such a revival. The Court's articulated doctrine provides real opportunities.[4] And yet the Court's cases taken in themselves seem more like responses to individualized injustice than a program for substantial doctrinal change. The Court described one case as involving singling out a particular property-owner for regulation, not imposed on people in precisely the same circumstances, that effectively destroyed the value of his property. Another case involved the proverbial disabled and aged widow.

In 1999 five justices found unconstitutional a federal statute imposing retroactive liability on mining companies for health care benefits. But the five justices couldn't agree on a theory. Four justices found an unconstitutional taking but five said that there was no taking at all. Justice Anthony Kennedy cast the deciding vote, saying that the statute deprived the company of its right to economic due process. But, again, the case is notable more for what the majority believed to be its egregious facts – the company held liable had transferred its mining operations to a wholly owned subsidiary well before Congress tried to clean up the mess *other* mining companies had made with *their* health care benefits, and even had sold the subsidiary five years before Congress acted.

The Court's Projects: Some Possibilities

No one who looked at what the Court has done so far would fairly describe the set of decisions as a return to the period before 1937. Of course, limited initiatives to date might serve larger projects to be developed in later cases. I believe, however, that there really is no larger project, and that the Court is doing nothing more than articulating its vision of *all* government, itself included, as engaged in only small decisions, whether they be small policy initiatives or small revisions in existing constitutional doctrine.

Skeptics about my claim might suggest that the Court indeed has a larger project, and that the scope of the national government's power, in all its branches, might be diminishing substantially. I want to sketch two candidates for a larger constitutional project and explain why I think they are not serious candidates. I'll conclude by locating the Court's chastened role within the larger framework of a chastened national government.[5]

Restoration

The first large project might be called *restorationist*. Here the idea is that the Supreme Court took a wrong turn in 1937 by abandoning the original Constitution, and that the modern Court will restore the Constitution's proper and original understanding.

The strongest support for imputing the restorationist project to the Court comes from the cases involving state immunity from suit. At first the Court presented these cases as Eleventh Amendment cases. But that was manifestly unsuitable because the Amendment's text demonstrated its irrelevance to the problems the Court was confronting: The Amendment by its terms bars suits by citizens of one state against another state, but the cases involved suits by a state's own citizens. For a

4 A particular favorite of mine are arguments, unthinkable until recently, that a government's action in *de*regulating a market might require compensation.

5 I present a somewhat more extended version of the argument that follows in *What is the Supreme Court's New Federalism?*, Oklahoma City University Law Review (forthcoming, December 2000).

while the Court relied on *stare decisis* as the basis for its decisions, noting that the Court had abandoned a strictly textualist interpretation of the Amendment a century ago. Incorporating *stare decisis* concerns into a restorationist project is obviously difficult, because the restorationist aims to overturn at least a half-century of decisions. Eventually the Court settled on a more satisfactory account of these cases. According to the Court, it was enforcing an understanding implicit in although not textually expressed by the original 1789 Constitution. Thus, the cases restore the proper original understanding.

Justice Thomas sounded the restorationist theme in his separate opinion in the Gun Free School Zones Act case. There he criticized the post-1937 Court for abandoning the view, which he somewhat implausibly attributed to Chief Justice John Marshall among others, that the Constitution's reference to "Commerce among the several States" gave Congress the power to regulate only the actual transfer of goods from one person to another – commerce in the narrow sense, and not including manufacturing or the extraction of natural resources.

That the Court's project is not the restorationist one is suggested, however, by the very fact that Justice Thomas's opinion was a separate one. As I have suggested, the Court's majority accepts a much larger role for Congress in economic matters than Justice Thomas's interpretation would allow. Perhaps the Court may want to restore something like the regulatory role Congress played in the late 1950s or early 1960s, before the rise of the Great Society and Richard Nixon's environmentalism. But this is not a real restoration of anything like the original Constitution.

The restorationist project faces the further difficulty of reconciling the constitutional transformation worked by the Reconstruction amendments with the original Constitution. So far at least the Court has treated the Reconstruction amendments as doing nothing to alter the relation between Congress and the judiciary. It has not directly addressed the question of the degree to which the Reconstruction amendments altered the relation between the national government and state governments. The Court's concession that Congress has the power to abrogate state immunity from suit when Congress demonstrates to the Court's satisfaction that state governments have been too insensitive to constitutional concerns suggests, however, that the Court continues to agree that the Reconstruction amendments worked what Justice Potter Stewart called a "vast transformation" in national-state relations. Conjoining that position with a restorationist view of other congressional powers would take conceptual work that the Court has not begun.

Transformation

A second large project on which the Court might be engaged would be a substantial *transformation* of constitutional understandings. Here the idea is that the Court in 1937 properly rejected an overly restrictive view of government power, but that Congress, with the Court's encouragement, simply went too far in a new direction. A transformationist Court would develop constitutional law to authorize actions that would have been unthinkable to the Framers, which distinguishes it from a restorationist Court. But it would also pull back from the most expansive assertions of national power associated with the later years of the New Deal-Great Society political system.

The Court's cases dealing with the scope of congressional power might fit into the transformationist project. The Court said that Congress had gone too far, and it was especially concerned that it could see no theory available to justify what Congress had done that would not simultaneously justify anything that Congress might do. Similarly, the cases dealing with economic rights might be

transformationist to the extent that they are motivated by a sense that legislatures have gone too far.

The real difficulty in describing the modern Court as transformationist is that the Court has given us no vision of what it hopes to transform the Constitution *to*. The restorationist vision is clear enough, but I find it quite hard to understand what affirmative constitutional vision Justices Kennedy and O'Connor have. For example, I doubt that someone with a large theory of federalism would approvingly describe, as Justices Kennedy and O'Connor have, a decision invalidating a national law as implicating the "etiquette of federalism." To adapt a phrase from Justice Stewart, they know what an unconstitutional statute is when they see it, but, like Justice Stewart, they have not been able to offer a larger theory that would explain why one statute is constitutional and another is not. Perhaps the closest anyone has come to describing the affirmative transformationist vision is Justice Kennedy's metaphor that the Framers "split the atom of sovereignty." So far, however, that remains only a metaphor, not a theory.

Chastening

The very absence of an overarching transformationist theory suggests that the Court might be pursuing a different project. I have described this project as a *chastening* of constitutional ambition.[6] Here the basic insight is that the Court has articulated its restrictions on legislative power in cases where many, perhaps most, would agree that the legislatures had engaged in overreaching. The fact that the Court's economic rights cases involve what seem to be individualized injustices is not a happenstance, according to the view that the Court is engaged in chastening our constitutional ambition.

On that view, the Court's project consists of reminding legislatures *and itself* that governments should engage in no large-scale projects of constitutional construction. Snapping the whip when Congress or state legislatures get too far out of line is fine. But a Court concerned with the chastening of constitutional ambition would itself be reluctant to develop a large-scale constitutional vision, whether that vision be restorationist or transformationist. Doing so would be ambitious, and no branch of government should be ambitious, on this view.

As I have argued in more detail elsewhere, a chastening of constitutional ambition may flow naturally from characteristics of the modern U.S. political system. The American people seem to have expressed our preference for divided government, in which one party, through its position in one or another branch, has the power to thwart ambitious initiatives offered by the other: Congress obstructs large-scale revisions in the system of financing health care, the president blocks the enactment of the most expansive aspects of the Contract With America. What falls out of legislative-executive interaction are programs, sometimes interesting but almost always on a rather small scale, that can get substantial bipartisan support.[7] Interest-group conflict over judicial nominations makes the characteristic federal judge the stealth nominee, a

6 *Foreword: The New Constitutional Order and the Chastening of Constitutional Ambition*, 113 Harvard Law Review 29 (1999).

7 The picture on the state and local levels is more complicated, and I continue to research the issue. The relevant features of the modern political system on the state and local level appear to be the transfer of power from local to state governments resulting from tax-limitation initiatives, and the reduction in professionalism among elected officials resulting from the adoption of term limits. The policy implications of these features are, however, unclear, particularly because legislatures have only just begun to be staffed entirely by officials elected under term limits.

person of high professional credentials with no strong constitutional vision. Under these circumstances, a chastened constitutional system should be an unsurprising outcome.

The Future

As has been said, prediction is a risky business, particularly about the future.[8] A new president might find it worth incurring high political costs to nominate a Supreme Court justice with a restorationist or transformationist vision. Or the justices might find themselves backing unexpectedly into a transformed rather than a chastened Constitution, as they feel pressed to provide a more general account of the incremental steps they have taken. Encouraged by academics who seek to explain decisions made one at a time by referring to broader, neutral principles, the justices might end up articulating a vision of a new Constitution quite different from the one created from 1937 to the early 1990s. My guess is that the odds are against this, though. The Court will probably continue to invalidate occasional statutes that many observers will readily describe as legislative overreaching, and will probably rarely invalidate statutes that have real social importance.[9]

The Court in the New Deal-Great Society era was a big Court suitable for a big government. But, we have been told, the era of big government is over. The Court has reduced its caseload by fifty per cent in the last decade. Perhaps we are now about to see a small Court in a small government.

8 There is some controversy over whether this was said by Yogi Berra or Niels Bohr, who presumably said it, if he did, in Danish. A LEXIS search on November 1, 2000, found eight unsourced attributions to Berra and two to Bohr.

9 I have not discussed many prominent Supreme Court cases, particularly those dealing with so-called social issues like abortion and gay rights. Here my view is simple. Justice Scalia is correct in seeing the Court's decisions as skirmishes in a broader "culture war." The outcome of that war will be determined by forces well outside the Court. The constitutional skirmishes are of interest to constitutional specialists, but have little more than symbolic importance (and even that seems to me rather small).