THE POLITICS OF CONSTITUTIONAL INTERPRETATION

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Gary J. Jacobsohn. *The Supreme Court and the Decline of Constitutional Aspiration*. (Totowa, NJ: Rowman and Littlefield, 1986). ix + 182 pp. Notes, bibliography, index. $29.50.

Christopher Wolfe. *The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law*. (New York: Basic Books, Series in American Government, 1986). x + 392 pp. Notes, index. $24.95.

Realism, the contemporary American paradigm that places the judge at the center of the law, has given the Supreme Court immense power. Constitutional doctrines announced by the Court have all but supplanted the text itself and certainly marginalized all other authorities except those willing to give a special place to what the judges have to say. The Supreme Court has become the definitive source for the meaning of the fundamental law in America. This is a modern phenomenon, yet we take it for granted. The judge as authority, rather than law, is as much a part of our life as streamlining and television commercials. The two books under review are unusual in that they do not take this power for granted. Both critically examine the power of American appellate courts, particularly the Supreme Court, with reference to constitutional interpretation.

Neither Gary Jacobsohn's *The Supreme Court and the Decline of Constitutional Aspiration* nor Christopher Wolfe's *The Rise of Modern Judicial Review* accepts realism. Consequently, although they were both published in 1986, they seem outdated. They ask us to reflect on lost practices, like a more general inclination and capacity to interpret the Constitution. This reflection illuminates the present. Jacobsohn begins with Frederick Douglass's view of the American republic in 1852, which he links to Martin Luther King's speech at the Lincoln Memorial in 1963 (p. 1). There is also a vision of a future in which constitutional discourse and attention to the constitutional aspirations of this republic become more common. Wolfe calls attention to changing styles of judging over the history of the nation. Thus, they both offer a great deal to contemporary law study. Yet, one can hardly lose track of how different their approach is from the tradition associated with the *Law & Society Review*. One's awareness of this gulf is intensified by exam-

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ining what these books have to offer those with scientific aspirations for research about law.

To those outside this activity, Jacobsohn and Wolfe are likely to appear very similar. They do in fact share a tradition: Both reflect a growing interest in institutional relations and interpretation as part of a constitutional structure (Murphy *et al.*, 1986). The characteristics of that growing interest in new sources of interpretive authority and the divergent elements of method and purpose represented in these works are necessarily central to this review. There are differences between the two, however, for the positions taken by these two scholars differ about as much as those of Duncan Kennedy and Richard Epstein.[1] The thesis advanced by Wolfe is simple and striking: The nature of judicial review has changed from the initial constitutional understanding of a limited role for judges to a more expansive power. Jacobsohn's position is more complex. The judiciary, he says, has lost its commitment "to what is permanent in our fundamental law" (p. 145). He says we have lost our constitutional aspiration.

Wolfe describes the "rise" of modern judicial review through three periods. The first, or traditional, era runs from the ratification of the Constitution until just after the Civil War. Wolfe describes this period as typified by "a distinctively judicial power, essentially different from legislative power," in which the modern notion of what a judge does would have been "unthinkable" (pp. 3–4). The discussion is masterful. It has some of the qualities of Agresto's (1984) work but is much more detailed and less wedded to contemporary policy questions about the role of the federal judiciary. Wolfe's treatment of the lost tradition of interpretation, which flourished before 1937, is longer than Agresto's entire book. The interpretation is strong. Wolfe's thesis has a basis in political economy that ends with "the victory of laissez-faire due process" (p. 203). He relies heavily on established studies of conservative activism prior to 1937, but hedges on the obvious fact that conservative activism and not the New Deal is the foundation for the modern era. The strength of the book is in Wolfe's discussion of the early court, when the original intent of the men who wrote the constitution is most relevant. The section on the modern era presents the transition of 1937 as institutionally significant. This seems wrong given the reasons Wolfe so forcefully offers for believing the modern Court was in place well before 1937, reasons that are quite different from those that produced that political shift. Here in particular his claim of a "new theoretical understanding" (p. 205) is weak.

[1] Duncan Kennedy is a Professor of Law at the Harvard Law School and a figure in the critical legal studies movement. Richard Epstein is a Professor of Law at the University of Chicago and part of the law and economics movement.

Jacobsohn examines the past more self-consciously. The result is compelling and a little curious. He juxtaposes Roscoe Pound with the Founding Fathers to distinguish between what he calls community aspiration, which is evident in the "post-Watergate mentality" (p. 33) that holds public officials strictly responsible for violations of the public trust, and constitutional aspiration, which is an embodiment in the language of the Constitution. In this formulation, community aspiration is associated with sociological jurisprudence and constitutional aspiration with the goal of republican government. This challenging mode of inquiry is jarring at times and sometimes difficult to penetrate. I once heard a radio interviewer stumble noticeably over the title of this book. But, Jacobsohn *is* provocative, and although his work does not fit into popular categories, his perspective on constitutional interpretation and insights drawn from an expansive historical examination are likely to be quite important to public discussion of the present condition of our Constitution.

Jacobsohn treats time quite differently from Wolfe. Jacobsohn works his way back to the founders of the republic and then forward to Lincoln and ultimately to the present. Lincoln is in the pantheon of "Straussian"[2] figures whose words and place in constitutional history have been promoted by those trained at the University of Chicago and derivative institutions. Wolfe's more rigid history is limited in its prescriptive power, but the coverage it provides in the first two periods is a strength. We get from Wolfe a picture of constitutional reform being at the heart of constitutional interpretation. His discussion of Woodrow Wilson, taken from an earlier work, is an exciting bit of intellectual history that could be even more exciting if its implications were followed. The constitutional system assessed by Wilson is practically modern; all that it lacked was the critical perspective, generated by reformers like himself, of the dominant realist paradigm on which the present system rests.

These scholars thus illuminate certain crucial issues in American politics that social scientists have taken for granted. One of these concerns is the nature and extent of judicial authority over constitutional interpretation. Jacobsohn devotes two chapters to judicial finality, one on Lincoln's view and the other, his last chapter, on "the dilemma of judicial finality" (p. 113) in our time. The latter is of considerable interest for its method as well as its insights. Jacobsohn discusses the 1982 debates on the Human Life Bill (U.S. Senate, p. 129), drawing on legislative discourse to show the status of Supreme Court authority in Congress. This work is a model for social research on how legal institutions structure social

[2] Followers of Leo Strauss, an émigré political theorist who taught at the New School for Social Research in New York and the University of Chicago.

life and political discourse. Wolfe's treatment of judicial finality pervades his book and is difficult to assess more narrowly. Yet, this approach offers its own truth. Judicial finality has emerged from our past. It is perhaps most evident when we compare present practices with those now lost. Furthermore, the political and economic developments of the late nineteenth century are more important than any other for revealing the nature of the "rise" of modern judicial review. Thus these inquiries probe considerably deeper than the traditional policy-oriented debates have.[3]

The Founding Fathers are important to both authors, certainly much more than they are to realist or sociological scholars in law. They matter to each author in divergent ways, which is another instructive difference between these books. For Wolfe, the men who wrote the Constitution are a special source, and things have moved progressively downhill since they produced the Constitution. His picture of the Founders' in the nineteenth century (p. 216) is ahistorical and not as essential for saying what they meant as it is for establishing the theoretical turn he wants to make at this late date. For Jacobsohn, although the Founders exemplified the crucial aspiration and must be appreciated, others, like Frederick Douglass, Abraham Lincoln, Martin Luther King, Jr., and maybe Archibald Cox, also represent the aspiration. Very few contemporary constitutional thinkers make Jacobsohn's list—not, for instance, Ronald Dworkin, Thomas Grey, or John Hart Ely. In the end, the model of constitutional aspiration, like the "constitutional frame of mind" described by Barber (1984: 8), seems likely to prove more fruitful as both goal and basis for inquiry into constitutional practices beyond the Supreme Court than elevation of the founders to apostolic status.

Wolfe and Jacobsohn are also right to insist that realism has changed the way we see action on textual authority. Realism in law has undercut the authority of the text, and makes us cynical about the capacity of meanings to guide and constrain. Wolfe's historical approach is intuitively attractive. We are shown a change in practices and conceptions over time. This is easy to follow, and the telling has merit until the author seems to be hoping that the eighteenth century can be recreated. Here we feel the power of the Founders for those of a certain faith. For Jacobsohn, the portrayal also has a historical dimension, but it is subordinate. Clearly his point is that something has been lost in the way the Constitution is treated. Yet the author gives the distinct impression that what we lost is within our grasp to reclaim, a contemporary possibility in need of nurturing. This is a little dreamy, but credible nonetheless.

Leo Strauss taught that meanings matter, especially in a scien-

[3] Fisher's (1985) work on this issue, from the perspective of the contribution of Congress is a distinguished exception.

tific age, and this thinking is the source of much of what we might call postmodern traditionalism in constitutional interpretation. Like Strauss's work, the animus for this approach has been political as well as epistemological. The legacy, like the man, is conservative. We hear this refrain in the speeches of Attorney General Meese (1986). It is diametrically opposed to critical legal studies and much of the law and society movement, which still has science at the core of its episteme. This is where Jacobsohn, again like Barber (1984), is so exciting, and where Wolfe, with all the richness of his portrayal, stumbles on the right as Carter (1985) has wobbled on the left. Wolfe's book is presented as political theory rather than description. It is flawed by its rhetorical excess, as seen in his statement that the framers would be "amazed" (p. 210) at how Woodrow Wilson portrayed them, and its argumentation, which is more aggressive and confrontational than deliberate. On the other hand, Jacobsohn's complexity is his strength. His book is sometimes a puzzle, but in its resistance to the poles of positivism it shows that it is still possible to construct a viable alternative conception of constitutional interpretation.

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