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Discovering a Judicial Story

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Abstract

We all know that stories create culture and that law creates culture; it may well follow (this is only a probabilistic judgment) that the stories that one finds in judicial opinions might be especially powerful in creating culture. There are two problems with the thesis that judicial storytelling can be powerful. The first problem is that ordinary citizens do not read these stories and could only hear about them through the mediation of television and the newspapers. This objection is factually correct; judicial opinions do not speak directly to the average citizen. However, the objection errs in supposing that the indirect is less powerful than the direct. In family life, the indirect influence of parental example is more important than the direct influence of parental instruction. So also in school, the direct instruction about proper conduct is far less important than the indirect absorption of the unspoken mores. Why could not the same be true for judicial opinions?

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There are two problems with the thesis that judicial storytelling can be powerful. The first problem is that ordinary citizens do not read these stories and could only hear about them through the mediation of television and the newspapers. This objection is factually correct; judicial opinions do not speak directly to the average citizen. However, the objection errs in supposing that the indirect is less powerful than the direct. In family life, the indirect influence of parental example is more important than the direct influence of parental instruction. So also in school, the direct instruction about proper conduct is far less important than the indirect absorption of the unspoken mores. Why could not the same be true for judicial opinions?

The empirical issues of how an indirect influence might be possible can not be addressed in this short paper, but perhaps some speculation is appropriate. One might plausibly suppose that the stories told in judicial opinions would be absorbed by the general legal community of lawyers, judges, and law professors. If so, then it is possible, and perhaps probable, that these stories could then spread from the legal community to other groups that interact with lawyers, groups such as those who work in the media, in education, and in management (private sector as well as the public sector). And finally, those who have interacted with lawyers could pass on these stories to the public at large. As these stories percolate through the different social strata, they could be received into the general fund of ideas that we call "common sense," and if so, then these stories could gain social power and create culture.

To be sure, the speculations of the last paragraph may be sheer fantasy, and false. But I suspect that some part of my speculations may be true. American culture does seem to be obsessed with legal matters in a way that other cultures are not. At any rate, I believe that the matter is worthy of empirical investigation. Yet if one were to undertake such an investigation, a second problem would arise.

The second problem is that judicial storytelling is often a hidden phenomenon. Narrative is not the surface form of a judicial opinion; indeed, judicial opinions appear to be examples of expository and analytical prose, and for the most part, rather dull examples at that. The story, if there is one, is hidden behind the analytic surface, and thus the problem of "indirectness" is multiplied. Not only are judicial stories mediated via other groups, the stories themselves are not told directly, even in the opinions themselves. This "double mediation," if I can call it that, appears to be a curious phenomenon, and it surely complicates our inquiry. But let us take the first step in the inquiry by discussing how one might begin by discovering stories in judicial opinions.

A Description of a Case

The judicial opinion that I wish to examine was written by Justice Stevens in the case of *U.S. Term Limits, Inc. v. Thornton*. The parties to the lawsuit were contesting the constitutionality of a term limit restriction that was imposed by an amendment to the Arkansas constitution; the amendment limited the number of terms that anyone elected from Arkansas could serve in the United States Congress. The Supreme Court held, 5-4, that the Arkansas provision was unconstitutional; Justice Stevens wrote the opinion for the majority.

There is always more than one way to decide a case, and *Term Limits v. Thornton* is no exception. One could ask whether term limits are a good idea, that is, whether they would be good for the political health of the nation. However, Justice Stevens did not argue that term limits are bad, and therefore, unconstitutional. We can all understand, I am sure, why he avoided the policy question. The issue was, and is, politically controversial, and judges try to remain neutral (without necessarily succeeding) and to appear above the fray. Addressing the policy question directly would pull the judges directly into the merits of a political dispute, and judges try to avoid that.

Instead of addressing the merits of the policy behind term limits, Justice Stevens discussed the issue before him as though it were an issue about the interpretation of a text. Interpretation, as we know, can be a complex enterprise. I wish to examine the complexity of Justice Stevens' interpretations and to unearth some of its assumptions.

Reading Stevens' Opinion

On first read, there is not much of a story in Stevens' opinion, although there is some storytelling; overall, the opinion appears to move abstractly. Justice Stevens examines the relevant text of the Constitution, ascertains that the text standing alone is not decisive, and then proceeds to resolve the ambiguity, to fill in the gap, by using some of the standard interpretative tools that lawyers and judges commonly use. The basic interpretative move is to posit that there must be an intention that lies behind the text and to use standard arguments (set out below) to discern what that intent must have been. Of course, to the degree that one is arguing about intent, there is the germ of a story presented in one's argument. To assert "Mr. X wrote [the text] because..." is to tell a miniature story. But the form in which the argument is presented may not highlight the story as a story. To see how the story is almost buried, let us turn to the details of the opinion.

Justice Stevens was surely right when he declared that the bare text was not dispositive. The text does state qualifications for members of Congress, but it is not immediately clear whether these qualifications are exclusive. Consider for example, the language that governs the House of Representatives: "No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen." The text states a set of legally binding minimum requirements, but it does not specify whether this minimum is also a maximum, i.e., whether the qualifications prescribed are the exclusive list of qualifications. And the rather baffling syntax of the sentence ("No Person shall be... who shall not have... ") seems opaque, at least to my ear, on the issue before the court, i.e., is the list exclusive. If not, then the States would presumably have the power to add qualifications. But if it is an exclusive list, then the States (and thus, Arkansas) could not add to it. (And by the way, Stevens ultimately held that the list was exclusive.)

There is nothing peculiarly legal about this issue. For example, if a friend gives one a list of groceries to buy (perhaps one is helping out by shopping for a party), one may have questions about the scope of one's power to add or substitute. If one is told to buy a particular brand of tomatoes, but there are none on the shelf, can one purchase a substitute brand? If one is given a list of spices, can one add additional spices? Issues like these arise routinely in daily life. One often gets instructions that require one to decide whether the list of imperatives is exclusive or not.

The Apparent Logic of the Opinion

On the face of the opinion, the inquiry into intent proceeds by way of a *seriatim* consideration of isolated items of evidence. The dominant mode of discourse appears to be analysis, not narrative. Analysis proceeds from evidence, and so we must begin by investigating the sources of the evidence that Justice Stevens considers and how well he uses them. The sources that Stevens uses are perfectly reasonable ones: he looks at debates in the convention that drafted the Constitution; he looks at the Federalist Papers, which were published as part of a campaign of persuasion on the issue of ratification; and he looks at the Ratifying Conventions, whose affirmative vote was the act that actually adopted the Constitution. Although his sources are acceptable as evidence for intent, his range is far more limited than a historian would find acceptable; Stevens does not push back into the culture of ideas that are the context for these public debates.

When Stevens examined the records of the drafting convention, he discovered the sort of absence that one normally discovers. The drafters did not say whether they interpreted their own list of qualifications as being an exclusive list. Consequently, Stevens must draw inferences from the discussion of other provisions. For example, the delegates chose to have Congress set its own salary, rather than having the salary set (and paid for) by the State legislatures. The professed rationale of the choice was to increase the independence of the representatives. What inferences can be drawn from this action that

would be relevant to this case? It is perfectly reasonable for Stevens to infer that the independence of the national legislature was a fundamental value for the framers, and then further to infer that letting the States add additional qualifications to the minimal list of the text will reduce the independence that the drafters valued.

However, the inference is not very strong, since one might view the two issues of salary and term limits as different in kind. If the States could set Congressional salaries, then the members of Congress would be dependent on the good wishes of the members of the State legislatures in a rather direct way. However, term limits would not increase the power of State legislatures over Congress, and so the evil that the drafters had in mind does not seem to be present. Although Stevens' inference is weak, this does not eliminate the relevance of such evidence. Analysis often proceeds by assembling details, no one of which is decisive, or even particularly strong, but which can be powerful when grouped together.

In Federalist Paper Number 52, James Madison discussed the two provisions that govern the qualifications of those who can vote and the qualification of those who are candidates. (Although I discuss this item second, it is actually the first matter that Stevens discusses; I have chosen to present the relevant evidence in chronological order.) There is a rather striking contrast between these two provisions. The text does not prescribe qualifications for those who are elgible to vote, but leaves that decision to the States, whereas there is a list of qualification for those who are to serve. Madison explains the difference by declaring that uniformity was not possible for the former (the electors), whereas it was as to the latter (the elected).

There were serious political obstacles to prescribing uniform criteria for voters, although Madison glides over this matter by way of an elegant obfuscation. "To have reduced the different qualifications [for voting] in the different States to one uniform rule would probably have been as dissatisfactory to some of the States as it would have been difficult to the convention." In other words, in some States, aliens, blacks, and the poor were not allowed to vote, whereas in others, they could. To choose among the different rules would have been controversial and might have generated political difficulties.

Madison's rhetorical strategy for avoiding this politically embarrassing topic was to shift the focus to the issue of political checks, and thus rationalize the text by an elegant political theory. His thesis was that neither legislature, that of the United States nor of any State, should prescribe the qualifications for those who voted for Congress. Instead, the matter should be decided by the State constitutions; in other words, Madison argued that State constitutional provisions that governed the question of who could vote for "the most numerous Branch of the State Legislature" should also govern who could vote for the House of Representatives. Madison rested his argument on his political theory of the salutary effect of political checks. Since the People of the several States were unlikely to alter their own constitutions so as to deprive themselves of the suffrage in any arbitrary way, there would be a political check that would also protect suffrage for the Congress.

However, it was possible for the drafters to prescribe uniform criteria for those who could serve, and so Madison asserted that it was quite proper for the drafting convention to address this matter. And furthermore, since the criteria were both few and reasonable, he argued that the consequences of such criteria would be salutary: "Under these reasonable limitations, the door of this part [the House of Representatives] of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith."

Madison's testimony generates a much stronger inference than does the drafting convention's discussion of the salary issue. Madison can be read as asserting that uniformity is desirable so far as it is possible, and if the States can set term limit qualifications, then of course, uniformity will be lost.

Although the inference itself is strong, there is a problem with using Madison that Justice Stevens does not discuss, which is, that there is no reason to believe that Madison's views are relevant. First, one should begin by noting that The Federalist Papers were campaign propaganda, and that they were written late in the campaign for ratification; one might suspect that they were written with an eye on the New York ratifiers. To be sure, it may not be pious to question the motives of a venerable figure such a James Madison, and so how impressed one is with Madison's argument may be a function of one's "piety quotient." One might apply a discount to Madison's views because they were expressed in the context of propaganda. A second discount, and probably the more important discount, could be

generated by the suspicion that there is no reason to believe that Madison's views are representative. Madison's theory of political checks is suspect evidence on the grounds that it is a theory, and theories of this sort are the sort of thing that intellectuals like Madison produce. One might even say that "it smells of the lamp." The probability that Madison's views reflect the views of his fellow politicians seems rather low to me.

In theory, the ratification conventions should be the authoritative source for an inquiry into "intent." The drafting convention proposed; the ratification conventions enacted. If there were a serious disagreement between the drafters and the ratifiers over the interpretation of a clause, then one might argue that the ratifiers' views should be the trump. The crucial fact, to my mind, is the fact that the drafting convention met behind closed doors; and whatever their views, they were unknown to the populace. The sources that Stevens uses to reconstruct the intent of the drafters were not published until well after the ratification had been complete. For these reasons, I would argue that the ratifiers' views should be the trump. However, discerning the ratifier's views is rather difficult. Even assuming that our records of these conventions were complete (a counter-factual assumption), they are inconclusive. Those who ratified speak in many voices, without unanimity. Furthermore, the ratifying conventions operated under the handicap of lacking the power to amend the proposed constitution; they could only vote Yes or No. A convention that judged a particular proposal obnoxious might yet vote Yes on the grounds that the overall compromise was the best deal that was realistically available. Consequently, the discussion of any particular provision yields evidence that is both equivocal (the many voices problem) and inconclusive (the compromise problem).

Justice Stevens gets around these objections by an extremely clever rhetorical move. He notes that the issue of term limits was called "Rotation" in the vocabulary of the day, and that opponents of the proposed scheme raised the objection that the document did not provide for rotation. In a single paragraph of three sentences, he assesses the rotation debate as follows:

> Regardless of which side has the better of the debate over rotation, it is most striking that nowhere in the extensive ratification debates have we found any statement by either a proponent or an opponent of rotation that the draft constitution would permit States to require rotation for the representatives of their own citizens. If the participants in the debate had believed that the States retained the authority to impose term limits, it is inconceivable that the Federalists would not have made this obvious response to the arguments of the pro-rotation forces. The absence in an otherwise freewheeling debate of any suggestion that the States had the power to impose additional qualifications unquestionably reflects the Framers' common understanding that States lacked that power.

One might object to Stevens' argument on the principle that the absence of evidence does not equal evidence of an absence. This objection is sound, but it only weakens Stevens "unquestionably" to a "probably." His argument would still have merit. Even so, one would need to go deeper into the debates to evaluate the strength of the probability. It is also probable that the debaters would have thought that it would be unsatisfactory for some States to impose rotation, while other States did not, on the grounds that some States would gain seniority, whereas other States would not. We can not know, on the evidence that Stevens cites, whether the seniority argument was important. The logic of Stevens' argument is that the Federalists would have a political incentive to make the argument for State imposed rotation, if they had thought it was a plausible interpretation of the text; but they did not make the argument; so therefore it was (and is) an implausible interpretation. But maybe the argument that seems obvious to Stevens was not obvious to those who argued over ratification, and maybe their political incentives were more complex than Stevens allows. Perhaps the Federalists had a political incentive to avoid any arguments that would aggrandize State power.

Questioning Technique

So far, I have proceeded in the mode of analysis, following Stevens own technique. (By the way, I have not offered an exhaustive analysis of Stevens' argument; he does cite other evidence and he does make other arguments; I have merely focused on what strikes me as the key items of evidence and argument.) And in my review of Stevens' assertions, all that I have done is to suggest that his analysis is less conclusive than he pretends. But such a critique is not really fundamental. A more fundamental question is whether Stevens' analytical technique is adequate to unearth "intent." Recall that Stevens

examined three items (among others that I have not discussed) -- the professed rationale of a proposal (Congressional salary) that was adopted at the drafting convention, Madison's explanation of the rationale behind two other provisions (the qualifications of the electors and the elected), and the absence of an argument (local option for rotation) in the ratifying conventions. In each case, he assumes that a certain form of mean-end rationality operates and he further assumes that one can generalize from each particular instance of rationality. He assumes that each individual provision was adopted to advance some general political goal, and he further assumes that the goals promoted by each individual provision can be fit into an overall pattern. Once the pattern is understood, then one can then use it to decide the case at bar. Is this a satisfactory way of proceeding?

Reconstructing the rationale of human action is both necessary for historians, and dangerous. It is necessary because the historian does need to understand past actions, and only by knowing why historical actors have acted as they did can one know what needs to be known. Furthermore, one should not assume (without evidence) that historical actors were incompetent fools; one should assume that they had good reasons for what they did. Consequently, we should assume that the historical actors whom we are studying acted by some sort of norm of rationality. But making these sorts of assumptions is dangerous, because the rationality of those who lived in the past is likely to be different from ours. We are all too likely to project our own preoccupations onto others, and my own belief is that judges are especially prone to this mistake. Judges (like professors) live too much among books (and generally, the books of our day), and judges (like professors) travel in a narrow social class. Indeed, the social isolation of judges may be even greater than that of professors, since the public expectation of neutrality may lead judges to narrow the scope of their activity and friendships to an almost crippling extent. The historical imagination that one needs to inhabit the past must be learned by an immersion into records of the past, and it is rare (I am tempted to say "unknown") for a judge to attempt, much less to learn from it.

In short, I believe that Stevens' technique does not live up to its claims. He purports to be asking a question about historical intent, i.e., how did the Framers understand their text? Did they understand their list of qualification to be exclusive or non-exclusive? Unfortunately, the evidence that he uses, and his techniques for dealing with that evidence, seem inadequate, or so I have argued above. Stevens assumes that the generation of the Framers had motives and an ideology that is transparently obvious to him, but Stevens does not corroborate this assumption by serious historical investigation. Yet it will not do to contend that Stevens errs because he is dim. Instead, I would argue that he is being driven by a story that hides behind his analysis.

The stories in Stevens' opinion are partially on the surface and partially hidden. The stories that are on the surface are the miniature stories about each of the events discussed by Stevens in which proposals were made and arguments advanced. Each of these events was a human action, and each is a miniature story as well as being an analysis of evidence. However, as one reads, these small stories appear to hold together, and the glue that holds them together is the story that is hidden. Justice Stevens writes as though there was a single conversation. Each of the miniature stories is assumed to be part of a larger story, a story of the drafting and ratification of the Constitution, a story in which all of the actors are part of one large conversation.

As a historical matter, one can doubt whether the entire range of events that Stevens discusses *were* part of a single, large conversation. The members of the drafting convention met behind closed doors. The ratification conventions met separately in each State, and so one would have to be cautious about asserting that they were part of a single conversation. There was an elite that corresponded regularly, and they kept each other advised of the ebb and flow of public opinion. However, these elite letters were not contemporaneously published, and so these letters did not enter into a public conversation. Certainly, the newspapers of one city printed articles that were reprinted in other cities. (But one would need to know whether the views expressed in the newspapers had reflected those expressed in the conventions.) Madison's Federalist Paper # 52 was published in a New York newspaper, but the New York ratifying convention came toward the tail end of the process; it could not have been part of the conversations that went before it. Although the newspaper discussions would be the best exemplar of a single conversation, one must be cautious in seeing them as representative. The newspapers were based in the cities, and the votes of the cities were markedly more in favor of the new constitution than was the vote in the countryside.

Once again, I caution that I do not raise these factual matters as dogmatic assertions of fact that the

reader should accept. I merely wish to raise a note of caution. The reader should be skeptical of Stevens' story of the single conversation. However, these historical doubts are somewhat beside the point of the rationale of the story that Stevens propounds. The story that all of the individual conversations are part of one single conversation is central to the larger story that constitutional law is coherent. To assume, as Stevens does, that what Madison writes in the Federalist Papers is an extension of what he said at the drafting convention is a small step in the larger story that what Stevens writes in his opinion is an extension of what Madison wrote. Constitutional law is coherent if Stevens is extending Madison, and if there is a single story that is culturally important, it is the story that judges tell us, and believe, that constitutional law is coherent.

Conclusion

Let me now sum up. Justice Stevens interpreted the constitution by deciding what intent lay behind an admittedly ambiguous text. He pretended, as judges commonly do, that the evidence for intent was clearer than it really was. But one should not get lost in the details of Stevens' errors; the most interesting feature of the opinion is the story that lies behind the details and seems to drive the whole enterprise. At the level of detail, there are a series of individual stories about events in the drafting and ratifying of the constitution. Lying behind these individual stories is a story that links them together, the story that all the individual debates compose a single, unified conversation.

What is the best way to understand Stevens' story? To understand, one must use a framework, and to my mind, the best category to use would be "fiction of unity." For example, traditional interpretations of the Bible declare it to be a unified whole, albeit there are different versions of what that whole might be. One version of traditional Christianity has read the Hebrew Bible as being the Old Testament, and on this reading, events in the Old Testament prefigure the New Testament. I would remind the reader that there is a well established body of scholarship that views our constitution as the central document in the American "civil religion," and so a comparison of constitutional interpretation and biblical interpretation is, I think, justifiable.

Let me end with a note of caution. I have used the phrase "fiction of unity." One should not assume from my use of the word "fiction" that I think that these fictions of unity are false. Fictions are sometimes true, sometimes false, and sometimes both at the same time. Although this is not the time nor the place for an extended argument over the truth and the falsity of fiction, I do not wish to be evasive or obscure on this matter. So let me say that I think that Stevens' basic fiction, that what he says is an extension of what Madison said, is both true and false. Stevens does deceive himself when he assumes that he understands what Madison said and why he said it. But Madison's theory about political checks is in fact part of the conceptual apparatus of modern constitutional law, and so Madison and Stevens share a unity on that point.

Let me also end by noting that I have only answered one of the two questions that I posed at the outset. I have shown how one can identify a story in a Supreme Court opinion, both the stories that are on the surface and the stories that are hidden. But I have not answered any questions of how to discover the cultural importance of these stories. However, the empirical inquiry can not get going without prior work of interpretation, and interpreting judicial opinions is no easy task. Judges engage in legal analysis, and they tend not to be aware of the stories that support their task. Since they are not self-aware, they do not highlight their own story telling. Yet we scholars need to assess the merits of these stories and inquire into their role. Stories do create culture; it is both possible and likely that legal stories are part of this creation of culture. Yet we scholars must first identify the stories that judicial opinions contain and track them down, wherever they might have migrated.