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What Matters in the Constitution

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‘For several generations, the most intense, complex and consequential arguments among conservatives have concerned how to construe the Constitution — the various flavors of textualism and originalism — and the role of courts in society,” George Will recently wrote.

Over the course of his career, Will has switched sides in those arguments. His previous concern that federal judges will wrongly overrule other branches of the federal government, and intrude on the domains of state governments, has faded, while his worry that judges will leave too many governmental infringements of liberty in place has grown.

Around the time the New York Times published Will’s comment, I learned that I had left one of those intraconservative arguments unfinished. In 2018, Will devoted three columns to proposing questions the senators could ask Brett Kavanaugh during his Supreme Court confirmation hearings. In this space, I noted that Will’s questions were more interesting than what the senators’ staffs would probably give them, and offered some answers.

Will’s questions tended to push in the direction of his new judicial philosophy, my answers to push back toward his old one. So, for example, to Will’s question whether the Constitution exists to secure the rights set forth in the Declaration of Independence, I answered: Yes, but that fact does not establish the precise role of the judiciary in the securing of those rights.

It turns out that Will responded to my Corner post in a speech he gave to the Cato Institute. He seized on one short answer.

Him: “Can you cite an important constitutional provision (certainly not the regulation of interstate commerce, or the establishment of religion, or government taking private property for ‘public use,’ or the prohibition of ‘cruel and unusual punishments’) the meaning of which today is the same as the public meaning when the provision was ratified?”

Me: “I certainly consider the fact that all members of the House are elected every two years important.”

His comeback, published a few months ago:

That provision is important, perhaps, but uninteresting. It is so because this provision has never occasioned — it could not occasion — a controversy concerning constitutional reasoning (as distinct from policy reasoning). . . . What is interesting, however, is how little of the Constitution consists of such technical and unambiguous provisions. There is no scholarship seeking to establish the original public meaning of the phrase "have attained to the Age of twenty five Years." The stuff of constitutional law are what former Justice David Souter calls the Constitution's many "deliberately open-ended guarantees."

It is certainly true that judges haven't argued much about those provisions of the Constitution that are hardest to argue about. That seems like a good example of an uninteresting, indeed a nearly tautological, proposition.

Will may have something more in mind. But while he is normally the most precise of writers, the way this disagreement has developed leaves me unclear which of three more interesting propositions he is advancing or assuming.

He may believe that the plasticity of the Court's interpretation of many constitutional provisions over time means that there is no original meaning to be found. But I hesitate to attribute a non sequitur to him.

He may believe that where historical inquiry cannot pin down the original understanding of a legal provision, judges should consider themselves rather than legislators in charge of filling in its meaning. But that view is not an obvious inference from anything in the text, logic, or structure of the Constitution. And it is at odds with Marbury v. Madison, which argued that the writtenness, and thus by implication the cognizability, of the Constitution is what enables judges to divine a conflict between it and mere statutes and authorizes them to set aside the latter.

He may, finally, believe that the judicial interpretation of the Constitution's allegedly open-ended provisions has done more to secure Americans' liberties, or other goods, than such structural provisions as bicameralism, the election of the House, the veto: all of that boring, unambiguous stuff in the Constitution that leaves judges nothing to improvise. It is an assumption that for several decades has come naturally. But I am not at all sure it is correct.

The possibility that what is important in the Constitution and what is interesting to judges in it are not identical is, it strikes me, both interesting and important — as are George Will's evolving thoughts on these matters.