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Recognizing and Respecting Constitutional Structure

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At a meta-theoretical level, I agree with much of what Kim Roosevelt and Jack Balkin have said. In particular, the distinction between original meaning and original expected application is quite helpful. I also agree that the distinction between “living constitutionalism” and “originalism” has been overstated. On the one hand, in a way we are all originalists now because everybody concedes the text and the structure of the Constitution have to count for something. (I mean the entire text, and I mean the Constitution, not a few hand-picked clauses in the Bill of Rights. I will come back to that.) On the other hand, originalists plainly need some theory of constitutional change—not just a theory of precedent, but a theory of substantive constitutional change. So where does the disagreement come in?

If you want to think seriously about constitutional change, you must think seriously about constitutionalism. I do not mean constitutionalism in the simple sense of fidelity (although that is part of the picture) but in a more fundamental sense: Why do we have a written constitution? What is it supposed to do, and how is it supposed to work? Progressives deserve real credit for rehabilitating that question. But my answer differs.

A constitution—our Constitution, at any rate—is not a promise. Nor is it a contract (although it has elements of a contract). Rather, the Constitution is an exercise in equilibrium selection.¹ A Constitution cannot be like a zoning code: it has to be open in some fundamental sense. But neither can a Constitution be read as an invitation to do whatever we please: on that understanding, why have a constitution in the first place? The point of a constitution, then, is to constrain the outcomes within a range that will generally be perceived as fair, reasonable, and acceptable. This may sound drearily familiar, but it has important implications. I mention three.

First, the constitutional objective of ensuring *acceptable* outcomes may not seem terribly demanding, nor even attractive. An entire industry, of which I am a part, stands ready to demonstrate that the outputs of our political system are irredeemably stupid and craven, while much needed work remains unattended. Much of that is true, much of the time. But dissatisfaction with policy outcomes is in some measure a result of what statisticians call “range restriction.” Small variances loom large when the outliers have already been removed—in other words, when the Constitution has done the intended work of blocking outcomes that are not simply lousy (no constitution can do that) but horrid and oppressive. We mope about our politics because we can afford to take an awful lot for granted.

Second, equilibrium selection implies that the constitutional structure matters more than constitutional rights.² While I could crank out a catalogue of rights that would please me, I

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¹ See Peter C. Ordeshook, *Constitutional Stability*, 3 CONST. POL. ECON. 137 (1992).

² It is fair to say, I think, that this emphasis distinguishes my perspective from that of most Progressives. It also distinguishes me from rights-centered libertarian theorists. See, e.g., RANDY BARNETT, RESTORING THE LOST

recognize that Cass Sunstein would no sooner wish to live in my republic than I would live in his. To move beyond the rights revolution (to borrow a phrase),³ one has to move beyond the rights to the structure.

Every dictatorship has Bill of Rights. Most of those bills of goods are much better than ours, from a Progressive perspective. For example, President Franklin Delano Roosevelt's "Unfinished Revolution" contained a right to rest and leisure.⁴ No such right is recognized in American constitutional law, at least not yet. It is, however, an article of the Chinese Constitution, as well as international human rights conventions, to the comfort of inmates of the Laogai.⁵

Third, and most important, the constitutionalist perspective pushes one into questions of stability. What exactly keeps the outcomes within an acceptable range? What makes a constitution stable?

The pluralists' answer was that interest group democracy would render politics stable. Robert Dahl was the principal proponent of that view in political theory; its principal legal theorist was John Hart Ely.⁶ On their view, the Constitution *per se* cannot ensure political stability. It mostly helps to decide what interest groups should get advantages and disadvantages in the political process. With that baseline in place, the Constitution should empower interest groups and government, at least until they run up against some barrier in the Bill of Rights.

We have come to doubt the pluralist enterprise and now think of interest groups not as beneficent but as rent-seeking factions. Modern Progressives, having digested the public choice lesson, tie constitutional construction not to interest groups but to social movements as manifestations of supposedly authentic, deliberative democratic politics. I cannot do justice to the many variations on this theme. But they all frighten me.

Perhaps, my apprehension has to do with the fact that I was born and raised in a country whose history of political "movements" has been very unhappy. But neither the fact that American movements have been more restrained and public-spirited, nor even the injunction that only "progressive" movements should count for purposes of constitutional theory, comforts me much. Jack Balkin celebrates the "Second Wave" of feminism, whose principal achievement was abortion rights.⁷ Putting aside the question of whether that was really an advance for women's equality, the pro-lifers' case is that the genius of "equal protection" in the United States has been to extend that principle to heretofore excluded groups of individuals—blacks at first, then other racial minorities, then women, then (perhaps) homosexuals, now the unborn. So who exactly are the "progressives"?

CONSTITUTION: THE PRESUMPTION OF LIBERTY (2003); and (arguably) RICHARD EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

³ CASS SUNSTEIN, BEYOND THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990).

⁴ CASS SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER, at 10-16 (2004).

⁵ Zhonghua Renmin Gongheguo Zianfa, ch. 1, art. 43 (1982); U.N. Declaration of Universal Rights, art. 24 (1948).

⁶ ROBERT DAHL, A PREFACE TO DEMOCRATIC THEORY (1956); JOHN HART ELY, DEMOCRACY AND DISTRUST (1980).

⁷ Jack M. Balkin, *Abortion and Original Meaning*, 24 Const. Comm. __ (forthcoming 2007).

The abortion debate does not strike me as the most attractive display of American politics. Rather, it illustrates what the critics of interest group politics—William Riker, James Buchanan—perceived as its real danger: the descent into demagoguery.⁸ Do we really want to stake constitutional legitimacy on that kind of politics?

Our real constitutional problem, I think, is not democracy. It is stability, or the lack thereof.

The constitutional solution to this problem is too familiar to warrant elaboration: ambition must be made to counteract ambition. *Political* competition and churning is the recipe for *constitutional* stability. The judicial task, I believe, is to protect that general institutional framework. As I have argued elsewhere, the principle of the New Deal Constitution was “cartels at every level.”⁹ I would turn that paradigm upside down and have the Court act as a political antitrust agency of sorts.

Does that make me a radical? Not quite. First, self-enforcing norms—the constitutional structure, not courts and their parchment—must do most of the work in keeping the Constitution stable. Second, in the small realm where the competitive game collapses and governmental conspiracies threaten to take hold, I am still an Easterbrookian at heart.¹⁰ Most of the time, competition-reinforcing courts have no idea what they are doing. One wants to be humble about the enterprise, especially because the costs of false positives are much higher than the cost of false negatives.¹¹

Still, when intergovernmental conspiracies are clearly afoot, the Court should intervene. Let me give you a few examples of how I think this cashes out. (I do not necessarily quarrel with the results in the cases; my only point is to illustrate the considerations that should drive the analysis.)

First, in *Saenz v. Roe*,¹² the Supreme Court held that residency restrictions with respect to welfare benefits are unconstitutional. Welfare benefits, the argument runs, are constitutionally protected rights, so that residency requirements operate like an entry restriction. In one of the dissents, Justice Thomas argued on originalist grounds that this cannot be right. Justice Greve would go to the constitutional structure first and then try to understand the right in light of the structure. What the structure is supposed to do is to keep political competition open. Welfare benefits operate substantially like a taxpayer-provided public good. From that perspective, it has

⁸ WILLIAM H. RIKER, *LIBERALISM VERSUS POPULISM: A PRIMER* (1982); JAMES M. BUCHANAN, *THE LIMITS OF LIBERTY: BETWEEN ANARCHY AND LEVIATHAN* (1975).

⁹ Michael S. Greve, *How to Think About Constitutional Change Part 1: The Progressive Vision*, AMERICAN ENTERPRISE INSTITUTE FEDERALIST OUTLOOK, at 23-1, Jun. 7, 2005, available at : http://www.aei.org/publications/pubID.22622/pub_detail.asp; Michael S. Greve, *How to Think About Constitutional Change Part 2: Originalism, Pragmatism, and the Constitution*, AMERICAN ENTERPRISE INSTITUTE FEDERALIST OUTLOOK, at 23-2, Aug. 2, 2005, available at : http://www.aei.org/publications/filter.all.pubID.22942/pub_detail.asp.

¹⁰ See Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).

¹¹ Michael McConnell, *Federalism: Evaluating the Founders Design*, 54 U. CHI. L. REV. 1484, 1487 (1987).

¹² 526 U.S. 489 (1999).

to be okay to restrict access to that good to local residents or those who have been there for a while.

Second, consider *Gonzales v. Raich*,¹³ the medical marijuana case from California. What struck me both about the government’s brief and about the ultimate disposition of the case was how little it mattered whether marijuana actually crossed state lines. Suppose you had a state scheme that was carefully calculated to keep medical marijuana inside the state: in that case, I think an interstate commerce predicate for the federal law would look highly suspect. Most likely, the federal law serves no other purpose than to stamp out state competition on the medical marijuana margin. I would ask that question directly. And if the answer is “yes,” the purported Commerce Clause justification should be rejected.

Third, the Public Corporation Accountability Oversight Board (affectionately known as “Peek-a-Boo”), a fabulous institution brought to you by the Sarbanes-Oxley Act, monitors and enforces the governance and audit procedures of public corporations. It has its own regulatory authority. It has its own criminal enforcement authority. (Mess with Peek-a-Boo, and you go to jail.) For good measure, PCAOB has its own taxing authority. It funds itself—as well as its presumed overseer, the SEC¹⁴—by sending letters: “Dear CEO, we need more money. Please remit check.” PCAOB members are appointed, not by the President or even the head of the SEC but by the SEC as a collective. They are harder to remove than even the independent prosecutor of *Morrison v. Olson* fame.¹⁵ In pending litigation, the Department of Justice contends that this is all perfectly fine.

Having observed the litigation up-close, I can report that the Justice Department’s conduct to date has been consistent with its constitutional credo (“Whatever we can get away with”). But the larger point is structural: You can have a long and difficult discussion about the true scope of the delegation doctrine, the definition of “inferior officers,” and the like. But if one winds up with a constitutional construction that permits this type of agency, combining as it does all the rival powers of government, something is wrong with the construction.

Fourth, the Compact Clause provides that no state shall make any agreement or compact with any other state without the consent of the Congress. In 1998, the so-called Master Settlement Agreement settled tobacco litigation among 46 states and the big tobacco producers. By its terms, the MSA created a nationwide tobacco cartel and divided the surplus profits among the states, the trial lawyers, and the producers.¹⁶ Initially, the states asked Congress for its imprimatur. Congress refused. The states and their business partners went ahead on their own.

For each participating state, the MSA conditions the receipt of billions of dollars on the “diligent enforcement” of its provisions. If that is not a compact requiring congressional consent, nothing is. (Full disclosure: I serve as an advisor to the Competitive Enterprise Institute, counsel

¹³ 545 U.S. 1 (2005).

¹⁴ Peter J. Wallison, *Rein in the Public Company Accounting Oversight Board*, AMERICAN ENTERPRISE INSTITUTE FINANCIAL SERVICES OUTLOOK, Feb. 1, 2005, available at: http://www.aei.org/publications/pubID.21833/pub_detail.asp.

¹⁵ 487 U.S. 654 (1988).

¹⁶ Michael Greve, *Compacts, Cartels, and Congressional Consent*, 68 MO. L. REV. 285 (2003); *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004).

to plaintiffs who are challenging the MSA on Compact Clause and other grounds in a pending case.)¹⁷ Nonetheless, attacks on the MSA have run up against a Supreme Court precedent to the effect that *no* compact shall require the consent of the Congress unless it is already preempted under some other existing laws.¹⁸ (The MSA violates even that stricture, but never mind.)

We have here a splendid example of a larger phenomenon: while the Supreme Court has been very creative in finding new applications of original meaning, the structure of the Constitution has in many respects dropped from sight. The Compact Clause case I just mentioned features a devastating dissent: If the Compact Clause vitiates only already-preempted laws, Justice White asked, it is empty. And if it is empty, why is it there? The majority's response, in substance, was that constitutional formalities must not get in the way of creative (and as it were collusive) state cooperation. That same attitude also accounts for the PCAOB mess. In the post-Blue Dress world, the realization sunk in that we would have been better off, had we listened to Justice Scalia in *Morrison v. Olson*. That case, alas, contained essentially no response to Scalia's lone dissent and, for good measure, overruled *Humphrey's Executor* in a half paragraph. Its true holding was: "Shut up, he explained."

Finally, an equally splendid constitutional motto, and perhaps a fine epitaph for its author (Justice O'Connor), is this: "We decline to embark on the constitutional course." The pronouncement appears in a unanimous decision in *Hyatt v. Tax Franchise Board*,¹⁹ which held that the Full Faith and Credit Clause, as it relates to public acts, is right up there with the Compact Clause: it is unenforceable. The full sentence reads as follows: "We decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause." As it happens, balancing sovereign interests is what the clause explicitly demands. Again, one can have a long and difficult discussion as to what "full faith and credit" means, but it cannot mean nothing. Lest you think this is some kind of bauble: in the context of gay marriage and familial relations that have to do with it, the clause matters a lot. Or it would, if it were enforceable.

The cavalier displacement of explicit constitutional provisions, I believe, is rooted in a single, overriding objective—to wipe out the norms that protect political competition as a means of ensuring constitutional stability. (What could the Compact Clause possibly aim at if not intergovernmental collusion?) I am working on a book to explain that no-longer-obvious point. Suffice it here to say this: explicit constitutional provisions should come with a presumption that they mean *something*. When the Supreme Court nullifies them *ex cathedra*, constitutional construction has lost its moorings.

I cheerfully concede that the Constitution is open to competing constructions. Its structural provisions attract constituencies. That is how the Constitution gets beyond parchment and comes to *constitute* a living, breathing polity. When the provisions bite the dust, then so does a piece of constitutional politics. That is the direct corollary of a seemingly unconnected phenomenon—the attempt by "movements" or their academic patrons to monopolize the surviving clauses in the name of progress. That is not constitutional politics; it is its polar

¹⁷ A.B. Coker, Inc. v. Foti, 05-1372 (W.D. La. 2006).

¹⁸ U.S. Steel v. Multistate Tax Comm'n, 434 U.S. 452 (1978).

¹⁹ 538 U.S. 488, 499 (2003).

opposite. Ultimately, the only question that matters in that framework is: whose side are you on?²⁰

I am all in favor of constitutional commitment. But its true measure, I think, is an insistence on the difference between the Constitution and political commitment.

²⁰ If you are on the wrong side, you will be “tested by following.” *Planned Parenthood v. Casey*, 505 U.S. 833, 868 (1992) (O’Connor, J., concurring).