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The Constitutional Constant

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THE CONSTITUTIONAL CONSTANT

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The Constitution embodies the deepest values of the Amer-ican people. That feature of our political culture is constant. As a result, the meaning of the Constitution changes over time. The content of American values changes from generation to generation, after all. So because the Constitution constantly embodies our deepest values, the meaning of the Constitution also changes. It has to, or else the Constitution would cease to embody the American people's deepest values.

The proposition that the Constitution embodies the deepest values of the American people is as robust and stable a truth as exists in our political culture. It seems to be true all the time, generation after generation, even in the face of tremendous change. American values change; circumstances change; doctrines and institutions and methods of government change. But whatever our deepest values are, and whatever we understand to be our most basic commitments about government, will reliably be reflected in the Constitution. At any moment, there will be a correspondence between our deepest values and the meaning of the Constitution as we understand

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it. That correspondence is what I am calling the *constitutional constant.*

My claim about the constitutional constant presents a picture of constitutional law different from the one on offer in the civics-book conception of the Constitution as a precommitment strategy.[117] On that familiar view, constitutional law is a system that overcomes pathological decisionmaking at Time 2 by enforcing the decisions made at a more thoughtful Time 1. For the system to work that way, the idea goes, the content of the rules must be constant over time, so that the decision made at Time 1 is in fact what will be enforced at Time 2. On that model, change in the meaning of the Constitution over time would be a fatal flaw.

Constitutional law in practice sometimes works the way that the civics-book precommitment picture imagines.[118] Much of the time it does not. Over the course of history, and particularly where the most value-laden constitutional issues have been concerned, the content of constitutional law has been a variable rather than a constant, and the relevant changes have usually come without formal amendments.[119] The relevant variability is not of the kind where any constitutional rule in existence today might be different tomorrow, or even next year. Most of the time, most things are stable, at least in the short-to-intermediate run. But over the longer run, even many fundamental things change substantially. The scope of federal regulatory power under Article I,[120] the re-

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117 *See, e.g.*, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) ("The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written."); *see generally* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY 37–38 (1979) (discussing general examples of precommitment strategies).

118 To this point in history, for example, Americans have reliably enforced the Time 1 decision to hold presidential elections every four years, rather than asking in the face of various political exigencies whether this time we should just skip the next election.

119 *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1458–59 (2001).

120 *Compare* Hammer v. Dagenhart, 247 U.S. 251 (1918) (holding Congress did not have the power to regulate labor conditions), *with* United States v. Darby, 312 U.S. 100 (1941) (overruling *Dagenhart* in upholding the Fair Labor Standards Act of 1938).

quirements of due process[121] and equal protection,[122] the nature of protected expression under the First Amendment[123] and the limitations on firearms regulation under the Second[124]—all of these have changed over time. In short, and in contrast to what simple forms of precommitment theory imagine, the content of constitutional rules over long stretches of time is regularly not a constant. It is a variable.

What is constant is the correspondence between Americans' deepest values and the meaning they attribute to the Constitution. As Americans came to believe deeply in a cluster of ideas about free speech and racial discrimination, those ideas gave content to constitutional law and meaning to the First and Fourteenth Amendments.[125] To be sure, Americans regularly disagree with one another about important normative issues. We disagree about abortion and affirmative action, to take two easy examples. While those disagreements rage, we also disagree about what the Constitution directs on those subjects—just as we disagreed about what the Constitution directed with regard to racial segregation during the years when Americans were deeply divided on that issue. When one side of such a conflict prevails in the battle for mainstream American values, the prevailing reading of the Constitution comes to track the winning side's conception. That prevailing reading, which is then no longer one side's view of a controversial question but a reflection of the dominant set of American values on the matter in question, is then regarded as the meaning of the Constitution.

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121 *Compare* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding a Georgia sodomy law), *with* Lawrence v. Texas, 539 U.S. 558 (2003) (striking down a Texas sodomy law as contrary to the Due Process Clause of the Fourteenth Amendment).

122 *Compare* Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding racial segregation in public schools), *with* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (declaring racial segregation in public schools unconstitutional).

123 *Compare* Whitney v. California, 274 U.S. 357 (1927) (upholding a conviction under the California Criminal Syndicate Act based on involvement with an organization of Communists), *with* Brandenburg v. Ohio, 395 U.S. 444 (1969) (invalidating, on First Amendment grounds, a conviction under Ohio's criminal syndicalism statute).

124 *Compare* United States v. Miller, 307 U.S. 174 (1939) (allowing a restriction on transporting certain shotguns when their relationship to the preservation of a militia could not be shown), *with* District of Columbia v. Heller, 554 U.S. 570 (2008) (guaranteeing an individual's right to possess a firearm unrelated to serving in a militia).

125 *See, e.g.*, RICHARD A. PRIMUS, THE AMERICAN LANGUAGE OF RIGHTS 177–233 (1999) (identifying how European totalitarianism during World War II catalyzed an American push towards constitutional rights relating to racial equality, free speech, and open democratic politics).

A few clarifications are in order here. First, when I speak of the values or beliefs of Americans, my focus is on what we might think of as the decision-making class: not a population of hundreds of millions, but the smaller group of officials, activists, and opinion makers who wield power in the world of ideas and who most shape the dominant public discourse, certainly among professionals and probably among a broader public as well. Second, I do not mean to suggest that even that smaller population ever exhibits consensus in the sense of unanimous opinion. When I speak of a prevailing view, or of the deeply held values of Americans, I mean to refer to relatively broad agreement within the decision-making class—a state of affairs in which, within that class of Americans, an opinion is widely held or at least rarely challenged.[126]

Moreover, when I say that the Constitution embodies the deepest values of the American people, I do not mean to say that just *any* values are likely to be read into the Constitution if Americans are sufficiently committed to them (though that might be true). Nor do I mean to suggest that constitutional law traffics only in questions of values (thought that might be true also). Rendered more precisely, my contention is that there are two kinds of propositions that become propositions of constitutional law when the American decision-making class regards them as sufficiently important and sufficiently salient. Building upon and partly adapting the work of Charles Black and Phillip Bobbitt, we can call the two kinds of propositions *structural* and *ethical*. A structural proposition is one that concerns the nature of, or the relationships among, the institutions of American government.[127] An ethical proposition is one about the American people's self-conception as a polity; it concerns who we think we are as Americans, or perhaps who we think we are at our best.[128] Our collective self-conception—our ethos—changes over time, as do our ideas about what governmental structure would best serve us in light of our ethos and

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126 *See generally* Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1209–10 (2010) (exploring the role of consensus within the decision-making class in shaping constitutional meaning).

127 *See generally* CHARLES BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969) (explaining and recommending structural analysis in constitutional decisionmaking).

128 *See* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 93–119 (1982) (developing the category of "constitutional ethos"); *see also* Richard Primus, *The Functions of Ethical Originalism*, 88 TEX. L. REV. 79 (2010) (adapting Bobbitt's conception so that "constitutional ethos" means the general idea of the polity's self-conception, rather than just the particular self-conception for which Bobbitt argued).

our circumstances. Controversies about structure and ethos are reflected in controversies about constitutional meaning. And when there is broad agreement within the decision-making class about an important matter of governmental structure or a salient aspect of the American ethos, that agreement is reflected in the content of constitutional law. (The preceding sentence is a more fully specified version of the first sentence of this essay.)

The correspondence between the content of constitutional law and the decision-making class's views on important matters of structure and ethos is what I am calling the constitutional constant. At any given time, constitutional law reflects prevailing views on our most important issues of structure and ethos, and it does so to the extent that there is broad agreement on the relevant question. The content of the decision-making class's commitments on matters of structure and ethos changes over time. But the correspondence between those commitments and the content of constitutional law remains. Whatever an elite American consensus regards as most fundamental to its system of government and its value-laden sense of the national polity will be understood to be required by, and embodied in, the Constitution. Indeed, that is why the content of constitutional law changes over time. Our values change, and what we require of our government changes. So to maintain the constitutional constant—that is, the correspondence between the Constitution and our important commitments—the meaning of the Constitution changes as well.

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Christopher Serkin and Nelson Tebbe argue that lawyers tend to think of constitutional cases as distinctively important.[129] I agree. But as my discussion of the constitutional constant may suggest, my sense of the reason why lawyers think of constitutional cases as distinctively important may differ from Serkin and Tebbe's.

Serkin and Tebbe take the view that constitutional cases are deemed important *because those cases are constitutional.* On that framing, whether a case is a constitutional case is a fact independent of the case's perceived importance. I suspect that most constitutional lawyers would agree. On the most conventional view, a "constitutional case" is one that raises an

129 Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

issue about the meaning of a clause in the Constitution, regardless of the importance of that issue. Serkin and Tebbe do not specify whether they have that textual criterion for constitutionality in mind or whether, in their view, there is something else that distinguishes constitutional cases from non-constitutional ones. But whatever it is that makes a case constitutional in their view, it is apparently something independent of the perceived importance of the issues it raises. Constitutionality is the independent variable in their analysis, and the perception of importance the dependent one; the fact of constitutionality makes lawyers think of a case as important.

I suppose things do work that way sometimes. But in my view, the judgment that a case raises a constitutional issue is often not independent of a substantive judgment about the importance of the issue raised. More particularly, the judgment that a case raises constitutional issues is not independent of the profession's sense that the case implicates fundamental questions about structure or ethos.[130] In the year 1890, the state-court prosecution of an unlawyered felony defendant raised no constitutional problem. Today it does.[131] When the legal profession's prevailing intuitions about what is fundamental to our constitutional structure and our constitutional ethos change, so does the profession's sense of which cases raise constitutional issues.

Serkin and Tebbe are accordingly correct, I think, to say that American lawyers intuitively think of constitutional cases as distinctively important. But that happens in part because the cases we intuitively classify as structurally or ethically important get described as "constitutional." The meaning of the Constitution then adapts: we discover ways to read the Constitution's text so that it speaks to the issues we regard as fundamentally important.[132] As a result, the category of "constitutional cases" is continually populated with the cases that strike lawyers as raising the most salient questions of governmental structure and national ethos. So yes, lawyers

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130 Richard Primus, *Unbundling Constitutionality*, 80 U. CHI. L. REV. 1079, 1129–35 (2013).

131 *See* Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment, as applied to the states through the Fourteenth, guarantees felony defendants legal representation even if they cannot afford it).

132 *See* Primus, *supra* note 130, at 1095–98 & nn.41–46 (describing constitutional textuality as a continuum along which substantive propositions move as the legal profession's intuitions about the merits of those propositions changes).

think that constitutional cases are distinctively important.[133] But they do so in large part because the distinctively important cases have a way becoming "constitutional."

Note here how Serkin and Tebbe write about *United Steelworkers v. Weber*,[134] the decision in which the Supreme Court upheld affirmative action in workplaces covered by Title VII. In an earlier portion of this conversation, Serkin and Tebbe contended that lawyers and judges pay less attention to text in constitutional cases than statutory ones.[135] In response, I suggested that whether judges hew closely to enacted text may depend more on the stakes of the case than on whether the text at issue is part of the Constitution or part of the U.S. Code.[136] Where there is a lot to lose, I argued, judges are more willing to buck prior authority, including the authority of previously enacted text—and they are willing, when the stakes are high, to buck not just constitutional text but statutory text as well. As one of my examples of a high-stakes statutory case in which the Supreme Court ignored enacted text, I offered *Weber*.[137] Responding to that example, Serkin and Tebbe agree that the *Weber* Court behaved nontextually but deny that *Weber* exemplifies statutory rather than constitutional interpretation. *Weber*, Serkin and Tebbe say, was "constitutionally inflected," because the subject matter of affirmative action sounds in the constitutional category of equal protection.[138] *Weber* should therefore be understood as a quasi-constitutional case, they say, even though it was formally statutory. So in Serkin and Tebbe's view, *Weber*'s disregard for enacted text supports the claim that it is in constitutional contexts that judges are prone to behave nontextually.

I agree that there is a sense in which *Weber* was a constitutional case, or at least a constitutionalish one. The relevant

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133 I mean this in a general way: it is a statement about lawyerly intuitions toward the big categories of "constitutional cases" and "non-constitutional cases." When one gets down to particulars, it might turn out that the vast majority of formally constitutional cases are not distinctively important, except of course to the people directly affected. *See infra* note 142 (describing suppression motions under the Fourth Amendment as typical constitutional cases). For further discussion of this point, see Primus, *The Cost of the Text*, *supra*, at 9–10.

134 443 U.S. 193 (1979).

135 *See* Serkin & Tebbe, *supra* note 129, at 718–19.

136 *See* Primus, *The Cost of the Text*, *supra* note 133, at 7–11. To be precise, I suggested that it depends partly on the distinction between high-stakes cases and low-stakes cases and partly on the distinction between cases in thickly developed doctrinal areas and cases raising questions of first impression. *See id.* at 10.

137 *Id.* at 8.

138 Christopher Serkin & Nelson Tebbe, *Mythmaking in Constitutional Interpretation: A Response to Primus and Stack*, *supra*, at 4.

sense of "constitutional" is substantive rather than formal. What makes affirmative action under Title VII a "constitutionally inflected" issue, to use Serkin and Tebbe's term, is not merely that affirmative action cases arising under Title VII raise issues that overlap with the issues raised by cases arising under the Fourteenth Amendment. The deeper reason why affirmative action seems "constitutionally inflected" even when the legal issue in a case is formally statutory is that issues of racial equality are important to the American constitutional ethos, and being important to the constitutional ethos is what makes an issue constitutional. In other words, *Weber* is substantively constitutional for the same reason that *Fisher v. Texas*[139] is: because it raises an important ethical issue.[140]

Preserving the idea that judges reason nontextually in constitutional cases more than in statutory ones by classifying formally statutory cases like *Weber* as substantively constitutional is a perfectly defensible move on its own terms. But it requires adopting a view of the relevant difference between constitutional and non-constitutional cases that largely tracks a distinction that I suggested does much of the real work of determining when judges are willing to depart from textual authority: the distinction between ordinary cases and cases where judges feel there is a lot to lose.[141] In other words, the fact that a case raises high-stakes issues of structure and ethos has at least two sets of consequences. Judges are more likely to reason nontextually, and the legal profession is more likely to regard the case as constitutional. But neither of those consequences is caused by the other one. Judges in a case like *Weber* do not first think, "This case is important, so we regard it as constitutional," and then proceed to think, "This case is constitutional, so we might not hew to the text." Instead, it is the fact that the case raises the high-stakes issue it raises that drives both the judges' willingness to depart from enacted text and our intuition that the issue is in some sense constitutional.

I do not mean to suggest that the constitutionality of a case is always just a consequence of some anterior perception of its importance.[142] But the category "constitutional cases" attracts

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139 136 S. Ct. 2198 (2016).

140 *See* Primus, *supra* note 130, at 1132–35 (describing ethos as a basis for constitutional status).

141 Primus, *The Cost of the Text*, *supra* note 133, at 9 & 11.

142 Indeed, I do not think that it is true that (formally) constitutional cases in general are regarded as particularly important—though of course many are. For every case in which a court orders a state to recognize same-sex marriage, there are thousands of cases in which courts adjudicate suppression motions under the

and assimilates the cases that strike lawyers as raising the most important issues of structure and ethos. Sometimes, as in *Weber*, we continue to regard a case as technically non-constitutional even though we also perceive a sense in which the case is constitutional. At other times, we develop new readings of the Constitution itself in order to make the Constitution bear on our most salient questions.[143] In so doing, we perpetuate one of the intuitions that Serkin and Tebbe identify: that constitutional cases are distinctively important. After all, the questions in which we are most invested somehow turn out to be constitutional questions. As must be true, if the Constitution is always going to embody our most important commitments.[144]

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Serkin and Tebbe's claim that American lawyers think of constitutional cases as having an especially elevated status is consistent with my view that Americans constantly reimagine constitutional law so that it speaks to our most fundamental

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Fourth Amendment. Suppression motions are often important—particularly to the defendants who raise them. But to the judges who adjudicate them, suppression motions might be important in an ordinary sort of way, rather than in the special way that same-sex marriage cases were important in the last several years. The sense that constitutional cases are distinctively important is thus driven, I think, by the profession's tendency to let the most salient constitutional cases color an impression of the entire category.

143 *See* Primus, *supra* note 130, at 1095–98 & nn.41–46 (discussing this process of textual reconciliation).

144 Serkin and Tebbe respond to my other leading example of a statutory case in which the Court departed from enacted text—*King v. Burwell*, 135 S. Ct. 2480 (2015)—by arguing that the Court in *King* actually did pay much closer attention to the text than it usually does in constitutional cases. And it is true that the Court engaged closely with the enacted statutory wording in *King*, though it did so en route to a decision that refused to give legal force to a key bit of enacted text. I do not think, however, that the Court's close engagement with enacted text in *King* lacks parallels in cases arising under the Constitution. Consider *District of Columbia v. Heller*, 554 U.S. 570 (2008), in which the Court held that the Second Amendment protects an individual right to possess certain kinds of firearms. The *Heller* Court engaged closely and at great length with the wording of the Second Amendment, and so did Justice Stevens's *Heller* dissent. I would agree that *Heller*'s in-the-weeds engagement with the wording of the Constitution is unusual in modern constitutional law, and I would further agree that such close engagement with enacted text is more common in statutory cases. But as I have previously argued, I think that much of the explanation for that difference lies with the fact that statutory cases present more questions of first impression about the meaning of enacted text than constitutional cases do. *Heller* was a constitutional case of first impression regarding the meaning of a constitutional text, and, presented with that case, the Court engaged with the enacted wording of the Constitution at least as closely as the *King* Court engaged with the enacted wording of the U.S. Code.

concerns. But Serkin and Tebbe have some worries about that dynamic. One worry is that if Americans code their most important issues as constitutional, there will be a tendency for those issues to be taken out of ordinary political discussion and relegated to the domain of professional elites.[145] Another is that the constitutionalization of the polity's most important issues raises the stakes of political conflict and reduces the available space for compromise.[146]

The first worry can be understood either as a concern that courts will decide issues that are better left to the normal political process or as a concern that people who are not constitutional lawyers will shrink from engaging with important issues because those issues seem to require a refined and technical treatment that is beyond the abilities of laypeople. On the first conception, the worry strikes me as reasonable. If prevailing understandings of the Constitution evolve as the norms of American elites change, and if courts understand themselves as authorized to countermand the decisions of other institutions on the basis of their understandings of the Constitution, then courts will probably decide some number of issues that are better decided by other institutions. To be sure, people will differ as to the particulars here, and we would need a robust theory of judicial review to sort out when courts should and should not intervene. Over-judicialization is to be avoided, but so is under-judicialization, and trying to figure out how to avoid both problems is one of the longer-lived preoccupations of American constitutional theory.

If Serkin and Tebbe are also worried about the second version of this problem, however, then I do not think I share their concern. Yes, there is a risk that courts will decide issues that are better resolved in other forms. But I doubt that the American tendency to understand our most salient questions of structure and ethos as constitutional questions has the effect of discouraging people who are not professional constitutional lawyers from engaging vigorously with those questions. As far as I can tell, there is a robust lay discourse about guns, gay marriage, affirmative action, abortion, the Affordable Care Act, and many other issues denominated "constitutional." If there is evidence that ordinary Americans, or members of the decision-making class other than lawyers and judges, regularly decline to express themselves on these matters because they believe the topics require professionally expert resolution, I am

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145 Serkin & Tebbe, *Mythmaking*, *supra* note 138, at 8.

146 Serkin & Tebbe, *supra* note 129, at 776.

not aware of it. Indeed, I think it at least as likely that broad public discussion on several of those issues influences the judiciary as it is that the way the issues are discussed by elite lawyers limits the speech, thought, or activism of other interested Americans.

I do suspect, however, that Serkin and Tebbe are correct to worry about the other concern they express. Precisely because Americans intuitively regard the Constitution as embodying their deepest values, disagreement about constitutional law can seem like fundamental disagreement. And where disagreement is fundamental, people often find it hard to recognize the legitimacy of differing views.

In my own view, a polity is generally healthier when the members of its decision-making class are able, across a relatively broad range of issues, to recognize the legitimacy of different ideas. Indeed, I am attracted to the idea that the Constitution works best when it is understood to provide for governance that assumes important disagreement within the polity, rather than when it is understood to resolve all such disagreement. The Constitution, as Holmes remarked, is made for people of fundamentally different views.[147] But it is also true, as I noted earlier, that the meaning of the Constitution adapts over time so as to continually embody the deepest commitments of the American decision-making class. It follows that Americans are unlikely to see the Constitution as neutral on the polity's most salient issues. We have fundamentally differing views, and, much of the time, we each see our views reflected in the Constitution.

So perhaps the key questions are these: Can members of the decision-making class recognize the existence of a gap, at any given time, between their own views on issues of structure and ethos—even their own *fundamental* views on those issues—and the views of the American people, or at least those of the decision-making class, as a whole? Can they recognize, when such a gap exists, that the text of the Constitution might not settle the question one way or the other? Put differently, if two people have different and deeply held views about federal power or affirmative action, must each one regard the other as betraying the Constitution? Or can they think that the content of the Constitution might be indeterminate on the issue that divides them, at least until such time as one of them succeeds in persuading the broader polity to adopt one set of views? The

147 Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

latter frame of mind is harder to maintain, especially in the heat of mass politics. But it would surely make for a healthier constitutional culture.

Serkin and Tebbe worry that by treating the Constitution as special, Americans raise the stakes of politics in unhealthy ways. There is a sense in which I think they are right. But perhaps the problem is less that we treat constitutional issues as especially important than it is that we treat too many commitments as not subject to reasonable disagreement. If we were better able to tolerate disagreement, we might be better able to tolerate disagreement about the Constitution. And disagreement about the Constitution is not going away, precisely because of a deep respect in which the Constitution *is* special: even as American values change over time, the Constitution embodies the deepest values of the American people, and when we disagree about what our values should be, we disagree about the meaning of the Constitution. That feature of the Constitution may not be unique; indeed, one could probably say similar things about at least some other sacred texts that, for particular communities, have the status of higher law. But it does seem deserving of the label "special." And to this point in history, it also seems to have been reliably constant.