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How to Think about Constitutional Change Part II: Originalism, Pragmatism, and the Constitution

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The preceding Outlook *discussed the liberal-progressive vision for a "Constitution in 2020"—wedded to the constitutional apparatus of the New Deal and bent on entrenching, with the U.S. Supreme Court's capable leadership, a European-style welfare state. This* Outlook *contrasts the liberal project with a more appealing program: originalist pragmatism and a Constitution based on the principle of competition.*

We Have a Problem

Over the past two decades, constitutional originalists have made headway against purveyors of a "Living Constitution" that changes with "societal needs," as defined by the intelligentsia. Notably, they have dismantled the liberal debate stoppers: "What about *Brown v. Board?*" and "What about *Roe v. Wade?*" The *Brown* question lost its charm when Michael McConnell marshaled a persuasive originalist defense of the decision.[1] As for *Roe*, even liberal scholars now acknowledge that the decision is constitutionally indefensible.[2]

Progressives have responded by trying to tie the Living Constitution to democratic values. Prominently, Cass Sunstein has embraced O'Connor-esque "minimalism"—that is, the practice of deciding each case on its facts as circumstances and precedents may suggest but not necessarily with reference to the Constitution—as a democracy-friendly middle path between Justice Antonin Scalia's constitutional formalism and the Brennan Court's liberal, living enthusiasms. Minimalism conveniently protects the liberal gains of the past three decades, leaves the door open for social "progress" in small steps, and surrenders nothing (as a second coming of the Brennan Court is out of the question in any event). At the same time, minimalism allows progressives to turn the tables and to accuse originalists of activist tendencies. Principled originalism, they argue, is incompatible with the constitutional revolution of the New Deal. It therefore amounts to restoring a "Constitution in Exile"—"Herbert Hoover's Constitution," as Sunstein has warned.[3] Actually, Hoover's justices (Benjamin Cardozo, Owen Josephus Roberts, and Harlan Fiske Stone) all supported the New Deal, but let's not have that detail get in the way of a good scare: originalism translates, in this view, into an activist agenda for libertarian head-cases.

The push to confront originalists with the New Deal comes at a time when originalism's conventional account has crumbled under the accumulated weight of Supreme Court decisions. That account was Justice Scalia's "fainthearted" originalism: accept the New Deal and arrest the Brennan Court's rolling constitutional revolution. When Justice Scalia formulated that theory in the late 1980s, it was entirely plausible to draw a line between the settled transformation of the New Deal and the unsettled question of *Roe*. But *Roe* has since been reaffirmed not once but repeatedly, and the Supreme Court has in other contexts "evolved" standards of decency wholly outside the Constitution (gay rights) or in the teeth of the text (the death penalty). How much longer can

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conservatives pretend that this postmodernist transformation is any less settled than the New Deal? At what point does faintheartedness dictate acceptance of the steady dribble and drivel of minimalist decisions?

This is the point of the liberal project. "We progressives," they say, "have a theory of constitutional change. You originalists don't. Therefore, you must either stand with the 'Constitution in Exile' or else, accept the Supreme Court's accumulated work in the name of restraint. Take your pick." But we have a third, far better option.

Change!

Many originalists are loath to contemplate the idea of constitutional change. Yield an inch at this front, they fear, and one is quickly knee-deep into the muck of constitutional transformations. But constitutional change is a fact, and originalists need to explain as a matter of substance, not merely temperament, what changes are in or out of bounds and why. As it turns out, the most plausible account is pragmatic—and, at the same time, profoundly originalist.

In John Marshall's famous words, "We must never forget that it is a *Constitution* we are expounding."[4] A constitution permits varying constructions—some better, some worse. The question is not whether the New Deal toppled a fixed constitution but whether it remained within the range of legitimate constructions. To the extent that the answer is "no," we should abandon the New Deal—not because we hunger for the days of *Lochner* and Calvin Coolidge but because we should reject *all* out-of-bounds constructions. To the extent that the answer is "yes," we should still ask whether the New Deal Constitution is really the best we can do today—under greatly changed conditions, with considerable experience in the operation of that Constitution, and with a vastly improved economic and political understanding.

In that intellectual framework, we can get beyond debating the ludicrous proposition of "repealing" the New Deal. We can begin to ask whether we should build on the New Deal or rather rethink its constitutional architecture. The correct answer is, let's start anew. The New Deal's constitutional program was "monopoly at every level." We should build on the opposite principle: competition.

Constitutional Openness

Constitutional change is a constant even without the ideological confusion of a Living Constitution. Over the first 150 years of its existence, the Commerce Clause was understood as defining an exclusive federal power, except when it was not. It was read to mean that states may not regulate interstate commerce and then to mean that they may, provided they do so indirectly. These changes profoundly affected the salient political questions of the day (prohibition, for example). They all occurred at a time when federal judges and justices were originalists to the bone.

While the written Constitution directly answers many and perhaps most questions, openness is an essential—and deliberate—feature of the constitutional architecture. Federalism, the separation of powers, checks and balances, the police power: these terms indicating organizing principles of the Constitution appear nowhere in the text. These principles have to be inferred from its parsimonious clauses and its general structure. The point is not simply that a constitution crafted to endure for ages to come cannot specifically anticipate all contingencies. Rather, the crucial point is the Founders' distrust of "parchment barriers." Constitutional stability, they explained, cannot be ensured by scribbling rights on paper but only by establishing rival institutions with the means and the motives to resist one another. "Ambition must be made to counteract ambition."[5] We cannot predict the outcomes of institutional rivalry and competition (and the Founders wisely refrained from loading the dice: unlike modern constitutions, ours contains no social objectives of any kind). But if one can get the institutional entitlements and incentives roughly right, the outcomes will remain within a range that is generally perceived as reasonable and fair.[6] That is the only constitutional stability that can be had. The hope for more is contrary to the original meaning.

A Matter of Construction

While the just-rehearsed argument at one level commands universal assent, it is not easily sustainable. At one end, the idea that an open constitution is still a *constitution* implies that many questions must be settled by law, which tends to produce fits of lawyers' disease: the Constitution must supply a right answer to every dispute. At the other end, openness invites demagogues to mobilize contestable constitutional notions for ideological ends. The question is whether one can escape these extremes.

Sophisticated originalists (prominently, Princeton professor Keith Whittington) have emphasized that constitutionalism is not merely a matter of interpretation (which

is what we do when we read the right to "bear arms" as implying a right to keep weapons in our closet).[7] It is rather a matter of construction. Arguments that count often have to do with structure rather than semantics; with purposes and consequences as essential inputs into ascertaining constitutional meaning. By way of example, consider the following excerpt from Justice Sandra Day O'Connor's majority opinion in *Gregory v. Ashcroft* (1991), a cornerstone of the Rehnquist Court's federalism:

> [Federalism] preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[8]

The Court here invokes political principles to decide a humdrum case over the question of whether a federal law against age discrimination bars mandatory retirement provisions for state judges. No mere dictum, the passage grounds a canon of statutory construction (the so-called "clear statement" rule) that decided *Gregory* and many cases since.

To recognize the salience of constitutional purposes and consequentialist principles is not to say that anything goes. The constitutional text marks the limits of permissible constructions. All of the text, moreover, must be given a fair reading.

Tellingly, and lamentably, this modest demand has proven excessively constraining for the Supreme Court. Where the Constitution provides that no state may make *any* agreement or compact with another state without congressional consent, the modern Court has effectively held that *no* state agreement requires congressional consent. Where the Constitution provides that states must give "full faith and credit" to another state's laws, the Court has declared—unanimously, no less—that "full" credit means zero credit. As Justice O'Connor's opinion helpfully explained: "We decline to embark on the constitutional course."[9]

If the Compact Clause were enforced, state attorneys general would require congressional approval before reforming the national economy by means of multi-state settlements. If the Full Faith and Credit Clause were enforced, many multi-state class actions would be constitutionally barred. (Such actions often impose liability for conduct that is illegal in the state where a plaintiffs' lawyer filed the case but lawful or even required in the states where most of the plaintiffs reside.)[10] In short, these are no mere technicalities.

The demise of the Compact Clause and the Full Faith and Credit Clause follows the logic of the New Deal Constitution, which aggressively promoted state cooperation and the extraterritorial reach of state law. Note the irony: "Fainthearted" originalism will let the New Deal play itself out even when the constitutional text gets in the way, for fear of reviving old debates that it wants settled. A pragmatic originalism that allows for constitutional openness and change will insist on the text as a limit.

Constitutional Choice

Even within the text, constitutional construction is not a Hegelian night in which all the cows are black. We have criteria to tell good from bad constructions, such as intellectual coherence, precedent, and textual and historical plausibility, including evidence of what the Founders thought they were doing. (In this broad sense, even the progressives are now originalists.) But at the end of the day, constitutional construction involves normative, political choices. The trick in making those choices is to avoid the narrow politics of the day and to identify and enforce the enduring purposes of the constitutional architecture.

Recall the *Gregory* quote, which invokes the federalism values of diversity, democracy, innovation, and competition. These values may cut in the same direction. For example, a constitutional rule that limits federal power in some domain will simultaneously enhance diversity and state competition, as citizens will tend to sort themselves into state regimes that suit their varying tastes. But federalism values may also cut against each other and require a choice. *Printz v. United States*, involving a federal law that required local officers to enforce federal gun registration requirements, illustrates the point.[11]

Unlike the Articles of Confederation, the Constitution authorizes the federal government to enforce its own laws directly against citizens. Does this power imply that the national government *must* act directly—or may it rely on the states to enforce its laws? Writing for a majority of five justices, Justice Scalia held that the federal government may not "commandeer" state and local officials. Rather, it must enforce its own laws. In dissent, Justice Stephen G. Breyer sharply criticized that holding. A modern society,

he argued, cannot confine the national and state governments to separate spheres. State or local enforcement permits more democratic participation than a federal monopoly and greater flexibility in taking account of varying local preferences and conditions. Justice Scalia in turn replied that intergovernmental cooperation will encourage governments to conspire against citizens. When citizens complain about odious laws, the local enforcers will blame "the feds," who in turn will harrumph about local overreach. This erosion of accountability is incompatible with the constitutional scheme.

The divide in *Printz* arose not over the constitutional text (there is none) or over interpretive theory. It arose over diverging federalism conceptions and, as Justice Scalia and Justice Breyer both recognized, required a reasoned choice among rival political principles. The question is what that choice should be.

Competition

The New Deal's choice was the collective provision of social security. In operation, the preceding *Outlook* explained, this choice translated into pervasive political and economic cartelization. Instead of building on that foundation (as contemporary progressives would have us do), we should do the exact opposite and choose competition as a central constitutional value. "All things of value," including public policy, "should be provided by multiple suppliers in rivalry with each other," as AEI president Christopher DeMuth put it in his compelling 2004 Bradley Lecture on "Competition in Government."[12]

Competition maps the structure and logic of the Constitution, which arms rival institutions with the means and the motives to resist each other's ambitions and encroachments. The separation of powers and bicameralism reflect that orientation. But the most pristine and consequential structural principle is federalism—a federal government of limited, enumerated powers that leaves the states a great deal of autonomy.

The *Federalist Papers* picture the states as independent power centers, which compete with the federal government for the citizens' "affections." Federalism competition in this sense has withered, and the Founders may not have expected or even wanted it to last.[13] But federalism is competitive in a different sense: a government of limited powers compels states to compete on all the margins where the federal government lacks the power to act. What the states compete for are the assets, talents, and affections of productive citizens and firms.

Social scientists have explicated the many advantages of federalist competition.[14] Theorists in the tradition of Friedrich A. Hayek emphasize that competition fosters the disclosure of information (we find out what works) and institutional learning, as states will adopt successful experiments. Other economists stress the so-called "Tiebout effect." Given a choice, citizens will sort themselves into a jurisdiction that supplies the best mix of public goods and services at the best price. Because individual preferences vary greatly, a choice among many differing regimes gives more people more of what they want (relative to a central regime that must accommodate a much wider range of preferences). Public choice theorists have proffered a third, especially potent rationale—*discipline* in government. The business of politics, they argue, is the transfer of wealth from unorganized groups with small stakes (taxpayers) to concentrated interests with much higher stakes. Federalism provides a defense and remedy for this ill by giving the losers an opportunity to "vote with their feet."

One must not push a constitutional competition principle too far. Modern competition theories are no more bullet-proof than other social and economic theories, and they are not perfectly congruent with the Founders' intellectual universe.[15] But the essential insights of that scholarship cohere very well with perspective of the *Federalist Papers* and with the constitutional structure—well enough, certainly, to get us beyond both the tired nostrums of the New Deal and a dogmatic, crabbed originalism.

More Democracy?

"Competition as a constitutional principle" is the polar opposite of the New Deal Constitution, which embodies a firm presumption *against* competition. We now understand that error and its consequences. The New Deal favored monopolies because it thought that it could stabilize one economic sector at a time—milk today, ice tomorrow—without having the unintended consequences rattle through the economy. We now know better. FDR was famously committed to trying something—*anything*—that might work. We now know that public-spirited experiments are typically hijacked by organized interests.

"We" is not shorthand for free-market enthusiasts. Progressives, no less than conservatives, recognize the pathological character of interest group politics. The point

of disagreement lies not in the analysis but in the envisioned remedy—competition, or more democratic engagement. Instead of constraining the New Deal state, progressives seek to perfect it. That is a fool's errand.

The New Deal confronted economic scarcity, constitutional constraints, and pressing demands for government intervention. We now have the opposite problems. With respect to economic regulation, government faces no serious constitutional constraints, and our general condition is not scarcity but affluence.[16] A government with great freedom to reshuffle enormous resources will become hyperactive, sclerotic, and wasteful at the same time: hyperactive, because there is no limit to the organized demands for a piece of the pie; sclerotic, because there is no practical way of dislodging the entrenched beneficiaries of existing policies; wasteful, because political redistribution and bargains typically produce losses rather than gains and because considerable resources are spent in the jockeying for other people's money.

The costs are not merely economic; they affect democratic governance. Polls reflect a profound public disillusion with the power of special interests and with Washington's ability to "do what is right for the country." Americans do not like to be governed by a distant, impenetrable, monopolistic bureaucracy. They sense, moreover, that we cannot make ourselves wealthier, let alone happier, by shuffling the proceeds of our productive activities through the Washington maze.[17] Of course, we all insist on defending our own special benefits. But the disconnect between good sense and opportunistic behavior is itself a consequence and cost of an unconstrained system that promises a free lunch to all.

The proposed cure of contemporary progressives is "more democracy." Cass Sunstein has advocated a "New Deal for Speech"—that is, the governmental allocation of speech, albeit through "flexible" and "incentive-based" means such as taxes and subsidies.[18] Bruce Ackerman has proposed a work-free "National Deliberation Day" preceding federal elections, as well as the distribution of federal "Patriot Dollars" to eligible voters to spend on political candidates of their choice.[19] But such earnest proposals cannot escape the pathologies they are meant to redress. The McCain-Feingold campaign finance law, vehemently defended by Sunstein and Ackerman, was indeed a New Deal for speech: it rationed speech about political candidates. By "taking the money out of politics," the sponsors hoped to make electoral politics more democratic. They succeeded, so to speak, in making democracy safe for unhinged billionaires.

One cannot cure the defects of an unconstrained political process through yet more politics and empowerment. One has to look for constraints and discipline instead, and competition is a ready means to that end. The exit threat has become more effective, as the costs of mobility have dropped sharply both for firms and for individuals over the past decades. Its utility has risen, as we lack other viable means of disciplining government. In short, the competitive dynamics of our federal, constitutional structure are more necessary, and potentially more potent, than at any time in our history—provided we can figure out a constitutional construction that allows the dynamics to work. A few applications illustrate the content and scope of such a construction.

Commerce

The competition principle yields a functional understanding of the congressional power to regulate commerce "among the several states" that differs from both the pre–New Deal interpretation and the New Deal's limitless federal commerce power.

The pre–New Deal Court rightly insisted on a limit to the commerce power, lest the whole system collapse into the center. To that end, it drew formalistic lines—for example, between commerce and manufacture, which is neither "interstate" nor "commerce" and therefore beyond the reach of the Congress. Those lines, however, often yield implausible results. For example, the Clean Air Act regulates *interstate* pollution (among other matters) by regulating *production* standards. Left to themselves, states would vie to export pollution to neighboring states. Federal intervention to suppress such externalities, even by means of regulating manufacture, seems just as legitimate as federal prohibitions against protectionist state laws—the core purpose of the Commerce Clause.

The Progressive and New Deal assault on the Commerce Clause, however, was not tied to externalities. Its thrust was far more radical. In *Hammer v. Dagenhart*, the United States defended a federal child labor law as an attempt to prevent a "race to the bottom" in which states would seek to retain industries by lowering labor standards.[20] At the time, however, all states already had enacted child labor laws (though many less stringent than the federal age limit), and they were raising rather than lowering their standards. Over the post-*Hammer* decade, child labor dropped significantly, due in large measure to rising prosperity.[21] The point of the government's empirically baseless claim was purely ideological.

The threat of industry exit, the argument runs, harms the regulating state in the same way in which interstate pollution causes harm. In both cases, a collective action problem will induce states to "race to the bottom." But pollution is not a collective action problem. It is an externality problem, and in the child labor context, there is no externality except competition. Put simply, the Progressives and New Dealers defined *competition itself* as a harm, the better to replace it with federal policy cartels.

The *Hammer* Court, in its preoccupation with conceptual lines, missed this point. While rightly declaring the federal statute unconstitutional, it accepted the "race to the bottom" proposition and then insisted that regrettably, the Commerce Clause affords Congress no power to equalize the "unfair" advantages that might be enjoyed by individual states. The correct answer is that in political as in economic markets, competitive harms, while real (after all there must be losers in competitive arrangements), can never count as social harms. Doubt that proposition, and competition and its gains are gone. So whatever the Commerce Clause might authorize, a mere desire to suppress interstate competition is beyond the pale.

To see the force and good sense of this analysis, consider this year's decision in *Gonzales v. Raich*, where the Supreme Court held that the Commerce Clause authorizes Congress to regulate the mere possession of marijuana even where a state (California) has authorized possession for medicinal purposes. Justice Scalia's concurrence and Justice Clarence Thomas's dissent rightly observe that this holding cannot rest on the Commerce Clause, which by its terms does not apply to an in-state act that involves no commerce (possession). It must rest on the federal government's authority to do what is "Necessary and Proper" to enforce the purposes of the Commerce Clause—here, according to the federal government, the suppression of interstate drug trade. That purpose is legitimate because one state's dope might easily spill over into states that would rather not have it. But suppose the liberal state's law was carefully calibrated to prevent such spillovers (as California's was not); that conservative states support their liberal sister (as they did, in a cogent brief authored by Alabama's solicitor general); and that the federal government has no credible evidence that the state regime creates spillovers: under those circumstances, it appears that the feds are simply substituting their war-on-drugs preferences for the states' autonomous policy choices—in other words, to replace salutary policy competition with a federal cartel. That bare purpose, the competition principle says, is unconstitutional.

Preemption

Under a sensible Commerce Clause doctrine, there will be areas where both the federal government and the states are competent to act. In these areas of "concurrent" jurisdiction, federal law trumps (or "preempts") state law. Because federal statutes are rarely clear about the extent to which Congress intended to preempt the states, the courts operate with constitutional canons of construction—foremost, the presumption that preemption in areas of "traditional state authority" requires a clear congressional directive. This presumption against "implying" preemption reflects a laudable desire to protect state governments against an effectively omnipotent federal government. Alas, it has proven unworkable in practice and unsound in theory. The scope of "traditional" state authority is infinitely manipulable, and in any event, the mere fact that Congress has "traditionally" refrained from regulating a particular issue provides no reason to believe that it lacks the authority to do so, or that its exercise of that power should be suspect.[22]

A presumption for competition produces a much closer approximation of the constitutional order and far more attractive outcomes. The core purpose of the Commerce Clause is to combat state interferences with interstate commerce, including the export of regulatory and tax costs to other states. Federal statutes, the competition principle says, should be read as broadly preemptive when they serve those purposes; narrowly, when they merely harmonize state laws that have no external, anticompetitive effects.

Suppose the federal government adopts safety standards for outboard motors. May a state nonetheless permit liability verdicts premised on the contention that a particular motor, while fully conforming to federal standards, had an injury-causing defective design?[23] Current law says that product liability is a species of tort law, an area of "traditional" state authority. "Competition" says that design defect liability—unlike, say, liability for local slip-and-fall accidents—almost invariably induces product modifications *on a nationwide basis*. Manufacturers cannot efficiently design motors to fifty different state specifications and, in any event, would gain nothing by doing so, since a motor built to one state's standards can easily find its way into, and trigger liability in, a state with very different standards. *Sans* preemption, product liability

produces a pervasive free-rider problem. The rules of the most restrictive state will dominate, and since liability verdicts typically redistribute wealth from out-of-state producers to in-state plaintiffs, states will race toward ever-stricter standards. One has to presume that federal product standards are intended to forestall precisely those results. They should therefore be read to have broad preemptive force.

In contrast, where state regulation poses no threat to competition, the judicial presumption against preemption seems right. Statutes regulating labor conditions or waste siting fit this description: states that regulate on top of federal standards will at all events have to live with the costs as well as the benefits. Let them.

Federalism

In an effort to protect the autonomy and "dignity" of the states, the Rehnquist Court has rejected the "process federalism" of the post–New Deal era—that is, the notion that federalism is protected exclusively through the political process (such as the states' representation in the Senate), not through judicial oversight. The competition principle likewise rejects process federalism, but for different reasons and purposes.

States, no less than private producers, detest competition. Democracy translates into interest group demands, whose satisfaction requires taxes and regulation. Federalism competition induces the taxed and regulated to vote with their feet, thereby constraining state politicians. Hence, states will forever seek to lock themselves into policy cartels—federal minimum standards for work places and the environment, federal taxes and funding for state-administered transfer programs, and so forth. We need judicial federalism not to protect the "states as states" (as the Rehnquist Court would have it) but as a kind of constitutional antitrust law to protect institutional competition and its intended beneficiaries, citizen-consumers, against exploitation and intergovernmental cartels.

In some cases, the competition principle readily translates into constitutional rules. In the 1998 tobacco agreement, for example, the states colluded to impose a quarter-trillion national excise tax, along with detailed regulations for the sale and marketing of tobacco products. The scheme never received the consent of the Congress. It flagrantly violates the Compact Clause, which requires congressional consent for "any agreement" among states. Case closed, agreement gone, competition restored.[24]

Federal conditional spending statutes (such as Medicaid or education programs), under which states administer federally funded programs subject to more or less stringent conditions, pose greater difficulties. A few scholars have argued for a competitive baseline, which would compel each state to run and fund its own education or welfare system and render most federal grants programs unconstitutional.[25] Powerful arguments support that position. Recall *Printz*: the federal "commandeering" of state and local officials, Justice Scalia argued, facilitates intergovernmental conspiracies. The same danger arises when the federal government purchases rather than commands the states' cooperation. When local schools cease to function, states complain about federal "mandates" and demand more money, while federal officials blame irresponsible state managers. Moreover, funding programs erode responsibility and competition on a fiscal as well as a regulatory margin. Since the programs are paid from general federal revenues, each state's citizens pay a share regardless of whether or not the state participates in the purportedly voluntary federal program. This helps explain why states rarely opt out of federal programs even when the conditions of participation prove extremely burdensome.

Even so, the conclusion that such programs are unconstitutional seems overdrawn. If Congress can tax and spend to purchase services from Halliburton (and demand specific performance), why may it not contract with local school officials? Competition does, however, provide a potent justification for two constraints.

First, federal grant conditions are often enforceable in court by private parties, such as the intended beneficiaries or service providers (for example, hospitals serving Medicaid patients). The transformation of grant conditions into private entitlements, which we owe to the Brennan Court, systematically expands the federal programs and—since legal entitlements are by definition uniform—exacerbates their cartelizing effect. The Rehnquist Court, to its credit, has crafted federalism doctrines to curb this tendency. Prominently, the "clear statement" rule of *Gregory v. Ashcroft* holds that grant conditions are privately enforceable only when Congress has unmistakably intended that result. While the Court has grounded that rule in state autonomy, competition yields an independent and perhaps more compelling justification.[26]

Second, competition warrants a tight nexus between grant purposes and funding conditions. For example, existing law requires that federally funded educational institutions must observe federal antidiscrimination rules—including sex quotas for athletic teams—so long as even a

single student receives federal aid. That seems highly problematic. The federal government may condition direct grants. It may not leverage wholly unrelated grants, which in no way bias the private recipients' educational choices, for the purpose of suppressing institutional competition. The Supreme Court has hinted at the need for such an "unconstitutional conditions" doctrine.[27] Competitive federalism needs more than the hint; it needs the doctrine.

Everything in Moderation—Including Moderation

The competition principle applies to a broad range of issues. The "dormant" Commerce Clause, which bars state discrimination against interstate commerce, is connected intimately to the purpose of compelling states to play to their comparative advantages. And while the modern Court's cases on abortion, the death penalty, and homosexuality are untenable under any plausible constitutional theory, competition and its ancillary advantages provide an added rationale for abandoning these decisions. Even defenders of the Supreme Court's universal rights declarations have argued that we might do much better with more decentralized, democratic, and competitive arrangements.[28]

The competition principle does not decide each individual case, because the theory says nothing about the intensity of judicial review. In *Gonzales*, Justice Scalia deferred to Congress's averments about interstate spillovers, whereas Justice Thomas looked more closely and believed not one word. The standard of review, not the substantive analysis, spelled the difference between concurrence and dissent. How closely, then, should the courts look?

My bias is toward moderation, partly for reasons having to do with the competition principle and its limitations. Regulatory competition works well in some areas (such as corporate law) but not in others (such as transboundary pollution). Similarly, competitive federalism favors mobile production factors, such as capital and to some extent labor, over immobile factors, such as land or local businesses with accumulated (and non-transportable) goodwill. One can think of second-order rules to address such difficulties. With each refinement, though, the rules become more contestable and subject to increased risks of judicial error. Just as antitrust enforcers ought to be circumspect in applying contested theories to complex, poorly understood economic arrangements, so should judges think twice before operating with rigid, across-the-board rules.[29]

Still, a Supreme Court that accepts the competition principle will recognize that government actors will forever seek to evade competitive discipline. When intergovernmental conspiracies are afoot, the Court will intervene. At the other end, such a Court will generally accept the results of a competitive political process, awkward though they may seem at times. It will recognize that the case for competitive government is at its zenith when it comes to the state regulation of morals, where people's preferences are particularly varied and intense and spillover effects negligible. Our actual Court, in contrast, has typically encouraged "cooperative" federalism and manufactured a "national consensus" to mow down the state's policy choices on moral issues. Even a modestly deployed competition principle would entail a major course correction.

Do the Rights Things?

The competition principle lies midway between a progressive program of empowering government and a libertarian program to disable, rather than merely discipline, government at all levels. Curiously, those extremes converge on a common premise: rights first, constitutional structure second (if at all). Progressives would empower government to do anything it wants—until it bumps up against some sacred rights nostrum, usually having to do with sex, race, or redistribution. Libertarians, too, operate with rights-based "keep out" signs.

The competition principle, in contrast, starts with the structure. The great difficulty, James Madison explained, is to allow government to control the governed, "and the same time, to oblige it to control itself"—in other words, to strike a balance between the competing needs for restraint and energy.[30] Federalism, the separation of powers, and checks and balances fragment government and make it jump through a lot of hoops. But when broad popular demand or compelling circumstances require action, government can and generally will respond. The structural constraints discipline but do not disable government. This middle path that has compelling advantages over the competing accounts at either extreme. For amply rehearsed reasons, the progressive case is unattractive. The libertarian case, for its part, has undeniable elegance, rigor, and appeal. Its problem is that it proves too much.

Some rights, libertarians rightly argue, are so fundamental that we do not permit state governments to violate them on the theory that the losers can vote with their feet. (The Civil War amendments rest on that conviction.)

Competition theory must also recognize at least one right—the right to exit and to freely enter another jurisdiction, on equal conditions—as fundamental. At all events, then, one must explain what our rights are, how far they extend, and how they fit together with the general constitutional structure.

It matters, however, at what end one starts the inquiry—with a presumption for competition or rather with a "presumption for liberty," as Boston University professor Randy Barnett has advocated in his forcefully argued plea for *Restoring the Lost Constitution*.[31] By the time Barnett is done with the restoring, little is left of the U.S. Code or for that matter state codes. More distressing to my mind, little is left of the constitutional structure. In Barnett's telling, the presumption for liberty operates through the most general provisions of the Bill of Rights. The structure does no work and winds up buried rather than restored under the imposing weightof rights.

I prefer to start at the opposite end—work through the structure, and see how far it carries. The libertarian rights model places an extravagant burden on the courts to get it "right." When the Court enforces Cass Sunstein's rights rather than Randy Barnett's, the libertarians can say no more than that the Court is wrong. To be sure, a presumption for competition does not fully eliminate that difficulty. While it trusts that the structure will do much of the work of judicially enforced rights, the Supreme Court must still enforce the structure. It may fail and has failed to do so. It is easier to correct *that* error, however, than to press government into the straightjacket of libertarian rights. And in truth, we need the rights less than ever. In a world of Internet transactions, rapid technological innovation, international trade, and unprecedented mobility, monopolies and exploitation are hard to sustain—provided we can keep the exits open. Randy Barnett's "Free State" or Cass Sunstein's "Peoples' Republic": let competition reign, and let people choose. Let the Supreme Court stand up for the rules of competition—and stand down.

Originalist Pragmatism

On the eve of what promises to become an overheated, personalized political brawl over the Supreme Court, it seems fantastic to contend that constitutional theory has made progress. But it has. Originalists have thoroughly discredited the idea of an aspirational, "Living" Constitution. Progressives have made a persuasive case for pragmatic, consequentialist reasoning in constitutional construction. The point of contention is not about constitutional pragmatism per se but about its purpose and objectives.

Purpose and objectives are what the progressives have wrong. They peddle a moribund, European social model. On their account, all law is politics, and a presumption for competition is no more plausible, constitutionally speaking, than a presumption for collectivism. Only then do they mobilize pragmatism—to escape the socialist implications of their theory and to render it politically palatable. Originalist pragmatism, in contrast, takes its bearings and objectives from the constitutional architecture. The Constitution cannot work without pragmatism and consequentialism. But one must make those dispositions work for, not against, the Constitution.

The New Deal opposed pragmatism to constitutionalism, and the modern progressive project is to keep the two asunder. To reinvent a pragmatic originalism is the challenge for constitutional theorists, and justices, in the decades ahead.

Notes

1. Michael W. McConnell, "Originalism and the Desegregation Decisions," *Virginia Law Review* 81 (1995): 947.

2. See, for example, Mark Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," *Harvard Law Review* 96, no. 4 (February 1983): 781; Jeffrey Rosen, "Worst Choice: Why We'd Be Better Off Without *Roe*," *The New Republic*, February 24, 2003; Jack M. Balkin, ed., *What* Roe *Should Have Said* (New York: New York University Press, forthcoming 2005).

3. Cass R. Sunstein, "The Rehnquist Revolution," *The New Republic*, December 27, 2004.

4. *McCulloch v. Maryland*, 17 U.S. 316 (1819): 407, emphasis in original.

5. James Madison, *Federalist* no. 51.

6. In the parlance of modern social theory, a constitution is not a contract but a coordination game. See, for example, Peter C. Ordeshook, "Constitutional Stability," *Constitutional Political Economy* 3 (1992): 137.

7. Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Lawrence: University of Kansas Press, 1999) and *Constitutional Construction: Divided Powers and Constitutional Meaning* (Cambridge: Harvard University Press, 1999).

8. *Gregory v. Ashcroft*, 501 U.S. 452 (1991): 458.

9. *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003): 499. For an analysis of the case, see Michael S. Greve,

"Choice and the Constitution," *Federalist Outlook* no. 16 (March 2003).

10. See, for example, *Avery v. State Farm*, 321 Ill. App. 3d 269 (Ill. App. Ct. 2001).

11. *Printz v. United States*, 521 U.S. 898 (1997).

12. Christopher DeMuth, "Competition in Government" (Bradley Lecture, AEI, Washington, D.C., October 4, 2004): 2, available at www.aei.org/news21341.

13. Madison and Hamilton argued that citizens' affections would naturally run toward their state rather than toward the federal government. On both occasions, however, they added that a "much better administration" of the federal government could overcome that "antecedent propensity." See James Madison, *Federalist* no. 46 and Alexander Hamilton, *Federalist* no. 17. Quite likely, Hamilton expected that the federal government would be much better administered than the states, especially so long as he himself would do the administering.

14. For a characteristically judicious overview, see Michael McConnell, "Federalism: Evaluating the Founders' Design," *Chicago Law Review* 54 (1987): 1484. A useful discussion of the strengths and weaknesses of the modern theories in a legal context is William W. Bratton and Joseph A. McCahery, "The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World," *Georgetown Law Journal* 86 (1997): 201.

15. While public choice theorists have often claimed James Madison as one of their own, important differences exist. For example, the *Federalist Papers* mention state competition only once—and then in the sense of destructive, protectionist competition, which is the opposite of what the modern theorists have in mind. Similarly, *Federalist* no. 10 is not concerned with the concentrated interests that worry public choice theorists but with majority factions. And far from viewing federalism as a bulwark against factions, *Federalist* no. 10 describes states as their hotbeds. Still, the general theoretical framework is substantially the same.

16. Christopher C. DeMuth, "After the Ascent: Politics and Government in the Super-Affluent Society," (Boyer Lecture, AEI, Washington, D.C., February 15, 2000) available at www.aei.org/boyer/demuth.htm.

17. Public opinion surveys provide potent evidence. See, for example, Karlyn H. Bowman and Everett Carll Ladd, *What's Wrong: A Survey of American Satisfaction and Complaint* (Washington, D.C.: AEI Press, 1998): 75, 105.

18. Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1993): 17–92.

19. See Bruce A. Ackerman and James Fishkin, "Righting the Ship of Democracy," *Legal Affairs*, January/February 2004, and Bruce Ackerman and Ian Ayres, *Voting with Dollars: A New Paradigm for Campaign Finance* (New Haven: Yale University Press, 2002).

20. *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

21. For data and a brief, instructive discussion, see Richard A. Epstein, "The Monopolistic Vices of Progressive Constitutionalism," *Cato Supreme Court Review 2004–2005* (Washington, D.C.: Cato Institute, forthcoming).

22. Second Employers' Liability Cases (*Mondou v. New York*), 223 U.S. 1 (1912): 54–55.

23. The case, here stripped of its many complexities, is *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002).

24. For a more and perhaps mind-numbingly detailed analysis see Michael S. Greve, "Compact, Cartels, and Congressional Consent," *Missouri Law Review* 68 (2003): 285.

25. Ilya Somin, "Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments," *Georgetown Law Journal* 90 (2002): 461.

26. In some contexts, the clear statement rule can have the effect of protecting state governments from federal rules (such as employment law) with which private employers must still comply. In other words, the rule operates not as a limit on congressional power but as an exemption for the "states as states," for which there is no constitutional warrant. A competition rationale would render many of those impositions unconstitutional across the board, thus obviating the need for state "exemptions" and letting the clear statement rule operate in contexts (such as federal funding statutes) where that problem does not arise.

27. *South Dakota v. Dole*, 483 U.S. 203 (1987).

28. See, for example, Ruth Bader Ginsburg, "Speaking in a Judicial Voice," Madison Lecture, *New York University Law Review* 67 (October 1992):1185, 1198–1208; and Jonathan Rauch, "Give Federalism a Chance," National Review Online (August 2, 2001), available at http://www.nationalreview.com/comment/comment-rauch080201.shtml. Justice Ginsburg argues that the "extreme" Supreme Court ruling in *Roe* "halted democratic processes" and "prolonged divisiveness" with regard to the abortion issue; similarly, Rauch criticizes the possibility of a constitutional amendment on gay marriage.

29. For the classic version of this argument in the antitrust context, see Frank Easterbrook, "The Limits of Antitrust," *Texas Law Review* 63 (1984): 1.

30. Madison, *Federalist* no. 51.

31. Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, N.J.: Princeton University Press, 2004).