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CONSTITUTION-TALK AND JUSTICE-TALK

*Mark Tushnet**

Does anything distinguish constitution-talk from justice-talk? Professors Eisgruber and Sager have written extensively about what they call the justice-seeking Constitution¹—a document that takes establishing justice as a goal for legislation and as a guide to the document's own interpretation. Their position makes the Constitution and justice coincident, so that an inquiry into the Constitution's meaning is simultaneously, and indistinguishably, an inquiry into justice.² For them, constitution-talk *is* justice-talk. Should we follow their lead?

The question is particularly pressing when we think about the Constitution outside of courts. Inside the courts, one might distinguish between constitution-talk and justice-talk on the ground that the former, but not the latter, results in enforceable legal judgments. So, inside the courts, we might *interpret* the Constitution with justice in mind, but what we *do* is produce legally enforceable judgments. Outside the courts, however, it might seem that all we do is interpret and talk. It is not immediately obvious that cloaking justice-talk as constitution-talk outside the courts has much rhetorical force.³ As I will argue, the fact that invoking the Constitution outside the courts, in the course of discussing justice, does have some

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1. Christopher L. Eisgruber, *The Living Hand of the Past: History and Constitutional Justice*, 65 Fordham L. Rev. 1611 (1997); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410 (1993).

2. Clearly much of the Constitution does not deal with establishing justice, but rather an operating government that has the capacity to establish justice. Professors Sager, Eisgruber and I do not contend that constitutional provisions creating an operating government should be interpreted *directly* with reference to justice. Presumably though, one would prefer an interpretation of such provisions that made it more likely that the government, once up and running, would establish justice. I have referred to such provisions as the "thick" Constitution to distinguish them from the "thin" Constitution that Professors Sager, Eisgruber, and I are concerned with in this discussion. The thin Constitution embodies the principles of the Declaration of Independence and the Constitution's Preamble, which is the part of the Constitution concerned most directly with accomplishing justice. Mark Tushnet, *Taking the Constitution Away from the Courts* 9-13 (1999).

3. See generally Mark Tushnet, *What Is Constitutional About Progressive Constitutionalism?*, 4 Widener L. Symp. J. 19 (1999).

rhetorical force helps to provide a clue to the distinction between constitution-talk and justice-talk.

Consider the following example: one member of Congress asserts that justice requires public authorities to assume some responsibility for paying the costs of essential prescription drugs for the elderly and the poor. Another member of Congress contends that the Constitution—say, the equal protection component of the Due Process Clause—requires public authorities to assume that responsibility. Has the second member said anything different from the first? Although I confess my doubts, which might seem to suggest that I agree with Professors Sager and Eisgruber on the justice-seeking Constitution, I have, in fact, substantial reservations.

One speaker, invoking justice, may draw on a different set of resources from another speaker, invoking the Constitution. For example, the justice-speaker may refer to universal norms of fairness, or religious traditions regarding responsibility for others, or the rightness, in consequentialist terms, of providing adequate medical care. The Constitution-speaker, more attuned to a legal tradition, may refer to the intent of the Constitution's drafters, the Constitution's reference in the Preamble to securing justice, and scattered Supreme Court cases. The constitutional tradition is broader than that and should be understood to include such doctrines as President Franklin D. Roosevelt's assertion that our Constitution should be interpreted to guarantee a "right . . . to adequate medical care."⁴

Is anything gained or lost by treating the two speeches essentially the same? I take it that the gain seen by proponents of a justice-seeking Constitution is the translation of legalistic concepts into a broader, justice-oriented framework, within which can be found thicker concepts of justice than can be found in more legalistic sources. There are, however, concomitant losses that deserve to be noted.

Let us assume that the Constitution-speaker is a lawyer. Can such a Constitution-speaker contribute anything *distinctive* to political discourse, and if so, is the distinctive contribution lost when constitution-talk is treated as equivalent to justice-talk? Lawyers have some specialized knowledge and some distinctive skills. These skills arise primarily in connection with interpreting texts, particularly in exposing and taking advantage of the ambiguities we believe are inevitable in any complex text, and, relatedly, in designing institutions in ways that are sensitive to interactions among their components.⁵

4. Tushnet, *supra* note 2, at 171-72 (quoting President Roosevelt and grounding his speech in a constitutional tradition).

5. An example of the latter capacity, which I admire, is presented in Boris Bittker, *The Case for Black Reparations* (1973), which examines a large number of the technical problems that a reparations scheme would have to work out.

Lawyers, however, generally have little to say that is particularly insightful about justice, especially if defining justice requires attention to deep normative issues in detailed institutional settings.⁶ Certainly the legal academic literature that purports to deal directly with justice is largely simplistic and derivative.⁷ Anyone who wants to think deeply about justice would do much better reading political philosophers than legal academics.⁸

The shortcomings of lawyers do not, however, lead me to think that we can make progress in resolving practical problems of governance, such as those presented by the prescription drug issue, by talking about justice as identified with the Constitution.⁹ Rather, I am led to wonder why anyone should pay more attention to lawyers' invocations of the Constitution as a source of guidance about justice than to ministers' invocations of the Bible, or political philosophers' invocations of social contract theory.¹⁰ While ministers and philosophers may help us understand *why* adopting a prescription drug plan is required by justice, lawyers may help us figure out *how* to draft a statute that effectively does so. Lawyers are better equipped than philosophers to figure out how to draft a statute that makes it more difficult for ingenious doctors and drug companies to evade the

6. Lawyers, though, can remind political theorists, focused primarily on the normative issues, of the need to attend at some point to institutional detail.

7. I note in particular the really bad critical commentary on John Rawls produced by law professors. (I cannot recall my own contribution to such commentary, and I may have been cautious enough not to write any, but I am sure that if I did, I would be embarrassed to read it today.) For a description of a particularly acerbic comment made by someone who should know, and that illustrates my general point here, see Martha Nussbaum, *Still Worthy of Praise*, 111 Harv. L. Rev. 1776, 1779 (1998) (describing the comments a philosophy professor might make about Richard Posner's criticism of Rawls "were she to receive [it]... in an undergraduate paper").

8. This is not to say that particular legal academics, as different as Ronald Dworkin and Patricia Williams, have not made important contributions to our understanding of justice. The ratio of original work to derivative or uninteresting work on justice by legal academics, though, is almost certainly lower than that ratio by political philosophers.

9. My concern about the failure of law professors to produce interesting work on justice might seem in tension with another position I hold—that law is not itself a distinctive enterprise; more specifically, it is generally reducible to politics understood in a broad sense. Saying that law is politics, however, is different from saying that law is justice (in a particular context). Practical politics requires no specialized knowledge or skills, but only the knowledge and skills that anyone develops living in organized society. Figuring out the best political move in any given situation may be difficult, but it is something everyone can, and frequently does, do in ordinary life. My sense is that figuring out what justice requires is much more difficult, and does call upon some specialized skills, which some lawyers have, but which are developed more intensively in the course of training political philosophers.

10. Perhaps the answer is simply that this is the way a particular subset of the population talks about justice, which would be an interesting sociological observation, if true, but which would not, I think, contribute much to the way people in other parts of the population should think about the Constitution.

solutions enacted to address the problem of moral hazard.¹¹ Lawyers who spend too much time thinking about justice may sacrifice what they can distinctively contribute to the policy-making process.¹²

Undoubtedly, lawyers, as intelligent people, could get up to speed on the philosophical questions. We ought to be sensitive, however, to matters of comparative advantage. Time is limited, and I know that I personally find it incredibly difficult even to keep up with legal developments relevant to my areas of expertise. Trying to assimilate what scholars who spend their time thinking systematically about justice have said (and continue to say) would certainly reduce the time I have available to keep up with legal developments. Considerations of comparative advantage suggest that attempting to stay abreast of political philosophy would be a misallocation of resources.

So far I have focused on the differences between what might be called the *technical* aspects of constitution-talk and justice-talk. There is, in addition, a substantive difference between justice-talk and constitution-talk. Justice-talk is generally universal, while constitution-talk is nation-specific.¹³ The latter proposition is straightforward. While the Constitution may refer to general concepts of justice, such as equality, it is ultimately the Constitution of only the United States.¹⁴ Although the Constitution's reference to equality surely has implications for the United States government's treatment

11. "Moral hazard" refers to the response expected from rational decision-makers who are insured against the costs associated with some course of action; when protected against the associated costs, a rational decision-maker will increase the amount of that action. In the present context, the moral hazard is that patients will ask doctors to prescribe more drugs than the doctors otherwise would, because the patients do not have to pay the full cost of the drugs, and doctors will accede to the request because the doctors bear no costs from over-prescribing.

12. I offer the following in a quite speculative vein: the past generation of legal scholarship has seen (a) progressive scholarship dominated by research in the justice-seeking tradition, (b) conservative scholarship dominated by research in a formalist and legalistic tradition, and (c) an increasing hold of conservative scholarship in academic and public debates. Perhaps the last phenomenon derives from the first two. That is, progressive lawyers, thinking that law and justice are indistinguishable, may have abandoned the field of law to conservatives. They have criticized conservative legal scholarship for being formalist and legalistic, rather than providing reasons that the conservatives' arguments are defective *qua* legal arguments. Except for the assertions by progressives that law is indistinguishable from justice, conservatives have been left to hold the ground of law unchallenged.

13. Subject to a qualification discussed below.

14. For explicit references to the nation-specificity of the United States Constitution, see *Stanford v. Kentucky*, 492 U.S. 361, 369 n.1 (1989) ("We emphasize that it is *American* conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant." (emphasis in original)); *Printz v. United States*, 521 U.S. 898, 921 n.11 (1997) ("Justice Breyer's dissent would have us consider the benefits that other countries, and the European Union, believe they have derived from federal systems that are different from ours. We think such comparative analysis inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one.").

of people beyond this nation's borders,¹⁵ the Constitution remains tied to the particular people and history of the United States. Constitution-talk, therefore, is about what "We the People of the United States" ought to do. Of course, what "We the People of the United States" ought to do may well have some connection to advancing justice, as the Constitution's Preamble asserts.¹⁶ In this way, constitution-talk may be contingently connected to justice-talk, a point to which I will return.

Justice-talk, in contrast, is about what ought to be done by *any* person or group of people in a particular situation. This is most obvious when justice-talk turns to identifying universal human rights, or rights that attach to people by virtue of their personhood. But it occurs as well when justice-talk deals with the rights and duties of people in specific positions, such as parents and children, or citizens of relatively wealthy nations. I cannot imagine a serious political philosopher writing about the justice-derived rights and duties of the American people as such. The American people, from a philosopher's point of view, are simply an aggregation of individuals who happen—by chance—to be located within the philosophically arbitrary territorial boundaries of the United States. Of course, those people, or at least some of them, might have some justice-relevant characteristics, such as relatively high wealth. In that event, what is interesting to the political philosopher is their relatively high wealth, not their location within United States borders.¹⁷

So, it seems to me, justice-talk is universal and constitution-talk, even constitution-talk invoking justice-related constitutional terms, is parochial. Although the term *parochial* tends to have pejorative connotations, perhaps those connotations should be ignored. I have a relatively narrow point and a more general point to make on this issue. The narrow point is that constitution-talk is parochial compared to justice-talk's universalism because constitution-talk, as a subset of law-talk, necessarily emphasizes the degree to which circumstances alter cases. As lawyers, we are trained to appreciate this in two ways. Suppose we are given one case and a legal rule that governs it, then are presented with a second case, and are asked whether the same legal rule should apply. A lawyer's instinct is to look for differences between the cases that are relevant to the reasons

15. For a comprehensive discussion of the extraterritorial implications of the United States Constitution, see Gerald L. Neuman, *Strangers to the Constitution: Immigrants, Borders, and Fundamental Law* (1996).

16. We should also acknowledge the possibility that the Constitution is, at least in some dimensions, unjust in ways that interpretation cannot eliminate. See Robin L. West, *Constitutional Scepticism*, 72 B.U. L. Rev. 765, 774 (1992) (urging that political progressives be "sceptical about the Constitution's value").

17. I think it significant, for example, that John Rawls has recently written of the law of *peoples*, describing the subjects of his concern as aggregations of people who satisfy certain general criteria. John Rawls, *The Law of Peoples: with, The Idea of Public Reason Revisited* 23-25 (1999) (describing the "basic features of peoples").

for the rule's adoption. Lawyers' professional training makes us skeptical about the propriety of abstracting rules too far from the circumstances under which they arose. That professional skepticism is a kind of parochialism: legal rules, like nations, have a more limited domain than universal principles of justice. Furthermore, given two cases and a single rule, we are frequently tempted to reformulate the rule so that "it" provides correct outcomes in both cases. This temptation again channels us towards narrowly framed rules and away from broadly stated universal principles.

To make my more general point, I return for a moment to political philosophy. Political philosophers have had notorious difficulties in providing satisfactory justification for special obligations, such as the ones I have to my wife and children, not because I am a member of the classes *spouse* and *parent*, but because they are simply *my* wife and children.¹⁸ The literature is full of labored efforts to defend special obligations by somehow invoking the universalist terms of general political philosophy, which, as Bernard Williams pointedly wrote, produces "one thought too many."¹⁹ It is a thought too many because parochial or special relationships are sources of value in themselves and are not examples of more general phenomena. Again, my relationship to my wife and children is a source of value to me because I am *their* husband and father, not because the relationship falls within the class of spousal and parental relationships. Moreover, I believe that special relationships are sources of value in ways that have some connection to advancing justice *outside* such relationships.²⁰

Constitution-talk, precisely because it is inherently parochial, avoids the difficulty of forcing special relationships into general categories. When we engage in constitution-talk, we are talking with each other as co-citizens or co-members of the United States; the uniqueness of our relation is inherent in the use of constitution-talk. At this point, it seems to me, two questions arise. First, is co-membership in a nation like the United States the right sort of special relationship that can properly stand apart from "mere" membership in the world community or the human species?²¹ Second, even if co-membership in *some* nation is the right sort of special relationship, is the United States the right kind of nation?

18. The philosophical literature deals with this problem by asking whether obligations of justice can be agent-relative. Including citations to that literature would be misleading to the extent that it might suggest, not that I know of its existence, but that I understand it.

19. Bernard Williams, *Moral Luck: Philosophical Papers 1973-1980*, at 18 (1981).

20. The general thought, which would need far more defense than I am competent to provide, is that deracinated cosmopolitans cannot have commitments to anyone, even to others considered simply as members of the human species.

21. In contrasting the membership in the United States to membership in the human species, I do not mean to foreclose consideration of obligations we might have as humans to non-humans.

The first question arises from the thought that, for many people, relations with co-members of the nation are far weaker than relations with non-members. Many readers of this essay, for example, probably have closer normative and moral ties to members of the transatlantic elite than with most residents of Iowa.²² Similarly, some may have closer normative and moral ties to members of the Catholic church in Africa and India than they do to evangelical Protestants in South Carolina. If co-membership in the United States is not the right sort of special relationship that can stand apart from membership in the world community, then constitution-talk would be different from justice-talk, and may not contribute to advancing justice. Thus, although co-membership in *some* nations may provide justice-related value to some people, membership in a nation as large and diverse as the United States may not.²³

Against this background, I would contend that constitution-talk may matter because the Constitution constitutes the American people. As I have mentioned earlier, the provisions of the thick Constitution have little to do, directly, with establishing justice (or the other goals set out in the Preamble), whereas those of the thin Constitution do.²⁴ One notable point about the thick and the thin Constitution is that both provide opportunities for Americans to engage in discussions about an object held in common. To use an example that only law professors could find interesting, people from New York, Texas, and Wyoming can come together in a discussion of whether Texas' members of the Electoral College could cast their votes for both George W. Bush and Richard Cheney. This and similar discussions matter because they deal with the way we all are going to find ourselves governed. The Constitution, then, is one thing—perhaps the only thing—around which everyone in the United States can gather. It may be a large part of what *makes* us Americans rather than cosmopolitans or (merely) Catholics or Jews or Protestants.

Beyond that, there are the thin Constitution's commitments to justice. Those commitments do not prescribe outcomes—precisely because they are thin. Constitution-talk about the thin Constitution may differ from justice-talk in this regard because justice-talk aims at identifying the correct principles of justice. Constitution-talk about the thin Constitution does not have that aim, although each participant in the conversation may hope that the outcome will be the choice of the correct principles. Rather, the aim of people engaged in constitution-talk about the thin Constitution is the conversation itself. If the United States is not the right kind of community, constitution-

22. I refer to Iowa specifically because most of my spouse's family continues to live there.

23. Sometimes I think of this as the "what's he to Hecuba" problem. See William Shakespeare, *Hamlet* act 2, sc. 2 ("What's Hecuba to him, or he to Hecuba, That he should weep for her?").

24. See *supra* note 2.

talk would be different from justice-talk, and would not contribute to advancing justice. This thin Constitution strives not to achieve particular principles of justice but to advance the enterprise of establishing justice.²⁵ Justice-talk can thus enter into constitution-talk, but the latter remains distinctive because it is about the commitments of a particular people, not about the requirements of some universal principles of justice.

I conclude that constitution-talk differs from justice-talk because the latter is necessarily connected to justice itself, while the former is only contingently connected to justice. It is an accident, but a happy one, that the United States Constitution contributes to constituting a people among whose commitments is the establishment of justice.

25. Politics will determine the actual outcomes of conversations about the thin Constitution's principles, in a world where people reasonably disagree about the implications of those principles for particular problems.