

SOME DOUBTS ON CONSTITUTIONAL INDETERMINACY

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I. INTRODUCTION

A well known dualism lies at the heart of any theory of constitutional interpretation. On the one hand, any inquiry into this subject could be directed to issues of judicial function and role. How ought a court approach a particular text? Should it adopt a posture of judicial activism or judicial restraint? Does it make a difference whether the disputed text is concerned with the preservation of fundamental individual rights or with the defense of economic or property interests, assuming that we can draw a workable distinction between the two?

For these purposes, however, I am less interested in the question of judicial response to textual indeterminacy and more interested in the underlying philosophical and linguistic issue: how much indeterminacy is there in the Constitution, and how much of it is irreducible? The question not only sets the stage for taking any judicial stance on interpretation, but it also throws light on the entire enterprise of constitutionalism: if a text is so routinely indeterminate that two judicial decisions that flatly contradict each other can both be consistent with the relevant text, then what is meant by the rule of law, understood in opposition to its immortal opponent, the rule of men—often the rule of lawless men? Not all disputed matters are subject to this concern: if the issue is whether the police had probable cause to search, or whether a driver exercised reasonable care, we expect the line-drawing questions implicit in the legal standard to generate close cases at the margin. But on matters of basic structure and design—what is the proper division of authority between executive, legislature, and judiciary—we cannot tolerate the same high levels of uncertainty. Texts must be clear enough to bind those who would like to violate their commands. Only then we can take some comfort in ceding the coercive power of the state. But how high should that comfort level be? And how high can it be?

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II. ORDINARY DISCOURSE

To get some perspective on this issue, it is best to proceed by indirection, that is, by asking how central is the problem of indeterminacy in the hurly-burly world of commerce and social affairs.¹ My strong impression is that language is a very efficient mechanism for responding to these daily pressures. Usually when people are wrestling with a knotty problem, they are much more interested in knowing about the people involved in a dispute, the facts that underlay it, and the customary practices used to resolve it, than they are in a disquisition about the meaning of any particular term. Or, if they do not know the meaning of the term, they assume that asking for its meaning can produce an answer satisfactory to both inquirer and respondent. The language of the trade must organize a constant stream of transactions within a given institutional framework. Even if the parties themselves might not think of all the variations on a given problem, its repetitive nature will force them to focus on the most common variations, and will provoke, if only by trial and error, some kind of stabilizing institutional response. Because of the long term cohesion of the group members, the norms that emerge will often turn out to be simple, sensible and stable—a troika that we cannot always attribute to judicial interpretation. We do not witness endless deliberations over the linguistic meaning of puts and calls in disputes that arise at the Chicago Board of Trade.

Thus far I have focused on business settings with repeat players—the most hospitable environment for developing determinate and clear legal rules. But often times the disagreements take place between individuals who are drawn from different social groups, which have very different understandings about the nature of a just society or the proper resolution of some given problem. Yet, even in this context it is a mistake to assume that the key barriers that separate these groups are those of terminology, not substance. “Get out of Vietnam now” may be short, but in 1968 its message was crystal-clear to friend or foe alike. The political debates of the time did not quibble over how soon is “now.”

To be sure, attitudes may be shaped by the powerful symbolic effect in the choice of words: reverse discrimination is not the phrase of choice for the ardent defender of affirmative action;

1. For one account, see Richard A. Epstein, *The Path to the T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992).

and diversity is not the term of choice for its opponents. But however important the positive and negative connotations, what remains clear is that each side can understand, state, and oppose the policy that is advocated by the other, and show how the difference in choices of approach leads to a difference in consequences, namely on such questions, as to who is in and who is out. Indeed, in cases like this, once the social objective is clear, then the stripping away of metaphor and verbiage may increase the *moral* outrage to which it is subjected. Terminological underbrush may block a joinder of issue in social settings, but not for very long.

So why do the terminological issues come in? Sometimes for good reason. There may be ambiguity in what my opponent (but never my supporter) says, so that what looks like a clean logical connection involves a desperate and impermissible leap of faith. But ambiguity means that we use a symbol A to stand for either A1 or A2, and then allow A1 to be in the premise (for example, "ought" in its predictive sense) and then find that A2 resides in the conclusion (for example, "ought" in the normative sense). But ambiguity is a curable problem. Once the subscripts are added, or new terms are introduced, the ambiguity should disappear. Ambiguity presents no inherent, deep, philosophical problem of interpretation. It only presents practical difficulties where individual arguments misfire because of the careless, but remediable, use of language. Surely sloppy texts are littered throughout the law, but it is less threatening to have to clean up a particular drafting mistake than to resolve the inescapable ambiguities that plague the most skillful native users of the language. And it is with this deep, rooted version of textual indeterminacy that interpretation reaches its philosophical high.

Yet often the terminological or definitional points are used for a quite different reason: if you have nothing to say on the merits, you might, as a ploy, raise the specter of deep philosophical ambiguity to avoid some embarrassing silence. Suppose that B takes A's car without permission, leaves A stranded away from home and wrecks the car to boot. His reason: B simply wants to go on a joyride. Now when met with the charge that his conduct was unreasonable and reprehensible, B may well be tempted to ask, "What do you mean by unreasonable anyway?" But that question is put in this general form precisely because no *reason* could be offered to explain or to justify the act in question: that is, this is

not a case in which B drove the car to help A's daughter to get to work when she ran the risk of being fired for arriving late, a reason that works to B's advantage, not A's. We should always look askance at flights to intellectual skepticism taken by individuals in tight corners. So too we should be aware of the peril in judges who take a disputed word, then put it between quotation marks, and then observe that no one really knows what is meant by "commerce" or "nuisance" anyway.

III. CONSTITUTIONAL INTERPRETATION

Those two terms, "commerce" and "nuisance," are not, I might add, simply picked out at random. Rather, they are chosen because both have had an important role in structuring constitutional deliberation over the scope of government powers we have inherited today. But why these terms instead of others? It is here that legal disputes do have one critical difference from ordinary social disagreements. Precedents and statutes and constitutions contain particular words that confer powers, limit jurisdiction, create rights, and impose duties. These words are like the critical fortifications on a battlefield. You have to take them in order to win. To control the entire territory you must control the crossroads and the high bluffs. If the outposts must be taken or defended, then most of the heavy artillery will line up on either side of the disputed term. Just that "do-or-die" quality induces people to make desperation stands one way or another about particular terms, including "commerce" and "nuisance," that are situated at the key constitutional terrain.

The Commerce Clause is an example of one of those outposts that must be overrun because it cannot be skirted. If asked what commerce meant in a world devoid of constitutional overtones, the answer would likely suggest, trade of all sorts and description, and the mechanisms that make that trade possible: for example, the instruments of transportation.² Surely when one speaks of commercial zoning, one does not include within that designation manufacturing zones; and when the National Association of Manufacturers looks for its members, it does not seek out railroads

2. For my views on this subject, see Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987), which I am happy to say seem to have found some new life in *United States v. Lopez*, 115 S. Ct. 1624 (1995), on which my views can be found in Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. 167 (1996).

and airlines; and the Uniform Commercial Code deals with sales, negotiable instruments, and security interests, and not with the construction of heavy industrial equipment.

That ordinary sense of commerce fits in quite well with the constitutional provision that gives Congress the power to regulate "Commerce with Foreign Nations, among the several States, and with the Indian Tribes."³ The meaning of these terms is if anything made more clear by its context. It takes little imagination to see, but much courage to admit, that Article I to the Constitution contains a list of enumerated powers that are "delegated" to Congress, either by the people or by the several States. If the desire is to preserve a federal government that regulates some particular affairs, but not all affairs, then no single clause of Article I could give Congress the right to regulate anything it chooses. But during the critical period of the New Deal, the political consensus thought that it was a good thing to make everything a federal case, lest competition between the States, or lack of coordination among them, allow powerful private actors to escape effective regulation at any level. So the intellectual engines of constitutional interpretation were brought out to overturn the established rules that commerce meant trade among the several States, and began where agriculture and manufacturing ended.⁴ Hence all things which have some "indirect effect" on commerce came to count as commerce among the several States. In fact, the Supreme Court has said in so many words that it would be mistaken to assume that "Commerce among the several States" merely means only "Commerce among the several States."⁵ How naive! Rather, it means everything that has an indirect effect on commerce among the several States, including feeding your own wheat to your own livestock, the solemn holding in *Wickard v. Filburn*,⁶ a decision as beautifully written as it is fundamentally misguided.

3. U.S. CONST. art. I, § 8, cl. 3.

4. See *United States v. E.C. Knight*, 156 U.S. 1, 12-16 (1895); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188-90 (1824).

5. "The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate that so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (quoting *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942)) (internal quotation marks omitted).

6. 317 U.S. 111 (1942).

Of course we could have a spirited dispute over the question whether the constitution *should* allow the federal government to regulate the domestic consumption of homegrown wheat on the grounds that this practice will influence the price of grains in domestic and international markets. If asked to pass on that question I would argue that Congress should *not* be allowed to regulate the price of homegrown wheat *precisely because* home consumption influences the price of wheat in domestic and international markets. But the question of constitutional interpretation is not whether we like state-sponsored cartels in the grain business. It is whether that domestic consumption of grains is part of commerce among the several States. When that question is put to ordinary speakers of the English language they respond to it not with a learned disquisition, but with a giggle. It is clear that the desirability of a given end has been allowed to overcome the plain interpretation of the English language and to create a federal power that, if candidly acknowledged at the Framing, would have scuttled the new constitution of 1787 even before the ratification debates began. Imagine the political outcry if some learned scribe had anticipated future disputes and had sought to tidy up matters in advance by writing: "Congress has Power . . . To regulate Commerce with Foreign Nations, among the several States, and with the Indian Tribes, or any activity which indirectly affects that Commerce, including (without limitation) manufacture, production, mining and agriculture, and all useful trades, occupations, and professions that take place within any single State." It is comforting to know that slavery could have been regulated by Congress before 1860, and that the confirmed abolitionists among the senators and representatives of that day were, unaccountably, just too misinformed to use their evident federal powers to the hilt.

My criticism of the current wisdom on interpretation should not be read to preclude the possibility of some disagreement at the margins. Rather, it is to insist that the margins can be properly identified only after the central issues have been properly resolved. Even if we stay away from the extravagant interpretations of the Commerce Clause, there is a fair bit of interpretive work to be done under the Clause, as all the difficult litigation prior to the 1937 transformation of the subject matter indicates. But here we can take some comfort in noting that the harder the case, the less its importance for our overall legal and social struc-

ture. Thus we could have very interesting debates as to whether taxicabs that pick up passengers from interstate flights are in interstate commerce (answer: no), but it is quite clear that even if they are, they leave interstate commerce once they leave the airport, or reach their home or downtown hotel. No matter which way this case comes out, we do not find in this difficult decision any mandate for the agricultural or labor or environmental controls that now routinely operate at the federal level. There is a level of ambiguity that is both tolerable and unavoidable. But we have long since crossed that line in our Commerce Clause jurisprudence.

IV. TAKINGS AND NUISANCE

The question of constitutional interpretation also extends to matters that are left *unsaid* by the basic text. Perhaps the most famous illustration of this sort concerns the scope of the police power. The words "police power" are nowhere found in the text of the Constitution, yet some version of the police power limitation operates as a limitation on every substantive guarantee contained in the constitution. Even if speech is a preferred freedom,⁷ no one thinks that the freedom of speech includes the right to participate with impunity in a conspiracy to commit murder or to practice an old-fashioned con game.

So what are the limits of the police power? Clearly they have something at least to do with the obvious proposition that the police (narrowly construed) have the right to prevent certain wrongs against the persons and property of other individuals. One such traditional wrong has been the commission of common law nuisances by one person against the lands of his neighbors. But the question then arises, what constitutes a nuisance? The traditional accounts of the subject stress the nature of physical invasions that cause unreasonable interference with the use and enjoyment of the property of another.⁸ And there is little doubt that environmental regulation done at the state (or, alas, at the federal level) that is targeted against those activities cannot

7. See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . .").

8. See RESTATEMENT (SECOND) OF TORTS §§ 826-830 (1977).

be treated (for that reason) as a taking of property without compensation.⁹

Nonetheless it becomes quite clear from the chequered history of the takings law that the question what constitutes a nuisance sometimes receives a rather different answer, so that virtually anything that the State declares to be a nuisance is something that it can regulate with impunity. The net effect of this aggressive position is that one can claim that right to stop an individual from building an ordinary beachfront home,¹⁰ or from putting a set of railroad ties for a walkway into the side of the hill. Ordinary actions of husbandry become wrongs in the eyes of the State, which can then be regulated without compensation. In the original granddaddy of zoning cases, *Village of Euclid v. Ambler Realty Co.*,¹¹ Justice Sutherland was able to persuade himself that the construction of high-rise apartment houses in single-family neighborhoods "come very near to being nuisances" although neither case law nor the standard common law definitions support that general proposition. Most impressively, however, even Justices who have some partiality toward the protection of property rights find themselves drawn into linguistic snares. One instructive illustration is Justice Scalia's opinion in *Lucas v South Carolina Coastal Council*,¹² which explains in painful detail and always in quotation marks, that "noxious use" tests cannot explain the law of "takings;" that the distinction "harm-preventing" and "benefit-conferring" is "often in the eye of the beholder."¹³ But Justice Scalia cannot make the argument quite go. Thus he writes:

It is quite possible, for example, to describe in *either* fashion the ecological, economic, and aesthetic concerns that inspired the South Carolina legislature in the present case. One could say that imposing a servitude on Lucas's land is necessary in order to prevent his use of it from "harming" South Carolina's ecological resources; or, instead, in order to achieve the "benefits" of an ecological preserve.¹⁴

9. See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").

10. See, e.g., *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2901-02 (1992).

11. 272 U.S. 365 (1926).

12. 112 S. Ct. 2886 (1992).

13. *Id.* at 2897. Nor is he alone—his classmate Frank Michelman is similarly partial to the quotation mark in his classic paper, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-201 (1967).

14. *Lucas*, 112 S. Ct. at 2897-98.

But his example contains a latent ambiguity that, once exposed, reveals the weakness of his characterization. Do "South Carolina's ecological resources" include only those lands to which the State has fee title, or does it also include the lands that are subject to private ownership, as with the Lucas property, but which fall within the territory of the State? If Justice Scalia uses the former definition, then the question of harm depends on a showing of some spillover effects on other property, which is hard to do with the building of a new single family home. If he takes the second route, he has to show how the State, consistent with a regime of private property, can obtain title to resources simply by asserting that any use causes harm to others. If Lucas is the owner of his property, which entitles him to exclusive possession and exclusive use, then the endless degrees of intellectual freedom posited in the Justice Scalia analysis disappear.

In all judicial decision, however, the moment of reckoning comes when the judge (or Justice) has to put forward his own legal rule to govern a situation. Here the doubts of the critic have to give way to the clarity of the lawgiver. Indeed, I am happy to report that Justice Scalia himself displays in a pinch no allegiance to his own skeptical ruminations. Witness his instant transformation into a classical common lawyer. The quotation marks now (largely) disappear, and we are told:

The "total taking" inquiry we require today will ordinarily entail (as the application of state nuisance law ordinarily entails) analysis of, among other things, the degree of harm to public lands and resources, or adjacent private property, posed by the claimant's proposed activities, see, *e.g.*, Restatement (Second) of Torts §§ 826, 827, the social value of the claimant's activities and their suitability to the locality in question, see, *e.g.*, *id.*, §§ 828(a) and (b), 831, and the relative ease with which the alleged harm can be avoided through measures taken by the claimant and the government (or adjacent private landowners) alike, see, *e.g.*, *id.*, §§ 827(e), 828(c), 830. The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition (though changed circumstances or new knowledge may make what was previously permissible no longer so, see Restatement (Second) of Torts, *supra*, § 827, comment *g*. So also does the fact that other landowners, similarly situated, are permitted to continue the use denied to the claimant.

It seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on petitioner's land¹⁵

It is not my habit to quote at length from judicial decisions and to leave in public view all cross-references to the *Restatement (Second) of Torts*. But some philosophical cunning lies behind this tedium. The first point is that this passage strips away the ambiguity raised in Justice Scalia's philosophical *discursus* about harms and benefits on South Carolina's. Now we know that the harm to be shown has to be to the property of others, private or public, and that the State cannot justify this regulation for the protection of "its" resources. Second, we know the body of law that we have to look to: the *Restatement (Second) of Torts*, which contains certain ambiguities (and mistakes) in its treatment of the law of nuisance, but which never succumbs to the philosophical doubts that pervade Justice Scalia's previous speculations. Justice Scalia has picked his source wisely. Whatever the defects of the *Restatement (Second) of Torts*, it was not drafted for this occasion, and thus escapes the charge that its substantive commands were drafted to advance covertly one constitutional position or another. Its conclusion are far more reliable in that regard than any expert testimony on the meaning, or lack thereof, of the term nuisance that is prepared for the occasion.

In this Article, it is not possible to comment at length about the shabby and inconsistent treatment that the common law tort of nuisance has received at the hands of the judges in the context of property takings.¹⁶ But it is worth noting that when nuisance-like justifications are offered for the restriction of first amendment rights of speech, the linguistic skepticism disappears. It is no longer possible for the legislature to prevail by passing a law in which "it is hereby declared a public nuisance for any ticket seller . . . connected with a drive-in theater in the City to exhibit . . . any motion picture . . . in which the human male or female bare buttocks, human female bare breasts, or human bare pubic areas are shown, if such motion picture . . . is visible for any public street or public place."¹⁷ The declaration did not cut it. The ordinance disappeared without a trace, and no deference was

15. *Id.* at 2901.

16. For an example of such a commentary, see Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle*, 19 HARV. J.L. & PUB. POL'Y 147 (1995).

17. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 206-07 (1975) (citing and striking down JACKSONVILLE, FLA. ORDINANCE § 330,313 (1972)).

paid to the legislative determination, even though its account of a public nuisance was far closer to the common law conceptions than anything that the legislature had to offer in for its Coastal Management Act in *Lucas*.

V. CONCLUSION

Both general political discourse and constitutional theory pose many important questions of principle. But these queries should be treated for what they are: important points of principle that are capable of principled resolution. So it is here that the link between linguistic theory and judicial role is so important. One reason to start with a uniform presumption of strict scrutiny of all enactments is to keep courts on good intellectual behavior. Instead of dreaming up reasons why a legislature "could think" this or that, the high standard requires the legislature to present its reasons and to show why they count in the grand scheme of things. This difference is one with real bite. To take a mathematical example, the rational basis test allows the legislature to say that $2 + 2 = 5$, because after all the result is close, and others have made that mistake before and doubtless will do so again. But I prefer to think that a higher level of aspiration is both desirable and achievable. In constitutional adjudication, the legislature must learn to balance its sums, and to answer 4. To be sure, in matters political, it is not possible to balance the sums with this level of precision. But by the same token, if we are content with answers that we know to be false, when will we ever achieve those having at least some chance of being true.

And therein lies the vice of so much modern constitutional interpretation. The question it asks for itself is not what the Constitution, fairly read, requires. Rather it is, what methods of constitutional interpretation have to be invented to sustain massive federal power and provides only limited protection to private property. Engrafting that instinctive large government bias onto a small government doctrine is what produces the intellectual gymnastics that so often pass for constitutional interpretation.

