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## ABOLISHING JUDICIAL REVIEW

*Mark Tushnet*

### PROPOSED CONSTITUTIONAL AMENDMENT:

The constitutionality of acts of Congress shall not be reviewed by any court in the United States.<sup>2</sup>

### COMMENTARY

1. *Source:* The proposal is adapted from Article 120 of the Constitution of the Netherlands: “The constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts.”<sup>3</sup>

2. *Scope:* (a) “any court in the United States”

The proposed amendment would apply to all courts (other than international courts located physically in the United States, should there happen to be any), those established under the authority of the United States (the federal courts including courts established pursuant to Congress’s authority under Article I and subject to scope note (b)(ii) below) and state courts as well.

(b) “acts of Congress”

(i) The proposed amendment would not in general bar courts from determining that actions by executive officials violate the Constitution.<sup>4</sup> The courts could of course hold execu-

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1. William Nelson Cromwell Professor of Law, Harvard Law School. I have taken a relatively limited approach to the Symposium’s charge. (A broader approach would take the Essay’s organizing question to be: Why bother to interpret the Constitution to advance the cause of socialism if you can rewrite it to do so?) I thank Jill Hasday, Louis Michael Seidman, Girardeau Spann, and Adrian Vermeule for comments on a draft of this Essay.

2. Alternative language: “No court in the United States shall have the power to hold unconstitutional any act of Congress.”

3. It is surely relevant to the provision’s operation in the Netherlands that its Constitution contains another provision which states: “Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with treaties that are binding on all persons or of resolutions by international institutions.” GW. § 94.

4. In addition to the executive actions discussed in the text, this limitation means that agency decisions and regulations could be reviewed for their constitutionality as well as for their consistency with the agency’s organic statute and the Administrative Procedure Act. I would expect that it would be rare for a court to find unconstitutional a regu-

tive action unauthorized by statute. In addition, they could take constitutional values into account in determining whether a specific executive action had been authorized by Congress, and hold the action unlawful (“unconstitutional,” in a slight adaptation of existing usage) in the absence of sufficient authorization. Further, they could adjust their assessment of the sufficiency of statutory authorization in light of their assessment of the importance of the constitutional values implicated in the case. They might require that certain kinds of executive action be specifically authorized in quite express terms by congressional enactment.<sup>5</sup> But, importantly, expressly authorized executive action would *not* be reviewable for consistency with the Constitution.<sup>6</sup>

(ii) The proposed amendment would not preclude Congress from enacting the entire Constitution or portions thereof as a framework statute, and from authorizing the courts to determine whether some subsequent enactment is consistent with the “statutory Constitution.”<sup>7</sup> Should the courts find a statute inconsistent with the statutory Constitution, Congress would retain the power to reject their interpretation (of the statutory Constitution) by expressly amending the statutory Constitution to make its statute effective notwithstanding the courts’ interpretation of the statutory Constitution.<sup>8</sup>

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lation implicitly but not explicitly authorized by the organic statute, because the more obvious path would be to find the regulation insufficiently authorized in light of the constitutional concerns it implicates.

5. At the limit, they could require that detentions of individuals without judicial process be authorized by congressional legislation identifying by name the persons to be detained.

6. Perhaps I should emphasize that the fact that Congress *might* expressly authorize actions that courts exercising the power of judicial review would find unconstitutional is a feature, not a bug. I sketch the argument for why this feature is attractive below, text accompanying notes 14–16.

7. The statutory Constitution could contain a provision stating that it should control the interpretation of later-enacted statutes in the absence of an express statement in such statutes that they were to displace all provisions in the statutory Constitution.

8. A modest problem of interpretation might arise were a litigant to contend that a later-enacted statute effectively amended the statutory Constitution, though not in express terms. The argument would take the form of asserting that the conflict between the later-enacted statute and the statutory Constitution is plain, that the later-enacted statute would have no significant effect were it to be found in conflict with the statutory Constitution, that Congress should not be taken to have enacted an ineffective statute, and that the later-enacted statute should for that reason be taken as an amendment to the statutory Constitution. I personally am inclined to think that this argument is a good one, and that it would place some pressure on courts to reconcile the later-enacted statute with the statutory Constitution, by an aggressively limiting interpretation of the former or an aggressively modest interpretation of the latter. Others might think, though, that the courts’ application of clear-statement rules would counsel against accepting the argument. Given

(iii) The proposed amendment would not apply to legislation enacted by state legislatures or to municipal ordinances. Were Congress to disagree with a judicial determination that some state statute or municipal ordinance violated the Constitution, it would have the effective power to enact a statute making the state statute or ordinance legally effective within the jurisdiction that adopted the statute or ordinance. And conversely, were Congress to disagree with a judicial determination that a state or local statute did *not* violate the Constitution, it would have the power to enact a (national) statute denying legal effect to the state or local statute (and presumably though not necessarily all similar statutes in other jurisdictions).<sup>9</sup>

(iv) The proposed amendment would not allow the defensive use of constitutional objections. Assume that Congress enacts a criminal statute that a court would find unconstitutional because it violates the First Amendment, were the court to engage in its own analysis of the legal materials relevant to determining whether a statute violates that Amendment. The proposed amendment would bar the court from engaging in that independent analysis (except insofar as relevant to interpreting

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the possibility of congressional response, the issue is less significant that it might otherwise be.

9. The proposed amendment would insulate such congressional legislation from review for *its* constitutionality, thereby rendering irrelevant the jurisprudence associated with questions about Congress's authority under Section 5 of the Fourteenth Amendment to define the scope of constitutional rights (in this context, determining that a state statute or local ordinance did *not* violate constitutional rights as Congress defines them). *See, e.g.*, *Katzenbach v. Morgan*, 384 U.S. 641 (1968) (Congress may forbid practices that are not themselves unconstitutional provided the law is aimed at preventing or remedying constitutional violations); *id.* at 651 (“[Section Five is] a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”). *But cf.* *City of Boerne v. Flores*, 521 U.S. 507 (1997) (holding that Congress may enact legislation that remedies constitutional violations, but may not create new substantive rights not guaranteed by the Constitution). Put another way, the proposed amendment's application solely to congressional legislation rests on a strongly nationalist view of national power in our federal system (a view that, in my own judgment, is prescribed by Section 5 of the Fourteenth Amendment). Members of Congress would of course have to consider whether they had the power under the Constitution as they understood it to enact such a statute, and their deliberations might be informed, though not controlled, by pre-amendment jurisprudence.

In operating in this manner, the proposed amendment would generalize from the power Congress has under currently prevailing interpretations of the Commerce Clause, *see, e.g.*, *Northeast Bancorp v. Bd. of Governors*, 472 U.S. 159, 174 (1985) (“When Congress . . . chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.”) to authorize states to enact legislation that would violate the so-called dormant Commerce Clause in the absence of congressional authorization.

the statute). The court would be required to allow trial to proceed and to remit a convicted defendant to executive custody.<sup>10</sup>

### DISCUSSION

The proposed amendment is modeled on a provision in the constitution of the Netherlands, but it is not a simple transplant from that constitution. The United States and the Netherlands differ along many dimensions relevant to institutional design and modification: size, degree of heterogeneity among the population,<sup>11</sup> political structures such as federalism, the use of a parliamentary or a separation-of-powers system in organizing the legislative and executive branches, the electoral system, and perhaps the ideological and political predispositions of the political elite. Yet, the Netherlands is recognizably a reasonably well-functioning liberal democratic state.<sup>12</sup> Its refusal to allow judicial review of national legislation establishes an “existence” proposition that that sort of judicial review is not *necessary* for a state to be a reasonably well-functioning liberal democracy.<sup>13</sup>

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10. Individual judges may be uncomfortable remitting defendants to executive custody, so much so as to raise questions for them about continuing to hold office. Judges may be similarly uncomfortable with respect to setting an even partially discretionary sentence in such a case.

11. However, although the Netherlands is more heterogeneous than one might initially think. According to the Dutch census bureau, approximately 80% of the people of the Netherlands are “ethnic Dutch.” See Population: sex, age, origin and generation, <http://statline.cbs.nl/StatWeb/publication/default.aspx?DM=SLEN&PA=37325eng&D1=0&D2=0&D3=0&D4=0&D5=0-1%2c84%2c102%2c139%2c145%2c210%2c225&D6=a&LA=EN&HDR=G2%2cG3%2cG4%2cT&STB=G1%2cG5&VW=T> (last visited Oct. 9, 2010). Whites in the United States are also roughly 80% of the population. See T-3 2006: Race; 2006 Population Estimates, U.S. Census Bureau, [http://factfinder.census.gov/servlet/DTTable?\\_bm=y&-state=dt&-ds\\_name=PEP\\_2006\\_EST&-CONTEXT=dt&-mt\\_name=PEP\\_2006\\_EST\\_G2006\\_T003\\_2006&-redoLog=true&-caller=geoselect&-geo\\_id=01000US&-geo\\_id=NBSP&-format=&-\\_lang=en](http://factfinder.census.gov/servlet/DTTable?_bm=y&-state=dt&-ds_name=PEP_2006_EST&-CONTEXT=dt&-mt_name=PEP_2006_EST_G2006_T003_2006&-redoLog=true&-caller=geoselect&-geo_id=01000US&-geo_id=NBSP&-format=&-_lang=en) (last visited Oct. 9, 2010).

12. Of course the Netherlands is not a perfectly well-functioning liberal democracy, but then neither is the United States. Nor does it matter that some features, including the specification of particular constitutional rights, of the Netherlands’s version of liberal democracy differ from the parallel features in the United States version; both versions are situated well within the boundaries of the class of liberal democracies.

13. One qualification to this assertion might be that the Netherlands is part of the European human rights regime, and its national legislation is subject to scrutiny by that regime’s institutions, such as the European Court of Human Rights. Yet, the actions of those institutions—unlike those of the European Court of Justice—have no direct effect within the Dutch legal system. Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 INT’L J. CONST. L. 619, 638 n.74 (2009) (“[T]he ECHR, different from EC law, does not have direct effect in the states parties.”). See also *NV Algemene Transporten Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Admin.*, 1963 E.C.R. 1 (establishing principle of direct effect for rulings of the European Court of Justice). In one sense those institutions function as civil-society institutions monitoring domestic compliance with international

The proposed amendment recognizes a fundamental feature of the U.S. Constitution: Nearly all of its terms, and for all practical purposes all of the terms that generate the kind of dispute that leads to judicial review, are subject to reasonable alternative interpretations.<sup>14</sup> The U.S. system of judicial review rests on the proposition that the interpretation found more reasonable than alternatives by judges prevails over reasonable interpretations found more reasonable by Congress. That is a specific institutional arrangement that, in my view, has never been successfully defended against criticism. It certainly does not flow from a conceptual analysis of terms like “law,” “supreme law,” “Constitution,” and the like—as, again, the example of the Netherlands shows.<sup>15</sup>

This Essay is of course not the place to develop all the (to me persuasive) criticisms of the U.S. institutional arrangements for enforcing the Constitution. Three deserve brief mention, though. I state them dogmatically, with equally dogmatic responses.

(1) *Judges as experts in the law.* The Constitution is law, statutes are (mainly) policy embodied in law. Judges are good at interpreting the law, legislators are not as good. But: (a) The Constitution is a special kind of law, in the interpretation of

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human rights norms, and doing away with judicial review in the United States would not eliminate the ability of civil-society institutions to perform a similar function here. The ECJ has begun to enforce fundamental human rights within its jurisdiction, and those decisions do have domestic legal effect within the Netherlands. See Andrea Bianchi, *Security Council's Anti-terror Resolutions and Their Implementation by Member States*, 2006 J. INT'L CRIM. JUST. 45 (2006) (“In the absence of any provisions in the constitutive treaties concerning the protection of human rights, the European Court of Justice had to elaborate by itself a judicially-made human rights doctrine.”). This practice might be thought to weaken the “existence” proposition that I use the Netherlands to establish. In that case I would probably revert to the example of the United Kingdom before the enactment of the Human Rights Act 1998, although I would thereby lose the textual model the Netherlands Constitution provides.

14. This is not to say that every individual will find all available interpretations equally reasonable, but rather to say only that some people who are unquestionably reasonable people deploying the available tools of legal interpretation in well-recognized ways will find one interpretation more reasonable (“better”) than another, while other people, with the same characteristics of rationality and use of recognized interpretive tools, will find a contrary interpretation more reasonable.

15. Most defenses ultimately end up with the assertion that the Constitution is supreme law, that judges are the institutional actors who regularly determine what the law is, and that they have the power to interpret the Constitution in the course of applying the law. The flaw in the argument, familiar from the beginning, lies in the assumption that the judges’ interpretation of the Constitution necessarily determines what the law “is” in some ontological sense. There are of course pragmatic reasons, addressed in the text, for giving judges some role in constitutional interpretation, but that role would not be eliminated by the proposed amendment.

which politics and policy properly play a role. The advantage judges have over members of Congress may well be smaller in constitutional interpretation than in other areas of law. (b) Congress could develop institutional mechanisms to improve its capacity to engage in expert constitutional interpretation, and might do so as a by-product of the proposed amendment's adoption.<sup>16</sup> The proposed amendment might give Congress incentives to enact as statutes rules that some would think constitutionally problematic, and doing so might in turn give Congress incentives to revise its internal procedures so as to bring the constitutional discussion to the surface.

(2) *The burdens of inertia.* Judges are required to address all constitutional complaints addressed to them in proper form, whereas Congress has no similar obligation. True, but insufficient to establish that the U.S. institutional arrangement, where judges' constitutional interpretations prevail over Congress's alternative reasonable ones, is necessary to enforce constitutional limitations,<sup>17</sup> given the possibility allowed by the proposed amendment that courts will construe statutes in light of constitutional values or will be called upon to enforce a statutory Constitution.<sup>18</sup> And, just as Congress might develop institutional mechanisms to improve its capacity as the proposed amendment moves toward adoption, so too might it find enacting a statutory Constitution attractive as part of the amendment process.

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16. For a discussion of such mechanisms, see Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 *DUKE L.J.* 1277 (2001).

17. One perhaps important exception is for cases in which the constitutional complaint is that Congress has failed to perform some duty the Constitution imposes on it to enact legislation. In light of the prevailing view that the U.S. Constitution is one of negative rather than positive rights, the number of such cases (about the U.S. Constitution, not about all possible constitutions) is likely to be quite small. One can imagine situations in which Congress failed to perform one of its duties, for example by enacting a statute that suspended an election for the House of Representatives, or for one-third of the Senate, or even for the presidency. (I thank Jill Hasday for the example.) But: (a) other reasonably democratic nations have gone through suspensions of regularly scheduled elections without damage to their democratic credentials (most notably, Great Britain failed to conduct a regularly scheduled election in the middle of World War II), and (b) were Congress to (unreasonably and solely to preserve its own power) suspend an election, the nation would be in such deep doo-doo that it would be foolish to think that the relevant legal actors—here, the members of Congress itself—would comply with a Supreme Court decision finding the suspension unconstitutional.

18. The enactment of a statutory Constitution might—but need not—lead to a recreation of judicial review of the sort the United States now has, through the following sequence: enactment, judicial interpretation of the statutory Constitution, development of a practice of congressional acquiescence in those interpretations, and the hardening of that practice into a convention against any statutory responses to judicial interpretations other than those that accept the courts' interpretations.

(3) “Distortions” in congressional constitutional interpretation due to politics and vote-getting. Congressmembers’ incentives to take the Constitution seriously arise solely from their incentives to be re-elected, and so are derivative of their constituents’ interests in taking the Constitution seriously. Those interests may be weak, and in any event are likely to be diluted by the fact that constituents must vote for or against a candidate who offers them an indivisible package of positions, only one of which will be the degree of the candidate’s commitment to taking the Constitution seriously. Again, true enough. But (a) the difficulty lies in establishing that the incentives to take the Constitution seriously, which for present purposes I concede to be weak, are so weak—particularly when aggregated through the institutional processes of law-making—as to result in enacted legislation that falls outside the range of laws permitted by some reasonable constitutional interpretation, as compared to the judicial incentives to uphold legislation that falls outside the range of reasonable constitutional interpretations. And (b) in my experience objections based on distorted incentives typically involve claims about statutes the questioner expects to be enacted *because of* the distortion, and dislikes on the merits, without serious consideration of whether such statutes might nonetheless be supported by reasonable constitutional interpretations (with which the questioner disagrees, of course).

The proposed amendment would convert the U.S. Constitution from what British constitutionalists call a legal constitution into what they call a political one.<sup>19</sup> Political constitutionalism rests on, but also contributes to, constitutionalist sensibilities prevalent in a nation’s people and political elites. Importantly, political constitutionalism operates through politics, and so through the mechanisms we use to organize our politics—the political parties as much as, and ordinarily more than, direct participation of the people in political activities such as demonstrations and politically oriented organizations in civil society.<sup>20</sup> Perhaps the constitutionalism of the people of the United

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19. For recent discussions, see RICHARD BELLAMY, *POLITICAL CONSTITUTIONALISM: A REPUBLICAN DEFENCE OF THE CONSTITUTIONALITY OF DEMOCRACY* (2007); Symposium, *The Role of Courts in Constitutional Law*, 60 U. TORONTO L.J. 1 (2010).

20. For this reason I have come to think that *political constitutionalism* is a better term for the phenomenon than the one that has become prevalent in U.S. discussions, “popular constitutionalism.” The most careful discussions of popular constitutionalism do blend attention to direct participation with the activity of political parties, *see, e.g.*, LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND*



States has been debilitated by our experience with strong-form judicial review, though I personally doubt that, given the widespread presence of constitutionalist rhetoric (much of it uncomfortable to me on the merits) in popular discourse.<sup>21</sup> But, constitutional amendments such as that proposed here do not come into effect instantaneously. A political process of public education and popular mobilization takes place before a proposal reaches Congress, a process that continues while Congress deliberates, after it submits a proposed amendment to the states for ratification, and in each state as its people considers whether to ratify. Just as that political process might generate institutional innovation within Congress, so too might it reinvigorate popular attentiveness to the Constitution.

Of course there are no guarantees that political constitutionalism will always produce results that I personally favor. Indeed, each of us would undoubtedly find occasions on which political constitutionalism yielded undesirable results as each of us evaluates those results. Yet, it should be equally obvious that *someone* will find exactly those same results—the ones that discomfit me or you or your uncle or your neighbor down the block—entirely acceptable. As Louis Michael Seidman suggests in his contribution to this Symposium, it would be nice (for you or me or your uncle) if you or I or your uncle could guarantee that the results under any constitutional system would track precisely the outcomes we like. Because we can't (that is, because what you like, what I like, and what your uncle likes are inevitably going to differ), the absence of guarantees about outcomes does not in itself count against political constitutionalism.

Perhaps not “in itself,” but the real question is a comparative institutional one. How does judicial review stack up on the “no guarantees” question compared to how political constitutionalism does? As the preceding paragraph suggests, each of us

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JUDICIAL REVIEW (2005), but the term itself might mislead readers into disregarding the role of parties.

21. I think it worth emphasizing the importance of the parenthetical here. Many readers of this Essay may think that popular rhetoric about, for example, reinterpreting the Fourteenth Amendment to deny automatic citizenship to children born in the United States of those not lawfully present demonstrates a lack of popular commitment to constitutionalism. My view is that this is simply a disagreement either about reasonable interpretations of the Fourteenth Amendment or about whether the proposed interpretation is a reasonable one, not an indication of popular disregard of constitutionalism. (For an argument that a statute denying birthright citizenship under the specified circumstances would conform to the Constitution, see PETER SCHUCK & ROGERS SMITH, *CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY* (1985). I note that I find the argument unpersuasive, but not unreasonable.)

will have to answer that question with reference to our own values and preferences without imputing those preferences to some objective Constitution “out there” that just happens to track what each of us values and prefers. Doing so requires some rather difficult calculations and assessments.<sup>22</sup> All I can say is that, for myself, the assessment of the U.S. Supreme Court’s performance from 1791 to 2010 is pretty bleak when taken as a whole. From my perspective, it’s hard to think that political constitutionalism could have done much worse.<sup>23</sup> I think it’s worth a try.

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22. The best account of which I am aware of what is needed to answer the comparative question is WOJCIECH SADURSKI, *RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE* (2005), reprinting, *inter alia*, Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002) (arguing that “the ‘matrix’ of rights-protection in any specific system of judicial constitutional review must incorporate two types of calculation. First, it must “compare incidences of the invalidation of ‘wrong’ statutes (on the ‘gains’ side) with invalidations of ‘right’ statutes *and* cases of upholding ‘wrong’ statutes (on the ‘losses’ side). The second looks at the gains and losses resulting from the very existence of the system of judicial review (rather than the specific cases that have been upheld or invalidated)”).

23. Which is to say, because the ultimate question is a comparative institutional one, that the performance of legislatures in the United States from 1789 to the present is somewhat less grim.