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Hopeless Constitutionalism, Hopeful Pragmatism

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I DOUBT THAT constitutional law as typically conceived will do much to better the most severe social injustices that face us in the early twenty-first century. In fact, I think the Constitution is as likely to be an impediment to positive social change, not only because an increasingly conservative federal judiciary will use constitutional law to block or limit progressive legislation on everything from gun control to school integration, but also because the Constitution will seduce the Left away from the more daunting but more direct avenue to social justice offered by popular politics.

By way of explanation, I'd like to focus on one particularly serious social justice problem. Here's a description of one U.S. city—worse than many, but still representative:

> Locals call the street the "Berlin Wall," or the "barrier," or the "Mason-Dixon Line." It divides the suburban Grosse Pointe communities, which are among the most genteel towns anywhere, from the East Side of Detroit, which is poor and mostly black. The Detroit side is studded with abandoned cars, graffiti-covered schools, and burned out buildings. Two blocks away, within view, are neatly-clipped hedges and immaculate

houses—a world of servants and charity balls, two car garages and expensive clothes. On the one side, says John Kelly, a Democratic state senator whose district awkwardly straddles both neighborhoods, is "West Beirut," on the other side, "Disneyland."[1]

If I had to identify only one social injustice that most cries out for redress, it would be the plight of the disproportionately black urban underclass. Residential segregation is the most intractable legacy of America's struggle with racism. And unfortunately, it makes many other problems—poverty, unemployment, crime, educational disadvantage—harder to address. Isolated from mainstream society, ghettoized minorities suffer under several burdens: They are unable to establish the social networks that might alert them to better job opportunities. They remain unfamiliar with the social norms of the mainstream—hence, they have difficulty favorably impressing employers—exacerbating employment discrimination. They eventually become socialized to a ghetto subculture in which employment in the mainstream doesn't seem to be a viable option: They lack role models who work in mainstream jobs and become acculturated to norms that are functional only inside the ghetto environment.

These conditions don't just attach to neighborhoods within cities; increasingly, entire municipalities are characterized by ghetto-like conditions. In any metro area, one can identify the poor cities and the rich ones. This reinforces ghetto neighborhood poverty by making cities compete with rich suburbs for rich residents and lucrative tax bases by offering tax breaks and improved services—at the expense of the poor populations within their borders.

Background Rules

I and many others have argued that the black ghetto is kept in place by public policy, including policies such as local taxation and revenue distribution (school finance), the delegation of land use authority to local governments (exclusionary zoning), and the organization of U.S. states into localities with a franchise restricted by strict territorial borders and a residency requirement.

Typically, localities collect and retain the revenues collected through taxes levied against property in their territorial boundaries. This provides a fiscal incentive for residents of wealthier jurisdictions to resist integration. After all, because taxes levied against local property are

retained for the benefit of schools exclusive to local residents, any merger with poorer districts effectively dilutes the fisc of the wealthier districts and makes them financially worse off. The resulting inequities and incentives for class and race segregation effectively undermine the constitutional promises of integration.

The power of localities to use land use planning as an effective immigration policy also predictably perpetuates segregation. By restricting moderate and low-income housing, localities can and do effectively screen out lower-income residents, who are often disproportionately racial minorities. In some cases, the desire to eliminate low-income housing may be motivated by classic land use considerations such as a desire for open space and low-density development generally or a desire to avoid traffic burdens and environmental impacts. In many cases, the policies are driven by fiscal concerns: The background rules that allow localities to restrict the use of public services to residents and that allow localities to retain locally collected property and sales tax revenue give localities a powerful incentive to exclude low-income residents (who will require expensive public services but contribute little to the tax base) in favor of upper-income residential, commercial, and industrial uses (that will improve property values or generate taxable sales). Local land use decisions are, of course, laws; moreover, the ability of localities acting autonomously (as opposed to through regional or state government or through shared or negotiated land use authority) to make such decisions is itself a revisable legal rule. Needless to say, a racially segregated municipality will, in most cases, have racially segregated public schools: Although school district boundaries do not always match the municipal boundaries of local governments with zoning power, they rarely diverge so much as to take in communities of significantly different race or class demographics.

Desegregation is by and large limited by the territorial boundaries of local governments. Most U.S. cities fund public services primarily through property taxes. They also are entitled to and with very rare exceptions do limit access to local services to residents of the jurisdiction. This means that cities have an overwhelming incentive to encourage in-movers with resources, who will invest in real estate and thereby increase the value of property (and tax revenues) while requiring relatively little in terms of public services, and to discourage in-movers without resources, who will need a lot of public services. It scarcely needs to be said that the heavily minority urban poor fit the latter description. And although local governments in the United States do not have explicit immigration policies, they do have quite broad powers to restrict

land uses. By excluding all or most high-density or multifamily housing, middle-class and wealthy suburbs can and do effectively screen out low-income (again, disproportionately minority race) potential residents by prohibiting the housing that they can afford. And suburban local governments can and do resist regional public transportation, halfway houses, group living arrangements, and rehabilitation centers—all services that many low-income people require.

These background legal rules are a fail-safe recipe for racially segregated neighborhoods. They are not the only reason that segregation remains, but they alone are enough to keep U.S. neighborhoods segregated indefinitely.

Pessimism (and Optimism)

For constitutional lawyers, the next step follows pretty easily: The policies that perpetuate ghetto segregation are unconstitutional. But these arguments have not moved the federal courts. And I'm very skeptical that, by the year 2020, any significant durable successes in terms of egalitarian distribution of social resources can be achieved through federal constitutional litigation. I'm only slightly less skeptical that constitutional litigation will offer real gains in terms of civil rights for minorities or members of stigmatized groups: Equal protection litigation, for as long as I've been an adult, has been as likely to stall or reverse racial justice gains achieved in popular politics as to advance them beyond what can be achieved there, and this trend shows few signs of reversal. The Supreme Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* is only the most recent citation in this respect. There, the Court, astonishingly yet predictably, held that the Fourteenth Amendment not only does not require, but in fact *prohibits* the most commonly used and efficacious policies for promoting integration in the public schools. *Parents Involved* is not a fluke nor an aberration—it is simply the latest in a long line of Supreme Court cases that have steadily eroded the integrationist spirit of *Brown v. Board of Education*. The process began in 1971 with *Milliken v. Bradley*, which held that federal courts could not require interdistrict desegregation remedies unless each district had been found to have engaged in de jure segregation in the past, and it continued apace with *Missouri v. Jenkins*, which severely limited the authority of federal courts to require milder desegregation policies of even those districts that had been segregated by force of law and remained segregated in fact. Having effectively

undermined the commonsense integrationist meaning of the Fourteenth Amendment guarantee under *Brown*, the Court was poised to apply a strictly formal interpretation of that guarantee to prohibit even voluntary integrationist policies.

My point here is not to lament the erosion of *Brown*'s integrationist mandate. Although I do lament it, it's plausible that more forceful integrationist mandates imposed by federal courts would have been politically unworkable and retreat was the prudent course of action. My point is that constitutional litigation is now part of the problem; it's in the way of the integrationist policies that *are* politically workable and that have been endorsed by state and local majorities in the political process. And this can't be explained away as an aberration or as judicial overreaching or even as bad jurisprudence. Let's face it: The interpretation of the Fourteenth Amendment as a requirement of formal color blindness is plausible; it fits nicely with a traditional legalistic preference for high principle and neat formalism over messy sociology and policy-like argumentation, and it is consistent with a widespread, if oversimplified, view that the evil of Jim Crow was the formal codification of racial hierarchy. We can spend the next forty years complaining that the conservatives are wrong as a matter of constitutional theory, but as long as they dominate the federal judiciary, their theory is the only one that matters.

But all is not despair. In many states and localities, there are plenty of encouraging developments, including political movements and tangible victories centered on specific problems and bolstered by a powerful, if small, sense of political solidarity. States from California to Texas (the site of the *Rodriguez* litigation) to New Hampshire have required the equalization of public funding between rich and poor localities. The New Jersey Supreme Court famously invalidated exclusionary zoning under the state constitution, and eventually the state legislature passed innovative legislation to require localities to implement more inclusive land use policies. Cities in Massachusetts are governed by anti–"snob zoning" laws, and many states require localities to accommodate low-income housing in their land use planning.

Localities such as Portland have pioneered land use planning that can put an end to urban sprawl and make cities livable and humane. And such "smart growth" land use planning has an incidental benefit: It prevents the migration of industry to the suburbs and hence preserves the tax base of more racially and economically diverse inner cities. Localities have pushed back against the exploitation of workers by passing living wage ordinances and have worked to preserve local quality of life by controlling the location of big box retailers. Local governments

have—beyond what's required by state or federal mandates—made serious efforts to provide for the indigent, not only by providing minimum cash grants but also by making real efforts to bring the homeless and jobless into the mainstream through job training, substance abuse rehabilitation, and supportive housing.

These state and local success stories capitalize on the classic advantages of localism: detailed, context-specific analyses that come from proximity to specific problems and a popular sense of solidarity that comes from an inchoate, but I think real, sense of belonging to community and place. The decisions are less abstract and principled than conventional constitutional law; and they're more down and dirty, more context-bound, more political. That's what makes Washington Beltway politicians (and elite law professors) dismiss them as anomalous or inconsequential. For instance, New Jersey's *Mount Laurel*[2] case was constitutional litigation, but much of the opinion focused on specific local facts: housing markets, changing patterns of urbanization, and the postwar suburbanization of industry and hence of the traditional urban job and tax base. *Mount Laurel* didn't look like typical constitutional litigation: It wasn't formal, conceptual, principled. Similarly, the school finance litigation in California, Texas, and New Hampshire focused on the brute facts of school segregation and the distribution of resources. But these decisions have had a more profound effect than most federal constitutional litigation, albeit on a smaller scale; for instance, some states have significantly revised their tax structures to meet school finance equalization mandates.

Constitutional Concerns

The Constitution as traditionally conceived actually can impede such progressive politics in three ways.

First, as I have suggested, the federal Constitution can be and is deployed to hinder progressive agendas at the state and local level. The Equal Protection Clause now limits or forbids affirmative action, school desegregation, race-sensitive electoral reapportionment, and public contracting set-asides for women- and minority-owned businesses. An expansive Takings Clause could undercut efforts to regulate land uses in the public interest and might even block living wage ordinances. The Second Amendment thwarts local efforts to reduce gun-related violence in our nation's most dangerous and crime-prone urban areas. The Constitution is as likely to reverse gay rights as to advance them as

conservatives push for a "defense of marriage" amendment. These and many others are good reasons for liberals and progressives to reconsider our long-standing defense of judicial supremacy and perhaps even to try to curtail the power of the federal bench.

Second, progressive constitutionalism—epitomized by the important civil rights decisions of the Warren Court—can seduce us into believing that political victories are best achieved through abstract conceptual arguments rather than concrete political struggles. Conservatives have dominated national popular politics for decades—as Barack Obama noted,[3] for better and (more often) for worse, the Republican Party has been the party of ideas since the 1980s. In these circumstances, it's tempting to hope for a shift to a more favorable arena of struggle: from the ballot box to the courtroom. It's especially warm and cozy for people who did well in school to imagine that there's a place where sound arguments always prevail over half-baked rhetoric and raw power, a place where buckling down and doing your homework brings just rewards, a place where the values of Socrates, Daniel Webster, and Hermione Granger triumph over those of P. T. Barnum, Karl Rove, and Draco Malfoy. But it's a fantasy to think that fancy conceptual arguments and debate club skills can substitute for the more raw and rugged, street-level persuasion of popular politics. The stymied antipoverty aspect of the civil rights movement is one of many cautionary examples: A conceptual commitment to "equal protection of the laws" could not somehow underwrite, much less *mandate*, the egalitarian redistribution of wealth from rich suburbs to poor inner cities.

Third, sometimes the arguments that lawyers have to make in court distort the real political stakes of an issue. This is especially true in the case of equal protection arguments, where the language of bigotry and invidious discrimination is almost obligatory. It's often necessary in litigation to, in essence, claim that one's opponents are irrational chauvinists. But it's dangerous politically to believe this. The litigation-influenced idea that those who disagree with us about, say, affirmative action, immigration, or same-sex marriage are just bigots whose views are beneath engagement or consideration can become a shabby psychological consolation prize when we lose in popular politics. How often have you heard someone say, after losing a political struggle: "Well, *of course*, our position is unpopular because so many people are prejudiced; that's why we need the courts." This combination of defeatism and smug condescension is a recipe for continued failure in popular politics.

I don't want to suggest that there's no role for courts or that we should abandon judicial review altogether—only that liberals in particular have

been far too willing to place their fondest hopes with the federal judiciary, an institution that, let's not forget, has historically been a bastion of conservative reaction against popular progressive politics. Based largely on the significant but limited historical period marked by the Warren Court and its progeny in lower federal courts, we have come dangerously close to an implicit assumption that the federal courts are somehow intrinsically more liberal than the popular branches. But that interlude between periods of judicial conservatism has been over for a long time, and given the decades-long dominance of conservative politicians and conservative ideas in the popular political culture from which judges ultimately draw their inspiration and legitimacy, a pioneering liberal judiciary is unlikely to reemerge anytime soon.

Liberals and conservatives alike have participated in creating an elaborate mystique for the federal courts, which insulates their many bad decisions from appropriate scrutiny and encourages the type of faith in judicial rescue from popular politics that now too often paralyzes progressive legal thought. I think this has happened, in part, because many fear that, without such a mystique, there would be no sound justification for judicial review, and we'd be left to the mercies of mob rule. I'd like to propose an unsentimental defense of a modest judicial role, one that doesn't rely on a belief either that the Constitution as a document can control judicial decision making, nor that there is one correct set of constitutional principles that judges could apply to the specific disputes and which would guide their hand.

The federal courts are a political branch of government, one of the purposes of which is to occasionally temper the excesses of representative government and even more occasionally to jump-start needed but stalled political reform. The purpose of judicial review is to allow well-educated and (hopefully) civic-minded elites who are relatively insulated from short-term politics to overrule the popular branches on occasion. Provided the elites are good enough at couching their interventions in terms that look principled, maintaining the charisma and mystique of the judiciary (hence no cameras in court or revealing autobiographies—attention Justice Thomas!—and hence the otherwise somewhat quaint attachment to archaic props like black robes, gavels, etc.), and limiting their interventions to those that most people will eventually accept, the system, such as it is, will "work." Of course, the legal elites have their own internal norms of self-discipline which keep them from intervening too often or in ways that are too blatantly political, and for the most part these internal norms (reinforced by their peers within and outside the judiciary, such as law professors and professional legal commentators)

keep the elites from going too far in the direction of naked legislation from the bench long before the legitimacy of the system is even close to crisis.

One doesn't need a substantive theory of constitutional interpretation to have this view. In fact, this view arises from a sort of disenchantment with constitutional theory; it's what you wind up with once you've lost faith in the idea that there's a "right" way to do constitutional analysis (there is still, of course, a wrong way, which is to do it so that it's conspicuously political and undermines the legitimacy of the courts). We need to temper the excesses of popular rule—too much democracy can be a very bad thing, not only for minorities but also for sound policies that require tough choices, sacrifices (always unpopular), or specific expertise that's beyond the average voter. Of course, the decisions of the federal courts are "political," but that doesn't mean they should be subject to the short-term preferences of majorities. This is one of the defining features of constitutional democracy; it might not play well on CNN, but we needn't be ashamed of it.

So far, this argument doesn't take the Constitution as a document all that seriously. It sounds as if the Constitution is just a fig leaf behind which elite judges hide their own political preferences. But it's more than that. *Given the customs of legal argument and interpretation*, some outcomes can be justified by the text and many simply cannot. That's a result of a tradition of textual interpretation in which all good constitutional lawyers and scholars engage. Of course, this tradition evolves in reaction to changing social circumstances and political pressures, and so the meaning of the Constitution evolves—so much for original intent or strict textualism. And the tradition is, again, largely an elite enterprise—whether it's Ed Meese and the Federalist Society plotting the reinstallation of the Constitution in exile or a bunch of liberal law professors and lawyers meeting in New Haven to discuss the Constitution in 2020. At the same time, this elite conversation is informed by popular politics—and the more sensitive it is to popular politics, the more likely it is to be successful and long-lived.

Solidarity

Any successful political program requires a popular story that gives it meaning and legitimacy. I suspect that the best—perhaps the only—way to frame a broad constitutional vision that will both appeal to a majority of Americans and satisfy traditional left-liberal objectives (egalitarian

redistribution of wealth, either in kind or through socially progressive legislation and policy; more humane workplace relationships; social esteem for racial, religious, and sexual minorities; and so on) will be to tell a story that emphasizes what joins us as a political community.

In order to build support for a meaningful social safety net, we'll have to build opportunities for common experiences and build communities that a majority of people will want to join, communities whose members will be willing to aid the needy because the needy will show by their actions that they merit the aid. In a world that is increasingly interconnected and "flat," as Thomas Friedman[4] would put it, we, more than ever, need a good rationale for a political ethic of sharing that can underwrite a social safety net and a commitment to civil rights. Liberal humanism isn't sufficient because it doesn't explain why we owe a greater duty to people in the nation than to those, equally in need, outside its borders. For instance, given the ease of trade in agricultural products across national borders and the multinational interests of many nominally "American" corporations, why do we owe a free public education and minimum social services to noncitizens who do seasonal agricultural labor in the United States but not to noncitizens who do similar work in other countries producing goods for export to the United States? True, we benefit from the labor of migrant farmworkers every time we buy produce from the San Joaquin Valley of California, but we also benefit from the labor of foreign farmworkers whenever we buy imported produce. American agribusiness directly employs migrant labor but increasingly it also directly employs labor forces that remain entirely offshore. I suspect (and share) a strong, inchoate sense that migrant laborers—even those who send much of their earnings to foreign countries and reside in the United States only seasonally—are still "us" whereas people residing and working exclusively in a foreign country are not. But without a reasonably coherent and convincing account of who "we" are, I think defending this inchoate sense to a skeptic will be very rough going.

It's a truism, but not less true for it, that nations with strong social safety nets (the caricature of European social democracy) tend to have a strong sense of social solidarity. This doesn't mean, as is often suggested, that ethnic or cultural homogeneity is a prerequisite. (It's another caricature that European nations are ethnically and culturally homogeneous; a glance at the history of almost every European nation reveals a host of distinct regions, principalities, and ethnicities, which have been joined as a single nation relatively recently and not without much political effort.) Nor does solidarity necessarily involve the brutal suppression of difference: Even the modern stereotype of ambitious and

aggressive national centralization—republican France—was successful not as much because of the violent suppression of ethnic difference (not that this didn't occur) as because of the (coincidental and deliberate) creation of economic incentives to assimilation (here, I think of Eugen Weber's account of French nationalism in *Peasants into Frenchmen*) and the emergence of a robust narrative of republican citizenship (here, Benedict Anderson's *Imagined Communities* comes to mind).[5]

This does suggest, however, that whenever possible our legal and policy interventions should not be premised on strong presumptions of subgroup difference. Some of this is a question of framing. A characteristic of the New Left has been a volatile and often unrequited romance with identity politics. This romance has matured into an obsessive and dysfunctional relationship; today, it often seems that progressives deliberately frame political questions in terms of identity politics, even when substantially similar ends could be achieved by framing the question in more universal terms. For instance, Kenji Yoshino[6] has argued, quite convincingly, that many arguments for gay rights could be more usefully framed in terms of liberty—a universal interest—rather than equality, which in our constitutional tradition comes with the group-focused apparatus of "suspect classes." Not only do I think Yoshino is right about this as a matter of constitutional theory, but (dare I say, more important) I also think his insight is valuable to political organizing and popular persuasion. For instance, support for gay rights rises as voters come to see that the issue involves resistance to governmental or employer intrusion into intimate relationships; it falls when opponents are able to recast the debate as one over "special rights."

To return to my earlier example, I believe we can address the seemingly intractable problem of the ghetto underclass if we abandon the idea—untrue since at least the 1980s—that all good things come from the center and must be forced on the provinces. Local governments have some good ideas about reversing segregation and improving life in poor neighborhoods, and in many cases what they need most is help—financial help and help in terms of additional authority—not top-down limitations and pressure.

Local experiences also suggest that we'd be well served to drop feel-good multiculturalism and take a hard look at the subculture of the ghetto, with an eye toward accommodating what can be socially productive and changing what can't. Abstract constitutional theory arguments too often suggest that popular opposition to the cultural traits of racial or ethnic groups is a form of invidious prejudice. But solidarity in common institutions requires common cultural norms: It's unlikely

that we'll see durable integration in the public schools if we deprive them of their historical capacity to advance a common set of social and cultural values. A realistic program of integration will necessarily entail an assertive attempt to reform the dysfunctional aspects of inner-city culture—indeed, such reform is a big part of the value of integration to the inner-city poor. If assimilation to mainstream norms and values is made an explicit goal of integrated schools and is aggressively pursued, there might be less resistance to integration among middle-class families (of all races), who would have less reason to fear the potentially negative peer influences too often associated with inner-city schools. It's easy to dismiss resistance to busing as simple bigotry from the lofty perspective of constitutional litigation—and it's just as easy to dismiss local efforts to achieve integration as lazy reverse discrimination. But from the local perspective of families with kids, neighborhoods with problems, and communities with real if fragile senses of solidarity, the situation is a complex mix of reflexive prejudice and realistic assessment, indefensible selfishness and understandable self-preservation.

Such solidarity will of necessity entail some restrictions that may strike outsiders as overbearing: Communities may demand work or changes in lifestyle or the embrace of common values or commitment to master a common language as a condition of membership in a community. Group-focused constitutional litigation can stymie these attempts to create solidarity. But the alternative to solidarity is not freedom and tolerance; it's anomie and alienation. Tell the local school district that its dress code banning gangbanger fashions is "culturally discriminatory," and the result will not be integrated schools with students of diverse cultural affectations. It will be resistance to integration in the form of strident demands for neighborhood schools, litigation to block even modest attempts to achieve integration, and of course, exit from the public schools altogether in favor of private alternatives.

Conclusion

Perhaps the greatest risk of constitutionalism as it's currently understood is that it substitutes abstraction for practicality and prefers lofty and abstruse moral rhetoric to commonsense morality. If we suspend what I'm tempted to call the constitutional lawyer's mind-set, we'd be much more likely to settle on something messier, more incomplete, less intellectually satisfying, but also more likely to create real and durable solidarities, if only by fits and starts. In other words, I'm suggesting an

inversion of the conventional constitutionalism, wherein the Constitution—interpreted and imposed from above—informs and improves the retrograde politics of the provinces, and I'm suggesting that the sloppy, trial-and-error virtues of local popular politics could usefully inform the meaning of the Constitution.

Notes

1. Kenneth T. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 278 (1985).

2. *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151 (1975); *Southern Bulington County NAACP v. Township of Mount Laurel*, 92 N.J. 158 (1983).

3. See Clinton Obama Slugfest, FactCheck.org (January 22, 2008), http://www.factcheck.org/elections-2008/clinton-obama_slugfest.html

4. Thomas Friedman, *The World Is Flat* (2006).

5. Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870–1914* (1976); Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (1993).

6. See Kenji Yoshino, Gerken-Yoshino Discussion of Liberty and Equality, *Convictions*, May 21, 2008, http://www.slate.com/blogs/blogs/convictions/archive/2008/05/21/gerken-yoshino-discussion-of-liberty-and-equality.aspx