Bradley Lecture
March 2009

I.

Courts are empowered to interpret constitutions for two basic purposes. One, they coordinate relations among government institutions—the legislature and the executive, states and the national government, and so forth. Let's call this a "structure" function. Two, courts protect individual rights against majoritarian politics. Let's call courts committed to that business "rights courts."

Our Supreme Court is a rights court. It has lots of company: around the globe, courts enforce an ever-expanding panoply of rights, most having to do with sex or with welfare. Rights proliferation and the accompanying empowerment of courts and legal elites—"juristocracy," as political scientists now say—have been among the most conspicuous features of the "Third Wave**"** of democratization over the past decades.

Note the oddity: by all accounts, courts are the least democratic institution of liberal regimes. Only in the United States, however, has juristocracy's anti-democratic thrust met with resistance—*conservative* resistance. Of course, libertarians complain about the Court failure to enforce "economic" rights. But the anti-rights-proliferation, pro-democracy voices clearly dominate among conservatives. I have been part of that chorus, and I am not going to defect to the boisterous rights mob tonight. I believe, however, that the conservative choir needs a second, new but also very old tune. The Court and its law should not simply be *against* more rights but also *for* more structure.

Behind that proposition lurk an obvious question, and a controversial contention. The question: why do we *need* a second tune? Don't we conservatives have our originalist, anti-rights-proliferation, pro-democracy, anti-activist ducks all in a row? My answer: I pity the ducks. The unvarnished pro-democracy position was put before the American public in 1987, in Robert Bork's nomination. It lost decisively, and it has failed to recover since. I do not mean to excuse the despicable tactics deployed in the campaign against Judge Bork. Nor do I deny that sustained conservative opposition to promiscuous rights proliferation may have helped to prevent the Supreme Court from expelling Right-to-Life constituencies from respectable political discourse. But we always had a broader contention: we ought to govern ourselves, and the Supreme Court's endeavor to articulate a collective moral conscience is inherently problematic, regardless of its appalling content. That broader argument has plainly failed.

Why has it failed? Juristocracy's worldwide ascent suggests a deeper cause than the ebb and flow of American politics. Martin Shapiro, from whom I have borrowed the distinction between structure courts and rights courts, has linked the rise of rights courts to mass democracy. Competitive politics is plausible if it is a reasonably fair repeat game. That confidence in democracy is hard to sustain in deeply divided societies, where a loss in one round may mean death. Nor is it plausible even in the societies of Western Europe or Canada, where every citizen's welfare, from cradle to grave, hangs on political allocations. One way of hedging against the risk of ruin is to let rights proliferate and to entrust their protection to an independent body—the judiciary.

Conservative resistance to the Supreme Court's reign rests on the contention that we Americans are better than that. Are we? My colleague Karlyn Bowman has collected data on public confidence in our institutions. That confidence collapsed in the late 1960s, just when the country was supposedly becoming vastly more democratic. In the long run, the only institutions to emerge unscathed, and in fact with heightened degrees of public trust, were the least democratic: the armed forces, and the Supreme Court. Quite naturally, people measure "democracy" by the democratic institutions they know and see. And they neither like nor trust what they see.

Hence, my proposition: a jurisprudence that sets its face against juristocracy and rights proliferation solely on the grounds of democracy, *without more*, is doomed. Moreover, it deserves its fate. "Democracy" (full stop, period) is just a slogan. If it means an unstructured, undisciplined, exploitative interest group free-for-all—our politics, that is to say—it is an unpalatable alternative to juristocracy. On the other hand, if democracy means a structured, institutionally cabined and constitutionally disciplined form of government—a *republican* form of government, as we used to say—it is emphatically worth having. By constitutional design, though, that form of government assigns a prominent role to the Supreme Court. It collapsed because the Court abandoned that role, and it cannot and will not restore itself. Thus, the appeal to democracy has to be coupled with a credible judicial re-commitment to the Court's constitutionally envisioned role of protecting a transparent, responsible politics.

A rights court—our Court—cannot and will not do that. Even an anti-rights court cannot and will not do it. I will provide examples of the contemporary Court's dereliction

at the structure front. But the full extent of that abdication appears in sharpest relief against the purest structure court in American history: the Court of the Gilded Age. Let me introduce you to that Court. What did it do, and why did it do it?

II.

The late nineteenth-century Court under Chief Justices Waite and Fuller is bracketed by two seminal rights cases. At the front end, the *Slaughterhouse Cases* in 1873 held that Privileges and Immunities Clause of the newly enacted Fourteenth Amendment covered only the rights of *national* citizenship and, in so doing, took a potentially enormous number of rights claims off the table. The tail end is the notorious *Lochner* case in 1905, which covered a portion of the ground abandoned in the *Slaughterhouse Cases* with a doctrine that eventually came to be called "substantive due process." Between those bookends, the Court had virtually nothing to say about rights.

The justices, though, did not sit idle. Year-in, year-out, they decided more than twice as many cases as the modern Supreme Court (without law clerks, mind you). What were those cases about? Overwhelmingly, they had to do with constitutional structure—in particular, the structure that governs the commerce of the United States. And overwhelmingly, they arose in diversity jurisdiction—that is, the Court's constitutional authority to decide cases between a state and a citizen of another state, or between citizens of different states. Two sets of doctrines and cases loomed particularly large: federal general common law, and the dormant Commerce Clause.

"Federal general common law," very roughly, says this: in diversity cases that are not governed by a federal or state statute, the federal courts will decide cases under a *federal* common law (of contract, or of negotiable instruments), as opposed to following state courts' pronouncements. In substance, the doctrine protected contracts in interstate commerce. Railroad bond cases illustrate the point.

At the time, local governments (primarily in the Midwest) often sought to attract railroad investment with offers of aid, typically financed by floating local bond issues. State constitutions often barred local governments from issuing such bonds or limited their terms. Equally often, those restrictions were ignored, with a willful intent to dishonor the bonds once they had been sold or re-sold to Wall Street or foreign investors. State courts routinely sanctioned those maneuvers. The question was, and is, whether the protection of bond investments and contracts is any of the Supreme Court's business. On one view, local autonomy should trump. In theory, the risk that local governments might do very bad things could be priced into the bonds. In practice, however, nobody knew how to price the risk of random exploitation on the frontier with any kind of accuracy. The liquidity and marketability of commercial paper in secondary markets depended on ensuring the integrity of the underlying transactions. And only the Supreme Court could provide that protection.

The force of these considerations appears in *Gelpcke v. Dubuque*, an early and notorious bond case decided in 1864. The Iowa legislature had authorized localities to float railroad bonds, and the Iowa Supreme Court had repeatedly declared those authorizations constitutional—until the schemes went belly-up and the Iowa Court

determined that the authorization violated the State Constitution after all. With that ruling, the bondholders were out of luck. The Supreme Court reversed on principles of general law. The justices were scandalized by the political shenanigans that had prompted the Iowa Court's about-face. "We shall never immolate truth, justice, and the law," the Court intoned, "because a state tribunal has erected the altar and decreed the sacrifice."[1] Only Justice Miller (who hailed from the Iowa town of Keokuk) dissented, as he would in many municipal bond cases.

Over time, municipal bond defaults reached some $100 - $150 million—real money in those days. The settlement was a protracted tug of war between the states and the Supreme Court. States barred railroads and other companies from doing business in the state unless they surrendered their right to invoke the federal courts' diversity jurisdiction. Counties re-organized themselves to escape payment. State judges consistently sided with the debtors. With equal consistency and determination, the Supreme Court enforced the contractual rules and insisted on its jurisdiction.

The general common law, then, protected already-made investments in interstate commerce. What, though, of cases where states seek to block those investments? The Constitution affirmatively empowers *Congress* to regulate "commerce among the several states." Throughout most of our history, that language has been taken to prohibit—of its own force, and without any federal legislation—certain state regulations of interstate commerce. At the time, this so-called "dormant" Commerce Clause prohibited two types of state laws. First, states were prohibited from taxing or regulating the in-state leg of

[1] *Gelpcke v. Dubuque*, 68 U.S. 175, 206-207 (1864).

interstate commerce on a discriminatory basis. Second, states were prohibited from taxing or regulating interstate commerce on an "extraterritorial" basis. Interstate commerce as such was exclusively for Congress to regulate.

That two-pronged doctrine did not protect *all* interstate commerce as well as one might wish. For example, insurance was not deemed to constitute interstate commerce at all. Hence, states discriminated and excluded to their hearts' content, as they do to this day. Similarly, the last mile of a railroad connection was undoubtedly in-state. States taxed that last mile and its proceeds to the hilt, with the result that nobody made any money running a railroad in those days. But for the great majority of industries, the dormant Commerce Clause solved a central problem—the problem of vertical firm integration.

Consider a humble, once-standard household item—the sewing machine. Around 1860, I.M. Singer had found that existing local wholesalers were incapable of supplying consumer credit or demonstration and repair services. Over the next two decades, therefore, Singer created its own distribution network, consisting of over 500 stores that also served as a base for a large force of door-to-door salesmen. States did not like it one bit. They stepped up enforcement of licensing laws against peddlers, and they imposed taxes that effectively put the sellers of out-of-state products out of business.

Singer had both the incentives and the muscle to break those barriers. It urged its local agents to ignore state laws so as to invite prosecution and conviction and then hired high-powered law firms to contest the state laws. In 1875, the strategy bore fruit: in *Welton v. Missouri*, the Supreme Court invalidated a Missouri law that required

peddlers—defined as persons selling commodities "not the growth, produce, or manufacture of the State"—to pay a license fee for the privilege of doing local business. The prohibitory force of the Commerce Clause, the Court held, "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character"—that is to say, up to and including final retail sales.[2]

Precariously perched on this doctrinal beachhead, Singer was still exposed to a barrage of hostile fire. Virginia, in one variation on a common theme, enacted a license fee that effectively forced I.M. Singer and similar companies to disband their state sales force. The Supreme Court invalidated that scheme, too, along with several others.

A similar pattern unfolded in the meat industry. The invention of the refrigerated railroad car sharply reduced transportation costs, relative to on-the-hoof transport. The "Big Four" Chicago meatpackers, led by the Swift Company, soon proved able to ship dressed beef over long distances. But Swift did not become dominant because of the refrigerated railroad car. Rather, it was the first to appreciate the need for a vertically integrated distribution network to produce, store, and deliver meat all the way to retailers. Local wholesalers, organized in 1886 as the National Butchers' Protective Association (BPA), organized boycotts and mobilized local opposition—a losing cause, in light of the national firms' low prices and the superior quality of their products.

The local monopolists' best bet was "federalism"—specifically, the states' right to ensure their citizens' health and safety. That claim was more than colorable. There was a real risk of sales of spoiled goods to consumers who cannot readily ascertain the quality

[2] *Welton v. State of Missouri*, 91 U.S. 275, 282 (1875).

of the product, and modern solutions (such as branding by producers or supermarkets) were decades away. Even so, when states mandated inspections of out-of-state beef, the Chicago producers prevailed. Health and safety concerns, the Court insisted, would have to be met by measures less fraught with protectionist risks.[3] Evasive state maneuvers enacted at the BPA's behest (such as discriminatory inspection fees) were likewise struck down by the Court.

III.

Three decades after *Gelpcke*, the justices had decided some 300 railroad bond cases. Commerce Clause cases also numbered in the hundreds. And those sets of cases were part of a much larger universe of interrelated doctrines on federal removal jurisdiction, unconstitutional conditions, and the law of foreign corporations. All those doctrines show the same pattern: states displayed boundless creativity in expropriating interstate commerce. The Supreme Court displayed equal creativity and determination in adjusting constitutional doctrines to forestall that result. Though highly technical, those doctrines were anything but lawyerly abstractions. They were a central means—make that, *the* central means—of the nation's economic and political integration. Deliberately and self-consciously, the Court strove to reconcile democracy and corporate capitalism on a constitutional basis. The doctrines I have sketched—the federal common law, and the dormant Commerce Clause—left states and the Congress ample room to regulate

[3] *Brimmer v. Rebman*, 138 U.S. 78 (1891).

commerce. But they had to do so within constitutional metes and bounds; and in the shadow of a commerce-protective structure, not on an open field.

From our modern vantage, the Court's enterprise looks suspect. Grant the benefits of vertical integration and large-scale industrial organization, and the pernicious effects of state protectionism: isn't it for *Congress* to decide those questions? Maybe. But Congress had neither the means nor the motives to decide them. Either the Court would establish and protect a viable structure, or no one would.

The point is susceptible to something closely approximating proof. As I mentioned, insurers were not covered by the Court's doctrines. Starting in the 1870s, they begged and lobbied Congress to provide a remedy by providing them with an optional federal charter. My colleague Peter Wallison knows that policy proposal well—not because he is an expert on nineteenth-century law, but because the campaign for a federal insurance charter continues to this day, with no happy end in sight. Or consider the rare case where the Gilded Age Congress actually did intervene—the Sherman Act: as laymen are startled to hear but antitrust lawyers know all too well, that statute prohibits, by its terms, *any* kind of contract. Congress left *to the Supreme Court* the task of figuring out rules of reason to make sense of a statute that lacked both.

Behind those illustrations lurk the deep sectional divisions of the age. While the America of the Gilded Age was divided in many ways, a true chasm ran between the industrial core (the Northeast and Great Lakes states) and the agricultural periphery. At stake in the cases over railroad bonds, peddler taxes, and meat inspection was whether the surplus of those activities would accrue to capital and labor in the producer states or else,

be expropriated by “consumer” states, mostly the South. The Supreme Court’s doctrines did two things. First, by opening the Southern markets, the Court created for American corporations economies of scale that were unavailable anywhere else on the globe. Second, by insisting that the profits find their way home to the producers, it cemented an alliance between labor and capital that spared America the class warfare that accompanied industrialization everywhere else.

Could that regime have been replicated in Congress? No way. Meat inspection? Every state except Illinois would have insisted on protectionist rules. Sewing machines? There would have been a Machine Sellers Protection Act before you can say “Singer.” (We did in fact get an economy-wide statute of that sort in 1936—the egregious Robinson-Patman Act.) The Supreme Court’s relative insulation from sectional and interest group interests, and the need to formulate general rules that cut across industries, prevented an otherwise certain outcome—the dissipation of economic gains in Congress, and institutionalized class warfare over the scraps.

Do not take this lightly. Many countries—Germany, Britain, France—underwent a transition to large-scale capitalism around the same time. As the renowned Harvard sociologist Barrington Moore observed, no democracy seems to have undergone it willingly. Capitalism’s destructive side appears to leave only two options—endless side payments to the losers, which wipe out the gains; or else, class warfare and, as in Germany, authoritarian politics. America alone escaped the horns of that dilemma. As Cornell’s Richard Bensel, one of the keenest experts on the period, has shown, a principal

reason for that good fortune was the Supreme Court's signal contribution to "The Political Economy of American Industrialization."[4]

The Court's resolve to play that structural role, I submit, was not judicial "activism." It was firmly rooted in a fundamental constitutional precept and intuition. Alexander Hamilton argued that political integration can be achieved in only one of two ways—by force of arms, or by law (the "mild influence of the magistracy," as Hamilton put it). A century later, that alternative was still very real. The justices of the Gilded Age were well aware of it, and they acted accordingly.

IV.

Fast-forward a century: the Supreme Court has ceased to play a structural role—not by desuetude, but by deliberate decision. Diversity jurisdiction, the primary structure venue, has been driven out by federal question jurisdiction, which is principally a rights venue. (Think "Bong Hits for Jesus": that is a federal question.) One of the Gilded Age doctrines I described is dead: a century's worth of federal general common law was buried—as *unconstitutional*, no less—in the famous *Erie Railroad* case (1938). My second example, the dormant Commerce Clause, has been stripped of its extraterritoriality prong: California or Kansas may regulate the Internet, barring only an overt preference for local residents. And even that anti-discrimination remnant is now widely viewed as illegitimate. In a recent decision (*United Haulers v. Oneida-Herkimer Solid Waste*

[4] Richard Bensel, *The Political Economy of American Industrialization, 1877-1900* (Cambridge: Cambridge University Press, 2000.)

Management Authority), the Supreme Court ominously compared the dormant Commerce Clause to *Lochner*.[5]

In the Supreme Court's own telling, this abandonment embodies a shift from federal judicial imperialism to judicial neutrality: less judicial control over the structure of the political process *ipso facto* means more democracy—and let free citizens make of it what they will. But that posture is at best a conceit. The decision *against* structural checks is a decision *for* political pathologies and exploitation.

Should you have the misfortune of wandering into a small town in Jackson County, Mississippi or Morris County, Texas, you will find the social structure virtually unchanged from Melvin Fuller's days. Everyone in town owes his livelihood to a single individual. That local lord resides in a big, imposing mansion—the only one around, separated from the shacks. He has prospered by expropriating rents from interstate commerce. He is a "philanthropist," meaning that he shares a few table scraps with the school band and the fire brigade. But the local lord is not a plantation owner; he is a trial lawyer. He has made the cotton fields into a private airstrip. And the former sharecroppers have found new employment as—the jury pool.

What does this have to do with the judiciary's structural surrender? Everything. Under the old constitutional structure, local lords and monopolists operated under severe constitutional constraints just as soon as they entered into the interstate commerce they

[5] "There was a time when this Court presumed to make such binding judgments for society, under the guise of interpreting the Due Process Clause. See *Lochner* v. *New York*. We should not seek to reclaim that ground for judicial supremacy under the banner of the dormant Commerce Clause." *United Haulers Association* v. *Oneida-Herkimer Solid Waste Mgm't Authority*, 127 S. Ct. 1786, 1798 (2007) (Opinion of Roberts, C. J., internal citations omitted) *See id.* at 1802: "[T]he Court's analogy to *Lochner v. New York* suggests that the Court should reject the negative Commerce Clause, rather than tweak it." (Thomas, J., dissenting, internal citations omitted.)

sought to exploit. Correspondingly, parties in interstate commerce enjoyed robust protections against local exploitation. Those constraints and protections have waned or been eliminated outright. In fact, the now-operative rules systematically steer business the local monopolist's way.

Back then, diversity cases were routinely decided under general common law. Now, the ironclad rule of *Erie Railroad* is that they must be decided under *state* law—in federal court, assuming a defendant can even get to that forum, under the state law in which the federal court sits. Since diversity cases by definition implicate more than one state's law, the question then arises whether a state court is obligated to respect the law that obtains in the defendant's state. The Constitution speaks directly to that question: it says that each state shall give "full faith and credit" not only to sister-states' "judicial proceedings," but also to their "public Acts." The Supreme Court, too, has spoken directly: it has said, in its most recent pronouncement, that, in the context of public acts, *full* faith and credit is satisfied by *no* faith and credit. The petitioner in that case was not some opportunistic corporation but the State of California, whose tax officials had been dragged into a Nevada court. Under California law, the officials enjoyed immunity; in Nevada, under Nevada law, they were stripped of it. Responding to California's argument that the constitutional language must mean *something*, the justices had this to say: "We decline to embark on the constitutional course."[6] The case is *Franchise Tax Board v. Hyatt* (2003), and the decision and opinion were unanimous.

[6] "Without a rudder to steer us, we decline to embark on the constitutional course of balancing coordinate States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause." *Franchise Tax Board v. Hyatt*, 538 U.S. 488, 499 (2003) (Opinion of O'Connor, J.)

Under those rules, what prevents plaintiffs from suing in jurisdictions that will reliably home-cook out-of-state defendants? Answer, "nothing." The strategic choice of law and "forum-shopping among states," the Supreme Court has said, is "reserved for plaintiffs."[7] (That, too, is a direct quotation.) You wonder why there are judicial hellholes? The mystery has been solved. They are the inevitable result of a Court that abjures a coordinating role.

V.

The doctrines I just sketched share two characteristics. First, they have no constitutional basis. Second, all of the decisions, from the *Lochner* comparison to the "we decline" morsel to the pro-plaintiff choice-of-law pronouncement, were written and joined by *conservative* justices. Justice Alito alone is wholly innocent and, to his great credit, has firmly defended the dormant Commerce Clause.

Why would conservative justices read the Constitution as a trial lawyers' Bill of Rights? The answer takes us back to the connection between rights and structure. If rights proliferation is bad because it is anti-democratic, then the implicit prescription—less judicial intervention, more democracy—must also apply to structure. "Democracy" is whatever an unconstrained political process throws up. If the people do not like the results, let them elect someone else. So goes the train of thought. But its destination is a

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[7] *Ferens v. John Deere Co.*, 435 U.S. 516, 534 (1990). While contained in a dissent, Justice Scalia's formulation accurately describes the binding principle of *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941).

very grim place. And the conductors presuppose a coordinating capacity that our political institutions no longer possess—if, indeed, they ever did.

The nineteenth century trajectory of the dormant Commerce Clause and federal common law, I said earlier, proves that Congress was simply incapable of supplying the structural function of those doctrines. In recent times, the proofs have continued to accumulate. In 1959, the Supreme Court effectively repealed dormant Commerce Clause restrictions against the extraterritorial state taxation of business income.[8] The Court acknowledged that the field needed coordination, and begged Congress to provide it. A half-century later, we are still waiting. In 1964, in a famous essay, Judge Henry Friendly endorsed the demise of a judicially enforced Full Faith and Credit Clause, already in progress at the time—but earnestly urged Congress to legislate a desperately needed statute to coordinate jurisdiction and choice of law.[9] If the saintly Judge Friendly is looking down on us now, he will see that no such statute exists; and, seeing all of history in the blink of an eye, he will tell us that it never will exist. Mind you: Judge Friendly recognized the need for legal structure in this field *before* the advent of modern class actions, the emergence of an organized litigation industry, and migrating asbestos mass torts. To no one's surprise, the Court's repeated, desperate calls for Congress to clean up *that* "elephantine mess" have likewise gone unheeded.

I seriously doubt that any Congress, ever, had the ability to play the coordinating role that the modern Court's doctrines presuppose. I doubt, even more seriously, that the

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[8] *Northwestern Cement Co. v. Minnesota*, 358 U.S. 450 (1959)

[9] Henry Friendly, "In Praise of Erie--And of the New Federal Common Law," 39 *N.Y.U. L. Rev.* 383, 411-20 (1964)

Founders *expected* Congress to be capable of playing that role. Be that as it may, though, the modern Congress most certainly lacks the judicially wished-for coordinating capacity. Congress is now a "universalist" institution, which is the political scientist way of saying: "I scratch your back, you scratch mine." Except under rare conditions, laws get enacted either near-unanimously (because everyone has been paid off) or else, not at all. Even the recent stimulus bill was passed only because it stimulated every Democratic interest, plus three Republicans.

A closely related phenomenon is the explosive growth and increased power of semi-autonomous governmental or quasi-governmental agencies. Products and profits disappear in hellhole jurisdictions; no one checks their exploitative tendencies. Entire industries are reorganized in multistate settlements under the auspices of the National Association of Attorneys General. Any AG in the country can unleash these proceedings; no one controls or coordinates them. No one really governs the agencies of the City of New York; most operate under open-ended judicial consent decrees. Despite much agitation, we do not have a reliable, knowable accounting regime for public corporations. Technically, those rules are the business of the Public Corporation Accountability Oversight Board, affectionately know as "Pekaboo," a wholly independent and nominally private body that combines rulemaking, prosecutorial, and for good measure taxing powers. But Pekaboo insists that it is only an "inferior" bit player and doing what it is being told. Told by whom? By the SEC, another independent body. By congressional subcommittees. Or maybe by Arthur Levitt.

Is any of this going to change? Why, yes: it will go from bad to much worse. James Madison proffered a sophisticated theory why Congress would be capable of enacting public-regarding laws, as opposed to factional dross. The central premise, though, was what Madison called "distance" between the electorate and the legislators. We now call that "agency slack," and the fact is that there isn't any. Every Congressman and Senator is perfectly monitored by his or her constituent interests. Coordination cannot happen because it requires mutual concessions, which no legislator can make. Similarly, the proliferation of functionally differentiated, semi-autonomous government organizations is an irreversible by-product of economic modernization and political democratization. "Democracy"—in the anarchic sense of interest group politics and institutional fragmentation—isn't the answer to our problems. It is their cause. A responsible constitutional jurisprudence would reflect that fact. It would re-commit the Court to its principal constitutional task: supply structure.

VI.

In urging that re-commitment, I do not suggest that federal judges act as a *National Review* in robes—standing athwart history, and yelling "stop." The point of institutional design, constitutional norms, and grants of judicial power is not to arrest or reverse the course of history. The point is to bound the equilibrium outcomes and to intervene when we can be confident that intervention translates into improvement, on a constitutional margin. Think of antitrust law as an analogy: No one believes that the courts are the first line of defense against anti-competitive conduct. No one believes that they should superintend private arrangements on an on-going basis. But we do not on that account

discard judicially enforced rules against naked cartels. Nor do we simply say, "Let Congress provide." The Supreme Court has been quite willing to cultivate and coordinate this field on its own.

If I were inclined to sarcasm and point-scoring, I would note that antitrust law supplies a coordinating function because it is a pristine form of federal common law—the very thing that *Erie Railroad* supposedly prohibits. Since I *am* so inclined, I *do* so note. But the analogy carries further. In antitrust law, courts generally trust economic competition but intervene when conspiracies are clearly afoot. We should adopt the same approach with respect to constitutional law and political markets.

Competition as a constitutional principle separates political pathologies that, so to speak, come with the democratic territory (like congressional universalism) from those that are constitutionally suspect, or even prohibited outright. By way of example: one pro-competitive coordination rule of thumb is a baseline of exclusivity. If the FDA has been entrusted with regulating drug approval or the FTC, tobacco advertising, only the strongest evidence to the contrary should overcome the presumption that the authority is exclusive. In a characteristically brilliant essay, Richard Epstein and I have developed a workable doctrine along these lines under a catchy moniker: one problem, one sovereign.[10]

A close corollary is that *joint* exercises of public authority are inherently suspect. As it happens, an application of that principle is right there in the Constitution. Article I

[10] "Conclusion: Preemption Doctrine and its Limits," in, *Federal Preemption: States' Powers, National Interests*, ed. Richard A. Epstein & Michael S. Greve (Washington, D.C.: AEI Press, 2007), 311-312.

§10 categorically forbids states from making treaties with one another, or with foreign nations. And it forbids them from making any other "compact or agreement" without the consent of the Congress. Predictably, though, the Supreme Court has done with that "Compact Clause" what it has done with all other inconvenient structural provisions: it has read it out of the Constitution. In a 1978 case, the Court held that the states may do jointly whatever they may do individually, without congressional consent.[11] In other words, the Compact Clause forbids nothing that is not already illegal. On that supposed authority, the states in 1998 banded together with one another and with the major tobacco producers to commit what my friend Jonathan Rauch has called "the constitutional crime of the century"—the imposition of a $250 *billion* tobacco excise tax that no legislator, state or federal, ever voted for. On that same authority, states have signed greenhouse gas compacts with each other, and with foreign nations, without congressional consent. In my estimation, federal courts should enjoin those arrangements. In so doing, they would re-impose on our faction-ridden politics structural constraints that are both badly needed and directly required by the Constitution.

So there is my program. I fear that it will leave many of you disappointed. I have no "Dirty Dozen" mega-precedents to overrule; no grand "presumption of liberty" that will bring the Constitution back from exile; no fifth justice on Injured Reserve whose activation will bring victory at last. A re-commitment to structure would mean cases without sex appeal, and mostly without sex. It would mean doctrines that only lawyers

[11] *U.S. Steel Corp. v. Multistate Tax Commission*, 434 U.S. 452 (1978)

can comprehend and decisions that proceed in an incremental, common-law-like fashion, not by bold declarations. Structure courts aren't given to dramatic gestures, because gestures don't structure anything. In my estimation, that dial-down is actually a virtue: structural cases compel judges on all sides to argue like lawyers, as opposed to oracles or culture warriors. I do concede that my program lacks the inspiring, constituency-building appeal of an originalist "no more rights" program, or for that matter a libertarian "more of our rights" program. Those programs, however, would leave the pathologies of our politics unchecked. A structure court would attend to them.

The hard question is how far it could get. That is primarily a question not of legal doctrine, but of politics. Seemingly arcane structural doctrines can be and have been every bit as controversial and ideological as, say, abortion. The Fuller Court's diversity jurisprudence and general common law were targets of relentless attacks and agitation long before *Lochner*, and they remained its targets long afterward. Whose attacks? Politically, state governments and their protectionist hangers-on, such as the Butchers Protective Association. An assortment of what we now call "public interest groups," such as prohibitionists. And, of course, trial lawyers. Intellectually, the law faculties at Harvard, Yale, and Columbia. The Court's course, they all chirped, thwarted democracy and democratic aspirations.

What protected the Court and its jurisdiction against that assault? Answer, business, and the Republican Party. Back then, the GOP had the good sense of not having a legislative program at all, knowing full well that any program would fragment its electoral base. Instead, the GOP defended the Supreme Court's diversity jurisdiction

against constant attack in Congress; appointed and confirmed justices who would exercise it; and dissipated the proceeds of the tariff to its friends. The permanent Republican majority of those decades rested on a simple formula: judicial ordering; tariffs; earmarks all the way.

That political context illustrates my final brief points. One, constitutional understanding is not simply a matter of having the "right" fifth justice. A structure court presumes, or will have to create, a politics that creates room for that role. Two, a judicial re-commitment to structure and coordination would be an intensely ideological affair. A judicial supply of structure translates into a competitive, disciplined politics. Judicial abdication at that front translates into a "democracy" where any faction enjoys the "active liberty" of occupying some institutional bastion any day of the week, and where the only secure expectation is permanent instability. That was the choice before the Fuller Court. It is our choice today. Whose side are you on?

Our current constitutional debate evades that question. The contestants fight about rights—that is to say, external barriers to a politics that all presume to be an unstructured mess, a factional grabfest, beyond judicial purview. That is not my answer. My answer is James Madison's. He had a word for an unconstrained politics: he called it *anarchy*, "as in a state of nature."[12] We have a constitutional structure calculated to forestall that result. If the Court will not enforce that structure, I'll join the juristocracy chorus after all: Give me my rights.

[12] "In a society under the forms of which the stronger faction can readily unite and oppress the weaker, anarchy may as truly be said to reign as in a state of nature." *The Federalist* 51 (Madison).