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THE CONSTITUTIONAL RATCHET EFFECT

Kevin M. Stack†

Christopher Serkin and Nelson Tebbe take an inductive and empirical approach to constitutional interpretation and elaboration. They ask whether attributes of the Constitution justify interpretive exceptionalism—that is, interpreting and elaborating the Constitution differently than other forms of law.¹⁴⁸ They conclude that the characteristics of the Constitution they consider do not justify interpretive exceptionalism—at most, the “Constitution’s principal distinguishing feature may be the fact that people *think* the Constitution is special—that it has a kind of mythological status.”¹⁴⁹ As Serkin and Tebbe see it, the extent to which individuals view the Constitu-

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¹⁴⁸ Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 703–04, 749–51 (2016).

¹⁴⁹ Christopher Serkin & Nelson Tebbe, *Mythmaking in Constitutional Interpretation: A Response to Primus and Stack*, *supra*, at 1.

tion or constitutional law as special is best explained with reference to a broad cultural gloss, a shared ascription of a particular kind of value to the Constitution rather than any particular feature of our existing Constitution or constitutional law.¹⁵⁰ As a result, interpretive exceptionalism appears to be founded on accepting a mythology of the Constitution's and constitutional law's special character.¹⁵¹ That thought in turn prompts Serkin and Tebbe to worry about the ways in which this cultural identification and valorization of the Constitution poses distinctive risks.¹⁵²

I take up their invitation to consider those risks below, but first notice how different Serkin and Tebbe's approach to constitutional theory and law is from more deductive and top-down theories. Under a more deductive approach, it does not make sense to ask whether observed features of the Constitution (such as the generality of its terms) are able to justify a distinct interpretive approach.¹⁵³ Rather, a justification for the Constitution's special treatment follows from arguments about the Constitution's distinctive authority or distinctive legal role—that is, premises of constitutionalism. On this view, the project of constitutional theory is to provide an account of how constitutional law performs a special function in our legal system, and then to develop interpretive theories on the basis of that ascribed function. The arguments for the divergence in constitutional and statutory interpretation that I make in my first response proceed from that perspective.¹⁵⁴

From Serkin and Tebbe's more empirical viewpoint, they want a showing—some proof—that constitutional law actually performs a distinctive function before they will endorse its distinctive interpretive treatment. For instance, they insightfully argue that constitutional law may not be particularly entrenched in the sense of being less subject to change than other kinds of legal arrangements.¹⁵⁵ So why, they wonder, does it make sense to continue to think of the Constitution and constitutional laws as distinctively serving a preservationist func-

¹⁵⁰ Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 771–72; Serkin & Tebbe, *Mythmaking*, *supra* note 149, at 8.

¹⁵¹ Serkin & Tebbe, *Mythmaking*, *supra* note 149, at 7.

¹⁵² Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 775–76; Serkin & Tebbe, *Mythmaking*, *supra* note 149, at 7–8.

¹⁵³ Kevin M. Stack, *The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains*, *supra*, at 5–6.

¹⁵⁴ See Stack, *supra* note 153.

¹⁵⁵ Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 753–59.

tion.¹⁵⁶ In this sense and others, they insist that constitutional practices should bear out the premises of any constitutional theory, otherwise claims of constitutional authority or function are perpetuating a mythology. This raises deep questions about the aims of constitutional theory, and the relationship between more ideal theory and a cultural study of the practices we identify as constitutional.¹⁵⁷

We need not resolve those higher-order questions, however, because even when we take a more empirical approach, grounds for divergence in constitutional and statutory interpretation still emerge. These arguments for interpretive divergence arise as responses to observed pathologies. Consider, for instance, Serkin and Tebbe's concern that the pervasive view of the Constitution as special produces distinctive risks. The constitutional risks they have in mind might be conceived as a constitutional ratchet with three elements.

The first concerns use of the Constitution in politics. If the Constitution is viewed as a repository of our deepest values,¹⁵⁸ politics can take strategic advantage by casting issues in constitutional terms.¹⁵⁹ Framing an issue in constitutional terms, when successful, "insulat[es] certain topics from political discourse because they ostensibly concern higher-order lawmaking."¹⁶⁰ Second, and closely related, that constitutional framing distances consideration of an issue from the normal politics that takes place in elected bodies and administrative agencies. It also augments the role of legal argumentation.¹⁶¹ In particular, once an issue is decided or framed in constitutional terms, the wide range of policy and evaluative concerns that might otherwise bear on its resolution must be translated into the terms of constitutional argument and accorded the weight that constitutional law grants them. Third, the Constitution's special status in our culture may make it particularly tempting for courts to enlarge the range of issues for which

¹⁵⁶ *Id.* at 758–59.

¹⁵⁷ See, e.g., PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 37 (1999) (explicating the conditions and aims of a cultural study of law).

¹⁵⁸ See Richard Primus, *The Constitutional Constant*, *supra*, at 1–2; cf. Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 771.

¹⁵⁹ Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 775 (commenting on reasons political actors invoke constitutional categories).

¹⁶⁰ Serkin & Tebbe, *Mythmaking*, *supra* note 149, at 8.

¹⁶¹ Serkin & Tebbe, *Is the Constitution Special?*, *supra* note 148, at 772–73.

constitutional law provides an answer,¹⁶² often in the form of a constitutional right.

When these dynamics operate together, they have a ratchet effect of transforming more and more of our political landscape into constitutional politics. On the one hand, the Constitution's special status as a repository of our deepest values means that what is constitutional not only changes with our values,¹⁶³ but changes in a way that expands the scope of issues touched by constitutional law. But once an issue is accorded a constitutional status or right, it alters normal politics about the issue, and to the extent that courts become the privileged forum for resolution of those issues, argument about the merits must move within the constrained model of practical reasoning provided by constitutional argument. As issue after issue is resolved in a form of constitutional law rather than resting primarily under the power of municipal governments, common law courts, state legislatures, Congress, or the federal executive, our already judicialized government becomes subject to the courts in a more profound way.

At an admittedly high level of abstraction, this constitutional ratchet effect may provide a diagnosis of an important dynamic or even pathology within American constitutionalism. It also seems to capture what Serkin and Tebbe worry are the risks or downsides of our view of the Constitution as distinctively important and special in ways that are difficult to tie to its attributes. Let us suppose that this ratchet effect obtains and describes a dynamic in American constitutionalism. Doesn't it, too, have implications for constitutional interpretation and elaboration?

I could imagine several ways in which it would justify principles of constitutional interpretation and elaboration. Here is one way that argument might proceed: lawyers and the public view the Constitution and constitutional law as distinctively important, and the way which they do so ends up producing the ratchet effect just described. Assuming that effect is generally undesirable—whether because it unduly impinges on the scope of issues subject to democratic resolution or for some other reason—an implementing rule could help check the judiciary's tendency to enlarge the scope of issues to which the Constitution provides an answer.

¹⁶² Cf. *id.* at 776 (asserting that political actors leverage the lofty status of constitutional law in political warfare).

¹⁶³ Primus, *The Constitutional Constant*, *supra* note 158, at 1–2.

Such implementing rules have deep roots in the American constitutional tradition. One such rule, framed as a “rule of administration,” was defended by James B. Thayer in his classic article, *The Origin and Scope of the American Doctrine of Constitutional Law*.¹⁶⁴ Thayer argued that when courts are faced with a question of whether legislation is constitutional, the question they should ask themselves is whether “the violation of the constitution is so manifest as to leave no room for reasonable doubt.”¹⁶⁵ As Thayer elaborates this defense of a kind of constitutional minimalism, he argues that “*the ultimate question is not what is the true meaning of the constitution, but whether legislation is sustainable or not.*”¹⁶⁶ Thayer’s rule, developed with regard to the dangers of judicial review of legislation in particular, could be generalized to help address the judicial tendency of finding too many constitutional answers, with courts asking whether the Constitution is clearly violated.

I do not mean to suggest that an approach that mirrors Thayer’s is the only inference that could be made from the ratchet effect, or that such a doctrinal standard would always be effective.¹⁶⁷ But if we see the constitutional ratchet effect as a consequence of the way in which judges mythologize the Constitution, that observation can provide a foundation for principles of constitutional interpretation along the lines that Thayer proposed. Notice that this type of argument for interpretive exceptionalism has a different character than more deductive arguments from constitutional authority that Serkin and Tebbe want to avoid. It begins with an account of political risks or pathologies and defends interpretive principles to address those risks. For Serkin and Tebbe, the focus would be on addressing the constitutional ratchet or other implications of our cultural ascription of value to the Constitution. Others, such as Adrian Vermeule, have generalized this inquiry, developing a theory of the Constitution based on an understanding of how well it manages certain political risks.¹⁶⁸ Following this path leads to arguments for interpretive exceptionalism, but based on functional accounts of risk or institutional tendencies. So even if we proceed, with Serkin and Tebbe, by focusing on how we view the Constitution, not theoretical arguments about au-

¹⁶⁴ 7 HARV. L. REV. 129, 139–40 (1893).

¹⁶⁵ *Id.* at 140 (quoting *Commonwealth v. Smith*, 4 Binn. 117 (1811) (Chief Justice Tilghman)).

¹⁶⁶ *Id.* at 150.

¹⁶⁷ See, e.g., ADRIAN VERMEULE, *THE CONSTITUTION OF RISK* 54–56 (2014) (examining a critique of “parchment barriers”).

¹⁶⁸ See *id.*

thority, why don't those differences, and the dynamics they create, also provide grounds to apply different interpretive principles in the constitutional and statutory domains?

† Thanks to Aziz Rana for his help on an earlier version.

169 Christopher Serkin and Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701 (2016).

170 *Id.* at 749–75.

171 *Id.* at 705–06.

172 *Id.* at 771–75.

173 *Id.* at 774–75.

174 Richard A. Primus, *The Constitutional Constant*, *supra*, at 3–4. Primus's agreement on this point depends on his argument that categorizing a case as "constitutional" depends partly on lawyers' perception that it raises important issues. We address this argument in a moment. Kevin M. Stack, *The Inference from Authority to Interpretive Method in Constitutional and Statutory Domains*, *supra*, at 3 ("[Serkin and Tebbe's article] carefully and compactly chronicles differences in the interpretive norms (what they call arguments) applied by courts when faced with statutory and constitutional questions. Their thoughtful account of