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SUBCONSTITUTIONAL CONSTITUTIONAL LAW: SUPPLEMENT, SHAM, OR SUBSTITUTE?

MARK TUSHNET*

Professor Coenen has given us an extraordinarily valuable examination of subconstitutional doctrines that allow the Supreme Court to influence legislative choice without dictating it.¹ Professor Coenen presents subconstitutional doctrines as supplements to the forms of judicial review that dominate theorizing about constitutional law. Those dominating forms, which I call substantive judicial review, involve the displacement of legislative and executive choice by the courts' specification of constitutional norms. In contrast, the subconstitutional doctrines Professor Coenen describes and commends allow the political branches to pursue their preferred policies, if only they do so in the proper way. But, according to Professor Coenen, subconstitutional doctrines still leave open the possibility of substantive judicial review.

In this brief Comment I make two points.² First, the subconstitutional doctrines appear to have the advantage of allowing elected lawmakers to pursue whatever course they wish, as long as they satisfy the requirements of these subconstitutional doctrines. In practice, however, what appears to be a provisional invalidation based on subconstitutional law turns out to be—and, indeed, might be expected at the moment of decision to be—a final, unrevisable decision.³ Further, courts might strategically deploy

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1. See Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575 (2001). I understand Professor Coenen's reasons for using the term *structural* to describe the rules he discusses. See *id.* at 1583-94, 1596-1603. I prefer the term *subconstitutional* nonetheless, in part because it avoids the kinds of confusions that Professor Coenen is careful to dispel in his article.

2. Professor Coenen mentions these problems near the conclusion of his comprehensive article but does not explore them in detail. See *id.* at 1845-51.

3. I note that some of the doctrines Professor Coenen discusses—the doctrines dealing with no-longer-advanced justifications, desuetude, and changed-facts—might be defended on the ground that they perform the function of cleansing the statute books of laws that legislatures today would not enact but have not yet repealed. This may be because the

these subconstitutional doctrines to avoid the sting of the charge that they are foreclosing legislative choice while effectively doing so. Second, one might fairly question the need for conclusive judicial review in the classic mode precisely because these doctrines are so widely available. Normatively, a combination of full democratic choice coupled with subconstitutional doctrines to ensure that such choice is informed, carefully made, and the like, might be more attractive than a system in which democratic choice is limited substantively by the courts. Exactly what extra value does democratic self-governance get from conclusive judicial review? Pretty clearly, not all that much, in light of the scope of these subconstitutional doctrines.

These two points are obviously in some tension with each other, and I do not wish to urge that one or the other is correct. Rather, I suggest that developing a more complete understanding of subconstitutional doctrines will require us to grapple with these and other objections that Professor Coenen mentions largely in passing. Professor Coenen's survey of subconstitutional law is so comprehensive that I can hope to use only selected examples to support these two observations. I believe, though, that my observations can be extended beyond the particular examples I use.

I. SUBCONSTITUTIONAL REVIEW AS SHAM?

The deep structure, so to speak, of subconstitutional rules is this: The Court says to a legislature, "You tried to accomplish goal X through means A. But, you can't do that. We're not saying that you are precluded in principle from accomplishing goal X. Rather, you can accomplish goal X, but only by using means B or C." The problem with this approach is that means A may be the only *politically feasible* method of accomplishing goal X. The Court *effectively* forecloses the accomplishment of the goal it says is available in principle, by foreclosing the only politically feasible method. And, notably, it does so without having to defend the

legislatures have more important things to do or, more interestingly, because the outdated statutes still have enough supporters to make repeal politically risky. I think this a valuable function, but it pretty clearly does not raise the kinds of questions of democratic self-governance that more robust forms of judicial review do.

proposition that the Constitution properly interpreted really does foreclose the legislature from accomplishing goal X.⁴

An example from Canada provides a useful illustration. *Morgentaler v. The Queen*, Canada's abortion case, invalidated that nation's regulation of abortion.⁵ It did so on what appears in the first instance to be structural or subconstitutional grounds. The statute making it a crime to obtain or perform an abortion also provided a defense. Putting it roughly, doctors would escape criminal liability if they showed that they had obtained the permission of a hospital committee finding the abortion medically appropriate. But, the Canadian Supreme Court said, the facts showed that this defense was actually illusory because hospital committees were unable to give their permission in a timely manner. It would seem, then, that the Canadian Parliament could continue to criminalize abortion by developing a better system through which someone would give the doctors the permission necessary to immunize them from criminal liability.⁶ Things turned out otherwise. Afraid to take a position on what was clearly a divisive political issue, the government allowed a vote on a revision of the abortion law, but made it a "free"—that is, nonparty line—vote.⁷ Parliamentary maneuvering produced a legislative stalemate, and the law criminalizing abortion went unrevised. That law was, of course, unenforceable after the *Morgentaler* decision. A purportedly procedural ruling had conclusive substantive effect.

The *Morgentaler* model can be generalized. A statute results from the confluence of political forces at the time of enactment. Some other statute would have been enacted if those forces had been different. Provisionally invalidating a statute may have conclusive effect when those political forces remain unchanged, because the statute actually enacted may have been the only one that could have emerged from the political process. And, I should emphasize, this may be true even if all participants in the legislative process gave as complete consideration of the lurking constitutional

4. Professor Coenen notes this concern. *See id.* at 1850.

5. [1988] 1 S.C.R. 30.

6. Or, presumably, to eliminate the defense entirely.

7. For a description of the post-*Morgenthaler* legislative activity, see F.L. MORTON, PRO-CHOICE V. PRO-LIFE: ABORTION AND THE COURTS IN CANADA 290-93 (1992).

questions as the subconstitutional doctrines demand. It is not that the legislature failed to consider relevant constitutional issues. Perhaps each legislator fully considered those issues. Then, when the legislators' diverse views were aggregated in the process of enacting legislation, the result was a *statute* that did not—because it could not—reflect on its face any specific position on the constitutional issues.⁸

The foregoing conclusion should be qualified. First, the contours of the political terrain may have changed. In particular, proponents of the policy in question may have gained enough power that they can now do something they could not do earlier: enact a statute that complies with the Court's subconstitutional demands. Some of Professor Coenen's time-linked subconstitutional rules make sense precisely because, as he notes, they provide a chance for a new political coalition to determine whether, and to what extent, it wishes to pursue a policy adopted by a prior coalition. The new coalition might in principle want to eliminate the old coalition's policy, but the new coalition might have higher priorities. Judicial invalidation pursuant to a subconstitutional rule gives the new coalition what it needs without having to affront the old one directly. In this setting the courts act as political allies of a new political coalition, accomplishing part of the new coalition's agenda without taking up the legislature's limited time. One could, of course, wonder whether courts serving this function are demonstrating the kind of independence of politics that we usually associate with rule-of-law ideals.⁹

Second, the Court's decision may give new information to the contending parties, and that information may have some impact on the political balance. Political forces contend over the precise location of an outcome in what political scientists call a policy

8. I emphasize that my argument combines a perspective drawn from political science with the normative concerns of traditional constitutional theory, and that, given my training as a lawyer, I think it would be profitable for political scientists to weigh in on the matters about which they are more knowledgeable than I.

9. A survey identifying the actual time lags between enactment (or reasoned reconsideration, as Judge Calabresi suggested in his opinion in *Quill v. Vacco*, 80 F.3d 716, 735, 738-43 (2d Cir. 1996) (Calabresi, J., concurring)) and the judicial invocation of these time-linked rules would be quite useful as a basis for assessing the contribution these techniques make to the constitutional order.

space.¹⁰ Sometimes the outcome results not so much from the balance of political forces but from contingent facts: agenda control by one or another actor, the press of time as a legislative session ends and opportunities for amendment and compromise disappear, and the like. Many outcomes in the policy space would be politically acceptable to the contending forces. The Court's new decision may shift the result from one point within the policy space of potential outcomes to another.

The doctrines dealing with the "who" of decision making that Professor Coenen identifies may have this effect.¹¹ Consider a President who would like to make policy on some matter, but who faces resistance from Congress. The President can overcome resistance by yielding on some other matter of less importance to him or her. The President's bargaining position is strengthened by a subconstitutional doctrine saying that the President is the only decision maker the Constitution permits. Notably, however, these subconstitutional doctrines do not mean that the President (or other decision maker identified by the doctrines) necessarily prevails. A President who moves too far outside what Congress is willing to accept will be confronted with retaliation in some other area of presidential concern.¹² Again, the subconstitutional doctrines shift the outcome from one point within the policy space defined by the balance of political forces to another, but rarely will they shift the outcome to a point outside that policy space.

With these possibilities in mind, we should also consider that sometimes the Court may want to foreclose the possibility of legislation without openly defending that desire. The Justices may calculate that barring the legislature from using the means it has chosen will have the effect of making further action impossible, as in the *Morgentaler* situation. The idea here is that the Justices

10. See CHARLES M. CAMEYON, VETO BARGAINING: PRESIDENTS AND THE POLITICS OF NEGATIVE POWER 86 (2000).

11. See Coenen, *supra* note 1, at 1773-1805.

12. The well-documented persistence of effective legislative vetoes even after *INS v. Chadha*, 462 U.S. 919 (1983), is an example of the role that political forces continue to play even after the Court identifies a constitutionally mandated decision maker. For a discussion of the persistence of legislative vetoes or their functional equivalent after *Chadha*, see JESSICA KORN, THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO (1996).

engage in a certain kind of political prediction on two levels: one about the public acceptability of a substantive decision, and one about the possibility of legislative enactment of the same substantive policy, but in a different form. A strategic Court would invoke subconstitutional doctrines after calculating that the risk of public rejection of a substantive decision is too high and that the legislature will be unable to reenact the statute in the form that the subconstitutional doctrine suggests would be constitutional.

As Professor Coenen notes, such calculations, if they occur, may be mistaken. The Court developed clear-statement rules to protect states from monetary liability under federal statutes.¹³ It turned out that the beneficiaries of Congress's first efforts had enough power to get Congress to reenact the statutes with sufficiently clear statements. The Court then imposed the substantive limits anyway.¹⁴

The state immunity cases suggest a broader concern. Sometimes invoking subconstitutional rules is a sham, when the Court correctly calculates that those rules eliminate the only political feasible method of reaching the legislature's desired goal. And it is unclear what the subconstitutional rules contribute if, in the end, the Court must confront the underlying substantive question anyway.¹⁵

II. SUBCONSTITUTIONAL REVIEW AS SUBSTITUTE?

Professor Coenen's catalogue of subconstitutional doctrines is so comprehensive that I am left wondering, what role is left for substantive constitutional review? Suppose that courts sincerely deploy these subconstitutional doctrines, structuring decision making by the political branches in a way that ensures reasonably

13. See Coenen, *supra* note 1, at 1624-26 (discussing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985)).

14. See *id.* at 1626. Notably, the substantive decisions have been far more controversial, at least among commentators, than the clear-statement decisions. That is, the Court's first-level political calculation, about public acceptability, appears to have been correct even though its second-level one was not.

15. I note, for example, that Professor Coenen wonders whether the subconstitutional rules developed in the current Court's early state immunity cases should survive now that the Court has imposed a substantive limitation on Congress's power. See *id.* at 1627-29.

full consideration of constitutionally sensitive issues. Why should the courts play any other role?

I am less skeptical than many others of the political branches' ability to deal reasonably with constitutional issues.¹⁶ The Court's subconstitutional doctrines, if anything, are likely to *improve* the political branches' performance. We should consider the possibility that these doctrines improve the political branches' performance so much that the need for substantive review will disappear. One need not be a Pollyanna about this possibility. The political branches will never be perfect constitutional decision makers, under any particular criterion of goodness. But, then, neither will the Court, unless the criterion of constitutional goodness is the purely positivist one that says, "The Constitution is what the Supreme Court says it is." Both the Court and the political branches, that is, will make constitutional errors according to any specified criterion. It could be that the subconstitutional doctrines, properly deployed,¹⁷ reduce the number and significance of the political branches' errors to the point where they are less important than the errors the courts commit.

Professor Coenen notes this argument, albeit in a somewhat sidewise manner. He defends the invocation of subconstitutional doctrines on the ground that they "reflect a wise and deeply rooted commitment to judicial restraint" while "leav[ing] courts with significant powers," particularly traditional substantive review.¹⁸ Professor Coenen's defense of subconstitutional doctrines suggests the form he would give in a direct response to the question of the need for substantive judicial review. As I read his final section, Professor Coenen finds the normative justification for doctrine, whether it be subconstitutional doctrine or substantive judicial review, in long-standing practice supported by "text, tradition, history, and precedent."¹⁹

16. See Mark Tushnet, *Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, DUKE L. J. (forthcoming 2001).

17. That is, taking into account the possibility that the Court will make a mistake in invoking one of the subconstitutional doctrines, just as it can make mistakes in substantive review.

18. Coenen, *supra* note 1, at 1834-35.

19. *Id.* at 1851.

Notably absent from this is an obvious additional candidate: normative democratic theory. The reason for that absence is clear enough to me. Reconciling substantive constitutional review with normative democratic theory has proved enormously difficult. As far as I can tell, all efforts at reconciliation founder on a single problem. There are uncontroversial constitutional norms such as "protect free speech" and "treat everyone with equal dignity and respect." Difficulty arises when we try to figure out what those abstract and uncontroversial norms mean in any particular setting, that is, when we try to determine whether a specific statute contravenes the norms. Reasonable people can reasonably disagree on particular applications even while they agree on the abstract norms. Typically, substantive judicial review is defended on the ground that courts have institutional characteristics that make them more likely than the political branches to select a specification of the abstract norm that lies within the range of reasonableness. That defense seems to me quite hard to make out once we have, as I believe we should have, an appropriately expansive sense of what the range of reasonable specifications of the abstract norms is.²⁰

Skeptics might respond by identifying a Supreme Court decision, decided on substantive grounds, that is unequivocally right according to some criterion. Candidates might be *Brown v. Board of Education*²¹ or *Texas v. Johnson*.²² The general form of my reply to the skeptic would be to identify potential subconstitutional doctrines that might have been invoked to avoid the substantive decision while offering the political branches the opportunity to reconsider their commitment to the questioned statutes. The skeptic might reply that the candidate cases are good ones to test my claim because they are cases where the nearly certain response from the political branches would have been the readoption of the statutes. I think that this reply is a good one for *Texas v. Johnson*.²³

20. For my elaboration of this argument, see MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999). See also FRANK I. MICHELMAN, *BRENNAN AND DEMOCRACY*, ch. 1 (1999).

21. 347 U.S. 483, 495 (1954) (holding school segregation unconstitutional).

22. 491 U.S. 397, 420 (1989) (finding unconstitutional a statute that prohibited flag desecration).

23. I emphasize again that identifying one or more legislative errors corrected by the courts through substantive judicial review is insufficient to establish the overall value of such

I wonder, though, whether there might not be subconstitutional doctrines that would have allowed the Court in *Brown* to insist that imposing a policy of segregation had to be done on the national level (a "who decides" kind of subconstitutional doctrine, in Professor Coenen's terms), pursuant to a clearer statement than existed in any statute on the books in 1954. That would have forced the proponents of segregation to take the initiative in Congress, and my guess is that they would have been unable to obtain enough support there to enact segregation policies even though they had enough power to block the enactment of antisegregation ones.

Subconstitutional doctrines, however, need not be inconsistent with normative democratic theory if they do not foreclose any substantive legislative choice. They clearly do not do so in theory, for their entire point is to ensure full consideration of constitutional norms by the political branches without dictating the content of those branches' conclusions.²⁴ Professor Coenen might have strengthened the case for subconstitutional doctrines by invoking normative democratic theory.²⁵ In doing so, though, he would have been less able to defend subconstitutional review on the ground that, after all is said and done, it preserves the possibility of substantive judicial review. But, it is unclear to me why one should regard that loss as a matter of regret.

CONCLUSION

As Professor Coenen shows, scholars have noticed the existence of subconstitutional doctrines before, and some have even tried to generalize them into a theory of structural due process. Professor Coenen's signal contribution is to demonstrate that subconstitutional doctrines are more common than even prior

review. A full assessment must also consider errors the courts themselves make in exercising substantive judicial review, and determine whether the judicial errors are less important overall than the errors made by the political branches. And, of course, all this depends on there being some agreement among the discussants on what the criterion for identifying errors is.

24. As discussed earlier, subconstitutional doctrines may foreclose substantive choices in practice. See *supra* notes 4-15 and accompanying text.

25. See TUSHNET, *supra* note 20, at 163-65, for a brief discussion of this point. Were I to write that passage again, I would certainly cite Professor Coenen's work.

scholars have thought, and indeed that such doctrines pervade the Supreme Court's work. In doing so, Professor Coenen makes it possible to ask what these doctrines actually do, and whether they are so pervasive that we could get along quite well with subconstitutional doctrine and no substantive judicial review. Professor Coenen's important article does what good scholarship should: open up paths for further exploration. Perhaps this Comment shows that some of those paths might lead to quite unexpected destinations. So much the better for his article.