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STRUCTURAL REVIEW, PSEUDO-SECOND-LOOK DECISION MAKING, AND THE RISK OF DILUTING CONSTITUTIONAL LIBERTY

DAN T. COENEN*

INTRODUCTION

I am very grateful to Professor Tushnet for his probing response to my treatment of structural review.¹ His comments are valuable under the principle of *res ipsa loquitur*, for Professor Tushnet long has been a leading observer of the Court's structural work.² I am especially grateful for Professor Tushnet's encouraging words about my project and its goals.³ We share, it seems, a strong conviction that academic lawyers, political scientists, and ultimately, the courts need to give more systematic attention to structural (or what he would call subconstitutional) review.⁴

Professor Tushnet's own essay focuses on two key thoughts. First, he worries that the Justices might manipulate structural review to

* The author thanks Milner Ball, Randy Beck, Walter Hellerstein, and James C. Smith for promptly delivered comments on a draft of this Essay.

1. See Mark Tushnet, *Subconstitutional Law: Supplement, Sham, or Substitute?*, 42 WM. & MARY L. REV. 1871 (2001).

2. See, e.g., MARK V. TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 201-13 (1988); Mark V. Tushnet, *Legal Realism, Structural Review, and Prophecy*, 8 U. DAYTON L. REV. 809 (1983).

3. 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).

4. The importance of structural review was recently highlighted by the Supreme Court's decision in *Solid Waste Agency v. United States Army Corps of Engineers*, 121 S. Ct. 675 (2001). There the Court applied a federalism-based clear-statement rule and a non-delegation-related constitutional "who" rule to reject an agency's action that represented "a significant impingement on the States' traditional and primary power over land and water use." *Id.* at 684. *But see id.* at 693 (Stevens, J., dissenting) (arguing that regulation did not involve "land use" but "environmental regulation"). For a useful account and evaluation of the recent rise in the Supreme Court's use of proper-findings-and-study rules, see A. Christopher Bryant & Timothy J. Simeone, *Remanding to Congress: The Supreme Court's New "On the Record" Review of Federal Statutes*, 86 CORNELL L. REV. 328 (2001). See also *id.* at 330-32 nn. 10-11 (collecting other secondary authorities).

obtain desired substantive outcomes while avoiding “the sting of the charge that they are foreclosing legislative choice.”⁵ Second, he considers the impact of structural doctrines on the Court’s more traditional substantive work, including by raising the possibility that their now-pervasive use may remove the need for substantive judicial review altogether.⁶

Limitations of time and space foreclose a full reply to these provocative observations. In this Essay, however, I will pause to note some reasons why the “sham decision” critique of structural review is, for me, unpersuasive. I also will offer a few comments on the proper relationship between structural and substantive review. I note, in particular, that an endorsement of “activist” structural review need not lead to a “nonactivist” approach to substantive review, far less its total abandonment. I also suggest that a vigorous embrace of structural rules may well lead to more, rather than less, overall judicial protection of fundamental rights.

I. STRUCTURAL REVIEW AS A SHAM

Professor Tushnet poses the question whether the true purpose of structural review is to facilitate strategic behavior by judges bent on writing their own philosophies into law. On this view, as Professor Tushnet has written elsewhere, “[c]lever judges . . . invoke structural review when they predict that the legislature will be unable to enact legislation that contravenes the judges’ personal preferences.”⁷ They thus “rig’ a desired substantive outcome.”⁸ They pretend to be exercising judicial restraint by declaring that the legislature may reinstate an invalidated law, all the while knowing that, as a practical matter, it cannot.⁹

5. Tushnet, *supra* note 1, at 1872.

6. *See id.* at 1876-79.

7. TUSHNET, *supra* note 2, at 211.

8. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 17-3, at 1686 (2d ed. 1988) (footnote omitted).

9. I recognize that this description does not focus on those situations in which a substantive invalidation is not a realistic option. In such circumstances, judges interested only in substantive outcomes may—because they have no other practical choice—issue a structural invalidation and then just hope for the best. I am not sure I would characterize this use of structural review as a “sham.” I also am doubtful that situations commonly arise in which the Court cannot issue a substantive invalidation if it genuinely wishes to obtain

Why do I doubt that judges often use structural review as a subterfuge for de facto substantive review? There can be no doubt that judicial motivation—like any form of human motivation—is complex. My own sense of things suggests, however, that judges usually state real reasons for real decisions when they set forth their reasons in written opinions.¹⁰ It is difficult to prove this proposition. It seems to me, however, that it corresponds with what we expect of ordinary citizens when they make important formal and public pronouncements. Why should we expect anything less of judicial authorities who are distinctively steeped by training and experience in the importance of truth, precision, and principle?¹¹

Let us assume, however, that judges (or at least many of them) have no qualms about manipulating doctrine any way they can to etch their own substantive preferences into law. In my view, if one aims to achieve substantive outcomes by way of judicial action, there are strong practical and tactical reasons not to rely on structural rules.

The key problem is that the technique “lacks reliability.”¹² From a sham-decision-making perspective, for example, the Court apparently felt it had done enough to lay the death penalty to rest

a substantive result. For these reasons, I believe the following discussion deals with the principal dangers presented by potential sham uses of structural review.

10. My view, which rests in significant part on my experience as a judicial clerk, is not unique. See, e.g., ROBERT S. SUMMERS & ROBERT A. HILLMAN, *CONTRACT AND RELATED OBLIGATION A-3* (3d ed. 1997) (noting that “[w]e believe nearly all judges try to give their ‘real’ reasons when writing opinions”).

11. Professor Tushnet points to the *Morgentaler* case as possibly involving strategic use of structural review. See Tushnet, *supra* note 1, at 1873-74. I lack a detailed familiarity with the case. Based on Professor Tushnet’s description of it, however, the Canadian court seems to have stood on solid ground in issuing a structurally minded invalidation. Put another way, if the political branches’ provision for committee review of the abortion decision was in actuality a dysfunctional and empty gesture, there is reason to believe their work was not carefully done at the outset or that it proceeded from faulty factual assumptions or both. In just such a case, given the significant liberty interest at stake, a judicial mandate to take a second look seems quite reasonable. Nor does the legislature’s failure to reach a new consensus upon reconsideration of the matter prove that the Court was overreaching. Professor Tushnet notes two reasons why this is so: (1) “the political terrain may have changed,” and (2) the legislature may have reassessed its position precisely because of “new information” supplied to it by the judiciary, including with regard to the important constitutional interests at stake. *Id.* at 1874. I consider these same dynamics (albeit in another context) in my article. See Coenen, *supra* note 3, at 1709-21.

12. See TRIBE, *supra* note 8, at 1686.

when it decided *Furman v. Georgia*.¹³ The Court also apparently felt it had done enough to ensure that legal aliens could get federal civil service jobs when it decided *Hampton v. Mow Sun Wong*.¹⁴ And the Court apparently felt it had done enough to safeguard states from damages actions under the Rehabilitation Act when it decided *Atascadero State Hospital v. Scanlon*.¹⁵ In all these instances, however, the law supposedly scuttled by way of a strategic structural invalidation made a roaring comeback in identical or near-identical form.¹⁶ In each of these cases, then, the Court's ostensible purpose failed, for the remand to political authorities produced precisely the substantive result the Court supposedly had sought to foreclose.¹⁷

13. 408 U.S. 238 (1972).

14. 426 U.S. 88 (1976).

15. 473 U.S. 234 (1985).

16. For later developments concerning *Furman*, see Coenan, *supra* note 3, at 1716 & n.572, and *Mow Sun Wong*, see *id.* at 1776 & n.850. For later developments concerning *Atascadero*, see *Lane v. Pena*, 518 U.S. 187, 200 (1996) (noting "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in amendments to the Rehabilitation Act). These three cases, of course, merely exemplify a much broader universe of instances in which judicial second-look interventions led to reinstatement of a prior action taken by the political branches. See, e.g., *Little Rock Sch. Dist. v. Mauney*, 183 F.3d 816, 822 (8th Cir. 1999) (noting that Congress responded to the Court's clarity-based decision in *Dellmuth v. Muth*, 491 U.S. 223 (1989), by clearly abrogating state sovereign immunity under the Individuals with Disabilities Education Act).

17. The point is strengthened by identifying carefully what structural rules are. Professor Tushnet describes them as embodying the following judicial instruction to lawmaking authorities: "You tried to accomplish goal X through means A. But, you can't do that. . . . Rather, you can accomplish goal X, but only by using means B or C." Tushnet, *supra* note 1, at 1872. This description is helpful, particularly if one conceives structural rules to include what I call quasi-structural means-centered proper-fit rules. See Coenan, *supra* note 3, at 1823-28. The "pure" structural rules on which my article focuses, however, might be captured more accurately with this slightly refined shorthand instruction to political decision makers: "You tried to accomplish goal X through means A. But you can't do that unless you do something more to show you really thought about and seriously committed yourself to both goal X and means A. If you do that something more, then you can accomplish goal X through means A (or a means so similar to means A that we would think of it as means A¹, rather than as means B or C)." Maybe this reformulation is too nitpicky. It makes the point, however, that the particular rules we are discussing ordinarily permit lawmakers to reinstall *exactly the same rule* they meant to or did install in the first place. And this point cuts against the argument that judges can tactically utilize structural rulings to frustrate pursuit of "goal X" altogether. After all, while it may be legislatively difficult to pursue goal X not with means A, but with means B or C, in any true remand-to-the-legislature situation, the legislature by definition already has signaled a willingness to utilize means A.

Another reason to doubt the reliability—and thus the common use—of substance-seeking structural invalidations arises out of the passage of time. It is difficult enough for a judge to predict what a sitting legislature will do with a law invalidated on structural grounds. But it will require true powers of prophecy to project what a very differently constituted legislative body will do two, ten, or twenty years down the road. Put another way, even if one can confidently conclude that today's legislature will not reinstate a law invalidated in a structural ruling, that fact does not mean tomorrow's legislature will have the same disinclination. Any judge interested in achieving a substantive end beyond the short term is therefore unlikely to use a structural approach.

One possible rejoinder to these observations is that manipulative judges who unsuccessfully deploy structural rules for substantive ends have a second line of defense. On this view, following restoration of a rule initially jettisoned on structural grounds, the court can simply declare the now-restored rule invalid in a conclusive ruling based on substantive doctrine. Professor Tushnet notes, for example, that the Supreme Court first invoked clear-statement rules when it set out to undermine would-be congressional abrogations of Eleventh Amendment immunities. When Congress responded by legislating abrogations with clarity, he says, "[t]he Court then imposed the substantive limits anyway."¹⁸

There are subplots to this story, however, that highlight the risks inherent in any judicial reliance on the fallback of a substantive invalidation. First, in its initial brush with the substantive question whether Congress could legislate clear abrogations, the Court held that such abrogations *in fact were effective* under the commerce power.¹⁹ To be sure, the Court later overturned that ruling with its decision in *Seminole Tribe of Florida v. Florida*.²⁰ But the Court that took this action was—because of the passage of time—a very different Court from the one that had engineered the Court's original structural clarity-based "invalidations."²¹ In addition, the

18. Tushnet, *supra* note 1, at 1876.

19. See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989).

20. 517 U.S. 44 (1996).

21. During the 11 years that passed between *Atascadero* and *Seminole Tribe*, Chief Justice Rehnquist succeeded Chief Justice Burger; Justices Scalia, Kennedy, Souter,

substantive ruling in *Seminole Tribe* came by way of a five-four vote, accompanied by a pair of particularly strident and comprehensive dissents.²² This fact reveals that a further passage of time may yet undo the current Court's *Seminole Tribe* approach.

The point is that Justices—who do not control the timing of legislative action, the nature of the cases brought before them, or the selection of future judicial colleagues—cannot count on readily correcting errors in their predictions that structural rulings will have a permanent debilitating effect. If uncertainty marks judicial predictions about political responses to structural rulings, even greater uncertainty lurks in predictions about the likely availability of later judicial opportunities to “fix” unsuccessful strategic uses of structural review.

There is another reason to doubt that the Justices often employ structural rules as a subterfuge for pursuing substantive goals. The reason is that there are many other legitimate justifications for putting these rules to work. I already have identified ten possible justifications,²³ and Professor Tushnet's discussion of “policy space”²⁴ suggests another argument for structural rules (as well as their doctrinal first-cousins, quasi-structural “means-centered proper-fit rules”).²⁵

Drawing on the work of political scientists, Professor Tushnet describes the legislative process as often involving choices among a variety of means, each of which is “politically acceptable to the contending forces,” for pursuing a desired goal.²⁶ If this depiction is accurate (and I think it is), structural review often may work neatly to advance both constitutional rights and the values of democratic self-governance. After all, what harm can come from a structural invalidation that pushes a legislature from a constitutionally problematic means to a nonproblematic means located within the same policy space? Plainly no harm arises if the troublesome means

Thomas, Ginsburg, and Breyer joined the Court; and Justices Powell, Brennan, Marshall, White, and Blackmun retired.

22. See *Seminole Tribe*, 517 U.S. at 76 (Stevens, J., dissenting); *id.* at 100 (Souter, J., dissenting).

23. See Coenen, *supra* note 3, at 1834-43.

24. See Tushnet, *supra* note 1, at 1874-75.

25. Coenen, *supra* note 3, at 1823-28.

26. Tushnet, *supra* note 1, at 1875.

won out in the first legislative go-round solely because of “agenda control by one or another actor, the press of time . . . and the like.”²⁷

It would go too far to say the “sham” argument against structural review is itself a sham. On balance, however, it seems to me to carry little persuasive force.

II. STRUCTURAL REVIEW AS A SUBSTITUTE

In the latter part of his essay, Professor Tushnet broaches a question of great importance: What is the proper relationship between structural and substantive review? Professor Tushnet also offers one possible answer, by advancing what we might call the “total-displacement thesis.” As he puts it: “Suppose that courts sincerely deploy these subconstitutional doctrines, structuring decision making by the political branches in a way that ensures reasonably full consideration of constitutionally sensitive issues. Why should courts play any other role?”²⁸

The idea of wholly abandoning “judicial review in the classic mode”²⁹ might seem shocking if it came from another observer. But Professor Tushnet comes to the task having already developed a sophisticated argument in support of the plausibility of this very result.³⁰ That argument, however, does not center on—and indeed treats only briefly—the subject of structural decision making.³¹ In his essay, Professor Tushnet develops the new point that the pervasiveness of democracy-aiding structural rules may bolster (or even independently establish) the case for abandoning traditional judicial review. As he explains: “It could be that the subconstitutional doctrines, properly deployed, reduce the number and significance of the political branches’ [constitutional] errors to the point where they are less important than the errors the courts commit.”³²

27. *Id.*

28. *Id.* at 1876-77.

29. *Id.* at 1872.

30. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999).

31. To be sure, Professor Tushnet’s book does not overlook structural rules altogether. See, e.g., *id.* at 124, 126, 163-64. But his book, unlike his essay, focuses on matters other than structural rules.

32. Tushnet, *supra* note 1, at 1877.

Perhaps some day I will embrace the idea that substantive constitutional review is a bad idea. For now, however, I remain a true believer. The reasons why could spawn an article even longer than the tract that triggered Professor Tushnet's responsive essay. For now, I shall simply rely—as Professor Tushnet predicted I would—on “text, tradition, history, and precedent.”³³ My only embellishment is to invoke as well so-called representation-reinforcement theory.³⁴ Put simply, if a court decides to intervene because it worries that a challenged law came from an impermissibly biased or antidemocratically structured legislature, it seems unsound (at least as a rule) to remand to that legislature so that it can act with bias or self-interest again.³⁵ (By the way, I cannot claim credit for this thought. Its source lies in the earlier writings of Professor Tushnet himself.³⁶)

There are other problems with the total-displacement thesis. Let us assume that a new-age Court, moved by Professor Tushnet's essay, chooses to do away with substantive review because it is persuaded that structural review adequately protects constitutional values. A difficult question would then arise: which rules are structural and which rules are substantive in nature? Most lawyers, for example, probably would identify *Alden v. Maine*³⁷—which broadly protected state sovereign immunity in state, no less than federal, courts—as setting forth a substantive rule. Close inspection

33. *Id.* See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 943 (1992) (Blackmun, J., concurring and dissenting) (“While there is much to be praised about our democracy, our country since its founding has recognized there are certain fundamental liberties that are not to be left to the whims of an election.”).

34. See Coenen, *supra* note 3, at 1689-98. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 183 (1980) (arguing that “constitutional law appropriately exists for those situations where representative government cannot be trusted”).

35. Cases that illustrate the problem of bias might include the school-desegregation and antimiscegenation cases. See *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Educ.*, 347 U.S. 483 (1954). Cases that illustrate problems of self-interest in the form of self-entrenchment might include the reapportionment and poll-tax cases. See *Harper v. Virginia State Bd. of Elec.*, 383 U.S. 663 (1966); *Reynolds v. Sims*, 377 U.S. 533 (1964). For a further discussion of *Brown*, see *infra* notes 41-46 and accompanying text.

36. See Tushnet, *supra* note 2, at 210. For more recent comments on the defensibility of judicial restraint, even in the face of representation-reinforcement problems, see TUSHNET, *supra* note 30, at 157-60.

37. 527 U.S. 706 (1999).

reveals, however, that *Alden* contains elements of a constitutional “who” rule.³⁸ For this reason, we cannot know how courts would characterize *Alden* in a “structural rules only” world.³⁹ This narrow point, moreover, suggests a broader and more important one. The persuasiveness of any argument to the effect that structural rules can serve as an adequate “substitute” for substantive review will depend, in the end, on the number and nature of structural rules the Court is willing to recognize.⁴⁰

Professor Tushnet’s discussion of *Brown v. Board of Education*⁴¹ illustrates one difficulty along these lines. Anticipating the predictable *Brown*-based attack on the total-displacement thesis, Professor Tushnet asks whether “there might . . . 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.”⁴² On this view, a Court limited to using structural rules might have decided *Brown* by applying a sort of “dormant Section 5” constitutional principle.⁴³ In other words, just as a state must welcome nonresident businesses into its markets,⁴⁴ a state would have to admit minority students to its majority schools—unless Congress issued an “unmistakably clear” statement to the contrary.⁴⁵ I suspect that most observers who celebrate *Brown* will take little comfort in this line of analysis. For this approach to have

38. See Coenen, *supra* note 3, at 1803 n.924.

39. Similar uncertainties mark other rules too. For example, would courts deem evolving standard rules, *see id.* at 1713-21, substantive or structural? How about strong manifestations of “form based” structural rules? *See id.* at 1640-55. And what about thoughtful-treatment-of-the-area rules, *see id.* at 1727-34, or less-restrictive-alternative and other forms of quasi-structural means-based rules, *see id.* at 1805-28.

40. Interestingly, some existing structural rules might disappear altogether if substantive judicial review is extinguished. For example, it is hard to see how the interpretive rule favoring avoidance of substantial constitutional issues can operate if constitutional issues cannot arise at all. *See generally id.* at 1634-35 & n.255 (discussing the avoidance canon).

41. 347 U.S. 483 (1954).

42. Tushnet, *supra* note 1, at 1879.

43. The phrase combines, of course, a reference to the “dormant Commerce Clause,” *see* Coenen, *supra* note 3, at 1640, and Section 5 of the Fourteenth Amendment, which grants power to Congress to enforce the substantive protections set forth in the Due Process and Equal Protection Clauses of Section 1.

44. *See, e.g., Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27 (1980).

45. *See Maine v. Taylor*, 477 U.S. 131, 139 (1986) (quoting *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 91 (1984)).

outlawed school desegregation in 1954, after all, the Court first would have had to craft a structural rule far removed from anything in our then-existing or present-day constitutional civil rights law. And even if the Court had applied such a rule in *Brown*, Congress could have followed up by affirmatively authorizing all, many, or some forms of racial segregation. In any event, *Brown's* bold and unanimous stroke for liberty and equality would instead have taken the form of a more tentative, watered-down procedural directive.

Professor Tushnet's discussion of *Brown*—and his identification of the total-displacement thesis—could be developed (by others) into an argument that structural decision making on balance is likely to dilute liberty by discouraging substantive review.⁴⁶ This result is far from inevitable, however, because the scope of liberty (or other constitutional values) will always depend on the precise combination and nature of those structural and substantive doctrines the Court chooses to employ. In particular, even if the Court cuts back on substantive review in favor of structural doctrines, its overall level of protection of individual liberty—on balance—might increase. Rights-based structural doctrines, after all, do protect rights. Thus, if the Court greatly energizes structural review, while reducing the level of substantive review only modestly, there may well be a significant net gain in the total protection of liberty. And this calculus does not take account of Professor Tushnet's separate point that shifting some constitutional decisions from courts to political officers may expand liberty by stifling judicial retrenchment and error.⁴⁷

CONCLUSION

Professor Tushnet's suggestion that structural doctrines might serve as a surrogate for traditional substantive review calls attention to a deeper point. The point is that structural rules and substantive rules inevitably operate within the context of an interlocking and dynamic relationship. It is a matter of no small

46. See Coenen, *supra* note 3, at 1848 & nn.1096-97 (collecting authorities).

47. See Tushnet, *supra* note 1, at 1878-79.

moment to ask how the Court's use of each set of rules should bear on how it uses the other.

Perhaps, in the end, the relationship between structural and substantive doctrines will remain unexplained by an organizing theory. Perhaps the very "normative democratic theory" that helps drive structural rules⁴⁸ supports leaving the nature of this relationship largely undefined. Perhaps, in particular, "under-theorizing" the proper relationship between structural and substantive review will wisely create "space for democratic reflection from Congress and the states" that would not exist in the face of "broad" and "deep" judicial pronouncements on this subject.⁴⁹

At least for now, however, this undertheorization is primarily the product of neglect. Professor Tushnet has taken a helpful step toward evaluating the push and pull of structural and substantive doctrines by identifying the possibility of total displacement. For most of us, however, the idea of a legal universe devoid of substantive judicial review will rub too hard against ingrained, and justifiable, notions about how courts and constitutions should operate.⁵⁰ As a result, in the real world, the Court's use of substantive constitutional doctrine is likely to persist. And so too, in the real world, will the fundamental question to which Professor Tushnet wisely has drawn our attention: How should structural review and substantive review fit together and shape one another?

48. *See id.* at 1878-79.

49. CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 9 (1999) (noting that "minimalist" justices "seek to avoid broad rules and abstract theories" (footnote omitted)); *id.* at x (further noting that decisional minimalism "attempts to promote the democratic ideals of participation, deliberation, and responsiveness").

50. *See id.* at x (noting that even "[m]inimalist judges are entirely willing to invalidate some laws" and "are not committed to majority rule in all contexts").