

2014

## Constructive Criticism

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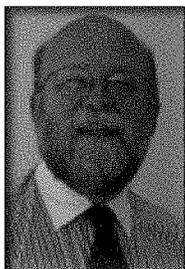
Pat Gudridge, *Constructive Criticism*, JOTWELL (March 21, 2014) (reviewing Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, Duke Working Paper (2014)), <http://conlaw.jotwell.com/constructive-criticism/>.

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# Constructive Criticism

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Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, Duke Working Paper (2014).



Pat Gudridge

In their beautifully clear essay, Duke Professors Bradley and Siegel argue that the clarity of constitutional terms—when we glimpse it—is a result of hard work, however implicit. Clarity turns on construction, the effortful identification and deployment of what we decide are apt presuppositions. Seemingly easy cases of constitutional interpretation and enforcement are, Bradley and Siegel think, therefore of a piece with hard cases. At work just below the surface, we discover the same repertoire of devices that lawyers, judges, and academics use in dealing with ambiguities, gaps, anachronism, history, or similar vagaries: senses of purpose or structure, concern for consistency with established readings, popular understandings, and so on. Circa 1980s cls (critical legal studies) discussions of constitutional law were pretty much right in this regard. “It is important to ask not only whether and why American interpreters regard themselves as bound by text that they deem clear,” they write, “but also *when* they deem the text clear. Text is not merely a fixed structure to be built upon...rather it is also something that is itself partly constructed and reconstructed.”

Are Blue Devils now Red Devils? Bradley and Siegel think not. They believe they are just clearing out confusion about the role of constitutional texts in constitutional thinking. Some theorists posit that constitutional texts as such figure mostly marginally—for example, as focal points within a largely common law analysis (Bradley and Siegel cite David Strauss) or as initial frameworks (they discuss Jack Balkin). But if we understand our readings of constitutional passages as involving the same hard work whether we reach clear conclusions or end indecisively, we may rightly characterize our approaches as strongly textual—as always closely engaging constitutional wordings, even if the literal texts never or hardly ever operate in our thinking in isolation. Professors Bradley and Siegel assemble a substantial list of exemplars in support. They include discussions of the word “Congress” in the First Amendment; Fifth Amendment reverse incorporation of the Fourteenth Amendment’s Equal Protection Clause; the limited limits (so to speak) on the applicability of the Eleventh Amendment, and Lincoln’s reading of the Suspension Clause.

*Constructed Constraint and the Constitutional Text* is a bracing and provocative effort. Its own approach may well be a telling counter to the models of constitutional thought David Strauss and Jack Balkin have developed (I leave this question aside for present purposes). The brute fact of construction—the hard work of assembly implicit in writing and reading—is surely an important thing to remember, whether or not something like a stabilizing sense of clear understanding follows.

No doubt Jacques Derrida is smiling somewhere. Maybe more pertinently, Kenneth Arrow’s classic *Social Choice and Individual Values* comes to mind—a patient elaboration of seemingly reasonable premises for

efforts to aggregate individual preferences that ends up unable to extricate itself from Condorcet's paradox and thus from unintelligibility absent intensive, proliferating efforts by Arrow and his readers to revisit and revise his starting points. Or we may remember Stanley Fish's transformative *Surprised by Sin*, within which the enormous and complicated text of John Milton's *Paradise Lost* is made to appear to be a series of challenges to the convictions of its readers, who are thus prompted, Fish contends, to reconsider repeatedly what properly religious thinking requires. We might not be surprised if Bradley and Siegel's rediscovery of constructed constitutional reading works similarly radically at times to bring to mind more clearly, for example, awareness of the ever-sobering tragedy evident in the Fourteenth Amendment text read entirely, and the enormous difficulty of escaping it clearly written in the history of that amendment's interpretations.

The immediately exhilarating impact of *Constructed Constraint* strikes especially squarely (struck me, anyway) when reading very recent work of the Supreme Court. Clarity is ubiquitous—and so is construction. Consider three examples:

? In *Daimler v. Bauman*, an in personam jurisdiction case concerning a German holding company sued in California because of the company's Argentine subsidiary's complicity in gross human rights violations in Argentina, Justice Ginsburg insists that the test of due process is whether the holding company was "at home" in California (it was not, she concludes). Justice Sotomayor writes separately to suggest that Ginsburg's approach is inane (Ginsburg returns fire furiously)—but every other Justice joins Justice Ginsburg. What gives? The Court plainly wants to treat the case as clear (even if there are even more Mercedes in Los Angeles than in Miami, for example). There are glimpses in the *Daimler* majority opinion of difficult agency problems with perhaps widespread implications in other settings, and an awareness of the strong aversion of European legal regimes to American civil procedure as a mode of dispute resolution. Maybe Justice Ginsburg and almost all her colleagues insist on the clear pertinence of their empty constitutional gloss as a way of avoiding risky hard work?

? In *Walden v. Fiore*, another in personam case, the defendant was a Georgia police officer detailed to assist federal law enforcement officers at the Atlanta airport in scrutinizing cash brought back from Puerto Rico by a professional gambler, who sued in a federal district court in Las Vegas (the gambler's home) to recover damages owing to the too-long seizure of the (evidently legally innocuous) winnings. Justice Thomas wrote for a unanimous Supreme Court, rejecting Nevada jurisdiction over the Georgia officer who—it was supposed—never knew that the gambler lived in Las Vegas. Thomas adroitly simplifies the case in order to make the defendant's ignorance decisive for due process purposes. The status of the defendant as a law enforcement officer has no bearing (most of the cases cited involve private citizen defendants). As a result, a complicated agency issue (again) recedes: should we view the defendant as a state actor or as a federal deputy of sorts? Perhaps bedrock federalism questions remain subsurface as well. Shouldn't federal law enforcement actors be supposed to consider themselves as working in the "United States" *entire* and not in some particular state (especially federal actors working at airports, maybe especially Atlanta Hartsfield-Jackson)? Or should the possible substantial financial impact of litigation costs and damages, if the small town police department were obliged contractually or otherwise to indemnify its federally-commandeered officer, suggest some sort of constitutional limit? How do federalism questions like these interact with ideas of due process of law? As in *Daimler*, the Supreme Court's construction work is apparent—and the clarity of Justice Thomas's opinion, like Justice Ginsburg's, is at the same time both sparkling and unsettling.

? *Kaley v. United States* is more provocative still. The issue was again due process of law. Federal prosecutors contended that a grand jury indictment (here for alleged interstate theft of medical devices) rendered cash derived from the challenged transactions unavailable to defendants seeking to hire their counsel of choice. Probable cause suspended usual property rights and right to counsel concerns. Defense counsel argued that there needed to be an adversary hearing, given the interests at stake, to determine whether, despite the grand jury finding of probable cause, the question of the defendant's guilt was open enough or complex enough to call the

sequestration of the money into question.

Justice Kagan wrote for a majority of six (Chief Justice Roberts and Justices Breyer and Sotomayor dissented), holding that grand jury indictment was decisive. Her opinion is strikingly odd. The first part argues that the Supreme Court had already decided that grand jury indictment authorizes seizures of both the person and property of a defendant pending trial—and that’s that. But Kagan proceeds—insisting that she is writing dictum without any real purpose or consequence—to consider at length whether concerns for procedural due process support a defendant’s claim to a right to be heard, given the inquisitorial character of the grand jury process. Applying *Mathews v. Eldridge*, she concludes not: conceding the importance of defendant’s constitutional interest in counsel of choice, she treats grand jury indictment as nonetheless dispositive, as seemingly mooted any case-by-case assessment of balances of risks and interests.

So *Kaley* is supposed to appear as easy twice-over—or maybe for the same reason stated twice. Grand jury indictment and due process of law are both constitutionally-founded institutions. Shouldn’t a proper analysis take both seriously? Even if Justice Powell’s opinion in *Eldridge* itself is similarly and famously cavalier, subsequent Supreme Court decisions not mentioned by Justice Kagan recast his formula more rigorously. Kagan surely knows all this. It is easy, however, distracted by the appearance of slap-dash, to ignore what she accomplished. Two constitutional “focal points” or “frameworks” are acknowledged in the *Kaley* opinion. We might well conclude that it is the declaration of dictum that is the only dictum. If so, the conflict of constitutional structures—prosecutorial priority as against acknowledgement of individual rights—is clear from the face of Justice Kagan’s own text. Difficulty is clarity? The way remains open going forward?

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Curtis Bradley and Neil Siegel remind us that we should remember *cls*. They are surely right. But read against the backdrop of Supreme Court opinions, their argument also suggests we should revisit Alexander Bickel’s *Least Dangerous Branch*, especially the chapter discussing Hugo Black. Constructions of clarity may undertake complicated, subtle, difficult, controversial, unsettling work—in constitutional law as elsewhere.

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