

## Introduction

I have two claims to offer. One is that constitutional rulemaking is best understood as a means to regulate and manage political risks. The other is that an approach I will call “optimizing constitutionalism” is the best approach to constitutional risk regulation. It will take a book to flesh out these claims, but let me at least introduce them.

### CONSTITUTIONS AS RISK-MANAGEMENT DEVICES

What do constitutions do? Legal and political theory offer several answers. Constitutions create and empower government by coordinating expectations and thereby creating institutions of lawmaking;<sup>1</sup> constitutions tie the hands of majorities in ways that protect majorities from their own predictable excesses and pathologies;<sup>2</sup> constitutions protect the rights of discrete and insular minorities;<sup>3</sup> constitutions further moral principles of equality, freedom, and human dignity;<sup>4</sup> and, most generally, constitutions “design democracy.”<sup>5</sup>

<sup>1</sup> See generally RUSSELL HARDIN, *LIBERALISM, CONSTITUTIONALISM, AND DEMOCRACY* (2003) (arguing that social coordination for mutual advantage constitutes the core of effective liberal constitutionalism).

<sup>2</sup> Compare JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979) (advancing this suggestion), with JON ELSTER, *ULYSSES UNBOUND: STUDIES IN RATIONALITY, PRECOMMITMENT, AND CONSTRAINTS* (2000) (critiquing it).

<sup>3</sup> See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980) (arguing that the Constitution should be interpreted so as to ensure that discrete and insular minorities are able to participate in the political process, thereby reinforcing the principles of democratic self-government).

<sup>4</sup> RONALD DWORKIN, *FREEDOM'S LAW* (1997).

<sup>5</sup> CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* (2001).

None of these answers is wrong, exactly. The problem is to determine whether and how they fit together. Each of the answers identifies a value or good promoted by constitutionalism, but those goods may work at cross-purposes to one another and, under certain conditions, trade off against one another. Empowering popular control through a coordinated set of lawmaking institutions creates a risk of majoritarian oppression; in turn, creating a set of insulated institutions, such as courts, to protect the rights of minorities risks undermining democracy and political equality; and so on. In these cases, the tensions between and among the values of constitutionalism are best understood not as contradictions, but as competing risks and tradeoffs. Our problem is not that we have no good theories of constitutionalism, but that we have too many, with too little understanding of how the plural aims and values of constitutionalism relate to one another under the conditions of uncertainty that bedevil constitutional rulemaking. None of the stock theories of constitutionalism provides an overarching analytic framework for addressing risk-saturated tradeoffs among constitutional goods.

In what follows, I attempt to provide such a framework. I claim that *constitutions, and public law generally, are best understood as devices for regulating and managing political risks*. Whoever and wherever we are, we inevitably have a “constitution of risk,” in the sense that constitutional law structures and regulates the risks that arise in and from political life. Constitutional theory and public discourse is fraught with debates, arguments, and worries about political risks – risks ranging from the large-scale and episodic, such as an executive coup or military putsch, to the small-scale and chronic, such as political abuse of ideological or ethnic minorities, ambient low-level corruption, and official incompetence.

This claim draws on a large and diverse set of insights developed in disciplines such as decision theory, game theory, welfare economics, political science, and psychology. The resulting framework goes under the heading of “risk analysis” or “risk management.”<sup>6</sup> In what follows, I will arbitrage the insights of risk regulation into constitutional law and theory. The key to this approach is to understand constitutions and public law as devices for regulating *political* risks, rather than risks arising from the environment, the market, or technology. Constitutions, whether designed or grown, may be justified and criticized as more or less successful devices for managing

<sup>6</sup> For a comprehensive overview, see DANIEL M. BYRD III & C. RICHARD COTHERN, *INTRODUCTION TO RISK ANALYSIS: A SYSTEMATIC APPROACH TO SCIENCE-BASED DECISION MAKING* (2000).

a range of risks that arise in and from politics, including tyranny and dictatorship, self-dealing by officials, akratic decision making by majorities, exploitative oppression of minorities, and various forms of bias or corruption in adjudication, regulation, and political decision making.

The risk-regulation lens is, if anything, even more suitable for public law and political risks than it is for the sorts of health, safety, and environmental risks typically addressed by ordinary regulation. Given the poverty of our causal theories about the large-scale and long-run effects of constitutional arrangements, constitutional rulemakers inevitably act under conditions of profound uncertainty. They must identify and cope with a set of worries (“risks”) that may or may not materialize, are potentially quite harmful if they do materialize, and that quite possibly compete with one another, because the measures taken to prevent one risk may exacerbate a different risk, or may even exacerbate the target risk itself. This is just the type of decision-making environment that the modern theory of risk management provides tools to comprehend and address.

Although I substantiate this claim by offering examples drawn primarily from the history of constitutional law and theory in the United States, I draw on a broad transnational discourse of liberal-democratic constitutionalism and political theory to motivate the argument and to give depth to the picture. And throughout, I offer local comparisons to the constitutional rules of other polities where appropriate.

#### POLITICAL RISKS AS SECOND-ORDER RISKS

Why focus on political risks, rather than risks to health, safety, the environment, and other goods? And what counts as a “political” risk anyway? The ordinary risks addressed by administrative risk regulation may be called *first-order risks*, which are dealt with by substantive governmental policies. Some of these risks arise as the unintended consequence of human action, as when the uncoordinated actions of financial firms create systemic risks to the economy. Some arise as the intended result of human action, exemplified by the risks of terrorist activity. Some arise from the interaction between human action and the forces of nature, as in risks of flooding, which is the joint product of exogenous natural conditions and human decisions about where to locate people and buildings.

By contrast, constitutional law addresses *second-order risks* that arise from the design of institutions, from the allocation of power across institutions to make first-order decisions, and from the selection of officials to

staff institutions. Constitutional law structures the power of government and allocates it in complex ways to a set of institutions, themselves constituted by the same law. Any such structure creates the chance of various good or bad political consequences, just as any policy for regulating nuclear power creates the chance of various good or bad environmental and economic consequences. Constitutional rulemakers will have to assess and then somehow compare and balance the goods and bads that might arise from various institutional designs and allocations of power across institutions – precisely the sort of decision that risk analysis addresses.

By defining political risks as second-order risks, I do not at all mean to imply that constitutional rulemakers do or should focus solely on the harms that may flow from official abuses, rather than the harms of “private” action that officials may prevent. On the contrary, I will argue, in contrast to the approach taken by Antifederalists and some other members of the founding generation, that official abuses should not be minimized, but rather optimized – in other words, that some positive rate of official abuse is optimal, as the unavoidable byproduct of a regime that optimizes the net overall risks of action and inaction, of abuses and neglect, on the part of both officials and powerful nongovernmental actors. As we will see, some of the founders attended solely to one side of the ledger – the harms of official abuses, especially at the federal level – without paying sufficient attention to the benefits of vigorous governmental action, especially at the federal level. In other cases, however, founders and early commentators widened the lens to include all relevant risks.

Nor do I mean to imply that constitutions or the rules of public law can never, or do never, focus on the sort of health, safety, and environmental risks typically addressed in the modern theory of risk regulation. In recent years, some constitutions have inscribed principles of health and safety regulation in the fundamental laws of their polities. An example is the Constitution of France, which mandates that regulation honor a version of the environmental “precautionary principle,” to be discussed in chapters 1 and 2.<sup>7</sup> By and large, however, what is distinctive about constitutions is that they offer second-order rules, which create institutions and allocate

<sup>7</sup> 1958 CONST. CHARTER FOR THE ENVIRONMENT Art. 5 (Fr.) (“When the occurrence of any damage, albeit unpredictable in the current state of scientific knowledge, may seriously and irreversibly harm the environment, public authorities shall, with due respect for the principle of precaution and the areas within their jurisdiction, ensure the implementation of procedures for risk assessment and the adoption of temporary measures commensurate with the risk involved in order to deal with the occurrence of such damage.”).

official power to and across institutions; it follows naturally that the main subject of constitutionalism is political risk.

#### WHO ARE THE REGULATORS?

I have been speaking of “constitutional risks” and their “regulation.” Who are the regulators of constitutional risks? Are only constitutional founders and designers who establish new constitutional orders at issue, or might other actors be included, such as officials who act within a constitutional system that is already up and running?

I mean to include and to address any actors who make constitutional rules, whether at the stage of constitutional design or at the stage of constitutional “interpretation” and implementation. The scare quotes are to indicate that in most mature systems of written constitutionalism, there is substantial leeway for interpreting the fundamental document one way or another, so interpretation often amounts to constitutional rulemaking *de facto*. (An analogous point holds with at least equal force for unwritten, conventional constitutions.) Certainly this is notoriously true in the United States, given the age, vagueness, generality, and downright opacity – the Delphic character – of many of its constitutional provisions. But it holds to greater or lesser degree in many other constitutional orders as well.

This is not to say that written constitutions are completely plastic, or that there is no difference between writing and interpreting constitutional texts. The upstream choices of the text-writers will sometimes, to some degree, constrain the downstream discretion of the text-interpreters. Justice Holmes famously observed that “judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions.”<sup>8</sup> Within that constrained discretion, however, interpreters make constitutional rules in a straightforward sense.

Put differently, constitutional provisions either will or will not clearly dictate what sort of attitude in-system officials must take toward particular constitutional risks. If the relevant provisions are clear, then it is the constitutional designers who have made the relevant choices about constitutional risk-regulation, and we may ask whether their choices were good ones. If the relevant provisions are ambiguous or silent, then in-system interpreters will have to make the relevant choices about constitutional risk-regulation, and we may instead evaluate the interpreters’ choices. The arguments and considerations I will offer are applicable at either stage.

<sup>8</sup> *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).

Whether through constitutional design or constitutional interpretation, then, some actor or other will make constitutional rules. Whenever they do so they will have to engage in the regulation of constitutional risks, like it or not. They may do so heedlessly or thoughtfully, but there is no escaping the fact that their choices about rules will structure the risk environment of the constitutional order – will help to determine, if only in small measure, whether and when constitutional risks materialize. Any and all constitutional rulemakers, to whatever extent they indeed have discretion to make rules, are thus the audience for and the subject of the claims I will discuss.

#### RISK AND UNCERTAINTY

A clarifying word about “risk” is necessary. The term “risk” has a colloquial sense that includes, under one large umbrella, well-defined decision-theoretic concepts such as risk, uncertainty, and ignorance. I generally mean to use the colloquial sense, except where the context of particular problems otherwise requires.

Strictly speaking, risk, uncertainty, and ignorance all have distinct technical meanings. In decisions made under risk, the decision maker can identify a discrete set of possible outcomes and assign to each outcome both a probability of occurring and a utility consequence if it does occur. In decisions under uncertainty, the possible outcomes can be specified and utilities attached to them, but probabilities cannot be assigned to the outcomes, or at least the probability assignments have no epistemic credentials – they are ungrounded hunches that need not hook up to anything real in the world. Under ignorance, even the range and nature of possible outcomes is itself unclear.

Risk, uncertainty, and ignorance form a sort of intellectual arena in which various camps of decision theorists, game theorists, and statisticians have fought epic battles. Within the normative branch of rational choice theory, the issues include not only the question how decisions under uncertainty are to be made, but whether there exists genuine uncertainty at all. Some Bayesian statisticians, and their fellow travelers in economics and political science, deny that there is any such thing as true uncertainty, on the ground that some probability assignment can always be elicited from the decision maker, even for unique, one-time events. In response, critics of the Bayesian view suggest that probability assignments can vary with the procedure for eliciting them, a clue that such assignments lack epistemic credentials in at least some cases.

Insofar as possible, I mean to stay well away from this contested terrain. In what follows, I will sometimes offer both a risk-based interpretation of relevant constitutional arguments, and sometimes an uncertainty-based interpretation. The loose injunction to design constitutions to avoid the “worst-case scenario,” for example, is irreducibly ambiguous. On the one hand, it can be interpreted in an uncertainty model as a *maximin strategy* for designing institutions: where the probability of various harms is unknown, act so as to maximize the minimum payoff, or to bring about the best worst-case outcome. On the other hand, the injunction can instead be interpreted in a risk model as a choice that embodies a high degree of risk aversion; in the latter case, probabilities are used but bad outcomes are treated as producing higher expected costs than good ones produce expected benefits. Overall, I will attempt to take account of both risk and uncertainty as appropriate perspectives, in different cases and situations. To some limited degree, of course, that itself represents a choosing of sides, insofar as it betrays a belief that genuine uncertainty does sometimes exist, and that the strict Bayesian approach is misguided. To that extent, I plead guilty.

#### STRATEGIC AND NONSTRATEGIC RISKS

There is a tempting contrast between first-order risks and second-order risks that goes as follows. Some of the time or even much of the time, first-order risks are simply given (“exogenous”). They arise from Nature with an emphatic capital N, or from the scientific structure of the world as it really is. From the standpoint of the regulator, the fixed character of (some or many) first-order risks makes their regulation a problem in decision theory, which is the theory of noninteractive, nonstrategic decisions. On the other hand, the comparison continues, second-order risks are inherently strategic and interactive. The risks that arise from the allocation of power across officials and institutions are risks that occur because of the strategic behavior of people within institutions, who choose their behavior in light of what they anticipate that others will do. On this view, second-order political risks must be addressed with the tools of game theory rather than decision theory.

It is surely the case that strategic risks are an important part of political risk regulation, and that game-theoretic tools are an important weapon in the arsenal of the constitutional analyst, and indeed the constitutional rulemaker. At various points in what follows I will point to constitutional

arguments with an implicitly game-theoretic structure, decades or centuries *avant la lettre*. That said, the contrast between first-order and second-order risks is overblown. Almost all first-order risks can be described as strategic and interactive, and not just the ones that arise from intentional action by public enemies, such as the risk of terrorism. The reason that first-order risks can almost uniformly be characterized in interactive terms is that decisions by regulated parties and by officials jointly determine the nature and magnitude of almost all first-order risks. Health and safety risks arising from economic production, for example, are the result of a complex multiparty strategic interaction between producers, employees, unions, consumers, and a potpourri of administrative agencies. Even risks that seem to come from Nature herself, such as hurricane damage, are pervasively shaped by the prior decisions of many parties – in the case of hurricanes, the citizens who live on flood plains and the legislature and agencies that subsidize them to do so.

Conversely, despite their pervasively strategic character, some first-order risks can be treated, for purposes of risk analysis, *as though* they are fixed and exogenous for the time being, and can thus be addressed with the tools of decision theory. Once citizens have bought houses on flood plains, the risks of hurricane damage are largely fixed in the short run, and thus the decision whether an emergency management agency should forcibly evacuate residents in the face of an impending hurricane of uncertain strength and trajectory can be viewed as a problem of decision theory. In the constitutional setting, as we will see, many arguments about the regulation of political risks have an implicitly decision-theoretic structure. Where institutions or patterns of behavior are costly to change in the short run, this can be a perfectly valid treatment, even if the problem is a strategic one in some long-run sense.

#### POLITICAL RISK, PROPERTY, AND CONTRACT

My broad definition of political risk is somewhat nonstandard, but I hope in a useful way. Literatures in the economics of international development, international law, and business strategy define “political risk” narrowly, to refer to “the risk that a government will expropriate property or violate a contract without providing adequate compensation.”<sup>9</sup> In these literatures, political risk management is undertaken by firms contemplating

<sup>9</sup> Stephen J. Choi, G. Mitu Gulati, & Eric A. Posner, *The Evolution of Contractual Terms in Sovereign Bonds*, 4 JOURNAL OF LEGAL ANALYSIS 131 (2012).



ventures or joint ventures in developing nations that are politically or legally unstable. Such firms attempt to gauge the risk of expropriation and to adopt measures – contractual, political, or economic – to minimize that risk. Insofar as the constitutional law of the host country enters the picture, its major or indeed only role is to provide rights protections for investors; here rights serve as a credible signal that the host government is committed to economic development and will not myopically seize investors’ assets for short-run gain.<sup>10</sup> The function of constitutional law as a credible commitment to property protection also underlies a classic account of the political economy of the development of capitalism. On this account, the Glorious Revolution in England in 1688–1689 amounted to a regime change that deprived monarchs of arbitrary power to confiscate property, creating incentives to invest in economic enterprises and making possible the economic development of the eighteenth and nineteenth centuries.<sup>11</sup>

These literatures are useful so far as they go, but they do not go very far. They address only a narrow subset of the second-order risks that arise from the design of institutions and the allocation of powers across institutions. Expropriation of property or arbitrary interference with contract rights is one of those risks, but there are many others that have nothing to do with property or contract, and instead involve risks to liberty, equality, or democracy. In general, the literature on political risks in international development is useful for multinational firms and for a slice of the problems that interest constitutional analysts, but its definition of political risks is too cramped for my purposes.

Accordingly, in what follows, I will generally focus on risks to goods other than property or contract rights; that focus will allow me to explore largely uncharted terrain. This is not to say, however, that I will ignore property rights altogether. Throughout, I use the Supreme Court’s highly controversial 2005 decision in *Kelo v. City of New London*<sup>12</sup> to structure questions about the optimal constitutional regulation of “takings” – government appropriations of property through the power of eminent domain.

*Kelo* allowed a “taking” of private property that was then transferred to another private party for economic redevelopment of an economically

<sup>10</sup> See, e.g., Daniel Farber, *Rights as Signals*, 31 J. LEGAL STUD. 83, 84 (2002) (arguing that “legal reform is a good signal of being truly committed to economic reform”).

<sup>11</sup> See Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutional Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803, 815–16 (1989).

<sup>12</sup> 545 U.S. 469 (2005).

depressed urban area; the decision triggered suffered a barrage of criticism from libertarian advocates of constitutional property rights. Takings generally require “just compensation” to the owner, but there are also restrictions on when government may engage in taking private property at all, most prominently that the taking must be for “public use.”<sup>13</sup> The libertarian critics hotly denied that a transfer of property to a private party, in the interests of economic redevelopment, could count as a public use. In *Kelo*, however, the Supreme Court offered an expansive definition of the public-use requirement, and allowed a wide range of governmental takings; as we will see, that approach fits comfortably with the argument I will develop. The libertarian critiques of *Kelo* focus to excess on one type of political risk – the risk that the power of eminent domain will be abused by officials in the service of interest groups or private-regarding agendas – while neglecting countervailing risks.

But now I have arrived at my second, quite distinct claim; let us turn to that.

#### PRECAUTIONARY CONSTITUTIONALISM AND OPTIMIZING CONSTITUTIONALISM

The book’s overarching theoretical claim is that constitutions and public law are best understood as devices for regulating second-order political risks. But how in fact should such risks be managed? As to that separate question, I offer a separate, narrower claim: *optimizing constitutionalism* is the best approach to constitutional regulation of political risks. Optimizing constitutionalism trades off all relevant political risks, giving them their due weight in the circumstances, without any systematic skew or bias against any particular type of political risk. This second claim is partially independent of the first as a logical matter: one may subscribe to the macro-idea that constitutional law manages political risks without accepting the narrower claim that optimizing constitutionalism is the best approach.

To understand the second claim, some background is necessary. The history of constitutional law and theory has witnessed a running contest between two (families of) competing views. The first view I will call *precautionary constitutionalism*. Precautionary constitutionalism is my construct, as opposed to a label that its proponents have self-consciously

<sup>13</sup> U.S. CONST. amend. V, cl. 5 (“nor shall private property be taken for public use, without just compensation”).