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Potentially Misleading Metaphors in Comparative Constitutionalism: Moments and Enthusiasm

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Professor Sajó properly focuses on ideas of constitutional enthusiasm and constitutional moments associated with Bruce Ackerman.[1] Ackerman developed his analysis out of close study of U.S. constitutional history.[2] Professor Sajó's discussion suggests that it might be valuable to pry apart a number of components in Ackerman's analysis. Those components fit more or less comfortably together in the U.S. context. Yet, they might not be related conceptually, or related empirically in other national settings.

One important component of Ackerman's analysis, for example, is largely descriptive. Ackerman observed that the constitutional system in the United States (understood as the set of fundamental institutions and value commitments that order the nation's government) has undergone a number of important transformations since 1789. He then sought some general account that would explain how and why these transformations occurred. The analytical problem was exacerbated by the fact that the

[1] And, in a different context and for different but related purposes, Jürgen Habermas.

[2] Ackerman applied the idea of constitutional moments to non-U.S. contexts. *See especially* BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION (1992) (using the idea of constitutional moments to discuss developments in Central and Eastern Europe in the early 1990s).

U.S. Constitution itself provides an amendment mechanism that, one might think, is all one needs to explain constitutional transformations. So, Ackerman's problem was to account for substantial change in the U.S. constitutional order outside the framework provided by the Constitution itself.[3] His solution lay in identifying a particular form of popular mobilization, which he called the constitutional moment. Innovations adopted during constitutional moments had the same status as formal constitutional amendments.

This descriptive account addresses a problem in U.S. constitutional history. In doing so, it need not have any implications for constitutionalism generally. In particular need not have any implications for constitutional change brought about by constitutionally authorized means – that is, for changes wrought by ordinary amendment processes.

Ackerman supplemented his descriptive account with a normative one. Here he addressed a general problem of constitutionalism. The problem is to explain why decisions made in the rather distant past properly (or legitimately, to use a term Professor

[3] It may be appropriate to note here that there is a more standard account available for two of the three transformations Ackerman identifies. The shift in constitutional orders that was embodied in the 1789 Constitution resulted from a victory by arms in a revolutionary struggle. The transformation after the U.S. Civil War might also be described as a traditional transformation accompanying revolutionary military victory. And, finally, many scholars of U.S. constitutional law (though not, I should add, me) are skeptical about Ackerman's claim that there was a constitutional transformation during the New Deal.

Sajó uses) constrain the choices made by people today.[4] Ackerman's answer was that public deliberation during constitutional moments had special characteristics, different from those of deliberation during ordinary politics, that gave constitutional innovations made during such moments normative priority over later decisions during periods of ordinary politics. During constitutional moments, he argued, the general public was deeply engaged in deliberation about the public interest, and the people in the aggregate took a relatively impartial view about developing public policy. During periods of ordinary politics, in contrast, the people attended primarily to their private concerns, and used the instruments of government to advance those concerns. So, Ackerman argued, decisions made during constitutional moments were better, in the relevant sense, than decisions made in the course of ordinary politics. That explained their normative priority.

This component of Ackerman's normative account solves a problem associated with the passage of time. It should be noted, though, that it is unnecessary to account for the binding force of constitutional decisions on the political generation that makes those decisions. Or, perhaps more accurately, a special account of constitutional moments is not needed; whatever it is that gives ordinary political decisions binding force for the medium run, can give similar force to constitutional decisions.[5]

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[4] Ackerman called this the intertemporal difficulty, to distinguish it from the countermajoritarian difficulty that had (mistakenly, according to Ackerman) been the focus of constitutional theorizing at least since Alexander Bickel introduced the term.

[5] I do not mean to minimize the difficulties of providing an account of why, for example, a person who disagrees with an enacted statute is nonetheless bound to obey it. All I

A final component of Ackerman's account of constitutional moments has more bearing on the problems Professor Sajó addresses, and it is the component that he invokes. According to Ackerman, during constitutional moments the people express a certain kind of political enthusiasm, and – if all goes well – they will retain that enthusiasm for their constitution after the constitutional moment passes. During constitutional moments the people become committed to the constitution they are creating. The people can create for themselves an identity centering around their constitution if such commitments endure. Again, Ackerman's account derives from the specific historical experience of the United States, in which nationhood has been constituted by the U.S. Constitution rather than, as elsewhere, by nationality or ethnicity.[6] Yet, at this point Ackerman's account intersects with on-going discussions dealing with constitutional developments in Europe.[7]

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mean to suggest is that such an account, whatever it is, will be enough to explain the binding force of constitutional decisions as well (with, I suspect, modifications that would not require the "constitutional moments" apparatus).

[6] For a brief discussion, see MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 50-53, 181-82 (1999).

[7] For example, Habermas has argued that Europe's experience requires that constitutional patriotism – a national identity centered around liberal constitutionalism – replace nationality as the way Europe's peoples are constituted. In addition, as Professor Sajó observes, discussions of whether Europe has a *demos* raise issues related to this component of Ackerman's argument.

Even so, it is important to note that this component of Ackerman's account does not occupy anything like the entire terrain of constitutionalism. Constitutions do many things.[8] At their inception, for example, constitutions create the institutions of government, allowing ordinary political decision-making to occur. Constitutions need not have much enthusiasm behind them for the governments they create to begin to operate effectively.[9]

As Professor Sajó says, there are "other normative grounds for acceptance and identification" with a constitution, beyond the enthusiasm generated during constitutional moments.[10] One is pure procedural regularity. Just as (and to the extent that) ordinary legislation binds because it has been adopted in a procedurally regular manner, so a constitution binds and gains short-term legitimacy from a similarly regular adoption.[11]

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[8] That is true even of liberal constitutions that constitute a nation's identity.

[9] As Professor Sajó puts it, with a caution about the long run, "the presence of an enthusiastic constitutional debate is not required in forging lasting constitutional arrangements but an apparent lack of constitutional commitment and passion of the citizenship might become a problem in case tyrannical or corrupt elites attempt to govern" (draft, p. 9). For more on the long run, see text accompanying note --- below.

[10] Draft, p. 5.

[11] Again, this is not to say that procedural regularity is all there is to making law binding, but only that the problem is no different for constitutions than it is for ordinary laws. And, the qualification *short-term* is necessary because of the intertemporal difficulty that arises as time passes.

Grażyna Skapska has suggested another possibility, which she calls "grass roots constitutionalism," or constitutionalism from below.[12] Grass roots constitutionalism, as I would put it, is a form of what Professor Sajó calls "consequentialist legitimation."[13] As a government created by a constitution goes about its operations, its demonstrable efficacy in stabilizing society, promoting economic growth, protecting civil liberties, and the like gradually generate in the citizenry the kind of loyalty or enthusiasm that Ackerman says arises during constitutional moments.[14] The constitution of Great Britain offers a good model for what I understand to be captured in the idea of grass roots constitutionalism.

Professor Sajó quotes the observation by Kalypso Nicolaidis and Robert Howse, that comitology is hardly as inspiring as the Statute of Liberty.[15] Grass roots constitutionalism, though, arises from performance, not process. If comitology produces the (constitutional) goods, grass roots constitutionalism posits that the citizenry will not care how that comes about. At some point performance might be supplemented by

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[12] Grażyna Skapska, "Paradigm Lost? The Constitutional Process in Poland and the Hope of a 'Grass Roots Constitutionalism," in THE RULE OF LAW AFTER COMMUNISM: PROBLEMS AND PROSPECTS IN EAST-CENTRAL EUROPE 149 (Martin Krygier & Adam Czarnota eds. 1999).

[13] Draft, p. 19.

[14] As Professor Sajó puts it, "performance may offer new sources of legitimacy, *if* it is backed by efficient service delivery by the policy network" (draft, p. 18).

[15] Draft, p. 18 note 19.

symbols and rhetoric,[16] but neither is necessary for grass roots constitutionalism to succeed.

Yet, of course, consequentialist legitimation is entirely dependent on the consequences of the government's operation. If the government fails to deliver, Professor Sajó observes, "popular distrust" will grow in the place of the hoped-for legitimacy, opening up the possibility that the government will be hijacked by "tyrannical or corrupt elites."[17]

There are, however, other possibilities when consequentialist legitimation fails to take hold. I return Ackerman's metaphor of constitutional moments. The metaphor suggests that the process is temporally compressed rather than extended. I have argued elsewhere that temporal compression matters to Ackerman because of his interest in designing a legal doctrine, which courts can readily administer, for dealing with the intertemporal difficulty.[18] No such temporal compression is needed for the other purposes to which Ackerman's analysis directs our attention.

Sometimes, specifically, responses to constitutional crises can occur over an extended period. An example from U.S. constitutional history may be suggestive here. Students of constitutional law focus on the Philadelphia convention of 1787 in discussing the response by political elites to the constitutional crisis they perceived in the mid-

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[16] In this context, I suppose that the canonical text would be THE INVENTION OF TRADITION (Eric Hobsbawm & Terence Ranger eds. 1983).

[17] Draft, pp. 22, 9. I should note – not inconsistent with Professor Sajó's presentation – that such elites can hijack the government even while it *is* delivering the goods.

[18] MARK TUSHNET, THE NEW CONSTITUTIONAL ORDER 3-4 (2003).

1780s. But, in fact, the successful Philadelphia convention was preceded by an earlier failure. In early 1786, prodded by James Madison, the Virginia legislature invited other states to send delegates to a meeting whose agenda would be developing proposals for modifying the Articles of Confederation.[19] Eight states appointed delegates, but only a handful of delegates, representing five states, showed up for the scheduled meeting in Annapolis, Maryland. The Annapolis Convention, plainly unable to propose serious changes to the Articles of Confederation, disbanded, but not before issuing a call for a broader convention, the one ultimately held a year later in Philadelphia. The resolution of the U.S. constitutional crisis, that is, occurred not in a moment, but over a more extended period.[20] What seemed a failure in 1786 was followed by (and perhaps led to) success a year later.

Similarly, failures of governments to produce the goods needed to generate consequentialist legitimation might be followed not by crisis and authoritarian take-over, but rather by constitutional revision. The process of revision might produce constitutional enthusiasm. Or, the re-designed government might turn out to be effective enough to generate conequentialist legitimation.

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[19] *See* "Annapolis Convention," 1 DICT. AM. HIST. 187 (Stanley I. Kutler ed.). I find it interesting that the four-volume *Encyclopedia of the American Constitution* (1986), edited by Leonard Levy and others, does not contain an entry on the Annapolis Convention, although its *Supplement*, published six years later, does.

[20] In this light one might consider that we will discover in later years that the Convention on the Constitution of Europe should be analogized to the Philadelphia or the Annapolis Convention.

Perhaps not, though. Here I briefly address another of Professor Sajó's concerns. He worries that a consequentialist or pragmatic approach to policy-making at the European level might undermine the development of attachment to the principles of the rule of law in Eastern and Central Europe.[21] Professor Sajó emphasizes, in particular, that European-oriented elites – both technocratic and political – might be excessively enthusiastic about pursuing the European project, without paying sufficient regard to political circumstances at the national level.

I have two short comments about this aspect of Professor Sajó's analysis. First, I would focus more on the possible political misjudgments that political elites might make than on the role of political elites as such in the European project. One strength of Ackerman's work is its simultaneous commitment to popular government – meaning, the governing of the people by themselves – and acknowledgement of the role of elites in any

[21] This echoes observations made shortly after the fall of Communism in Eastern and Central Europe. *See, e.g.*, Stephen Holmes & Cass R. Sunstein, "The Politics of Constitutional Revision in Eastern Europe," in RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT --- (Sanford Levinson ed. 1995) (arguing that the new constitutions in Eastern and Central Europe should be relatively easy to amend so that the citizenry could gain experience in making political choices that have real effects on public policy without being thwarted by constitutionalized limits on policy).

smoothing functioning constitutional system.[22] The difficulty to which Professor Sajó directs our attention, then, is not that political elites will play a role in developing public policy, or even that the elites actually in place are committed to the European project, but is rather than their political judgment about what their nations'citizenries will accept may be mistaken.[23]

Second, Professor Sajó's concerns about the rule of law may depend either on a contestable account of what the rule of law is, or, I think more plausibly, on a sociological account of what popular belief in the rule of law is. American legal realism has left a legacy: From a realist's point of view, pragmatic instrumentalism offers a coherent account of the rule of law.[24] The elites who concern Professor Sajó, then, could respond to his concerns by claiming that they *were* acting in accord with the rule of law.

I take it that such a response would not allay Professor Sajó's concerns. I believe he should be taken not to be expressing a concern about the rule of law as such, but instead about popular understandings of the rule of law. That is, pragmatic instrumentalism may be an intellectually acceptable account of the rule of law, but the

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[22] Ackerman refers to "*legitimation through a deepening institutional dialogue between political elites and ordinary citizens*." BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS 85 (1998) (emphasis in original).

[23] A matter about which I have no views.

[24] *See, e.g.*, ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982). The strongest legal realists contend that *only* pragmatic instrumentalism offers a coherent account of the rule of law, but I need not adopt that position here to make the points I want to make.

general public has a pre-legal realist understanding of the rule of law. Observing political elites behaving in a manner inconsistent with *that* understanding of the rule of law, the general public may come to think that today's political elites are no more committed to the rule of law than were the political elites in charge before 1989. Constitutional democracy in the new members of the European Community might then be weakened were such cynicism about today's political elites to become widespread.

I have nothing valuable to say about the foregoing social/political analysis. I note only that, if accurate, the analysis places post-realist elites in a difficult intellectual position. They understand pragmatic instrumentalism to be a permissible, and perhaps the best, understanding of the rule of law. Yet, for political reasons they cannot openly act on their understanding of the rule of law. One solution would be to devise some way to achieve what Meir Dan-Cohen calls acoustic separation in the law.[25] Acoustic separation allows legal decision-makers to communicate one message to a particular audience without communicating that same message to another. In the present context, acoustic separation would allow political elites to act according to the pragmatic instrumentalist understanding of the rule of law, while ensuring that what they do is heard by the general public as consonant with that public's pre-realist understanding of the rule of law. Dan-Cohen's analysis suggests that achieving acoustic separation is always

[25] Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

difficult. It may be particularly difficult in a world where transparency in decision-making has become highly valued.[26]

I conclude by observing that Professor Sajó avoids many of the pitfalls created by Ackerman's metaphor of constitutional moments. As I have suggested, he implicitly does distinguish among the components of Ackerman's analysis, and uses only those components that are relevant to the questions posed to the European Community's newest members by their accession. Other scholars would do well to follow Professor Sajó's example.

[26] Although I am not at all deeply familiar with European Community law and legal processes, I suspect that comitology might have been a way of achieving acoustic separation. And yet, it seems to me, the attacks on comitology for its lack of transparency indicate why, if comitology ever could have achieved such separation, it may not be able to do so today.