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A SPEECH ON THE STRUCTURAL CONSTITUTION AND THE STIMULUS PROGRAM

Richard A. Epstein*

The current stimulus measures enacted by Congress have given rise to a number of complex constitutional issues at both the state and federal levels: the system of checks and balances within the federal government and the distribution of powers between the federal and the state government. The proximate cause for this speech—not in the tort sense, but in the motivational sense—is the recent decision of the South Carolina Supreme Court in Edwards v. Sanford,1 which raised yet another novel variation on an important theme. How does the doctrine of separation of powers as it operates at the state level interact with the basic principles of federalism in situations where the federal government chooses to make available funds to the state government? Does the power to accept or reject that gift reside with the governor or the legislature of the state? Edwards resolved that question in favor of the legislature when it held that the governor was not given the power to make a decision about appropriations that the South Carolina Constitution reserved for the legislature. In this particular context, it meant that Governor Sanford was not in a position to exercise his independent judgment to turn down the stimulus money which the legislature had decided to accept.

Edwards was not, of course, as easy as all this sounded because the particular language of the stimulus legislation, grandly entitled the American Recovery and Reinvestment Act of

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1. 678 S.E.2d 412 (S.C. 2009).
2009 (ARRA), does at one point give the governor the power to apply for funds. But a fuller reading of the entire statute makes it clear that the governor does not have the independent authority on that question, as section 1607(b) provides: “If funds provided to any State in any division of this Act are not accepted for use by the Governor, then acceptance by the State legislature, by means of the adoption of a concurrent resolution, shall be sufficient to provide funding to such State.”

Chief Justice Toal was entirely correct in rejecting the governor's position that ARRA meant to cast aside all the state constitutional rules on separation of power, which defined the relative roles of the governor and the legislature. It may be that the federal government could overrule the state constitution as it applies to the internal distribution of powers within the state by allowing the state's governor to decide whether or not to make the appropriate applications for federal funds. But it would be most unwise to read that aggressive intention into federal legislation when there is any ambiguity in the language of the statutory command. If one ever wants a case in which grammar really matters, Edwards is it. If you decide that the proper applicant is the governor, then you do have a constitutional revolution. If, on the other hand, you decide it is the state legislature that has that power, the governor's role is just to execute the legislature's commands by filing the applicable papers, which is the type of executive action that is subject to the writ of mandate that the South Carolina Supreme Court granted in this case.

I think, therefore, that on the legal issues, the South Carolina Supreme Court was right to conclude that ARRA did not intend to alter the distribution of power between the governor and legislature of the state. I also agree with its view that the questions of constitutional structure and statutory interpretation must be decided independently of one's views of the merits of ARRA or the wisdom of a state decision to participate in the program. I might add that I reach this conclusion even though my own libertarian small-government

3. Id. § 1607(b).
instincts are deeply troubled at the injection of this much government control over the operation of the economy. But at this point we touch on a theme that deserves more elaboration: What is it that South Carolina, or any other state, can do to stop the train once the federal government has made its allocations under ARRA?

For openers, there is little doubt that the legislature understands the value of a new dollar, even one that is subject to some strings, which in this case are not that tight, given that section 1607(c) of ARRA leaves the allocation of funds largely in state hands. The clear implication is that even if the legislature manifestly thought that the taxes that citizens of South Carolina paid to fund ARRA imposed costs that exceeded the benefits that the ARRA program generated to South Carolina citizens, the legislature would still vote to accept the money. There is no way that the federal government will exempt South Carolina citizens from the tax. At this point, the legislature might as well take money that otherwise will be distributed to other states.

This set of economic incentives thus brings us to this question: Given the dynamics at the state level, what happens when we shift our gaze just a little bit to think about the processes that occur at the federal level to generate these programs? In particular, is there any way that one could raise constitutional doubts about the program when it is for practical reasons impossible to decline the program benefits? This is not a new issue. In many ways, the most important case in modern constitutional law on the aggregation of power in the federal government was in the twin decisions of *Frothingham v. Mellon* and *Massachusetts v. Mellon*. The issue in those cases was whether a citizen of a particular state, or the state itself, could bring an action against the national government in order to enjoin a federal expenditure program—in that case, the

4. Id. § 1607(c) ("DISTRIBUTION: After the adoption of a State legislature's concurrent resolution, funding to the State will be for distribution to local governments, councils of government, public entities, and public-private entities within the State either by formula or at the State's discretion.").

5. 262 U.S. 447 (1923) (consolidated action) [hereinafter *Frothingham*].
Maternity Act, which helped supply maternity care to young mothers—on the grounds that it spent money for an object that fell outside the powers delegated to Congress by the United States Constitution.

In order to understand why this question is so important, it is important to remember that the issue is not whether a particular state has a right to refuse to participate in federal spending programs, which gives rise to the dilemma that faces South Carolina under ARRA; rather it is whether the state or its citizens are in a position to challenge the law itself as unconstitutional, at which point all collections from and disbursements to all states are stopped. The first alternative—refusing money—is not going to pose any threat whatsoever to the viability of the program, given that citizens of the United States—and South Carolina, or Massachusetts, as the case may be—are going to be required to contribute funds through taxation, which are now going to be spent under whatever allocation formula Congress devises. To decline the benefits does not allow a citizen to refuse to pay the taxes associated with the program, which puts all political actors—except perhaps the heroic Governor Sanford—in a position where they have to take the funds to programs to which their citizens have been required to contribute. At this point, the key issue is to mount a challenge to the program's constitutionality.

Tactically, this gives rise to a real problem of collective action. A state has many individuals. Some of these people are in favor of the programs, but others are opposed to the programs, so the question is whether the dissidents can challenge a program that a majority of the public within a given state might support by saying that the actions in question lie outside the power of the federal government, or that they offend one of the substantive protections of individual rights. This issue is extremely delicate in dealing with a structural constitution because unless there is someone who has standing to challenge the act in court, the promise created by Marbury v. Madison cannot be fulfilled.

7. 5 U.S. 137 (1803).
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How is judicial supremacy to be maintained if it is conceded that an act may be unconstitutional, but neither a state, a citizen of any state, nor a taxpayer of any state, can challenge it? It looks as though that decision creates the classic but untenable situation in which there is a violation of a right, but there is no remedy that is going to be allowed to rectify it. The point here is that if the Constitution trumps the statute, its approval by legislative majorities cannot insulate it from judicial review.

This problem of minority challenges is not unique, I might add, with respect to the federal government. There are all sorts of lower-level bodies that have to face exactly the same challenge. So for example, if you are running a corporation, and there is a shareholder in it who thinks that your actions are *ultra vires*—that is beyond the power of the corporation—generally speaking, there is a widespread rule that *any* individual shareholder may challenge the expenditure or the transaction in question, and if successful, void it and require the return of the money from the corporation that has been distributed, or it may stop the distribution of the funds or the property if, in fact, the transaction has yet to be completed. The reason for allowing that individual action is one of simple necessity. If that shareholder is denied standing to deal with this structural matter, then no one can address the constitutional issue, which by definition is not to be decided by majority will. The real danger in these cases is that no one will be willing to shoulder the cost of creating a public good for the corporation. In order to generate that incentive to sue, the corporate law allows one shareholder to bring suit to protest against an action as *ultra vires*. If he loses, he gets nothing for his pains. But if he wins, so that a benefit is gained by the corporation, typically he may be reimbursed by the corporation for the service he provides in securing that benefit.

The same kind of rule applies with respect to municipal government.\(^8\) If it turns out that you have a local government that wants to make an expenditure or enter into a transaction that is beyond its powers, any individual within that community

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\(^8\) See, *e.g.*, Crampton v. Zabriskie, 101 U.S. 601 (1879) (allowing a member of a total township to sue to block a contract for which the local government had not obtained the requisite security).
may challenge that expenditure, and if successful, the consequences that follow on reimbursement are identical to those that take place in the corporate context.

So then the question you have to ask—and it is the question that Justice Sutherland had to ask when he talked about this in *Frothingham*—is what is so special about the United States that precludes the use of exactly the same mechanism to coordinate citizen or state challenges that seek to prevent the illegal exactions from taking place? The answers that Justice Sutherland gave to this question are to my mind entirely puny.9

Let's start with the first point, which I think is the most decisive. Justice Sutherland claimed that no person has standing under Article III of the Constitution to raise this challenge. But if you look at Article III, where is the textual ground for that conclusion? The word *standing* is not there.10 The constitutional text says that "the Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made under their Authority."11 Last I looked, the word "all" is not a word which is particularly restrictive. Indeed, if you go back to civil procedure, you will understand that a remedy in equity was exactly the kind of remedy that was used in the shareholder's case to enjoin—that is, to issue an injunction against the illegal expenditures.12 Therefore, as long as the Supreme Court has equitable jurisdiction, it seems to be able to give this type of remedy, i.e. an injunction tailored to the case. Well, it is said that there is no standing here because there is no case or controversy. But that can't be. I knocked on the courtroom door to say that I don't want this money to go out from Congress because I think it is a violation of the Constitution. Some government official, in

this instance Andrew Mellon, the Secretary of Treasury for the United States, wants to make just those payments. The case has somebody suing and somebody being sued. It takes a lawyer with rare constitutional genius to argue that this real, down and dirty, garden-variety fight does not rise to the dignity of a judicial dispute between the two parties.

So then Justice Sutherland continues: well the United States government is really a lot bigger than any local government and a lot bigger than any corporation. True, but irrelevant. The issue of size does not change the dynamics of a suit in equity. All it does is make it all the more important that somebody can represent the mass of unorganized opponents to challenge the legislation. Once that is done, the mechanism to secure one to step forward is exactly the same as it was before. One of the nice things about these equitable injunctions against illegal actions is that they are not vulnerable to differences in scale. You can enjoin expenditures by any government, both large and small. This one-time action, moreover, does not require that a court provide constant oversight as to what the state or federal government does; it just prohibits the action, knowing that compliance is far easier than it is if there is, to take a modern example, an order to develop a program to control carbon dioxide emissions under the EPA.13

Now why does this analysis turn out to be so important? Well, let me start to put the point in a slightly different fashion. Under the original Constitution, dual sovereignty was actually treated as a very important structural feature, with the states as coordinate sovereigns. The only way in which dual sovereignty will be sustained is if there are some activities that are exclusively reserved to the states and others, which are enumerated and defined, which are given to the federal government. Article I, Section 8, which details the powers of Congress, is worded in just that fashion. And those limits on Congress’s power had a lot more bite when Frothingham came down in 1923, for the Supreme Court had not yet reached its ultimate New Deal position on the Commerce Clause, which

made it all-embracive.\textsuperscript{14} So, there was a genuine question as to whether those expenditures, in fact, were within the power of the federal government.

Today, we have, in many ways, a similar problem with respect to dual sovereignty. Because even though it turns out that under the Commerce Clause the United States is allowed to regulate virtually any activity that the states can regulate, there is still a serious question as to whether or not the United States can regulate what the states, themselves, do. You have to understand that under the current situation, the level of federal regulation of state authorities is completely unsatisfactory and is indefensible even if we were to assume—although I think it is incorrect—that the Commerce Clause has the extensive reading that has normally been given to it. For example, under the recent amendments to the Fair Labor Standards Act of 1938—originally New Deal confection—it turns out that the United States government can set overtime pay for all state employees.\textsuperscript{15} It can tell the sheriffs how many hours they can work, what kinds of benefits they can get, what sort of time off they can take, and so forth.\textsuperscript{16} The only constraint the federal government has in regulating state officials is that they have to impose the same regulations on non-public employees;\textsuperscript{17} however, if the state employees turn out to be highly distinctive, like being a sheriff, the federal legislation is necessarily going to contain a level of uniqueness anyhow.

\begin{itemize}
  \item \textsuperscript{15} See 29 U.S.C. § 207(a)(1) (2006) (dealing with maximum hours for public employees).
  \item \textsuperscript{16} See, e.g., Christensen v. Harris County, 529 U.S. 576 (2000) (construing § 207(o)(5) dealing with compensatory time as a substitute for overtime wages).
\end{itemize}
FROM CONSTITUTIONAL LAW TO CONSTITUTIONAL POLITICS.

So, this issue turns out to be extremely important. When you start looking at the federal programs, such as the expenditures under ARRA, all of its purposes seem to be completely laudable. After all, is there anyone in this room who is against economic development? Is there anyone in this room who thinks that jobs are a bad thing to create in a down economy with unemployment rates hovering at ten percent? Are there people who are pleased that the stock market has gone down as much as fifty percent and could possibly go down some more notwithstanding the recent recovery? There is no question that everyone seems to be in favor of the ends that are championed in the statute. But, whenever you are dealing with legislation—and this is, I think, the genius of our Constitution, or at least was the genius of our Constitution—you have to worry as much about the means side of the problem as about the ends side of the problem.

As applied to the present stimulus program, the simple inquiry is whether it is constitutional. Under the current configuration of constitutional powers, the answer is virtually guaranteed that ARRA has no major constitutional infirmities. But this only illustrates the great flaw of the modern American constitutional design, which gives far too much discretion to political figures to label as a general stimulus package dubious programs that allow the Congress to dispense what is, in most cases, just old-fashioned pork.

Now I am not a Keynesian, to put it mildly.\(^{18}\) As a matter of general principle, I do not think increased government spending is a good thing in a time of depression, and let me explain to you why. If you start stimulating through federal programs, you are necessarily going to crowd out private programs that would otherwise be able to tap into those same resources. If you think that the federal government can give you a multiplier effect of 2.0—so that each public dollar spent gets two new dollars of public and private expenditures—you have to explain why private expenditures, which are generally more efficient, cannot

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give you a multiplier of 3.0.

Looking at the particular provisions of the stimulus package reveals all kinds of pork. Senator Harry Reed is a powerful man from Nevada. One of the stimulus programs seeks to build a railroad from Las Vegas to Los Angeles. I wonder for whose benefit? The sad truth is that a high level of discretion at the federal level turns out to invite large amounts of abuse. Indeed, this sorry episode illustrates many of the structural problems that we now face in the United States. On the one hand, we seal off, from any kind of systematic judicial challenge, virtually all major initiatives of the federal government that are designed to regulate the economy comprehensively. We do the same for legislation that imposes taxes on its key activities, often selectively. Nonetheless, there is no one who can challenge their validity as a citizen, as a taxpayer, or as a state. Next, you expand the scope of the federal power under the Commerce Clause, and with it, the scope of the federal power under the Spending Clause. That added measure of political discretion increases not just our collective capacity to do things well, but alas and alack, it also increases our capacity to do them terribly. Any effort to divine the future of this country under our current constitutional arrangements has to be soberly cautious. Generally speaking, Madison had it right. He said that the forces of faction, whether they represent the majority or some minority, will be a scourge on the land, unless you maintain tight constraints on what governments can do.19 Yet, as matters now stand, you will continue to see the types of stimulus programs that we have now.

Governor Sanford, then, was wrong to try and turn down the money for South Carolina that was given to everyone else. But I think that the core of his insight is correct on the economics. That point is this: if there had been no collection of the taxes, on the one hand, and no expenditures of the revenues collected, on

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19. See The Federalist No. 10 (James Madison) ("By a faction, I understand a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adversed to the rights of other citizens, or to the permanent and aggregate interests of the community.").
the other, we should have done far better than we have done now. What was, and is still needed, is a simple broad tax reduction that could stimulate, on a permanent basis, the private economy. But right now there is little chance with the political confusion in Washington that this should be done. And part of the reason for our systematic failure is the defect in our current world view that confers unlimited power to the political branches of the government who have regrettably little incentive to use it wisely.

Thank you.

Moderator: We are now ready to take questions. If you have a question, just raise your hand and wave vigorously so that I can see you. Here is one right down here. Yes sir?

Audience Participant: I am just wondering if, in this debate on the allocation of public monies of tax revenues, there is any room for the doctrine of public trust to be brought up. The doctrine of public trust says that the government holds certain land, certain real property, for public use and it cannot sell those lands to private individuals. Could we say that certain tax revenues could fall under that topic of public trust?

Epstein: That is actually a very revolutionary thesis if you push it to all its limit. The public trust doctrine doesn't quite say that you can never dispose of public lands. Rather, it is kind of a fiduciary duty doctrine. What it says is that if you wish to dispose of public lands, then you must in exchange bring some degree of return benefit to the state, of equal or greater value than what you have surrendered. If you apply that to taxation of each person, it turns out that it is going to be a very exacting requirement because if each person has to be made as well, or better off, as he was beforehand, virtually every modern redistributive program in the United States will fail. Now this outcome may be a good thing, but you have to understand just how far that the proposed use of the public trust goes.

Let me make the point in another fashion. If you are trying to figure out if what the federal or state government has done is a good thing, do you look simply at the process, or do you have to look at the output of the process as well? In my view, you have to do both. One reason that I am so down on the federal government is that too often it uses its expansive powers to
create tariffs, monopolies, and privileges that drive the nation further from the preferred competitive equilibrium. I do not think that the convoluted process typically works well. Of course, our current processes do get legislation through, but it is far too often legislation that is inimical to the public welfare.

**Moderator:** Any other questions? Right here in the front.

**Audience Participant:** If there was standing for a citizen to sue, what would be the constitutional arguments that the stimulus bill is unconstitutional—and how would you evaluate the merits?

**Epstein:** Okay, first of all, the question is if there is standing, what does it do? Let me try to clarify the relevant issues. The only thing that standing allows a claimant to do is to veto legislation that exceeds federal powers. No one can pass new legislation by negating existing legislation on constitutional grounds. Given that division of powers, separation of powers is preserved. In fact, unless you allow someone to make that challenge, *Marbury v. Madison* is effectively repealed in many settings.

At this point the importance of standing depends on the year about which the question is asked. For the year 2009, a reasonable enough assumption, I think that you would find it very difficult for anyone to maintain a successful constitutional challenge to the bill on Commerce Clause or spending power grounds. We read the Spending Clause in parity with the Commerce Clause. Since the Commerce Clause is, for all intents and purposes, all-embracing congressional authorization over economic activities, there is no activity that is done through spending that could not also be done directly through the Commerce Clause, so that all programs survive.

But the 1923 debate in *Frothingham* differed because “Lola” (in Damn Yankees) didn’t always get what she wanted simply because she wanted it. Then there were serious obstacles to seeking to achieve through indirection what outcomes that could not be achieved directly. The major illustration of that was the *Child Labor Tax Case*, which arose after *Hammer v.*

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Dagenhart\textsuperscript{21}—whose result I fully support\textsuperscript{22}—said that the federal government did not have the power to prohibit goods from being sent into interstate commerce if they were made by firms that use child labor in any of its operations, whether or not they were involved in the preparation of the particular goods that were shipped across state lines. Basically, Congress sought to regulate, through its power over trade, the means of production internal to the state. The Supreme Court said no, that is an illegal use of the monopoly power of the federal government to undo the proper balance of federal/state relations. Once the direct attack failed, Congress tried to impose a tax that did exactly the same thing, in exactly the same circumstances. The \textit{Child Labor Tax Case} was decided the year before \textit{Frothingham}, so it was no surprise in the pre-1937 era that the Court would conclude that if the regulation failed under the Commerce Clause, then the substitute tax would have to fail as well.

Now the question is whether there is any way to update this line of argument to deal with the current expenditures under ARRA to make out the case that the states were subject to unconstitutional conditions—if you could find out what those were. And, I actually read \textit{Edwards v. Sanford}, with just that in mind. No luck. As you know, Chief Justice Toal is a very fine lawyer, and she made it clear that South Carolina faced no such problem because the stimulus package left all of the states lots of power to spend the money they received in whatever fashion they saw fit. It would be hard, perhaps impossible, to find any coercion on it that would be parallel to \textit{Child Labor Tax Case}.

So, the correct answer today under our modern constitutional design is that there are no viable challenges because \textit{Marbury v. Madison} has for these purposes been undone. The only protections for states lie in the structural provision of the Constitution, because even somebody with bona fide standing—someone who is a direct victim—will be met with the claim that, when all is said and done, the legislative process has worked so well that there is no need for judicial review. In the end, this uniform faith in the political processes gets courts to a uniform

\textsuperscript{21} 247 U.S. 251 (1918).
\textsuperscript{22} See Richard A. Epstein, \textit{Bargaining with the State} (1993).
rational basis test on all matters great and small. Yet that test is inconsistent with any sound system of limited government.

Speaking generally, this discussion of the stimulus package is designed to put into high relief two alternative visions of the entire constitutional universe. I continue to defend, roughly speaking, the original design, which in its best features has a great deal of elegance to it. But be under no illusion. It has precious little support in the halls of Congress and the Supreme Court.

**Moderator:** Questions? We've got one over here; yes, right here.

**Audience Participant:** Professor Epstein, I do not see how—notwithstanding the flaws of factions, which Madison warned us about, and which were true in a lot of respects—I don't see how you can get around the argument that the citizens' standing is the electoral process. After all, it seems to me a very convincing argument that the standing of one taxpayer may not be the standing of another. As a class, taxpayers might have very little in common, in terms of their goals, motivations, and what determines their best interests. Given that, it seems that it is difficult to defend either taxpayer or citizen standing.

**Epstein:** To address this sensible objection, let's go back to the private comparison of the corporation. Somebody has brought an action that says that the transaction was *ultra vires* to the corporation when it also so happens that ninety-five percent of the shareholders approve of the deal. If it is *ultra vires*, then the five percent can stop what the hundred percent can do, until the majority can get a charter amendment that allows for this kind of transaction to go forward. Indeed, if one of the actions of the corporation was making a distribution to ninety-five percent of the shareholders, and leaving the other five percent high and dry, the protection of minority interests through litigation is not unattractive.

When you run the analysis with municipal standing, it comes out exactly the same way. You do not insulate local government from a constitutional challenge on *ultra vires* grounds by showing that it has the support of a majority vote. If you accept that position, in effect, no legislation could ever be challenged on constitutional grounds, and *Marbury v. Madison* is effectively at
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an end. That is the risk you run with your position.

Now put the point in perspective. Remember standing does not solve all problems. The claimant actually has to have a credible constitutional challenge too for standing to matter. It's not a question of walking into court and saying "Hey, I am a taxpayer, and I have standing; therefore it is unconstitutional." That "ergo" is much too large. As I said, and I think quite explicitly, in *Edwards*, given our current configuration of both commerce powers and spending powers, no claimant does have a credible case, even if he has standing. In this case, under current law, a citizen or taxpayer should have, but under current law, it would be standing to lose.

This line of thought leads to a broader inquiry: what is the proper role of judicial review? If, in fact, you take a benign view of legislation, it is critical to ask whether, even when people have undisputed standing, they will be allowed to thwart the will of the majority? If you remember, this is the whole problem that Alex Bickel raised with the counter-majoritarian difficulty in his 1962 book, *The Least Dangerous Branch*. I think that your question has embraced his position to a very large extent. How, in this view, does one deal with *Brown v. Board of Education*?23 We know that then the majority of people in South Carolina supported segregation, so why should one person with standing be able to thwart the majority will? I am just curious as to exactly what—and I think it is fair to push this point—what do you think to be the role of constitutional judicial review in a world which takes as its high value judicial deference to the legislature?

Nor do I think that it is possible to defend a strong restriction on standing on the ground that it is improper to let one person block a grand social initiative. Think back to the Supreme Court's initial foray into the area: on that occasion, there were two cases, *Massachusetts* and *Frothingham*, both brought against Mellon. Massachusetts doesn't lose to any *de minimis* argument, does it? So if a court is not going to allow citizens, it would still have to allow states to sue, for surely they are not too small.

Comment: In that case, the plaintiff was arguing that her taxpayer money was going to another state, and that was just far too remote, and what is the remedy? Are you going to enjoin the whole statute? I mean you’re going to frustrate the will of the people by doing that.

Epstein: My point is this: there is no way the federal government could do direct regulation on maternal care in 1923, so why should it be able to spend money on something it could control directly? If the doctrine of enumerated powers applies, this circumvention of basis powers raises a very troublesome issue: the whole point about structural issues is that they are not tied to individual harms, and that is what’s so wrong with the modern standing doctrine—it concentrates on the law side, which is always looking at concrete industries, but the text has the equity side, and somebody has to figure out why equitable remedies are designed to enjoin and protect people in structural ways, so as to make sure minorities don’t get overrun in any context where they are vulnerable to expropriation. Why should anyone leave out the equity side of the story in developing a complete constitutional account? And it is interesting that the Supreme Court in its own jurisdiction has never once stressed that word; it has always stressed the other half of it. And Justice Scalia, who’s the major champion of this, always analogized the Article III jurisdiction to tort suits.24 In fact, historically, it was the other way around. Putting equitable jurisdiction into the federal courts was an immense choice in 1789 because its exercise was associated with royal power as far back as the Coke/Ellsmere disputes in the early seventeenth century.25 All of a sudden the Constitution gave the federal courts the kinds of power that the chancery courts had when they were thought to be the tools of the king. But at a more mundane level, this political uneasiness could not last. It is not possible to run a judicial world unless you have injunctions and specific performance, which are equitable remedies. So the Founders gave that jurisdiction to the federal courts. I don’t see why they

25. For one discussion, see Mark Fortier, Equity and Ideas: Coke, Ellsmere, and James I, 51 Renaissance Q. 1255 (1998).
can't use that head of jurisdiction if it is in the Constitution in black and white. I'm not trying to be a modern anti-textualist. I'm trying to be a real textualist that takes every word seriously.

Next, I don't think that the numerosity issue is persuasive even in its own terms. Let there be one disgruntled taxpayer in New York City out of seven million and that person can challenge the legislation. Not enough, so ask for a thousand taxpayers. Give me any number you want; I could always in modern parlance organize a "tea party" to reach that level. To me numerosity is a detail at best.

Moderator: Let's take another question. Yes, you in the back there.

Audience Participant: Professor Epstein, I am uneasy with the use of a judicial remedy, when there is always a political remedy available, namely voting people out of office.

Epstein: The point obviously matters because the electoral check is one major feature of a well-functioning democracy. While no one should disparage it, we should also understand its limitations. One limitation is the difficulty with the political remedy of voting out of office those politicians whom the public thinks have acted against the Constitution is that it cannot hone in on particular issues. That was also a serious difficulty for Locke in dealing with the crown, which cannot be voted out of office. So he had to turn to the right of revolution, which led to an "Appeal to Heaven,"26 which was part of Locke's basic structure in which parliament limited the power of the king. Locke did not have a system that embedded judicial review. So by default he said, in effect, the only way to deal with unjust governments is to have an appeal, i.e., a political appeal to heaven, meaning that the people take up arms against the government.

The difficulty with that solution, however, arises with a

26. JOHN LOCKE, A SECOND TREATISE OF GOVERNMENT, ch. XIV, § 168 (C.B. Macpherson ed., Hackett Publishing Co. 1980) (1690) ("The people have no other remedy in this, as in all other cases where they have no judge on earth, but to appeal to heaven: for the rulers, in such attempts, exercising a power the people never put into their hands, (who can never be supposed to consent that any body should rule over them for their harm) do that which they have not a right to do."))
Congress—not this Congress—that does nine things of ten well, and one thing out of ten things badly. If you're talking about the political remedy of voting them out, you have the bundling problem. The voters are going to have to get rid of the guys that have done ninety percent of the things right, because they've done ten percent of the things wrong. If the Constitution, however, incorporates judicial review, with generous standing, a selective challenge becomes possible. The court can knock out one bad law and leave the other nine good laws in place. The people don't have to throw out the current government because there is a more targeted remedy.

This rule applies in really important cases. I would hate, for example, to think that a court would say that "Gee, Brown v. Board of Education involves a real abuse of the judicial process, so that it is best to wait for Congress to do something about it in another fifteen to twenty years." It's not as though this judicial review always works as well as it should. But whatever its shortfalls, it is wise to ask courts to be pretty confident that there is a constitutional violation before it intervenes. Judges should not act casually, any more than rebellions against arbitrary authority should be undertaken lightly, as Locke himself insisted. So in close cases judges should give a nod to legislative supremacy. But there are a lot of cases out there, in my mind, which are not close. Indeed, the whole reason for elaborate procedures was that legislatures could misbehave. Sometimes these devices fail, and when they do, courts should intervene. There are risks of over-intervention, but as I look at the sausage that comes out of Congress these days, I don't confuse it with prime beef. Much of this legislation, if meat, would be removed from the market by a diligent FDA, if it only knew what it was supposed to do. (Laughter).

**Audience Member:** Could you please comment on your views on Marbury v. Madison and its impact of those principles today on judicial review?

**Epstein:** Yes, I think Marbury v. Madison is a genuine puzzle, but let me see if I can go back and unpack the puzzle from the beginning. The original decision was one which just asked whether or not Congress could require the Supreme Court to accept original jurisdiction over matters that did not fall into the
Constitution’s grant of power to the Court. What the Court said is that we have the power to assert the limits on our own jurisdiction, and Congress cannot force upon us matter over which we do not have jurisdiction. And so the only institutional assumption needed to make that model of judicial power work is to simply assume that the three branches are coordinated so that no one can force its will on the others. You do not need judicial supremacy to get that position; you just need to have a sense that the court can act defensively. Indeed, for a long time it was uncertain as to whether or not the Court had the offensive power, that is judicial supremacy to negate what Congress did.

The key case on this came surprisingly late in the 1958 case of Cooper v. Aaron,27 which came in the midst of the segregation battle in Little Rock, Arkansas. The issue there was whether or not the Supreme Court could order Governor Oryal Forbes to integrate the schools. It’s not a question of the Court keeping its own internal jurisdiction in order; what happened was that Eisenhower was unwilling to enter that local battle unless he had the Supreme Court telling him that he had this thing to do. So this is a case of someone who wanted to intervene but desperately wanted to have the cloak of legitimacy that a Supreme Court decision would offer. So, Cooper made it very clear that the Supreme Court is boss man on the block and could block anything which did not involve the exercise of judicial power, besides the federal judicial system, but had influences beyond that. And what Frothingham did, and maybe it’s unfortunate, was to go back to the very narrow version of judicial review, before the broad version was ever established. What it essentially said was we can’t tell these guys, and if Congress thinks it’s within its power to pass this stuff, well then that’s fine.

The difficulty you get with that is that once Congress passes a law that imposes a notoriously invidious tax on someone—say one that’s race-based—what happens once it tries to collect this tax through judicial action? The government then asks the court to make him pay a tax that Congress thinks is constitutional. But

the Supreme Court balks because it sees in the tax a flat violation of the Equal Protection Clause. So there is no tax collection. But if on the other hand, the government seizes property and the Court orders its return, the Executive can then say it does not have to yield to that judgment, so the government keeps the money. The equal spheres view of constitutional interpretation thus runs the risk of creating these terrible impasses where the rules on collections and refunds differ totally. The situation gets only worse if the President has a different interpretation of the law than the Congress, which creates yet another layer of difficulty.

It is complications like this which leave everyone in practice comfortable with the judicial supremacy view of Marbury v. Madison. President Eisenhower liked it in Cooper v. Aaron because he wanted some judicial cover for a tricky political situation. Indeed, historically, the only way the civil rights movement took off was to have one judicial decision after another negating state or federal statutes as inconsistent with the Constitution, followed by the federal decision to withhold school aid from schools that did not comply with federal desegregation mandates. And, you know, for the most part, I'm quite sympathetic to the judicial intervention because, obviously, I don't want to defend "big government," which is what segregation turned out to be. But this whole episode shows how important it is to turn judicial review into a consistent theory and not just a bird of passage to be invoked opportunistically.

Now in dealing with ARRA, we're only talking about economics issues, which is a far cry from race, where the reaction is: "Oh my God, we can't let these scoundrels do what they've done! We've got to be tough!" But being tough on segregation does not require us to back off on economic issues. I prefer a more consistent view across different categories, as my book on Takings suggests. That is why, in general, I have thought that


the standing doctrine simply cuts off too many meritorious causes at the gate. For many little people, democratic politics are dominated by big guys, in and out of government. Yet on a daily basis, we have to worry about a licensing statute that prevents a small person from practicing his or her trade. What kind of campaign is that person going to be able to mount when the opposition is large, established companies with more resources? One of the organizations I work with, the Institute for Justice, specializes in bringing actions for braidors and taxicab drivers against various government agencies. The IJ is an anti-monopoly organization on behalf of the little people. And there are other organizations that may be on the other side of the political spectrum that share this common view. That is why I worked with the Mandel Legal Aid Clinic at the University of Chicago Law School to help secure relief for harsh forfeiture laws in *Alvarez v. Smith,* now before the Supreme Court. Democratic politics are a death knell to certain needed reforms. Not only do we have to look with suspicion on the standing doctrine, we have to be concerned about rational basis review in economic cases.

**Moderator:** Questions? Yes, right here.

**Audience Participant:** If an individual does not have standing in front of the federal government, can you find the tipping point where individuals could state "we have standing"? You say "one individual is not enough"—will there ever be "enough" individuals?

**Epstein:** That position was raised by Eugene Kontorovich, now an Associate Professor of Law at Northwestern Law School, who argued that standing may exist if one can demonstrate to the court that there is a group that is more representative of a large group of taxpayers instead of just one. I am not in favor of restrictions that don’t restrict, so you don’t want to develop a theory as to why it’s necessary. There is an organization out

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31. On December 8, 2009, subsequent to the date of this speech, the Supreme Court vacated the case as moot. *Id.*

there known as the National Organization of Taxpayers, and I could click my fingers, once groups had taxpayer standing; I could form one in every state in a matter of twenty-four hours. So, if these groups have standing, then you get all the issues before the court, and it's no different from a class action. It's just permissive joinder, rather, where everyone comes together on a voluntary basis. Well, if that's going to happen, why not let the one person do it—you just change the caption at the top of a piece of paper. All the institutional issues are going to be exactly the same in both group and individual suits. Is this law *ultra vires*, and if so, do we care? And is judicial supremacy the model? And, you know, I'm very uneasy about judicial supremacy—it's certainly not part of the original Constitution.

One of the most powerful elements in the anti-Originalist side of the constitutional debate is that, with time, the law develops a kind of constitutional prescriptive right. If you go back to the original decisions, *Marbury* is very tenuous, for reasons just developed. It turns out when you're trying to find out whether or not the federal government can review state decisions for being unconstitutional, the decision in *Martin v. Hunter's Lessee* is dubious as well. But these decisions have been around for about 200 years, each of them, and to have a nation that's worked well with these cases in place makes it inadvisable, at this late date, to come forward and blow up bombs in public places.

So if I had to answer the question, what is the strongest argument for defending the standing limitations, I'd say, we've followed the no standing regime for over eighty years, why do you want to change it now, Professor Epstein? And the answer to that is, I think, the other changes worked pretty well but I don't think the standing restrictions have worked well, given that the greatest problem we have today in the United States is the relentless expansion of the public sector. In the past decade, all of our increase in employment is in regulation and none of it is in production. This is, in part, a direct consequence of the fact that there is no viable restraint on the way in which the government

regulates, the way in which the government taxes, and the way in which the government subsidizes various economic activities. I say every time government takes initiatives that go beyond a simple flat tax, or go beyond the prevention of fraud and monopoly-type issues, it puts itself into negative sum mode. I think what we are now doing is seeing the cumulative impact of these miscalculations whose combined effect leaves everybody more nervous.

So, I want to change standing, and I know why. Just the way in 1954, I would not say “Gee, you know Plessy v. Ferguson\textsuperscript{34} has been on the books now for 58 years; that’s a long time in constitutional history, so we really ought not to touch it.” No, I think that would have been a terrible mistake. I think some of these settled expectations you expect to keep, and some of them are bad, and the hard part of Constitutional law is to decide what counts as a good thing and what counts as a bad thing. There is an irreducible element of judgment in constitutional law, just as there is in figuring out how to work the private law of prescription, where the first possession rule is in constant tension with the adverse possession rules.\textsuperscript{35}

Comment I think there’s another practical problem with taxpayer standing. Putting aside the legal issues, if you have a single taxpayer that can join the implementation of a program—maybe a jobs program or the banking bill—what do you do to the economy as a whole? Whether you think the TARP [Troubled Asset Relief Program] bill was a good thing or a bad thing, the policy maker said we need it in order to restore the confidence in the population to maybe get people spending again; this spending program was put out there. If you enjoin that, what does that do to the economy? What would that have done to the confidence of the taxpayer? Now, I know there’s a broad delegation of authority in that TARP legislation to the treasury department, primarily because it was put together so quickly, and I think as a trade off to doing that, Congress had put in an Inspector General who was not like other Inspector Generals, who are accountable to any

\textsuperscript{34} 163 U.S. 537 (1896).

particular department. They put in an Inspector General only accountable to Congress. So, I think that was the way Congress was trying to protect the taxpayer's interests when they adopted this bill so quickly.

But I think that would create a real disruption in the economy at this time, if a taxpayer was able to simply go in and enjoin the enactment of that law.

Epstein: There's a very instructive case that shows the peril of precipitate action. The standing issue loomed very large in the Chrysler bankruptcy dispute, and in fact, the whole miserable scheme, which was a public outreach, survived because of two applications of the standing doctrines. Now, most of you, like me, are not bankruptcy experts nor do you care much about the fine points. But essentially what happened was the United States government wanted to rescue Chrysler. To do so, they wanted to give it a partner and the partner was going to be Fiat, who didn't contribute a single dime. At this point, the Washington planners had to deal with a group of secured creditors who took priority over unsecured creditors. When the dust settled, essentially all of the money in this business went to the United Auto Workers (UAW), but the secured creditors received thirty cents on the dollar.

How did it take place? Nobody was allowed to challenge the bill. So when the Indiana Police Department wanted to challenge the bill, they said these assets are worth $2 billion—you've got your $2 billion in secured creditors. You can't complain about what's going on. Now how do we know the assets were worth $2 billion? Well, the government bid $2 billion to control the deal. But it didn't bid $2 billion for the assets; they bid $2 billion to buy the assets, because they agreed to assume about $5 billion of liabilities. It's a complete sham! Nobody would ever give a positive sum for a business whose liabilities exceed its assets. So essentially, the government just put a number of the assets to block off any complaints about the structure of the deal.

The transaction did not allow the going-concern value of Chrysler to be determined because the entire restructuring was not conducted in the ordinary course of business.

None of this mattered. The Supreme Court, the Second Circuit, and then the Bankruptcy Court all said no standing. I think they were wrong. So then, you get all this money going from the public money into New Chrysler. But the statute says that the money's supposed to go to "financial institutions." So what the government does is to put the cash into Chrysler, which then gives a $5 billion note to the UAW pension fund. The real question is whether an operating company, or its pension fund, should be regarded as a financial institution. But was there anyone who could challenge the government action? No. And why not? Because the taxpayer standing rule bars the suit. And so what you have now is set of judicial decisions that are not going to restore confidence in the stability of our credit institutions.

Why? Because the Chrysler deal, quite consciously, inverted the priorities of various classes of creditors for a short-term political advantage. The entire operation of the American credit economy depends, however, upon all secured and unsecured creditors knowing their place in the queue so that they can price their obligations accordingly and figure out how to manage their loan portfolios. So when standing doctrines say nobody can challenge massive government irregularities, it's a serious blow to the stability of credit arrangements. So how did this happen? It turns out that the government lawyers just beat the poor pension funds into a pulp. In fact, when there was some question as to whether the big pension players would join in the opposition, they did not. Rumors have flown that since they were getting TARP funds, they were told discreetly by high government officials, "no, you better stay off of this." There have been lots of undocumented complaints that the heavy hitters pulled out because of government pressures. Nor does it stop

38. See In re Chrysler, 576 F.3d 108 (2d Cir. 2009).
here. The standing doctrine is a danger because it blocks any serious review of highly dubious programs, free of judicial interference. Not good.

Comment: Please discuss the speed with which Congress passed the TARP funds bill. That speed suggests that it was a bipartisan, political, and hasty decision which conflicted with the long, slow, cumbersome process that the Framers intended.

Epstein: One of the reasons Congress and the President do things so fast is because there's nobody who's in the position to challenge their actions. So, it's easy to just pull through if you think that your lawyers could run the real auction. One of the things to understand is that no side has an advantage in good lawyers. Both the American Constitution Society and the Federalist Society, have excellent lawyers working for them full-time because the stakes loom so large. What we really have to think about is not the excellence of the lawyers but the rules of the game. At this point in time, the rules manage to spawn so much uncertainty that key segments of the population sense the lack of stable legal institutions and social arrangements. And that is the single largest reason why economic recovery will not take place as quickly as might be hoped. The fact that there's this political angle over all prudential investment adds a dimension of risk to a market that is already saturated with economic uncertainty. This nation cannot tolerate both economic and political uncertainty simultaneously, which is why the unemployment numbers are holding steady around ten percent and are not going to get better until we change our entire way of doing business, which is not likely to happen in the short run. This is a happy conversation (Audience laughter). Oh and by the way, I want you to know (pointing to his cell phone which had rung during the statement), I just enjoined a federal judge who was calling. It's great fun to put them on hold, I have to tell you (Audience laughter).

Moderator: We are just about out of time, so let me ask you a question that several people had. Back in July of 2007, the Stock Market had hit an all-time high at 14,000. A little over a year later, it was nearly half that, and now we are in the mess that we are in. Can you briefly state how we got here and what should the government do to get us out?
**Epstein:** Sure. What the government should do is get us out is to get out of the business of lending money (One audience member claps). I got one lonely round of applause! (Audience laughter followed by audience applause). It’s a bipartisan fiasco to some extent. Easy money essentially makes the purchase of complementary goods appear cheaper than they are, so you get an asset bubble. Getting Fannie Mae and Freddie Mac into this business gave you more cheap money, dumb guarantees, and terrible loans, and somehow leading figures in the federal government thought that what was lost on each individual loan could be made up in volume, which if you do the multiplication, is moving in the wrong direction. There is no diversification if all parts of the loan portfolio are doing lousy for the same reason. There’s just going to be more and more losses. They didn’t see that. Why, I cannot say.

Then on the securities side, it seemed to be that the market-to-market rules, which are very complicated, probably encouraged the downward cascade. When you force banks to sell in a market that’s not very liquid, and in which the prices are unstable, all the buyers are going to hang back. When they hang back, prices are driven lower. That in turn is going to drive other banks into insolvency, so by the time the cycle is done, everybody is trying to sell, which leaves only one person left to buy, which turns out, of course, to be Uncle Sam.

Next, we have to stop roiling other markets simultaneously with the unrest in financial markets. If you want to get stability in the financial market, you have to rethink the labor statutes, or just drop the whole package. You have to cut way back on the health stuff—there are lots of things to fix, but they’re not fixing them in the right way. And then you have to rethink the whole carbon-control program because it’s much too intrusive. Right now there are three major regulatory programs that are being advanced under the illusion of the balanced budget in a time of a depression. I know Barack Obama personally. One thing I can tell you for sure is that his skill set does not cover economic issues.

(Big applause).

**Moderator:** Thank you very much. We have got to close. Thank you.