



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

Self-Government, Change, and Justice

By Rebecca L. Brown

June 2007

**All expressions of opinion are those of the author or authors.
The American Constitution Society (ACS) takes no position on specific legal or policy initiatives.**

Self-Government, Change, and Justice

Rebecca L. Brown *

Poached or scrambled? Sometimes people speak as if the choice of approaches to constitutional interpretation is just that, a simple choice based solely on taste. I like dynamic, you like originalist. Public debates in the political arena often appear to take this form when the issue of the day involves the strengths and weaknesses of a Supreme Court nominee or a recent decision, for example. But the antinomy is misleading. In fact, the choice of constitutional methodology is a secondary, not a primary, decision, and it is not a matter of taste, but of reason. The choice will necessarily follow from a prior commitment about a matter no less profound than what gives the Constitution its power over our polity. In order to make claims about how we should interpret the Constitution, we must first have a theory about why the Constitution should be binding on us in the first place.

It is not obvious why the Constitution should bind us. We are a society deeply committed to a principle of self-government, usually as expressed by decisions reached by some form of direct or indirect majority rule. Yet the Constitution, by its own terms, purports to set forth the supreme law of the land, assuming priority over any ordinary law, even if that law has the support of a large majority of the people or its representatives. And a mere majority of the people is insufficient to change the text of the Constitution. Thus, we begin with something of a tension: we are a society committed to self-government, but we have a Constitution that all agree can constrain our ability to set policy in accord with majority rule. Because the Constitution holds itself out as authoritative on us, and purports to impair our ability to govern ourselves as we collectively see fit, it must be justified in some way that is consistent with our deep commitment to self-government.

That is why a conference devoted to the methods of maintaining fidelity to the meaning of our Constitution over time must also address the question of how the Constitution comes to bind us, or, in other words, its democratic legitimacy. This question essentially asks us to reconcile our commitment to a constitution with our commitment to self-government. Once we have a plausible theory for why and how our Constitution can purport to constrain our ability to govern ourselves, then the manner in which we read the document will follow. If we wish to battle over interpretation, then, and do so honestly, we must engage our adversaries in the arena of the Constitution's claim to legitimacy in a democracy. This essay is a step toward that goal.

I do not here seek to defend the claim that any theory of constitutionalism must be reconciled with a commitment to self-government. I take that as a given under the "small c" constitution that lies at the core of our political identity as a nation. Assuming that this is a requirement for any theory of constitutional legitimacy, I will consider one very prevalent such theory and evaluate its consistency with our polity's commitment to self-government, following with consideration of an alternative. This popular contender for supplying the democratic

* Allen Professor of Law, Vanderbilt University. This Issue Brief was first released by ACS in June 2007.

authority of the Constitution, both in the public eye and to some extent in academia as well,¹ is what I will call the Process theory for the binding authority of the Constitution. I will ask two questions of the theory: first, whether the theory offers a plausible justification for why the Constitution binds us, and second, whether this justification adequately comports with our society's commitment to self-government.

The Process theory, in essence, goes like this. The text of the Constitution was voted on by the people according to procedures that satisfied the most enlightened standards of democratic participation at the time. The resulting enactment, therefore, has democratic legitimacy as bearing the stamp of its adopters, "We the People."

This theory emphasizes the process by which the Constitution became law. Self-referentially, that process met the standards that the document itself prescribed, which gave the document the status it claimed for itself then and forever, until amended in accord with its own provisions. Thus understood, the Constitution is law in much the same way that a statute of Congress is law. It should be understood as a set of rules, like a code, to be followed by future generations as a command from those who validly enacted it. If subsequent generations want to change something, just as if subsequent Congresses want to change a statute, they should go through the required process for amendment, which in the case of the Constitution requires supermajority support.

Let me point out a few salient features of a theory that views the Constitution this way. The first thing to notice is that it has accomplished our first objective: to provide a reason why the Constitution should bind us even if we disagree with it. It suggests that we are bound by the Constitution because of a relationship of ruler to ruled. The people of the founding generation claimed for themselves the authority to issue a set of commands, in a sovereign capacity, to subsequent generations who are bound to follow as subjects. The founding generation's right to govern subsequent generations, on this theory, derives from the democratic process by which it laid its claim to power.

Notice also that this theory gives rise to significant implications for how to interpret the Constitution. This theory hangs the democratic legitimacy of the Constitution on the democratic process by which it came into being. It follows that if the very legitimacy of the Constitution depends on the circumstances of its original ratification, then only the exact text that was voted on, and the meaning that the text carried for those who voted for it, enjoy that legitimacy. Any departure from this focus on original understanding would necessarily compromise the legitimacy of the Constitution, on this account. The all-important democratic pedigree, providing the foundation for the authority to issue binding commands, extends only to the precise object of the democratic process that took place in 1787.

This, indeed, is a commonly urged justification for textualism and originalism in the interpretation of the Constitution. The hallmarks of these interpretative theories is that they carry forward only the commands that are legitimated by the Constitution's democratic provenance. It

¹ By way of illustration, it is worth noting that Professor John McGinnis has ably set forth a version of this theory. See John O. McGinnis & Michael B. Rappaport, *A Pragmatic Defense of Originalism*, 101 NW. U. L. REV. (forthcoming 2007), available at <http://www.law.northwestern.edu/lawreview/colloquy/2007/1/>.

is essential to this theory that change be resisted, because change necessarily undermines the basis of the Constitution's legitimacy thus conceived. Consistent with this view, Justice Scalia, in his standard argument promoting originalism, urges, both as a normative matter and as a matter of democratic theory, that the Constitution should be understood as a bulwark *against* change. Change is the enemy of constitutionalism, he quips, because we cannot assume that societies will evolve rather than simply rot.² The resistance to change is not, however, just an inclination or taste—it is an essential, indeed definitional, component of this theory of legitimacy.

Now that we have examined the legitimating theory for the Constitution based on its democratic provenance, and have explored its ramifications for interpretation, it is time to ask the second question: is the Process theory consistent with the American commitment to self-government? At a superficial level, the answer is “yes,” because the Constitution was ratified by a vote of the people. But this does not fully answer the question.

The Process theory faces significant obstacles in its own consistency with democratic tenets. Principal among these is its commitment to resist constitutional change, intrinsic to its coherence as an argument for constitutional legitimacy. The conception of the Constitution as a vehicle committed to the avoidance of change casts the founding document as a device intended to keep future generations from exercising their right to govern themselves, unless they can meet the significant obstacle of supermajority support for an amendment. Thus, there is a profound tension between this theory of the Constitution and America's belief in an inalienable right to self-governance. While the founders democratically participated in their own acts of self-government, those later subject to their commands did not, and cannot so participate by the usual principle of majority rule. The tension can be resolved, if at all, only if somehow the command-givers of earlier times can be understood as vicarious representatives of the later subjects, such that governance by the forebears fulfills their posterity's need for their own *self*-governance. If not, then the founding generation has simply assumed a power over future generations that depends on sovereign status rather than on self-rule—not a source of power that is generally considered democratically legitimate.

To summarize, the challenge here is to understand how a theory, justifying the Constitution by virtue of its formation in the crucible of a democratic process, maintains its legitimacy through future generations who did not participate in that process. One possibility is that the founders in some sense can be said to stand in the shoes of future generations and thus prospectively exercise the right to self-government on behalf of their successors. By this view, their employment of a democratic process once satisfies the need for democratic participation in the future. This is not an incoherent position. It is, after all, similar to the way in which we view ourselves as bound by statutes passed even by Congresses who legislated before we were born.

The circumstances of this particular application of the Process theory of constitutional legitimacy, however, make it more problematic than the statute analogy. The problem is that the principles defining who must participate in the formation of constitutive policy in order to be considered “democratic” have radically changed since the time of the ratification of the Constitution. Today there would be universal agreement that in order to form any kind of

² ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 40-41 (1997).

constitutive enactment such as the Constitution, a more inclusive participation would be essential to democratic legitimacy. That is not to say that there was anything invalid about the formation of the Constitution in its own time. The issue, though, is whether the process that would be considered invalid by current understandings of democratic legitimacy can serve to legitimate the future binding force of a document *on the ground that it was democratically enacted and thereby vicariously satisfies the future generations' need for self-rule*. Even at a high level of abstraction, there would seem to be little promise in claiming that those who ratified the Constitution somehow could be validly viewed as representatives of the “self” in self-government for those who live today. And yet, if the founders cannot be understood to have represented the ‘self’ of their progeny, their participation cannot be viewed as legitimating for all time. This lack of representative authority, then, combines with the Process theory’s resistance to change over time and a supermajority requirement for amendment, to stall this approach in its tracks.

It is the combination of these three effects that makes it difficult to argue that the Process theory supplies the democratic legitimacy in the Constitution that we have been seeking. A process, standing alone, even when enlightened and inclusive by the standards of its own time, simply cannot sustain the weight that this argument asks it to bear. This makes sense when one presses the role of process with a hypothetical: if a supermajority, following all democratic procedures of participation and inclusion, voted to adopt a despotic form of government, would that make such a regime democratically legitimate to impose on future generations?

I would suggest a negative answer, and I venture a suggestion of what is missing from this account. It is not simply the old “dead hand of the past” argument, which implies hyperbolically that prior generations can never bind subsequent generations. Rather, I think what is missing from the Process theory is any requirement about the *substance* of the document handed down. The argument from process, leading to originalism, does not concern itself with *what* was handed down, only *that* it was done.

Surely, democratic legitimacy requires more. In order to gain democratic legitimacy, a constitution must create the conditions under which future generations can continually exercise their right to self-government. Our Constitution, properly understood, passes this test, but not because it was voted on by some of the people two and a quarter centuries ago. Rather, it passes the test because it sets the stage for the policymaking and judgments that are the stuff of which self-government is made.

The core of the act of self-governance is the ability to make the moral and political judgments for oneself and for one’s society, including participating in the determination of what justice requires. These are the defining elements of any society, and they change over time. It is up to each generation to develop and live out its moral commitments. A constitution must enable that fulfillment of the inalienable right to self-governance, or it fails the test of democratic legitimacy. That is why democratic adoption procedures cannot legitimate either a despotic government or a static constitution for future generations, as both of these stifle the opportunities for self-governance down the line.

Our Constitution can boast democratic legitimacy precisely because it commits us to the cause of self-government and justice, its capacious and abstract terms permitting each generation to accept constitutionalism and still conform to its own conceptions of the demands of justice, viewed in light of its history and circumstances. This ability to implement society's understanding of the core issues of political morality preserves the commitment to self-government and thus satisfies the demands of democratic legitimacy. Even the more arid structural provisions contribute to this process by making possible the exercise of self-government with a stable structure and peaceful transfer of power. If each generation had to decide for itself how old the president must be or how many senators from each state, there would be little opportunity for the building of a society that fulfills the moral commitments of its current members. So the less capacious provisions can be tolerated as part of an edifice that supports the continued application of the more capacious ones.

It is evident that, like the Process theory discussed earlier, this theory—call it the Substance theory—has implications for interpretation. For this theory, the key to democratic legitimacy is the Constitution's ability to provide a structure within which the polity can continue to exercise its right to self-government, including giving voice to its own commitments of political morality. Thus, it is imperative that the rights-bearing terms of the Constitution be interpreted in a way that can change and expand with the values of each generation. Not only is a dynamic constitutionalism defensible, therefore, it is absolutely essential in order for the Constitution to maintain its democratic legitimacy under the Substance theory.³

There lies the stark contrast between the two models of interpretation, each with its underlying theory. Originalism is the product of a theory that puts great significance on the process by which the Constitution was adopted and depends on the sustaining of a static meaning for the Constitution's terms. This approach claims a democratic legitimacy of a nominal kind, but cannot claim to sustain a polity in its exercise of its right to true democratic participation in the values that shape it over time. The dynamic approach to constitutional interpretation, in contrast, does not place great importance on the procedural source of the Constitution, but rather emphasizes its substance. As long as the Constitution is read to permit the society's exercise of its own right to self-determination, then it contributes to the democratic legitimacy of constitutionalism itself.

³ A non-trivial question arises, of course, as to who may speak for the changing values of society over time, and a theory is needed to defend the entrusting of judges with this role in the interpretation of the Constitution. Launching such a theory is beyond the project that I undertake in this essay.