

Towards Reestablishing Democratic Participation in Constitutional Interpretation

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America is a democracy, and the fundamental law created by that democracy is the Constitution. As the preamble of the Constitution relates, it is the product of “we the people.” And the people have the power to amend or to abrogate the Constitution through the procedures outlined in Article VI. Although the Constitution is the only national law created directly by the people, the people as a practical matter no longer exercise control over the Constitution. More than three decades have passed since the last amendment. But this does not mean that constitutional law has remained static. To the contrary, constitutional law has continued to evolve; that evolution, however, has come from the government rather than the people.

The judiciary is responsible for most of constitutional law’s growth. Through their decisions, the courts have variously contracted, expanded, and altered the powers of the state and federal governments, and moved the lines demarcating the distribution of power among each of the branches in the federal government. They have created new individual rights, and they have redefined the scope of various preexisting rights, like the right to confrontation and the right to abortion.

One reason that the judiciary has had the most impact on the development of constitutional law is that the judiciary has claimed for itself the ultimate authority to interpret the Constitution. Relying on the statement in *Marbury v. Madison* that it is “the province and duty of the judicial department to say what the law is,”¹ the courts have taken the position that interpretations rendered by other branches or the states are not authoritative; only the courts can determine the meaning of the Constitution.²

But judicial supremacy is in tension with the popular disengagement from the Constitution. One of the principles behind judicial power “to say what the law is” is that the judiciary’s word is not final. A lawmaker that is dissatisfied with a court’s interpretation of the law can remedy the situation by enacting a new law. This arrangement ensures that the lawmaker, and not the judiciary, has the power to set policy. And when the controversial interpretation involves the Constitution (as opposed to a statute), then the democratic check on the judiciary is through constitutional amendment. Historically, the people have exercised this prerogative on several occasions. The Eleventh and Sixteenth Amendments are examples.

¹ 1 Cranch 137, 177 (1803).

² *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (“It is . . . a ‘permanent and indispensable feature of our constitutional system’ that ‘the federal judiciary is supreme in the exposition of the law of the Constitution.’” (quoting *Cooper v. Aaron*, 358 U.S. 1, 18 (1958))).

But those episodes are long past. Judicial interpretations are now regarded as virtually inviolate.

There are a number of possible explanations for this phenomenon. One is that the people have simply disengaged from the Constitution. Newspapers no longer publish op-eds like the Federalist Papers. People talk about things that they care about, like the movies, television, and the economy --- the Constitution is not on that list. Another explanation is that, because the judiciary has been willing to change its interpretation of the Constitution,³ people have no reason to pursue the tedious amendatory process --- it is easier to appoint a sympathetic judge than to mobilize the country. The failed Equal Rights Amendment provides an example. Rather than continuing efforts to amend the Constitution to specify that women have equal rights as men, the political branches explicitly articulated a policy of pursuing judicial opinions endorsing such equality.⁴ Whatever the reason, the consequence is that the judiciary, and not the people, have functional control over the meaning of the document setting forth our democracy's fundamental policy choices.

Of course, one might say that the *people's* disengagement from the Constitution is no reason to question judicial supremacy over the legislature on constitutional matters. But reengaging the public in constitutional matters has proven difficult to do. Although several proposals have been made to that end, such as holding an annual Constitution Day, none of them has shown much promise.

Placing greater constitutional control with the legislature is arguably the next best solution, because legislatures are closer to the people than the courts. Representatives are chosen by the people to make policy choices, and accordingly are more attuned to the views and desires of the populace than the courts. Judicial deference to the legislative interpretations of the Constitution would more closely implement the will of the people.

Currently, courts do not afford deference to constitutional interpretations rendered by legislatures.⁵ Although courts do afford legislatures some leeway through deferential constitutional tests, those tests do not involve deference to legislative interpretations of the Constitution. Rather, those tests involve a form of factual deference. Consider the deferential review of federal laws regulating commerce. The Supreme Court has held that the Interstate Commerce Clause authorizes Congress to enact legislation that regulates (1) the channels of commerce, (2) the instrumentalities or things in interstate commerce, or (3) economic activities that substantially affect interstate commerce. This test is not the only plausible interpretation of the Commerce Clause; one could rationally interpret it more broadly. But in reviewing

³ See, e.g., *Garcia v. San Antonio Met. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities v. Usery*, 426 U.S. 833 (1976)).

⁴ See Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 235-36 (1965) (quoting PRESIDENT'S COMM'O N ON THE STATUS OF WOMEN, AMERICAN WOMEN 44-45 (1963)).

⁵ See, e.g., *City of Boerne v. Flores* 521 U.S. 507, 529 (1997) (rejecting deference to legislative interpretations of the Constitution on the ground that "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V.").

Commerce Clause legislation, courts do not ask whether Congress might have held a different, rational interpretation of the Commerce Clause in enacting the legislation. Instead, they ask whether Congress could have rationally concluded that the law falls within one of the three categories defined by the Court. Any deference the courts afford is not to Congress's interpretation.

Deference to the legislative interpretations arguably also is appropriate given that the courts have framed a number of their tests on contemporary social norms. Whether a search is reasonable under the Fourth Amendment, whether punishment is cruel and unusual under the Eighth Amendment, and whether material is pornographic under the First Amendment all depend on current social norms.⁶ If constitutional interpretation depends on social norms, the legislature, being more attuned to those norms, should play a greater role.

Of course, suggesting that courts yield any portion of their independent interpretive authority is bound to meet a number of objections, too many to address here. Principal among those objections is that placing interpretive authority with Congress runs afoul of the reasoning in *Marbury* that, if the legislature controlled the meaning of the Constitution, the Constitution would be a nullity; legislative will would constitute the law. But *Marbury* was talking about absolute legislative control over constitutional meaning. Nothing in *Marbury* prohibits courts from granting some degree of deference to legislative interpretations. So long as the Constitution places some enforceable restraints on the legislature, the Constitution is not a nullity. Indeed, until the late nineteenth century, courts often stated that deference to legislative interpretations of the Constitution was appropriate.⁷

The judiciary plays an important role in our constitutional system. Its power is necessary to ensure that majoritarian impulses do not strip unpopular minorities of their rights. But the lack of a popular check on the judiciary has left the judiciary with de facto control over the Constitution's meaning. Judicial deference to the legislature would be a step toward reestablishing the public's role in the constitutional discourse.

⁶ See Corinna Lain, *The Unexceptionalism of Evolving Standards*, 57 U.C.L.A. L. REV. ___ (forthcoming 2009) (identifying a number of examples).

⁷ *E.g.*, *Union Pac. R. Co. v. United States*, 99 U.S. 700, 718 (1878) (stating that a declaration that a statute is unconstitutional "should never be made except in a clear case. Every possible presumption is in favor of the validity of a statute, and this continues until the contrary is shown beyond a rational doubt"); *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827) (stating that "the presumption is in favor of every legislative act"); *United States v. Ravara*, 2 U.S. (2 Dall.) 297 (C.C.D. Pa. 1793) ("tho' an Act of Congress plainly contrary to the Constitution was void, yet no such construction should be given in a doubtful case"); *Commonwealth ex rel. O'Hara v. Smith*, 4 Binn. 117, 123 (Pa. 1811) ("It must be remembered however, that for weighty reasons, it has been assumed as a principle in construing constitutions, by the Supreme Court of the United States, by this court, and every other court of reputation in the United States, that an act of the legislature is not to be declared void, unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt.").