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The Constitution and Democracy in Troubled Times

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FORUM TIDBITS

Quotable

The constitution and democracy in troubled times

Does textualism and originalism approach positively impact democracy?

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Constitutional Connections

Many judges, including a majority of the justices who presently serve on the U.S. Supreme Court, would agree with the following statement: Judges should interpret the Constitution according to its text, as that text was originally understood when it became law, even if that interpretation conflicts with one that might better serve the public interest.

They argue that this "textualist-originalist" approach is required to justify our practice of judicial review. Judicial review, commonly traced to the Supreme Court's 1803 decision in *Marbury v. Madison*, is our commitment to giving final say about what the Constitution means to the judicial branch.

Why, according to textualist-originalists, must judges confine themselves to discovering the original meaning of constitutional text, rather than, say, construing it to reach a more socially useful result? In a word, democracy. Judicial review can only be tolerated in a democracy, they argue, if judges serve as interpreters rather lawmakers when it comes to defining the Constitution. All other approaches inevitably involve a lifetenured elite imposing their moral and policy preferences on the rest of us. And that is anti-democratic.

There is a powerful logic to this argument. But what if we think of the relationship between our Constitution and democracy in different terms? What if, instead of prioritizing the theoretical, pro-democracy benefits of textualism and originalism, we ask whether the policy outcomes these modes of analysis produce positively impact our democracy in fact?

Reframing the analysis in this way raises questions about whether a strict textualist-originalist approach to constitutional interpreta-

SEE CONSTITUTION C3

The Constitution and American democracy in troubled times

CONSTITUTION FROM C1

tion actually advances democratic values. For the textualism and originalism practiced by many of our justices and judges has led them to regard as unconstitutional – or at least constitutionally problematic – many legislative reforms and judicial interventions that might help to shore up our faltering democracy.

Consider, for example, the role of money in political campaigns. Many believe that the nation would be well served by the enactment of experimental laws authorizing the public financing of elections, placing tighter limits on campaign contributions, and requiring more transparency from the persons and interests that fund politicians and political organizations.

But laws of this sort are, if not outright unconstitutional, at least highly problematic under interpretations of the First Amendment that the Supreme Court has adopted in recent decades. See, for example, *Citizens United v. Federal Election Commission* (2010), a 5-4 decision holding that political spending is a form of protected speech under the First Amendment, and that the government may not keep corporations or unions from spending money to support or denounce individual candidates in elections. Thus, the regulation of money in politics is at present largely a constitutional no-go zone.

Or consider, for another example, partisan gerrymandering – the widespread practice of state legislatures redrawing the boundaries of federal and state legislative districts to protect incumbents and to advance the interests of the party that controls the legislature. With the 2020 census recently completed, we are about to embark on another round of redistricting across the nation. And we can expect partisan gerrymandering to be rampant.

There is broad agreement among political scientists that partisan gerrymandering is playing a significant role in increasing polarization, facilitating the emergence of extreme politicians, undermining the prospects for legislative compromise, and exacerbating distrust in the integrity and fairness of our electoral processes.

But the Supreme Court, while acknowledging that extreme partisan gerrymandering can undermine rights and values protected by the Constitution, has held that held that the federal courts cannot order remedies for unconstitutional partisan gerrymandering. See *Rucho v. Common Cause* (2019), another 5-4 decision which held that partisan gerrymandering claims present political questions beyond the jurisdiction of the federal courts.

Moreover, a majority of the Supreme Court harbors strong reservations about a practice adopted in a handful of states in order to address the problem of partisan gerrymandering: the creation of independent redistricting commissions to redraw legislative boundaries. In *Arizona State Legislature v. Arizona Independent Redistricting Commission* (2015), a slim 5-4 court majority rejected an argument by the Arizona legislature that a state ballot initiative creating an independent redistricting commission unconstitutionally cut the legislature out of the redistricting process.

But there has been a significant shift in the Supreme Court's makeup since 2015, and some of the newer justices have expressed views about the state legislature's role in the electoral process that are more aligned with those of the *Arizona Independent Redistricting Committee* dissent. Therefore, if the court revisits the issue, there is reason to be concerned that the creation of independent redistricting commissions by ballot initiative may no longer be a constitutional means of dealing with the problem of partisan gerrymandering.

Finally, consider as two further examples term limits and the presidential line-item veto. Many believe that the public interest would be well served by placing limits on the number of terms that members of Congress can serve, and by empowering the president to strike wasteful provisions of legislation enacted by Congress while still permitting the remaining provisions to become law.

But, here again, the Supreme Court has interpreted the Constitution to bar these reform efforts. See *U.S. Term Limits, Inc. v. Thornton* (1995), a 5-4 decision which held that states cannot impose qualifications for prospective members of Congress (such as term limits) that are stricter than those specified in the Constitution, and *Clinton v. City of New York* (1998), a 6-3 decision which held that legislation that passes both Houses of Congress must either be entirely approved (i.e., signed) or rejected (i.e., vetoed) by the president.

These cases may or may not have been correctly decided. But the number of dissenting justices in each of them strongly suggests that the constitutional issue decided was not entirely clear. Our democracy clearly is in peril. So, perhaps the justices should think long and hard before deciding that our ancient constitutional text – enacted at a time when so many were excluded from the full benefits of citizenship – should be read to prevent We the People of 2021 from experimenting with measures that could help to save it? As Justice Robert Jackson once put it, the Constitution was not intended to be a suicide pact.

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