

Is it sensible to legislate today according to an eighteenth-century constitution?

This question takes the legitimacy of constitutional fetters on lawmaking for granted; it does not ask the prior question of what, if anything, legitimates such fetters. In response, this essay argues that constitutionalism - the constitutional limitation of legislation - is sensible insofar as it *structures* political contestation, but corrosive when it *forecloses* it. To structure contestation is to lay down fair and revisable terms on which a self-governing people may go on disagreeing and to protect each citizen's standing to participate; to foreclose it is to lift a disputed question out of politics and freeze one answer as higher law beyond the reach of a majority. Which of these a constitution does is independent of its age; an eighteenth-century constitution may structure or fetter as much as one codified last week. The US Constitution - which, having been revised 27 times in 238 years since its ratification, is thus not a wholly eighteenth-century document - does both at once. More specifically, its foreclosing elements lie beyond the reach of any majority to revise: the Second Amendment, a judiciary that settles questions citizens ought to contest, and a campaign finance regime that SCOTUS has constitutionalised and so placed beyond ordinary legislative correction. For these reasons, I contend that the US Constitution cannot provide a sensible framework for American legislative life.

First, we must extricate the question from the debate that would otherwise consume it, between originalism and living constitutionalism. Originalists bind interpretation to "the original meaning of the text, not what the original draftsmen intended" (Scalia, 1997: 38), that is, the *public meaning* its words bore at ratification, held fixed thereafter. Living constitutionalism treats the same text as one that "evolves, changes over time, and adapts to new circumstances, without being formally amended" (Strauss, 2010: 1). Both, however, share the presumption that legislation must answer to the entrenched text (see Samaha, 2008: 615-616). What neither asks, and what I pose here, is whether legislating sensibly according to the constitution depends on interpretation *at all*, or whether it depends instead on what ought to belong to the politics of the living rather than ossified in higher law.

The more pertinent distinction, rather than one between old and new readings of the Constitution, is between *two constitutionalisms*, or two relations of law to politics. The first, drawing on Holmes (1995) and Ely (1980), is *structuring* constitutionalism. In this conception, the constitution sets the rules of the game to which its players must adhere: it fixes who may vote, how power changes hands, and what no winning majority may do to entrench its own victory against reversal. Such constraints “do not merely limit power; they can create and organize power” (Holmes, 1995: 163-164). In this sense, its fixity is a feature, not a bug: a constitutional rule is, in Schauer’s (1991: 47, 137) terms, an “entrenched generalization,” valued because holding firm against the pressure of the moment allows actors to anticipate the rules under which their conflicts will be judged. A constitution of this kind may fix the *conditions* of contestation, but not the *answers* contested within them.

The second is *foreclosing* constitutionalism. Rather than setting the terms of the contest, the constitution settles its outcome, hiding the fact that a choice has been made at all by dressing a contested decision as the neutral application of settled law, what Shklar (1964: 1) termed ‘legalism.’ Bickel (1986: 16) called this the “counter-majoritarian difficulty”: unelected judges overruling the elected representatives of a present majority. This leaves dissenting voices with what Waldron (2006: 1406) termed “a rather insulting form of disenfranchisement.” Its endpoint is what Hirschl (2004) branded *juristocracy*: elites who, as their hold on elected majorities slips, hand contested questions to courts they trust to entrench their preferences against redistributive majorities (ibid., 43). Structuring constitutionalism lets a people govern itself; foreclosing constitutionalism governs in its stead, suppressing value-judgements as inaccessible matters of law.

How, then, can we distinguish these constitutionalisms in practice? Applying the procedural/substantial distinction would ignore how substantive decisions *structure* the ability of citizens to participate politically. Take the Thirteenth Amendment. It is substantive, since it removes an outcome (slavery) from politics permanently, but is the last provision anyone could plausibly consign as foreclosure. It structures contestation not because it is procedural, which it plainly is not, but because no-one can co-author laws while owned as property. What I term the structuring/foreclosing test might be put thusly: *does a provision protect each citizen’s standing to contest, or does it settle the contest itself?* Abolition structures while an entrenched answer on abortion, by contrast, forecloses, however couched

it might be in the language of rights, because it lifts a live and reasonable dispute out of politics in which the disputants are otherwise equals. One plausible response might be that reproductive autonomy is itself a condition of women's equal citizenship (see Ginsburg, 1985), which would make its entrenchment *structuring* and turn the structuring/foreclosing test against itself. To call it a precondition, however, presumes a prior answer to the very dispute it would settle. In other words: protecting the 'precondition' would decide the controversy. The fact that it is debatable even at this meta-argumentative level marks it as a live issue which politics, rather than ossification in law, must adjudicate, since, as Hampshire (1999: 18) notes, judgements in substantial matters "will always vary with varying moral outlooks and [...] conceptions of the good." This does not make disputability integral to the test strictly speaking, though. After all, slavery was fiercely contested in 1850, yet abolition could never have foreclosed, because enslavement prohibits participation. The 'liveness' of an issue counts only where the preconditions of participation are not themselves at stake.

The most serious objection is that the line between structuring and foreclosing is not self-defining. Whoever draws it may recast a contested preference as a precondition of agency, as the foregoing abortion example does. The worry is real but, I wish to postulate, not fatal to my argument. No standard applies itself: every rule, as Hart (2012: 128) notes, has an "open texture," a settled core of clear cases and a penumbra of doubtful ones where *judgement* must decide. The structuring/foreclosing test is no different. The objection challenges only at its penumbra, and there no more deleteriously than against Hart's famous rule forbidding vehicles in the park: the doubt whether a bicycle counts does not unsettle the rule's plain application to a car, just as the doubt over abortion leaves untouched the clear cases at either end. What it requires is for whoever would entrench a provision to show that it keeps a contested question open rather than settling it. In so doing, then, it places the burden of proof on foreclosure.

That objection's central concern is how the structuring/foreclosing test might be interpreted by a court, given the agency that judicial review has bequeathed the US Supreme Court, but I contend, instead, that courts should adopt what Ely (1980: 87) calls a "participation-oriented, representation-reinforcing approach to judicial review," not the dictation of substance, "saying no more than necessary to justify an outcome" (Sunstein, 1999: 3). On the substance those channels exist to resolve, its duty is restraint, leaving the rest

to the people. The structuring/foreclosing line, in fact, does not need to be drawn by a court at all. Foreclosure is not the only way to take rights seriously: weak-form review lets judges register a concern while the legislature keeps the last word, occupying “the intermediate ground [...] between legislative and judicial supremacy” (Gardbaum, 2013: 1). That the line is sometimes hard to draw is very much the point of the structuring/foreclosing test: a difficult boundary is still a boundary, and the alternative (a court free to settle whatever it chooses) is the purest kind of foreclosure because it transfers judgement on contestation from politics to law.

The American Constitution embodies both structuring and foreclosing constitutionalism, so we must ask whether its foreclosures can still be redressed. In the first instance, it has made strides in structuring political contest through the Reconstruction and franchise amendments, which secured the standing to contest by ending slavery and widening the vote, and the First Amendment, which protects free speech as a mechanism of contestation. However, its foreclosing provisions have become unanswerable and not easily amendable by a majority. The Second Amendment freezes a contested answer on private arms as higher law, and where the text leaves room, the Court has fashioned foreclosures of its own, reading the First Amendment to protect political spending and so entrench inequality in *Buckley v. Valeo* (1976) and *Citizens United v. FEC* (2010). Because the document's meaning is now whatever the Court declares it to be, juristocracy has effectively protected its foreclosing elements, rendering politics “a branch of law” (Gray, 2023: 127). In consequence, Congress drafts in the shadow of anticipated invalidation, and whole areas of policy—campaign finance, gun control—are removed from legislative reach because they have been colonised by judicial writ. What might once have been corrected by amendment now cannot be since Article V sets the threshold so high that those who must live under the settlement can no longer revise it. The Constitution is, in Levinson's (2006: 9) phrase, “insufficiently democratic [...] and significantly dysfunctional.” It fails the structuring/foreclosing test not on account of its being eighteenth-century *per se* but because its foreclosing elements have ossified beyond any practical means of revision. The bar is not that amendment is impossible but that it stands beyond any majority the country can now assemble; a lawful route no realistic coalition can use is, for the people it governs, closed.

It might seem that this is only the old dead-hand objection - that no generation may bind its successors and that “the earth belongs in usufruct to the living” (Jefferson, 1789) - but I wish to contend that it is not. Every act of legislation and every judgement by a legal authority outlasts the moment of its making, and structural constraints are designed to. The dead-hand objection has no *intrinsic* merit because restraint *per se* - even restraint from the far-flung past - is not a vice in itself. A constitution that fixes the terms of contestation performs what Schauer calls an “intertemporal allocation of power” (Schauer, 1991: 160), lifting those terms beyond a passing majority while leaving them to a sustained one. Constitutions are, as Elster (2000: 94) puts it, “designed to make it difficult to change their provisions [...] but not impossible,” so the amendment route stays open, though pitched far above ordinary legislation. The question is therefore never whether the future is bound but to *what*, whether that to which it is bound is structuring or foreclosing. The dead hand becomes a problem only when it forecloses, which is why Samaha (2008: 623) terms the American Constitution “a unique mark for dead hand criticism”: not for its age, but for the near-impossibility of revising it. This problem is “not rebutted by pointing to a formal opportunity for amendment” (Waldron, 1999: 275), least of all one the threshold puts out of reach, and Strauss's (2010: 5) living evolution merely hands revision to the Court rather than the people, since on his own account “the amendment process is, perhaps surprisingly, nearly irrelevant.”

Whether it is sensible to legislate today according to an eighteenth-century constitution depends on the constitution, not its age. It is sensible to be governed by a constitution that structures self-government, and not sensible to be governed by one that forecloses it. The American Constitution does both, but its foreclosures have outgrown its structures, and it can no longer be amended. The familiar complaint is that this lets the dead rule the living, but this is not quite right. The dead rule nothing because they are silent. A (practically) unamendable constitution lets the living rule in the dead's name, settling today's disputes by appeal to a consent the framers can no longer renew and the governed have never given.

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