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Frank I. Michelman: Brennan and Democracy

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CHAPTER 1

Brennan's Constitutional Democracy

CONSTITUTIONAL LAW, CONSTITUTIONAL THEORY

In American law schools today, cheek-by-jowl with the study and teaching of constitutional law, you find a sibling branch of academic exertion called “constitutional theory.” What’s the difference?

It all starts with judicial review, that noteworthy practice of American government by which unelected judges hear and decide cases of complaint—“it’s unconstitutional”—against laws enacted by electorally accountable legislatures. Unmistakably, these are legal cases, in which judges explain and justify their decisions with the same sorts of arguments about the best interpretations of legal texts and precedents that lawyers use in urging the decisions they favor. How much these legal arguments *cause* the decisions of judges and how much they merely decorate them is unknown. What is clear is that many people think it practically worthwhile to acquire a professional, insider knowledge of the materials—the legal texts, precedents, and doctrines—to which lawyers and judges refer in these cases, along with knowledge of the conventional codes and understandings that guide and ease professional exchange about the materials, the history of professional debate about their origins and meanings, and the relevant dispositions toward them of currently sitting judges. Such knowledge can become subtle and deep. Acquiring, refining, and conveying it is the business of the academic field of constitutional law. But then what is left for “constitutional theory?”

Most people who study constitutional law with much seriousness do so with the purpose of getting good at doing it as

lawyers do it, or teaching others to do so. Constitutional theorists study constitutional law for a different purpose. Their concern is to explain, and perhaps to justify, an apparently undemocratic practice of government “by judiciary”¹ in which popular political outcomes are subjected to the test of a judicially administered “higher” law. Having learned enough (they think) about the specifically American version of this practice and the texts, doctrines, methods, debates, institutions, and conventions that go to make it up, constitutional theorists look behind the practice for normative principles that can justify, or beliefs that can explain, our country’s use of it as a part of its system of government. Having found out (they hope) the motivating principles and beliefs, constitutional theorists may then want to use them prescriptively, as a guide to future resolution of debated questions about either the meaning of the Constitution or the right method for finding out that meaning. More radically, the theorist may want to reveal the poverty of the principles or the lunacy of the beliefs as a reason for wholesale abandonment of the practice of subjecting the outcomes of popular government to any further legal test.

THE PARADOX OF CONSTITUTIONAL DEMOCRACY

American constitutional theory is eternally hounded, if not totally consumed, by a search for harmony between what are usually heard as two clashing commitments: one to the ideal of government constrained by law (“constitutionalism”), the other to the ideal of government by act of the people (“democracy”). The search is one with which no partisan of democracy can proceed today without reckoning with the judicial career of William Brennan.

¹ “Government by judiciary” appears in the titles of two books that I know of, but neither author appears to give a source. See Raoul Berger, *Government By Judiciary: The Transformation of the Fourteenth Amendment* (Cambridge, Mass.:

Do you see some slight to democracy—some “Counter-Majoritarian Difficulty,” to recall Professor Alexander Bickel’s famous phrase—in unelected judges ruling the country, in part, by passing on the legal validity of laws duly enacted by elected representatives?² If you do, then William Brennan before all other American judges must personify the Difficulty you see. He was our generation’s model “activist” constitutional judge and, indeed, American history’s activist judge without peer except for the early great Chief Justice, John Marshall. That makes it something of a curiosity to find, among crowds of hand-wringers over the country’s submission to undemocratic government by judiciary, a good many of us who also greatly admire and loudly applaud Brennan’s judicial career. It would seem we owe ourselves and others some explanation. Are we, after all, as serious as we claim to be about democracy? Being myself caught in this compromising position, I felt it was right, on an occasion of academic exchange in Justice Brennan’s honor,³ to return once more to the question that keeps the Constitutional Theory department in business: Brennan and democracy—how to have both?

This chapter ends with a surmise about what might have been Brennan’s own answer to the question, drawn from his words and deeds. As we proceed, though, I shall be at least as intent on getting you to see how hard and deep and relentless the question really is. I shall speak repeatedly of a “paradox” of constitutional democracy. The paradox assumes various guises, but let us start with its simplest version, its normal form.

“Democracy” appears to mean something like this: Popular political self-government—the people of a country deciding for

Harvard University Press, 1977); Louis Boudin, *Government By Judiciary* (New York: W. Godwin, 1932), 12.

² Alexander M. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962), 16–23.

³ I originally prepared this chapter for the first annual Brennan Center Symposium on Constitutional Law. The Symposia are sponsored by the Brennan Center for Justice at the New York University School of Law and are funded by a gift from Professor Thomas Jorde of the University of California at Berkeley School of Law.

themselves the contents (especially, one would think, the most fateful and fundamental contents) of the laws that organize and regulate their political association. “Constitutionalism” appears to mean something like this: The containment of popular political decision-making by a basic law, the Constitution—a “law of lawmaking,” we shall sometimes call it—designed to control which further laws can be made, by whom, and by what procedures. It is, of course, an essential part of the notion of constitutionalism that the basic law must be untouchable by the majoritarian politics it is meant to contain. (If ordinary political majorities could fiddle with it, it wouldn’t be doing its job of containment.)

If these two rough definitions fairly capture what we mean by “democracy” and “constitutionalism,” then attempts to fold the two principles into one ideal conception of a political order do indeed appear to be headed for trouble. To see this, it will be helpful to define a category of “politically decidable” questions. A question is politically decidable, let us say, if it is the sort of question that *can* be settled by the act of some political ruler or the vote of some body such as Congress or the electorate. I mean “can” in a plain, practical sense. Thus, a very clear case of something that is politically decidable is a question about what the law of some country shall be. We have no trouble at all with the idea that a country’s law really is whatever a vote of some body (Congress, the electorate) from time to time decides it shall be. By contrast, everyone would agree that the force of gravity is not politically decidable, and most would agree that neither is the beauty of a poem.

We can now say that, by the principle of democracy, the people of a country ought to decide for themselves all of the politically decidable matters about which they have good moral and material reason to care. That apparently must include the contents of a country’s constitution, the laws that organize the institutions of government and set limits to governmental powers in that country. These obviously are politically decidable matters, about

which a country's people obviously do have strong reason to care. And yet these are the very laws of lawmaking that must lie beyond the reach of majority ("political") decision if constitutionalism is truly in force.

The full implications of these remarks will emerge as we go along. For now, though, just consider the following illustrative questions, all of them politically decidable:

- Shall there or shall there not be in force in your country a law of lawmaking that all but prohibits government from "affirmative action" or any other sort of race-conscious legislation or administration, in any circumstances, for any reason?
- Shall there or shall there not be in force in your country a law of lawmaking that narrowly restricts the ability of the government to regulate the flow of money in political campaigns?
- Shall there or shall there not be in force in your country a law of lawmaking that narrowly restricts the ability of government to regulate what people do about having sex, becoming pregnant, remaining pregnant, or becoming a parent?

The choices posed by such questions are so obviously important to so many people, materially and morally, that it seems they must fall within democracy's reach if we take democracy seriously at all. They are also quite unmistakably—I wrote them so that they would be—choices about the laws of lawmaking, and the principle of constitutionalism requires that at least some choices about the laws of lawmaking be placed securely beyond the reach of democratic politics to decide.

In this chapter, I want to push your sense of the paradox of constitutional democracy beyond the terms of "difficulty." The problem has a depth and a poignancy that we may not feel comfortable confronting, and Bickel's diplomatic phraseology lets us too easily off the hook. To say that difficulty stands in the way of a melding of constitutionalism with democracy is to imply that we can all the same do it if we keep our wits about us. But I think we learn more if we start by doubting

systematically whether constitutional democracy is possible, at least insofar as we take the point of it all to have something to do with individual freedom and self-government. Doing so should chasten our imagining of, and our hopes for, all the ideals in play here—constitutionalism, democracy, and self-government.

That does not mean we give up the ideals. It does mean we never let ourselves forget that any society's goals respecting democracy, self-government, and a rule of law or of reason must be ones of approximation, of holding in check the misfortune of how things are, of choosing among necessarily compromised offerings of necessarily damaged goods. That is just a matter of social fact and the laws of logic, or so I mean to contend, and American constitutional democracy is not immune to fact and logic; it is not the little engine that could; we are not *that* exceptional. Teaching ourselves to see our country's constitutional democratic practices as, at their best, sisyphian attempts to approximate unsatisfiable ideals of democracy and self-government under law—not just technically, but logically and conceptually unsatisfiable—may help us steer clear of foolish acts and proposals in the name of ideals that we nevertheless have reason to continue to hold. It may also sharpen both appreciation and criticism of those practices, and of justification-intended interpretations of them such as those to be considered in this chapter.

Recall my illustrative list of politically decidable questions about the laws of lawmaking that one would expect the citizens of a democratically self-governing country to decide for themselves. In fact, those are all questions that the United States Supreme Court currently decides for this country, in the course of interpreting the country's established code of laws of lawmaking, the Constitution of the United States. The Court reads the Constitution practically to forbid state lawmakers from making the election of any number of persons of color an objective when drawing up legislative districts, and in general to impose very strict limits on the use by government agencies of affirmative ac-

tion set-asides and quotas.⁴ It reads the Constitution to prohibit Congress from restricting political campaign expenditures for the purpose of “equalizing” the voices of rich and poor people in the selection of government officials or the setting of government policy.⁵ It reads the Constitution to prohibit states from restricting people’s use of contraceptives⁶ and from imposing undue burdens on a woman’s freedom to choose to abort a pregnancy.⁷

In all of this, we confront a spectacle of judges outspokenly holding themselves responsible, according to what they take to be the very notion of constitutional government, to pronounce with finality on the content and meaning of the country’s laws of lawmaking. The Supreme Court’s opinion in *Cooper v. Aaron*, issued in the name of the Court as a whole but mainly written by Justice Brennan, declares the Justices “supreme in the exposition of the law of the Constitution.”⁸ Similarly, but even more assertively, the decisive opinion in a recent abortion case claims for

⁴ See *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995); *Miller v. Johnson*, 115 S. Ct. 2475 (1995).

⁵ See *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁶ See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁷ See *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 506 U.S. 833 (1992).

⁸ 358 U.S. 1, 18 (1958). See also William J. Brennan, Jr., “The Equality Principle: A Foundation of American Law,” *University of California at Davis Law Review* 20 (1987): 673–78, at 674: “In our society, it has historically been the courts that have interpreted and made acceptable [the commitment to a set of values contained in a] Rule of Law.” *Cooper v. Aaron* was a case growing out of the decision of Arkansas Governor Orval Faubus to use the Arkansas National Guard to prevent black students from entering Little Rock Central High School in 1957 in accordance with a court-ordered desegregation plan, an action to which President Eisenhower eventually responded by sending in the U.S. Army and federalizing the Arkansas Guard. In the *Cooper* case, the Supreme Court made a swift and unanimous response—“No Way”—to a request of Little Rock school authorities for a postponement of compliance with the desegregation order, in view of public turmoil that they said had been stirred up by Faubus’s actions. For Brennan’s authorship of the Supreme Court’s opinion, see Richard S. Arnold, “In Memoriam—William J. Brennan, Jr.,” *Harvard Law Review* 11 (1997): 5–9, at 6–7.

the Court the role of “speak[ing] before all others” for “the constitutional *ideals*” (it’s not enough for them just to speak for the laws) of the country. At stake in the Court’s performance of this role, three Justices wrote, is Americans’ “belief in themselves as a people who aspire to live according to the rule of law.”⁹ The authors of those judicial manifestos don’t seem awfully worried about the country’s people deciding for themselves the contents or even the spirit of the fundamental laws. Must we then count them as foes of democracy?

Not necessarily, it is said: they may be democracy’s heroes, depending on the spirit and content that they by their interpretations accord to the laws of lawmaking. There are in circulation two main variations on this theme. One construes democracy as a matter of people actually having certain specific kinds of legal rights, the other construes it as a matter of the procedures we use to decide what legal rights people are to have. Each variation, providentially, has a champion among the constitutional theorists who served as commentators when I presented this material in lecture form—Ronald Dworkin for democracy-as-rights, Robert Post for democracy-as-procedure. I want to accompany each of those scholars on his tour from one of the poles of our terrain (democracy-as-rights, democracy-as-procedure) to the point where the two meet up in paradox.

Initially, though, I need to point out how controversial and problematic is the quest on which both venturers are embarked. Both pose for themselves what I suppose we can call Rousseau’s problem—to find a form of political association, a set of arrangements for lawmaking, in which each individual human being remains or becomes his or her own governor, providing from within his or her own will and judgment the direction and regulation of his or her own life. The problem has proved to be an extremely puzzling one, and when Post and Dworkin delve into the relations

⁹ *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 868 (1992) (O’Connor, Kennedy, and Souter, J. J.) (emphasis supplied). For an endorsement, see Ronald Dworkin, *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Knopf, 1993), 120, 126.

between democracy and constitutionalism, it is with a view to explaining how constitutional democracy can redeem an ideal of personal self-government in politics that has haunted, daunted, and taunted liberal thought for hundreds of years.

DEMOCRACY, INDIVIDUALS, AND SELF-GOVERNMENT

Self-Government and Individuals

What is the point of democracy? Why should you care about the establishment in your country of democratic political arrangements? No doubt, we care about this partly for reasons of accountability. We want the people's governors, whoever they are, to govern the people in accordance with the interests of the people. We think that if those who govern the people hold office on sufferance of popular majorities, and if the electoral and representational schemes for toting those majorities are geared to a fair reflection of interests in the population, then government probably will attend decently well to the interests of the governed. Thus, we will have government for the people.

But if Lincoln was right, Americans care about democracy for a further reason as well. We want government to be *by* the people as well as *for* them. A self-respecting people, we think, exercise their own charge over the politically decidable conditions of their lives. They thus realize, with respect to those conditions, that aspect of human dignity and freedom that philosophers sometimes call "positive liberty," and that we more commonly call self-government.¹⁰ We care about democracy, in short, because we care about people governing themselves.

¹⁰ "Negative" liberty consists in the absence of external social interference with one's chosen activities ("social," because gravity, e.g., doesn't count as an infringement of your negative liberty to fly), while "positive" liberty consists in social conditions allowing for effective exercise of one's faculties of judgment and choice in the giving of direction to one's life. The "negative"/"positive" distinction was apparently coined by Isaiah Berlin, "Two Concepts of Liberty,"

If so, then a political arrangement is defective if it fails to serve the people's self-government in roughly the way that democracy, according to some theory, is supposed to serve it.¹¹ Consider, for example, this account of how democracy serves self-government, on which we'll see Professors Post and Dworkin converging from their opposite-looking initial conceptions: Democracy serves self-government by providing each individual with a reason to identify his or her political will or "agency" with the lawmaking and other acts of collective institutions, or to claim such acts as his or her own. (In a philosophical usage, to speak of a person's or group's "agency" is to make reference to his or her or its faculty of taking action, of intentionally deciding and then doing something. "Agency" in that sense will be a handy term for us to have available here.)

In the views of both Post and Dworkin, as well as in Justice Brennan's and my own, the reference to individuals is crucial.¹² For to say that we value democracy for the sake of self-government is not yet to say who or what is the agent or subject of the self-government we have in mind—who or what is the self whose government by him of himself, or by her of herself, or by it of

in Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 118–72. Compare Benjamin Constant's earlier distinction between the "liberties of the ancients" (= "positive") and the "liberties of the moderns" (= "negative"). See Benjamin Constant, "The Liberties of the Ancients Compared With the Liberties of the Moderns," in Constant, *Political Writings*, ed. Biancamaria Fontana (Cambridge: Cambridge University Press, 1988), 308–28. Charles Taylor, "What's Wrong with Negative Liberty?" in Taylor, *Philosophy and the Human Science (Philosophical Papers 2)* (Cambridge: Cambridge University Press, 1985), 211–29.

¹¹ Both Professors Dworkin and Post share this view. See, e.g., Robert Post, *Constitutional Domains: Democracy, Community, Management* (Cambridge, Mass.: Harvard University Press, 1995), 273, 278, 283–84; Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Cambridge, Mass.: Harvard University Press, 1996), 21–22. Even while echoing Isaiah Berlin's famous warning against confusion of the human goods of positive and negative liberty (see id. chap. 8), Dworkin does plainly hold self-government to be a very important human good.

¹² As to Justice Brennan, see chapter 2.

itself, is the self-government we care about. American constitutional theorists often like to speak and write as if the agent in question is the capital-P People of the country somehow taken whole, as one, unified self. That, of course, implies that democracy's point is to give effect to a single political will attributed to a single popular agent—a will that has by some means, typically involving a majority vote or a series of them, earned the right to speak in the name of the People.¹³

I am betting, though, that that is not how you, Reader, in all innocence and candor see the matter, and in fact it's hard to imagine that most Americans do. I am betting that for you, as for us (Brennan, Dworkin, Post, and me), what finally, morally matters here (assuming self-government matters to you at all) can only be the self-government—the freedom, the dignity—of persons. It's not that I think you doubt that there really are in the world such things to speak of as nations and peoples and political communities, or that there are reasons to care about the histories and fates and flourishings and even in some sense the freedoms of these entities. None of us doubts that.¹⁴ It is, however, entirely another question whether a group or community can be a subject or agent of self-government. Self-government, I take it—the state of living a life of one's own under one's own direction—is a human good in its own right; certainly not the only human good, maybe hard to defend as the chief human good, but still a human good that is not paltry, and one that it does not seem that a group or community can have.

Not, at any rate, unless you can grasp—and I am betting that you can't, any more than I can—how the distinct human good of

¹³ The most sophisticated theorist at work today on how this right is earned is Bruce Ackerman. See his *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1991); *We The People: Transformations* (Cambridge, Mass.: Harvard University Press, 1998).

¹⁴ For the agreements of Professors Dworkin and Post, see below, pp. 30–31 and Frank I. Michelman, “Must Constitutional Democracy Be ‘Responsive?’” *Ethics* 107 (July 1997): 706–23, pp. 710–12. Regarding Justice Brennan, see chapter 2, below, pp. 113–19.

being a self-governing subject can accrue to anyone or anything that, try as you and I might, we cannot see as having a consciousness and a will of its own. We do not understand a nation or a people or a political community to be a being possessed of its own mind, its own ability to feel or experience or decide—possessed, in other words, of a capacity for self-directive agency for which we have any final, moral reason to care. I know of nothing to suggest that Brennan believed *that*, any more than, I am sure, Professors Post or Dworkin believe it.¹⁵ Any loose talk in these pages of a country's people governing themselves must, therefore, be taken to refer to the self-government of "everyone," meaning of and by each person.

The Institutional Difficulty

No doubt, such an individualistic notion of "everyone's" political self-government is beset with severe problems. Perhaps (it's controversial among both social and psychiatric theorists) individuals can be more or less self-governing in some departments of life. But try to explain how everyone can conceivably be self-governing on the field of politics, where laws are made. Laws can, of course, in some countries at some times, be made by the actions of individuals, those we would call autocratic rulers. In no country at any time, however, can *everyone* thus make the laws.

The creation of laws is irreducibly a social and collective activity in two, crucial respects. First, what is created as law for one must serve as law for all. True, a law can, in a sense, *apply to* a single person—as would, for example, a law made by autocrat Jones giving Jones a special and unique privilege of taking whatever he wants from anyone. But that law is a law *for* everyone; otherwise, there would be no point in calling it a law. (Try re-

¹⁵ Cf. Post, *Constitutional Domains* 306 ("Groups neither reason nor have an autonomous will; only persons do.") As for Dworkin, see below, pp. 30–31. For Brennan, see chapter 2.

sisting Jones trying to take something from you, and you wind up in court.) Second, no prescription will actually work as a law—people won't recognize and comply with it as such—unless there is a sufficient base of social agreement on the authority to make laws of whoever issued the prescription. When dictator Jones gives out with the Jones law, either folks credit what he says as really making a law or they don't. If they don't, no law is made. If they do, then Jones making the law is functioning as a lawmaking *official* or *institution* in his society.

Officials and institutions are social creations. So are customs, and all law-creation is accomplished by either some institutional or some customary means. Customary law is an accretion over time of the uncodified habits, norms, and expectations of successive, socially dominant fractions of a country's population. Official-made law may be a product of the dictatorship of a ruler or ruling group, or it may be a product of deliberation and voting among those subject to the laws, or their representatives. All these modes of law creation are social to the core, and there would appear to be no other way for lawmaking to happen.

Democracy surely means that we do it by discussions leading up to votes in which everyone gets to participate on an equal footing with everyone else. But all real-world votes have losers, and none is ever decided by the sole and independent action of any individual. So the questions are: How is everyone to regard himself or herself as self-governing through social and institutional transactions from which many have dissented and in which in any event there is no real chance that any single person's own vote, or speech, or other considered political action decided the outcome? How is a person self-governing through institutional creation of laws that are revolting to him or her? (I'm sure you can think of some laws in force where you are that are revolting to you.)

Viewing matters from the standpoint of a concern about individual self-government in politically decidable matters, this is what we may call the Institutional Difficulty. The activity of a

judge like Brennan is an example or an instance of the Institutional Difficulty, for such judges do indeed, as we'll soon see, create laws that are binding on you and me. (They do it by what we call "interpretation" of legal texts and precedents.) However, the law-creative activities of the Brennans is certainly not the *cause* of the Difficulty. The cause of the Difficulty is the simple, irremediable fact that *someone* has to make the laws, and we can't all do it for ourselves individually.

Interestingly, far from someone like Brennan being a cause of the Institutional Difficulty, both Professor Post and Professor Dworkin think he is or might be a part of its cure. How so? Both Post and Dworkin say that *democracy*, when rightly understood and carried out, can provide a warrant in reason for every individual's identification of his or her political agency with the collective acts of lawmaking institutions. If that is true, our Brennans might indeed play a crucial part in securing the possibility of individual self-government in and through democratic politics. The Brennans, then, might use their judicial powers of oversight of ordinary lawmaking to help ensure that democracy is, in practice, understood and carried out in the way that does make it a medium of the self-government of individuals.

So say our authors. Let us see.

THE SUBSTANTIVE CONCEPTION OF DEMOCRACY

Substance and Procedure

Social and legal theorists sometimes use the term "social norm" to encompass various prescriptive propositions that we more commonly would call moral and legal rules, standards, principles, and judgments. Social norms can be extremely abstract and general (the Golden Rule), or extremely specific and concrete (1998 Iowa State Fair blue ribbon for cucurbits rightly belongs to that 300-pound cuke right over there), or anywhere in between. Legal

theorists further make use of a distinction between “substantive” (or “primary”) norms and “procedural” (or “secondary”) norms. Roughly, a substantive or primary social norm does, and a procedural or secondary norm does not, contain information about what rights and obligations people are supposed to have, or, in other words, about how people in various social settings ought and ought not to act in regard to each other’s interests and claims. But don’t all social norms, by definition, contain information of that kind? According to the substance/procedure distinction, some do not. Some norms, it is said—the secondary, procedural ones—are directed only to the question of the method or procedure to be used in deciding the content of the substantive (primary) norms. Thus, “The legislature votes on it” is the secondary or procedural norm and “don’t possess cannabis” is the resulting primary or substantive norm; “spin the bottle” is the secondary or procedural norm and “kiss *him*” (*he* being the one the bottle points to, the bottle having been duly spun) is the resulting primary or substantive norm.

*Dworkin’s Conception of Democracy
as (the Right) Rights*

“Democratic” is the name of a norm or standard (or maybe more than one) meant for application to political arrangements and practices; some are, some aren’t, and we apply the standard in deciding which is which. According to Dworkin, the standard “democratic,” as meant for application to a country’s basic laws, is best conceived as a cluster of primary, substantive requirements, not of secondary, procedural ones. In Dworkin’s view, the question of the democratic credentials of the basic laws of a country is best conceived as one of matter not manner. It is the newspaper’s “what” that counts here, not the who, when, where, or how. In other words: To find out whether democracy prevails in a country on the level of its basic laws, you do not ask how or when or by whom those laws were made, you ask what those laws say.

Depending on what rights they establish, a country's basic laws may or may not serve democratic ends and values. They do so, in Dworkin's view, insofar as they rule out caste, guarantee a broad and equitable political franchise, prevent arbitrary legal discriminations and other oppressive uses of state powers, and assure governmental respect for freedoms of thought, expression, and association and for the intellectual and moral independence of every citizen.¹⁶

As we are going to see repeatedly below, "basic laws" here has to include not only the clauses of the Constitution but key interpretations of them. For example, the Equal Protection Clause in our Constitution does not necessarily or unqualifiedly count in Dworkin's eyes as a democratic feature in our system of government. It did not serve as such when construed as the Supreme Court construed it in *Plessy v. Ferguson* (1896) to permit states to segregate people by race into "separate but equal" public facilities. It did when the Court construed it in *Brown v. Board of Education* (1954) and succeeding cases to prohibit states from doing just that. Few would dispute these particular judgments. But judgments of the democratic or democracy-serving character of constitutional interpretations can be and often are very controversial. For example, many Americans find that the Equal Protection Clause stands in democracy's way when construed to prohibit race-conscious government action in the contemporary United States—whereas, needless to say, quite a few other people think exactly the opposite. That is why, if we accept Dworkin's view, a commitment to democracy on the basic-law level has to mean a striving not only to get the right abstract principles written into clauses of the Constitution but also to get key interpretations of those clauses—does "equal protection" mean that affirmative action is permitted or that it is not?—resolved in accord with the right or best conception of a democratic regime.

¹⁶ See Dworkin, *Freedom's Law*, 16–18, 24–26; Ronald Dworkin, "Equality, Democracy, and Constitution: We the People in Court," *Alberta Law Review* 28 (1990): 324–46.

*From Democracy-as-Rights to the Democratic Vindication
of Judicial Governance: Alleged Institutional
Advantages of the Judiciary*

If you grant that much, Dworkin immediately goes on to point out, you must admit that there is nothing necessarily anti-democratic about allowing the country to be fundamentally governed, in part, by judges interpreting the basic laws. You have accepted that the objective for democracy, at the basic-law level, is not only to proclaim as law the right abstract principles but also to arrive at interpretations of them reflecting the right or best conception of a democratic regime. So it must be your view that there is in fact such a thing to speak of as the right or best conception of a democratic regime. It must, in other words, be your view that when people disagree about what the right or best conception is and about which interpretation of an abstract constitutional clause the right or best conception calls for, it's not just a matter of *chacun à son goût* but rather a matter of one party's getting closer than the other to the truth. But then, runs the line of Dworkin's thought, you have to admit the practical possibility that an independent judiciary will tend to get closer to the truth than would the great body of the people or their elected tribunes in the legislatures.¹⁷

Here, Dworkin's argument implicitly ties into a body of American legal and constitutional thought—sometimes called “legal process”—that is concerned with the relative strengths and weaknesses of different branches of government in the making of various kinds of decisions. Unpacked, this stage of the argument might run as follows.

American constitutionalism subordinates the ordinary lawmaking powers of any sitting government to the constraint of superior laws of lawmaking. An inevitable accompaniment of any such arrangement is that disagreements sometimes break out over whether the government, by its making of some ordinary law (or

¹⁷ See Dworkin, *Freedom's Law*, 32–35.

its failure to make one), remains in compliance with the superior law, and there have to be ways of getting those disagreements officially resolved so that life may go on.¹⁸

In the established constitutional practice of our country, many such disagreements are referred for official resolution to the law courts and particularly the Supreme Court of the United States. There is an obvious connection between that fact and the fact that the Supreme Court heads up what we call an “independent” judiciary, meaning primarily one whose members, once chosen, are not beholden either to the voters or to elected officials for retention of their positions or their salaries.¹⁹ The Court is in that sense outside the sitting government that stands charged with illegal lawmaking, and there is apparent good reason to send the charges of illegal action to an outside body for decision. Wouldn’t it be both morally and prudentially reckless to leave them for decision by the accused government itself? To do so, Professor Dworkin has written, would be contrary to “the principle that no

¹⁸ Dispute over the constitutionality of the government’s *failure* to make a law is largely foreign to American experience, but is much more familiar in some other countries. South Africa’s constitution, for instance, requires the country’s elected Parliament to enact and keep in force legislation “to prevent or prohibit unfair discrimination.” Constitution of South Africa, 1996, §9(4). Since the concept of “unfair discrimination” is obviously one that is subject to sincere political debate and disagreement, it is easy to imagine questions arising, which some official institution will have to answer, over whether Parliament is duly performing its constitutional obligation. It looks as though that task will fall mainly to the Constitutional Court of South Africa.

One might ask why the authors of a constitution don’t just include in the instrument itself the law against “unfair discrimination” (or whatever) that they are evidently ready to maintain is morally or prudentially required of the governmental system they are chartering. The most likely answers are either (i) the constitutional authors believe for some reason that they are not in the best situation to write the morally or prudentially requisite antidiscrimination law in full detail, or (ii) although they agree on the abstract principle of having a law against unfair discrimination, they can’t agree on what the details of such a law should be, and they don’t want to risk the political success of their constitution-making project as a whole on a full airing of their disagreement.

¹⁹ By command of Article III of the Constitution, federal judges are presidential appointees (subject to Senate confirmation) and have life tenure, and judicial salaries may be increased from time to time, but never reduced.

man should be judge in his own cause.”²⁰ Others speak of setting the fox to guard the chickens.

But that's not enough to close the case in favor of giving unelected judges the decisive word on these questions of the higher, constitutional legality of ordinary lawmakings. To be sure, we may want a decider who stands outside the accused government, but the courts are not the only such decider available. Another is the body of the country's people, the sitting government's supposed bosses. It would seem that, on strict democratic principle, the entitlement to pass on questions of the higher legality of ordinary lawmakings belongs by right to this body. Disputes about the higher legality of particular instances of ordinary lawmaking are nothing other than disputes about how to apply the laws of lawmaking and questions about how to apply the laws of lawmaking are not cleanly separable from questions about what the laws of lawmaking *are*. Acts of legal application contain acts of legal manufacture. Consider the Supreme Court deciding for the first time, over intense and reasonable disagreement, that the Equal Protection Clause very strictly limits governmental use of affirmative action. In what sense is the Court not engaged in the making of a law of lawmaking? As we'll see below, there are many such cases—cases in which you cannot apply the laws of lawmaking without, at the same time, in some nontrivial measure, making them. But by the principle of democracy, it is the people of a country who are entitled to be the makers of the basic laws of that country.

If it were beyond imagining how we could practicably arrange for the people to have a deciding voice in constitutional interpretation, we might shrug the problem off on that ground. However, it is not. A simple way to do it is to abolish judicial review. If Congress or a state legislature stands charged with enacting laws that the laws of lawmaking prohibit, or with failing to enact laws that the laws of lawmaking command, let the voters decide

²⁰ Ronald Dworkin, “The Jurisprudence of Richard Nixon,” *The New York Review of Books*, May 4, 1972.

the charges at the next elections. They can find out how candidates stand on the matter and elect those who will carry out the people's judgment, repealing the offending law or enacting the missing one. Congress then is not the judge of its own cause, or a fox set to guard the people's chickens. Congress may have a cause, but the people are the judge; Congress may be a fox, but the people are the guard. To make the Court the judge and the guard is, from the standpoint of democracy, to put the Court in the people's rightful place. So it might be and has been contended.

If there is to be found a justification for setting the Court as the guard, the form of it will have to be: the Court is an institution much better situated and equipped to do a good job of it than are either the people or their elected representatives in the legislatures. As it happens, there is no shortage of impressive-looking arguments to that effect. Many begin with the observation that what is at stake here is not *preference* but *judgment*, and judgment, at that, of issues of a somewhat philosophical character, such as which of the competing interpretations of some abstract basic-law principle conforms to the right or best conception of a democratic regime. It may not be a very good idea—assuming it would be possible in practice—to turn every legislator's every vote on a pending bill, and every citizen's every decision about whom to vote for in a congressional or state legislative election, into an occasion of judgment of such issues. They are issues to which full-time political philosophers dedicate their lives, and to impose them on legislators and citizens in their ordinary political activities may be to overload those activities preposterously and ruinously.

Legislators and citizens, it may be said, have too many other things legitimately on their minds. Legislators considering bills are legitimately concerned with public policy options to which constitutional law and morality are indifferent (far from every legislative policy choice is a matter of basic political morality), and with constituent preferences about those policy options (more guns? less butter? less bread? more circuses?). Constituents

selecting representatives are legitimately concerned with public policy choices, with expressions of preference as between policies of equal moral defensibility (that's democracy, too), and with the general honesty, wisdom, courage, and leadership of those running for office. So if ordinary political operations do inevitably engage questions of a political-philosophical character, about the morally necessary constraints on government, there may be good reasons for placing primary responsibility for dealing with those questions in an institution better designed for the purpose, and less preoccupied by other purposes, than an ordinary legislature or an ordinary electorate is, most of the time. Let the electorate and the legislatures act on the basis of policy and preference, and leave it to the judges to tell them when their policies and preferences are over the line of morally necessary constraint. Correlatively, choose judges with due regard for their fitness for this sort of work.

So it is often contended. The contention goes arm in arm with Dworkin's argument that investing the judiciary with final authority to say what abstract constitutional clauses more concretely mean is not counter-democratic "in principle," just as such, at least not once you grant that a commitment to democracy on the basic-law level means a striving not only to get the right abstract principles into the basic law but to get key interpretations of those principles resolved in accord with the right or best conception of a democratic regime.

A clear intention of Dworkin's argument is to provide a defense of Justice Brennan's career against charges of riding roughshod over democracy. Of course, it's not Brennan by name that Dworkin defends but the mode of constitutional adjudication that Brennan's career epitomizes. Assuming Brennan's constitutional interpretations match up well with what *you* think makes for a substantively democratic regime—the goods are on display in chapter 2—you should have no trouble counting him a historic contributor to the improvement of democracy in America.

Actually, matters aren't so simple for Professor Dworkin. For him, remember, a part of democracy's point is self-government,

and it seems almost facetious to associate self-government with a notion of democracy's being a matter *only* of the substance or content of the basic laws and *not at all* a matter of who wrote those laws and by what procedures. Inescapably, "self-government" is the name of an activity, a reference to something that someone *does*. It would seem to follow that no simple test of outcomes on any given level of lawmaking, the constitutional level included, can reveal the presence or absence of self-government on that same level of lawmaking. From the standpoint of a concern about self-government, democracy is present only when a country's people decide for themselves, by democratic political procedures, all of those major conditions of their lives that are politically decidable at all. Insofar as those conditions include the contents of the country's basic laws (which they quite obviously do—I gave examples at the beginning of this chapter), a population's passive reception of those contents from judicial oracles must register as a serious shortfall from the democratic ideal.

But can that really be the right way to comprehend "democracy"? Can democracy conceivably mean that the people decide, democratically, *all* the politically decidable questions? Can a commitment to democracy really require the use of democratic procedures to decide even the basic laws of the country, including the rules and norms that set the aims and limits of governmental powers and establish the system for any and all further lawmaking? Daunting though it may be, the answer seems to be "yes," in view of the moral and material importance that people quite reasonably attach to the contents of many of these basic laws, these laws of lawmaking. And yet I suspect we will always feel (as I would guess many readers are feeling right now) an impulse to exclude the laws *of lawmaking* from democracy's procedural purview—to restrict the domain of procedurally democratic decision to whatever *further* political choices the laws of lawmaking leave open, while leaving *those* laws to be decided by right and true reasoning about what it means for a lawmaking system to be democratic.

Exactly this impulse to exclude the laws of lawmaking from the domain of decision by democratic procedures is what we see exemplified in Dworkin's proposal that we judge the democratic credentials of a constitution by reference to its content and not by reference to its authorship. This impulse to exclude is irrepressible. It is irrepressible for a reason. The reason is that behind the impulse there stands an apparently crushing logical objection to the alternative idea, that the contents of the laws of lawmaking could, consistently with a commitment to democratic government, themselves be within the keeping of a democratic procedure to decide. We take a close look at that objection below, but first we need to notice how another factor might independently lead Professor Dworkin to seek the American Constitution's democratic credentials in its regulative content and not in the procedures used to create that content.

*Interpretation (I): "Moral Reading" versus
Procedural Legitimation*

Textbook theory typically takes an opposite tack from Dworkin's. It tries to uphold the Constitution's democratic credentials in strictly procedural terms, by picturing the country's people, acting wholly or partly through votes cast by elected representatives, as having indeed chosen the laws of lawmaking for themselves. The simple version is that they did so on the various occasions when conventions in the original states ratified the original Constitution, when state legislatures or conventions ratified its several amendments, and when conventions in territories petitioning for statehood ratified (in effect) the constitution as then amended. Much more refined and complex versions are also in circulation.²¹ One could cite a number of grounds for

²¹ See Bruce Ackerman, *We the People: Foundations* (Cambridge, Mass.: Harvard University Press, 1993); Bruce Ackerman, *We the People: Transformations* (Cambridge, Mass.: Harvard University Press, 1998).

doubting the cogency and credibility of claims of this sort,²² but here I only want to make the point that it is closed off to Dworkin because of a view he holds about what judges really do when they interpret laws in the course of deciding how to apply the laws to cases.

At the point of application to cases, constitutional law is always a product of someone's interpretation of the constitutional clauses, judicial precedents and doctrines, and lawyers' conventional understandings of which this law is formed. So argues Dworkin, and I agree, and perhaps most lawyers would. But Dworkin carries the point to lengths where not everyone would follow, although I do. He finds no escape from what he calls a "moral reading" of certain clauses of the Constitution that appear to confer rights in very abstract terms, including those which speak of "the freedom of speech," "liberty," "due process of law," and "equal protection of the law." A legal interpreter of these expressions, Dworkin says, has no choice but to treat them as "invocations" of political-moral values or principles that the interpreter has the responsibility to distill from what he or she finds to be major fixed points in the historical practice of American constitutionalism. Such a distillation, Dworkin maintains, simply cannot be accomplished without putting into the brew some of the interpreter's own substantive vision of the proper ends and ideals of government.²³

We can use an opinion of Justice Brennan's to illustrate the moral reading approach to constitutional interpretation. The case of *Michael H. v. Gerald D.* (1989)²⁴ concerned an unwedded man in California who sought a right to visitation with a child he had fathered, whose mother was married to another man at the time

²² Many are set forth in Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985), 33–71. See also Frank I. Michelman, "Constitutional Authorship," in Larry Alexander, ed., *Constitutionalism: Philosophical Foundations* (Cambridge: Cambridge University Press, 1998), 64–98.

²³ See, e.g., Dworkin, *Freedom's Law*, 2–4.

²⁴ 491 U.S. 110 (1989).

when the child was born. California law, like the laws of other states, had long denied the biological father any right of visitation in these circumstances. It declared the person to whom the mother was married at childbirth to be the legal father, making the other man, in the sight of the law, a stranger to the family. Michael H. sought relief from this law, claiming that his interest in contact with his biological child is a constitutionally protected component of the liberty protected by the Fourteenth Amendment. Justice Antonin Scalia, writing for a majority of the Supreme Court said it can't be that because American law typically and traditionally had never granted visitation rights to men in Michael's position.²⁵ Brennan, dissenting, protested against this method of decision. He recalled prior Court decisions extending the protection of the Amendment's "liberty" clause to a class of what he called "generalized interests" that "society traditionally has thought important." Among these generalized interests, Brennan listed "freedom from physical restraint, marriage, childbearing, [and] childrearing."²⁶ He said the decisive question must be whether the biological father's visitation interest falls in all reason under an even more general principle of liberty that these traditionally esteemed, generalized interests exemplify. In Brennan's view, the law's preexistent refusal to respond to a biological father's visitation interest might have to be judged a failure on the law's part to measure up to its own immanent standard of reason and right. Correcting for such failures was, in Brennan's view, a chief mission of the office he held.

Nothing could better exemplify what Dworkin commends as a "moral reading" of the Constitution. But, as the case also illustrates and Dworkin explicitly recognizes, to give a moral reading to constitutional clauses and precedents often means to take sides on some matter of political-moral controversy on which sincere and thoughtful people can and do differ. "Intractable, profound

²⁵ See *ibid.*, 124.

²⁶ *Ibid.*, 136, 139 (Brennan, J., dissenting).

questions of political morality,” Dworkin has called them, that “philosophers, statesmen, and citizens have debated for many centuries with no prospect of agreement.”²⁷ I mentioned examples of such issues near the beginning of this chapter. Notions of equality and democracy, freedom and fairness, can doubtless help frame debate over them, but the sincerest commitment to such ideals cannot incontrovertibly settle them. Such a possibility is precluded by diversities of experience and vision and the thousand shocks to which human judgment is heir. In the face of resulting, unliquidatable, reasonable disagreement, someone has to decide these morally freighted questions of constitutional meaning, and whoever, for whatever reason, is excluded from participation in the decision is to that extent fundamentally governed by those who make it.

It should now be apparent why the moral reading theory of constitutional interpretation debars its partisans from the procedural way of defending the democratic character of judicially interpreted constitutional law—that is, by pointing to historical facts of popular enactment of the constitutional clauses that the judges interpret. On the moral reading theory, those popularly enacted clauses contain too small a share, and the judicial interpretations of them too large a share, of the total sum of operative constitutional meaning that is to be made. Too much meaning remains open at the point of promulgation and ratification of the constitutional text by popular forces. Insofar as democracy is about self-government, democracy means the people deciding for themselves, by political procedures, the politically decidable conditions of social life in which they have moral or material reason to take an interest. It follows that, if someone is going to use “moral readings” of highly interpretable constitutional texts to resolve for the country such basic and contested issues of political morality and prudence as those presented by affirmative action, racist speech, gay rights, property rights (e.g., as against environmental regulation), political campaign finance, term limits for

²⁷ Dworkin, *Life's Dominion*, 120.

elected officeholders, assisted suicide, abortion, etc. (the list is endless), it ought to be the people acting democratically who do that and not any cadre of independent judges. Work of that sort simply cannot be placed beyond democracy's purview, given a conception of democracy's point in which self-government strongly figures.²⁸

Nevertheless, it may have to, for the story is not over yet.

²⁸ I expect some resistance to this conclusion, although not much from Professor Dworkin, so I want at least to indicate briefly how I would go about heading off what I think are the three likeliest lines of objection to it, which I will call the objections from abstraction, from concretion, and from right-answerism.

Here is a schematic rendition of the objection from abstraction: It should not be insuperably difficult for a constitutional interpreter to arrive at, and publicly defend, a determination of whether the people have or have not ever politically enacted into their constitutional instrument an expression of the principle of (for example) equality of political concern and respect. Suppose the answer is that they have. Then to that extent the question of the people's self-government depends strictly on whether the government they receive back from judges and others does or does not thereafter proceed in true accord with the principle of political equality that the people themselves enacted. As long as it does, all is well; the people govern themselves.

I don't believe it. It appears to me that self-government is too gravely compromised by the range and gravity of the questions that the abstract principle of political equality leaves open to further debate and resolution. Only think of current controversy in America over governmental "colorblindness" as an uncompromisable principle of constitutional law. Issues of this magnitude are too fraught with moral and material significance to allow us to say that constitutional law is democratic in virtue of the people themselves having written the equal protection or due process clause into the Constitution.

But a principle of political equality (to continue with the example) is surely not the only one that the people may defensibly be found to have enacted into their governing instrument, which brings us to the objection from concretion or, as it might be called, the objection from integrity, which roughly is: The question for a constitutional interpreter is always one of how best to make an applicable synthesis of *numerous* abstract principles that the people over time have enacted into their constitution, adding into the normative mix whatever past synthetic interpretations have proven themselves to be enduring ones, and this is a far more thickly informed and constrained exercise than determining the application of any single abstract principle taken timelessly and alone. True enough. But not constraining enough to abate the problem I am posing. Dworkin himself has characterized these synthetic normative judgments of legal interpretation as both bottomlessly political and as having components of aesthetic judgment. See Dworkin, *Law's Empire*, 73–76, 87–93, 229–32. These seem to be ways of saying what I take to be true: that among sincere and reasonable