

Reconstituting We the People

Paul Gowder, 09/19

Goals

- Advance the literature on democratic constitutionalism
 - Directly confront the problem of exclusion
- Groundwork for further work (ultimately a book)
 - Further development of the constitutional theory
 - Doctrinal interventions, e.g., overrule *Richardson v. Ramirez*

- Part 1: setting up the problem of popular sovereignty and its relationship to constitutionalism
- Part 2: the constitutional conception of popular sovereignty and why it fails
- Part 3: Douglass et. al. repairing the constitutional conception

Part 1: Setup

- The problem of constituent power: the sovereign *demos* legitimates the constitution, but the constitution constructs the *demos*
- The countermajoritarian problem

Part 2: Habermas et. al.

- The constitution is legitimated by an ongoing process of revision
- The *demos* is unified across generations

Part 2: Habermas et. al.

- vs. constituent power problem: *demos* legitimates, on a continuing basis, the constitution that creates it
- vs. countermajoritarian problem: contemporary majority can recognize lawmaking of prior generations as product of own will

Part 2: Habermas et. al.

- Constitutional conception has empirical preconditions relating to shared identity/agency
- Exclusion of Black Americans and others from equal political power is inconsistent with those preconditions

Must we give up on
Constitutional legitimacy?

Part 3: Douglass et. al.

- Conditional attachment to American Constitutional institutions in virtue of their potential to promote inclusion/liberation
- Double-consciousness: simultaneously standing outside of and claiming membership within *demos*; genuine inclusion can repair identity of *demos*.

Part 3: Douglass et. al.

- For now, we should act as if the constitution is legitimate and work toward full inclusion
- If full inclusion is achieved, the reconstituted *demos* can fully legitimate the constitutional ideals and institutions that its members used and modified to secure their own inclusion

Thank you.