ON LAW AND DEMOCRATIC DEVELOPMENT: POPULAR CONSTITUTIONALISM AND JUDICIAL SUPREMACY

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Richard E. D. "Red" Schwartz has been a colleague and mentor for over a quarter of a century, and it is with great pleasure that I participate in this celebration of him and his work. The theme of the conference is most appropriate for the celebration. Red has devoted his career to an examination of the role of law in the development of societies. Moreover, Red's work on law and society has reached far beyond his extraordinary academic and scholarly achievements, extending as well to his important and significant contributions to the improvement of local, national, and international communities. Many years ago, Red organized a lunchtime reading group at the University to discuss the meaning of a "just society." It is most fair to say that Red has devoted his life not only to an academic understanding of such a society, but also to practical efforts to establish that society.

I was asked to comment on the topic of the conference as it relates to the United States. It is not simply my law background that persuaded me to focus on the issue of judicial supremacy. Examination of law and democracy in the United States at some point must turn its attention to the role of the courts, particularly the Supreme Court, in furthering democratic principles. A fundamental aspect of our democratic experience has been the institution of judicial review, the proposition that unelected, life-tenured judges have the power to declare that our elected representatives have acted unconstitutionally.[1] This is a remarkable power even if perhaps tempered by the fact that the judiciary lacks the power of the purse or the sword and, thus, cannot enforce its decisions.[2]

What role should the judiciary and the countermajoritarian institution of judicial review play in a democracy? Must we (the people) and our elected representatives comply with a judicial interpretation of the constitution that we believe is itself inconsistent with the fundamental law? Or, are we free to ignore judicial decisions

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1. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177-78 (1803).

2. *See* DAAN BRAVEMAN, ET AL., CONSTITUTIONAL LAW: STRUCTURE AND RIGHTS IN OUR FEDERAL SYSTEMS 168 (4th ed. 2000) (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)); ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 69-70 (1962).

that we believe are illegitimate? These, of course, are not new questions but ones that have been debated over the course of our history. In this brief commentary, I can only introduce some of the issues surrounding the current debate over these questions.

To place the matter in context, consider the following problem. In 1989, the Supreme Court held in *Stanford v. Kentucky* that the state did not violate the Eighth Amendment prohibition on cruel and unusual punishment by executing juveniles.[3] Only 16 years later, a closely divided Supreme Court reversed that decision and held in *Roper v. Simmons* that the Eighth Amendment prohibits a state from imposing the death penalty on a juvenile offender under the age of 18 years.[4] The *Roper* case involved the state of Missouri and, under preclusion rules, the judgment did not apply to the other 19 states that authorize the juvenile death penalty.[5] Suppose the other states maintain that the earlier decision in *Stanford* more accurately interpreted the constitution. Are these other states free to execute juveniles until a court rules that their laws are unconstitutional, or are they bound by *Roper* to stop the practice?

Recently, these kinds of questions are receiving considerable attention as a number of scholars advocate some version of the idea of "popular constitutionalism."[6] Professor Larry Kramer, author of *The People Themselves: Popular Constitutionalism and Judicial Review*, defines popular constitutionalism as a system in which the people have "active and ongoing control over the interpretation and enforcement of constitutional law."[7] Under this system, the "authority to interpret and enforce the Constitution is not deposited exclusively or ultimately in the courts (or in any agency of government, for that matter), but remains in politics and with 'the people themselves.'"[8] In contrast, judicial supremacy, or what Kramer refers to as "legal constitutionalism," places final authority to interpret and enforce the Constitution in the judiciary.[9]

One of the strongest statements of judicial supremacy is the

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3. Stanford v. Kentucky, 492 U.S. 361 (1989).

4. Roper v. Simmons, 543 U.S. 551 (2005).

5. As a general proposition, preclusion rules can apply only against a party to a prior proceeding. *See* Blonder-Tongue Lab. v. Univ. of Ill. Found., 402 U.S. 313, 328-29 (1971).

6. Larry D. Kramer, *Popular Constitutionalism,* 92 CAL. L. REV. 959 (2004) (reviewing the extensive scholarly literature on the questions raised in this article).

7. *Id.*

8. *Id.* at 961 n.3.

9. *Id.* at 959. *See generally* Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation,* 110 HARV. L. REV. 1359 (1997).

Supreme Court's decision in *Cooper v. Aaron*.[10] There, Arkansas officials urged that the Court uphold a suspension of the Little Rock School Board's plan to desegregate the public schools while state officials pursued efforts to ignore and nullify the holding in *Brown v. Board of Education*.[11] The Court in *Cooper* described the case as involving "a claim by a Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution."[12] A unanimous Court forcefully rejected any suggestion that state officials are free to ignore the decisions of the Supreme Court and engage in such a "war against the Constitution."[13] The Court held that when state officials take an oath to support the Constitution, they bind themselves to the Court's interpretations of the Constitution.[14] Quoting Chief Justice Marshall, the Court said: "'If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.'"[15]

Arkansas was not one of the states involved in *Brown* and was not bound by the judgment in that case under preclusion rules. Nevertheless, the Court concluded that the Arkansas officials were bound in a deeper sense by *Brown,* reasoning as follows: (1) under the Supremacy Clause,[16] the Constitution is the supreme law of the land; (2) *Marbury* declared that it is the duty of the judiciary to interpret the Constitution;[17] (3) therefore, the judiciary's interpretations of the Constitution are the supreme law of the land as well and bind officials who are sworn to uphold the Constitution.[18] Justice Frankfurter explained in his concurring opinion that any other conclusion would destroy the rule of law.

> [T]he Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. . . . The conception of a government by laws dominated the thoughts of those who founded this Nation and designed its

10. Cooper v. Aaron, 358 U.S. 1 (1958).
11. Brown v. Board of Educ., 347 U.S. 483, 495 (1954).
12. *Cooper*, 358 U.S. at 4.
13. *Id.* at 18.
14. *Id.; see also* U.S. CONST. art. VI, cl. 3.
15. *Cooper*, 358 U.S. at 18 (quoting United States v. Peters, 9 U.S. 115, 136 (1809)).
16. U.S. CONST. art. VI, cl. 2.
17. *Marbury*, 5 U.S. (1 Cranch) at 177.
18. *Cooper*, 358 U.S. at 18.

> Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit.' So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for.[19]

Thirty years later, Attorney General Edwin Meese gave a speech that attacked *Cooper's* reliance on the notion of judicial supremacy. In his controversial remarks, he too invoked the rule of law, but used it to support the proposition that the supreme law of the land is the Constitution itself, rather than the constitutional law announced in Supreme Court interpretations of the document.

> Obviously constitutional decisions are binding on the parties to a case; but the implication of the [Cooper] dictum that everyone should accept constitutional decisions uncritically, that they are judgments from which there is no appeal, was astonishing. . . . In one fell swoop, the Court seemed to reduce the Constitution to the status of ordinary constitutional law, and to equate the judge with the lawgiver. . . . The logic of the dictum in Cooper v. Aaron was, and is, at war with the Constitution, at war with the basic principles of democratic government, and at war with the very meaning of the rule of law. . . .
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> Perhaps no one has ever put it better than did Abraham Lincoln, seeking to keep the lamp of freedom burning bright in the dark moral shadows cast by the Court in the Dred Scott case. Recognizing that Justice Taney, in his opinion in that case, had done great violence not only to the text of the Constitution but to the intentions of those who had written, proposed, and ratified it, Lincoln argued that if the policy of government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court the instant they are made, in ordinary litigation between parties, in personal actions, the people will have ceased to be their own rulers, having to that extent, practically resigned their government into the hands of that

19. United States v. United Mine Workers of Am., 330 U.S. 258, 308-09 (1947) (Frankfurter, J., concurring).

imminent tribunal.[20]

Meese concluded that we must preserve the distinction between the Constitution and judicial interpretations of the Constitution, recognizing that it is the former that is superior. Meese warned that "[t]o do otherwise, as Lincoln said, is to submit to government by judiciary. But such a state could never be consistent with the principles of our Constitution. Indeed, it would be utterly inconsistent with the very idea of the rule of law to which we, as a people, have always subscribed."[21] As might be expected, Meese's position provoked sharp criticisms.[22] Anthony Lewis summarized the view of the critics when he wrote, "'To argue . . . that no one owes respect to a Supreme Court decision unless he was actually a party to the case—is to invite anarchy.'"[23] It is interesting to note that Meese eventually retreated from his position, explaining that he did not mean to suggest that Supreme Court decisions are not generally applicable.[24]

The current proponents of popular constitutionalism, however, have refocused attention on the issue and appear to join Meese in challenging the notion of judicial supremacy. It makes for strange bedfellows as the political progressives of today advocate views similar to those of the politically conservative Meese. It may be tempting to conclude that the debate between advocates of popular constitutionalism and those of judicial supremacy is not about deep theory but rather about outcomes. If you like the Supreme Court decisions, you argue for judicial supremacy. If you disagree with the Court's outcomes, you argue against the proposition that the Court's decisions have a general applicability outside the specific parties to the case. Such a conclusion, however, is not fair to any of the participants in the debate.

Kramer critiques each of the classic justifications for judicial supremacy and concludes that the arguments rest on controversial empirical assumptions and facts that can not be tested or proved.[25] He agrees with others who maintain that ultimately the differences between the popular constitutionalists and the judicial supremacists turn on fundamental views about democracy. Underlying the judicial

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20. Edwin Meese, *Perspective on the Authoritativeness of Supreme Court Decision: The Law of the Constitution,* 61 TUL. L. REV. 979, 987-89 (1987).

21. *Id.* at 989.

22. *See* DAAN BRAVEMAN ET AL., *supra* note 2, at 50.

23. *Id.*

24. *See* Kramer, *supra* note 6, at 964.

25. *Id.* at 1002.

supremacy model, he argues, is a distrust of democracy, a view that "ordinary politics is too dangerous to permit without some independent body to control its excesses and injustices."[26] He concludes that:

> the choice between popular constitutionalism and judicial supremacy . . . is necessarily and unavoidably one for the American people to make. The Constitution does not make the choice for us. Neither does history or tradition or law. We may choose . . . to surrender control to the Court, to make it our platonic guardian for defining constitutional values. Or we may choose to keep this responsibility, even while leaving the Court as our agent to make decisions. Either way, we decide.[27]

Critics have attacked Kramers' brand of popular constitutionalism and his notion that Supreme Court decisions should be binding on only the parties to the cases. Laurence Tribe, for example, argues that Kramer's reliance on history is misplaced, finding that "Kramer's picture of popular constitutionalism from the founding to the mid-20th century is as misleading as it is foreshortened."[28] More significantly, the view that the constitution means whatever the "people" say at any given time ignores the very purposes of a constitution. Tribe wrote:

> if constitutional law were but a vessel into which the people could pour whatever they wanted it to contain at any given moment, wouldn't the whole point of framing a constitution have been lost? A constitution announces the "promises to keep" that define who we are. "The people" whose promises a written constitution makes cannot be frozen in a snapshot—much less a snapshot taken today.[29]

Erwin Chemerinsky offers additional criticisms of popular constitutionalism. First, he maintains that Kramer relies on arguments that are abstract at best, failing to explain what he means when he says that final constitutional interpretative authority lies with the people.[30] Second, and perhaps more significantly, Chemerinsky suggests that

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26. *Id.* at 1004.

27. *Id.* at 1011.

28. Laurence H. Tribe, *The People's Court*, N.Y. TIMES, Oct. 24, 2004, § 7.

29. *Id.*

30. Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1014-18 (2004). *See also* Larry Alexander & Lawrence Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1616 (2005).

Kramer's version of popular constitutionalism is dangerous because it leaves protection of minority interests to the whim of the majority. The absence of judicial supremacy forecloses "judicial protection for litigants who have nowhere to turn but the courts—litigants who are, by definition, unable to harness 'popular' authority for their own constitutional interests."[31]

For our discussion today, I want to suggest that the division between popular constitutionalism and judicial supremacy may be overstated. There is a substantial role for the "people" even under a judicial supremacy model that recognizes the binding impact of Supreme Court decisions beyond the parties to the case.[32] Acting through their political representatives, the people, of course, can amend the Constitution to reject a Supreme Court interpretation. The amendment process may be appropriately burdensome but it nevertheless is an available means for expressing the will of the people.[33] So too, the politically responsive branches can use the appointment process to alter the composition of the Court, thereby producing changes in constitutional interpretations.

The people also exercise indirect, but quite effective, influence on the Court. As others have argued, the empirical data indicate that the Court is attuned to public opinion and its decisions are usually consistent with strong majorities.[34] Moreover, the Court uses self-restraint to avoid deciding issues that, for the time, are better left to the political branches for resolution. As Professor Bickel noted, the Court can—and does—deny certiorari and invokes doctrines like standing, ripeness, and political question as ways to postpone decision on politically controversial issues.[35]

Perhaps most important, however, when the Supreme Court renders a decision on a politically sensitive issue it does not necessarily

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31. Chemerinsky, *supra* note 30, at 1014.

32. *See, e.g.,* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy,* 92 CAL. L. REV. 1027, 1029 (2004) ("we do not understand judicial supremacy and popular constitutionalism to be mutually exclusive systems of constitutional ordering. . . . They are in fact dialectically interconnected and have long coexisted.").

33. *See, e.g.*, U.S. CONST. amend. XI (rejecting Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) holding States could be compelled to defend themselves in the courts of the United States); Hans v. Louisiana, 134 U.S. 1 (1890); For arguments that the people can amend the Constitution outside the Article V process, *see* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V,* 94 COLUM. L. REV. 457 (1994).

34. *See* Kramer, *supra* note 6, at 970 n. 42 (listing the articles cited by the author).

35. *See* BICKEL, *supra* note 2, at 132-33.

end the ongoing discussion about that issue. Indeed, to the contrary, the decision is better perceived as generating a dialogue with the political branches of government and the people. That dialogue, observed Herbert Wechsler, "concerns the adequacy of the reasons it advances for the value choices that it decrees."[36] Louis Fisher and Neal Devins stressed the importance of this ongoing dialogue and the role of the other branches of government in constitutional interpretation when they wrote:

> Constitutions draw their life from a variety of sources that operate outside the courts: ideas, customs, social pressures, and the constant dialogue that takes place among political institutions. Just as the judiciary leaves its mark on society, so does society drive the agenda and decisions of the courts. Justice Cardozo reminded us that the 'great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by.'[37]

The decision in *Roe v. Wade,* for example, plainly was not the final pronouncement on the abortion issue.[38] Even assuming nonparties were subject to the precise holding of *Roe*, there was plenty of room for continued opposition by arguing that *Roe* did not address a variety of specific issues. The people of Connecticut expressed their opposition to *Roe v. Wade* by authorizing Medicaid reimbursement for medical expenses incidental to childbirth but not for nontherapeutic abortions. The Supreme Court upheld the state law, concluding that *Roe v. Wade* did not prevent the state from making a value judgment that favors childbirth over abortion.[39] While the funding decision had a profound practical impact on the ability of the poor to exercise their right under *Roe*, the Court found that the State might influence a woman's decision by making childbirth a more attractive alternative. Similarly, the Court subsequently upheld the federal government's decision to deny public funding for medically necessary abortions.[40] In doing so, it observed that "[w]hether freedom of choice that is constitutionally protected

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36. Herbert Wechsler, *The Courts and the Constitution,* 65 COLUM. L. REV. 1001, 1013 (1965).

37. LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW 1 (2d ed. 1996) (quoting BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 168 (1921)).

38. *See* Ruth Bader Ginsburg, *Speaking in a Judicial Voice,* 67 N.Y.U. L. REV. 1185, 1199 (1992).

39. Maher v. Roe, 432 U.S. 464 (1977).

40. Harris v. McRae, 448 U.S. 297 (1980).

warrants federal subsidization is a question for Congress to answer, not a matter if constitutional entitlement."[41]

States also responded by imposing a number of restrictions designed to limit the availability of abortions. In *Planned Parenthood v. Casey*,[42] the Supreme Court reaffirmed the core principle of *Roe.* At the same time, however, it upheld the state restrictions on the right, including a requirement that a minor obtain parental or guardian approval for an abortion. It also upheld the state's mandate that at least 24 hours before performing an abortion a doctor inform a patient of the health risks of an abortion, the nature of the procedure, the age of the fetus, and the availability of material regarding medical assistance for childbirth.

It might be argued that Chief Justice Rehnquist was correct when he observed that the Court retained the "outer shell of *Roe*, but beat[ ] a wholesale retreat from the substance of that case."[43] The point here, however, is not to examine the continuing vitality of *Roe* but to illustrate the effect of the ongoing dialogue about the abortion issue.[44] Justice (then Judge) Ginsburg captured the significance of such a dialogue when she stressed that judges are not alone in shaping legal doctrine but rather "participate in a dialogue with the other organs of government, and with the people as well."[45]

If viewed in this manner, the judicial supremacists and the popular constitutionalists might not be as split as the rhetoric suggests. A Supreme Court interpretation might well be treated as binding on officials sworn to uphold the Constitution, even if they are not parties to the specific case. At the same time, however, that decision does not prevent an ongoing dialogue about the wisdom of the interpretation, a dialogue that recognizes the role of the people and the political branches and one that could lead to a change in the very constitutional determination.

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41. *Id.* at 318.

42. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

43. *Id.* at 944 (Rehnquist, C.J., concurring and dissenting).

44. The abortion controversy is just one of the many examples of such a dialogue among the Court, the political branches, and the people. Other prominent examples include *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857), and *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

45. Ginsburg, *supra* note 38, at 1198.