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Popular Constitutionalism and the Case for Judicial Review

The People Themselves: Popular Constitutionalism and Judicial Review by Larry D. Kramer. Oxford: Oxford University Press, 2004. 363 pp. \$29.95 (cloth).

Law and Disagreement by Jeremy Waldron. Oxford: Oxford University Press, 2001. 344 pp. \$64.54 (cloth), \$27.45 (paper).

Constitutional Self-Government by Christopher L. Eisgruber. Cambridge, MA: Harvard University Press, 2001. \$50.00 (cloth).

Larry Kramer's *The People Themselves: Popular Constitutionalism and Judicial Review* is a clear rejection of judicial supremacy, the view that the Supreme Court of the United States has a monopoly on constitutional interpretation. Instead, Kramer provides a historical account of multiple interpreters of the Constitution, including juries, legislators, leaders, and participants in protest movements and respondents to popular opinion polls. Kramer's project, however, is both descriptive and normative. History demonstrates that it is not the Court but "the people themselves" who, in a democracy, should be the source for resolving conflicts about constitutional meaning. Kramer concludes from this that judicial authority should be limited in order to increase the authority of citizen interpreters and to allow deference to their interpretations.

Among the major puzzles facing most constitutional theorists is how a polity can retain a commitment both to a constitution and to the ideal of popular self-rule. The advantage of Kramer's project is that, if successful, his constitutionalism would face no such challenge. For Kramer, constitutionalism does not constrain democracy because popular participation in constitutional interpretation renders the Constitution itself democratic. Yet, Kramer is unwilling to renounce judicial review, and the greatest weakness of his book is a failure to square popular constitutionalism with judicial review. Kramer's historical examples support the normative argument that constitutionalism does not require judicial supremacy. Kramer succeeds rhetorically in making a case against judicial supremacy by noting examples in which the Court interpreted the Constitution in a manner that was deeply undemocratic and instances in which alternative meanings were developed by nonjudicial actors. For example, Kramer describes how legislators, not courts, opposed

federalist attempts to enact sedition laws, citing the First Amendment. He also discusses how Lincoln and the abolitionists condemned the Dred Scot decision because the Constitution's principles were inconsistent with slavery. He mentions a widespread progressive movement—and eventually a president—who interpreted the Constitution as compatible with economic protections for workers, thus defeating Lochner-era jurisprudence. As I read him, Kramer contends that given competing constitutional interpretations, the interpretation most widely held among the people is more democratic and thus more legitimate.

The problem with this argument is that it fails to explain why Kramer's theory is constitutionalist at all and not merely a democratic repudiation of constitutionalism. A theory that is both democratic and constitutionalist might, for example, show how *good* constitutional interpretation is more likely to result if many actors and stakeholders participate in it. The Court has no monopoly on getting the Constitution's meaning *right*. Such an argument would demonstrate the flaw with justifications of judicial supremacy that conflate "good interpretation" with the authority of a particular office.

The most prominent defense of judicial supremacy is the decision in *Boerne*, which suggests that the Court serves as the final authority on Constitutional interpretation. But here the Court seems to conflate what might be called "procedural authority" with "substantive authority": it suggests that the substantive meaning of the Constitution, apart from procedural concerns about who is to be the final arbiter of that meaning, must be discerned only by the Court. Moreover, the decision ignores the distinction between better or worse interpretations. *Boerne's* equation of substantive meaning with the Court's particular interpretation seems to reject the validity of interpretations offered by non-Court actors. One defense of *Boerne* is that the Court has procedural authority in light of its institutional tendency to produce better answers than the people at large. Those trained in the law, for example, might be said to offer more consistent interpretations. But here the democratic constitutionalist could retort that historically, the best interpretations—especially those concerning the most central issues the Court has weighed in on—have often rested with non-Court actors. This retort derives from Kramer's examples and constitutes his best argument against judicial supremacy.

However, toward the end of his text Kramer seems to reject the premises necessary for this argument and instead invokes a version of epistemic moral relativism. Importantly, he misreads Jeremy Waldron's subtle argument against judicial review presented in *Law and Disagreement*. Kramer suggests that there will always be interpretive problems regarding the meaning of constitutions and that one way to resolve them would be to seek guidance from the requirements of justice, but Kramer then uses Waldron to argue that

this approach will always suffer from an epistemic defect. Because there is disagreement about what justice requires, there can be no definitive conclusion about the Constitution's meaning and no appeal to substantive values as authority for interpretation. But Waldron's argument in *Law and Disagreement* is *not* that disagreement about the meaning of justice suggests that there is no discernable right answer. To the contrary, Waldron's book (as well as his work elsewhere) aims precisely to discern better or worse ideas of justice and democracy. Waldron's point about democracy's relationship to judicial review is a normative one: in the face of disagreement about substantive matters, the Court lacks procedural authority to impose its substantive understanding of the Constitution, even when it is correct. Waldron leaves open the possibility (and in much of his writing embraces the idea) that there are better and worse substantive interpretations of the Constitution. He believes, however, that there is no successful argument on behalf of the Court's procedural authority to impose the protection of these rights (even when it is correct that justice requires such protection). Importantly, for Waldron, it is majorities that always retain procedural legitimacy, because in the face of conflict any other manner of deciding would impose on a polity a policy that violated its own capacity to decide. Waldron's point is that this capacity has more normative force in decision making than even a just solution. The advantage of his theory is that he gives us a clear reason to defer to majority rule and to reject judicial review, even in the face of bad outcomes.

In contrast, Kramer seems to embrace not a normative suggestion about what is to be done in the face of disagreement but an epistemic claim that even if a right answer exists it has no practical importance. The embrace of relativism also seems connected in the text to a refusal to see democracy itself as an ideal of interpretation. Oddly, he cites Gutmann and Thompson's *Democracy and Disagreement* as defending a position that emphasizes "unavoidable disagreement in thinking about democracy." But Gutmann and Thompson do not suggest that issues of moral disagreement cannot be resolved but rather seek to demonstrate how an ideal of democratic deliberation about "reasonable disagreement" can serve to generate legitimate solutions to policy disputes that take the interests of all citizens into consideration. In contrast to a reliance on a democratic ideal, Kramer's embrace of epistemic relativism undermines the normative force of his historical examples. Kramer does not give us stories of popular fascist uprisings against Courts (or mob lynching) in contrast to due process. Instead, his historical examples are of popular democratic uprisings against the Courts in defense of interpretations that *enhance* democracy. But such an understanding of the importance of these examples only makes sense when we reject the relativism Kramer seems to embrace.

Given his rejection of an argument against judicial supremacy from substantive authority, can Kramer be interpreted to claim with Waldron that it is procedural authority alone that makes multiple interpreters preferable to a Court monopoly? If this is in fact Kramer's view, then he has not provided an argument for it nor has he chosen the appropriate historical examples. To make the case for the procedural authority of popular interpreters, one would need to demonstrate that "the people's will" could be interpreted through a clear procedure. One might, for instance, like Waldron, claim that such a procedure lies in majority rule. But Kramer does no such thing. For him, the will of the people is not determined by a consistent, precise principle but can rest alternatively with the legislature, with protest movements, or with juries, to name a few examples. It is difficult to see how this amorphous concept provides the clarity demanded of an argument from procedural authority. Moreover, Kramer's suggestion in the epilogue that his theory is compatible with judicial review suggests that he disagrees with Waldron's procedural argument for the claim that judicial review is always undemocratic.

To explain why popular constitutionalism provides a role for judicial review, Kramer could follow Christopher Eisgruber's example of defending judicial review as a democratic institution in his *Constitutional Self Government*. Eisgruber helpfully distinguishes between majoritarian procedures in national and state legislatures and the "will of the people." He argues that at times the Court might directly instantiate the will of the people in a way that legislators do not. The confirmation process creates conditions in which the will of the people is expressed by representatives who decide who is on the Court in the first place. Moreover, the independence granted by life tenure might mean that justices have the political ability to directly institute the popular will even if it is opposed by interest groups, an ability that state legislators concerned with fund-raising and reelection might not have. Eisgruber's distinction between the people and specific legislative procedures offers a theoretical defense of judicial review as itself a process by which the people's will is interpreted.

The argument from substantive authority, however, goes beyond Eisgruber's procedural defenses of judicial review and at the same time retains Kramer's concern to preserve a role for nonjudicial interpreters. But what counts as substantively "good" constitutional interpretation on such a theory? In interpreting the document, we the people (as opposed to we lawyers, judges, and law students) should use the democratic ideal and democratic values as the lens with which to read the Constitution. In other words, democratic constitutionalism should not only invoke the notion of government "by" the people in its concern to make constitutional discourse more widely distributed; it should also advocate government "for" the people in that the object of

good democratic constitutional interpretation is one that creates the conditions necessary for self-government. To read the Constitution in any other way would be to risk allowing popular discourse to undermine the very basis we have taken for endorsing popular constitutionalism: that democracy is the basis for legitimate government. The move to popular interpretation, far from eliminating this disagreement, moves it to a forum beyond judges and professional commentators. In this larger forum a variety of official and non-official actors have the potential to offer the best democratic interpretations of the Constitution.

Can such a theory of substantive interpretation reconcile the argument against judicial supremacy with a defense of judicial review? Ideally, there would be no need for judicial review in a world in which the people acted democratically through widespread participation in legislation, accompanied by a concern to respect the requirements of the Constitution. However, a number of historical examples illustrate how majorities have produced undemocratic results, and these suggest why judicial review might be justified democratically. Weimar Germany produced Nazism in part through electoral procedures, and Jim Crow and South African apartheid used procedures that were claimed to be democratic. Moreover, the requirement that popular movements offer some defense in terms of constitutional interpretation is no guarantee that they will not be profoundly antidemocratic.

The potential for popular movements and popularized constitutional interpretation to undermine the very principles of democracy suggests that judicial review has a legitimate role to play. It can act in defense of democratic principles to strike down legislation passed with popular support. Historically, the most obvious cases of democratically justifiable judicial review involved widespread movements that disenfranchised part of the population based on ascriptive characteristics such as race. John Hart Ely in *Democracy and Distrust* famously sought to extend the logic of this argument to defend judicial review in defense of voting rights but also in favor of preconditions of voting. Without adequate education, he suggested, the right to an equal vote and to equal political power would be meaningless. Another democratic right implicated by the self-government argument is free speech. Without a right to both express one's own arguments about public policy and, as importantly, to hear the arguments of others, it would be very difficult to make informed decisions as a voter. A harder case concerns substantive due-process rights, such as a right to sexual intimacy for married and unmarried couples (gay or straight) and reproductive rights. These are often deemed basic to liberty, but are they rightly considered democratic? While Ely thought the self-governance argument led to a democratic defense of some

judicial review, others, such as Ronald Dworkin, have sought a democratic argument for even these substantive rights.

These provocative books by Kramer, Waldron, and Eisgruber do not resolve the debate about which of these rights should be regarded as democratic and therefore as candidates for protection through judicial review. But they do help us to see why the move to a popular interpretation of the Constitution is not itself an argument against judicial review. Rather, a democratic constitutionalism is consistent with the recognition that when “the people” violate the rights essential to the meaning of democracy, the Court must act as a democratic protector of these rights.

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