POPULAR CONSTITUTIONALISM IN THEORY AND PRACTICE

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ABSTRACT

Since grade school, we are taught a version of constitutional history and theory in which the power to interpret the Constitution rests solely in the hands of the Supreme Court. However, this "judicial supremacy" has deep philosophical, political, and practical flaws. I argue that judicial supremacy, and the doctrine of judicial review as we currently know it, carries with it the baggage of a faulty, originalist theory of what kind of law the Constitution consists in, and that the Court as it exists now is a body with unchecked and unjustified power. I outline, as an alternative, a "popular constitutionalism" in which interpretational power is dispersed with a particular emphasis on the will of the people. I argue that popular constitutionalism is able to give a better theory of interpretation, a more clear-eyed view of the function of the Court, and a more democratic division of powers. Finally, I address several practical challenges to popular constitutionalism and suggest various ways in which the Court's power might be returned to the people.

Introduction

In the wake of 1819's McCulloch v. Maryland decision, it was clear that the influence of the Supreme Court on American politics would be enormous. In McCulloch, the Court decided that the "Necessary and Proper Clause" of the Constitution gave the federal government implied powers that were not explicitly laid out in the Constitution's text.[1] [2] This meant the job of constitutional interpretation would involve divining the implications of the text and not merely interpreting the Framers' words. Having begun to elaborate a complicated, far-reaching, and non-obvious theory of interpretation in McCulloch, the Supreme Court brought into full focus the power that they had granted themselves to interpret the Constitution through judicial review. This was clear to Thomas Jefferson, who after McCulloch wrote the following in a letter to Virginia judge Spencer Roane:

> "[T]he [C]onstitution, on this hypothesis, is a mere thing of wax in the hands of the judiciary which they may twist and shape in to any form they please. [I]t should be remembered as an axiom of eternal truth in politics that whatever power in any government is independant, is absolute also… [I]ndependance can be trusted nowhere but with the people in mass."[3]

A year later, Jefferson reaffirmed this criticism of the power of the Supreme Court to interpret the Constitution in a letter to the diplomat William Jarvis: "to consider the judges as the ultimate arbiters of all constitutional questions [is] a very dangerous doctrine indeed and one which would place us under the despotism of an Oligarchy."[4] Jefferson identified a serious problem with a system in which the power to interpret the Constitution rests with the Supreme Court alone. Such a power is simply too important to rest solely in the hands of a body so independent from the will of the people. Instead, it is necessary for constitutional interpretation to be returned to "the people in mass."

In this essay, I will attempt to ground a theory of the Constitution that is continuous with Jefferson's words. This theory, popular constitutionalism, disperses the unchecked, independent power of the Supreme Court in our current system of "judicial supremacy" in a manner underlied by a respect for the will of the people. Popular constitutionalism remains out of the mainstream, but in the book The People Themselves, legal scholar Larry Kramer puts forth compelling historical arguments supporting the claim that judicial supremacy is in fact a relatively recent development and therefore not a foregone conclusion.[5] Here, I will build on the defense of popular constitutionalism put forth by Kramer and others. First, I will attempt to directly undermine the conceptual framework of judicial review in terms of interpretational theory. Then, I will situate the discussion in terms of political philosophy, arguing that concerns about a paramount Court being anti-democratic outweigh concerns that the institution of rights depends on the Court's continued supremacy. Finally, I will elucidate how popular constitutionalism could manifest in the United States, and attempt to put forward some concrete answers to questions of what popular constitutionalism would actually look like.

Popular Constitutionalism and Interpretational Theory

It may seem absurd to suggest that interpretation of the Constitution is anything but entirely the domain of the Supreme Court. Indeed, such a claim is at odds with

1. McCulloch v. Maryland, 17 U.S. 316 (1819).

2. U.S. Const. art. I, § 8.

3. Thomas Jefferson, "Letter to Spencer Roane," *Founders Online*, National Archives, September 6, 1819, https://founders.archives.gov/documents/Jefferson/03-15-02-0014.

4. Thomas Jefferson, "Letter to William Charles Jarvis" *Founders Online*, National Archives, September 28, 1820, https://founders.archives.gov/documents/Jefferson/03-16-02-0234.

5. Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review*, (Oxford: Oxford University Press, 2006).

dominant American practice and theory when it comes to the Constitution and even runs counter to what most Americans have been taught since they were schoolchildren in civics classes. We must recall, however, that the theory of judicial review stems not from the Constitution itself but rather from the 1803 decision of Marbury v. Madison. In that case, the Court granted itself the authority to review and strike down laws, saying that "[i]t is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule. If two laws conflict with each other, the Court must decide on the operation of each."[6]

This is the "Marbury syllogism," which can be distilled as the following argument: the Constitution is the law, law is the province of judges, so the Constitution is the province of judges.[7] The immense power of the Court—the power to override the popularly elected legislature by striking down laws—rests on this very simple formulation. However, this syllogism makes a deep philosophical error. It equivocates: the word "law" does not refer to the same concept in the first and second premises of the argument.

Let us begin with the sense of "law" used in the second premise, the sense in which it is clearly the province of judges. This is the way the word is usually used. Law, here, is a technical field. This law is what is studied by lawyers and looked up in law books. It helps fill in the details of social coordination, e.g. by telling us how fast and which direction one may drive on a particular road. When such details are lacking, or in conflict, the need for judges to interpret this kind of law is clear.

There is another sense of "law," however, employed in the first premise of the syllogism which affirms that the Constitution is the law. This "law" is the law of the social contract or as in "natural law." The existence of this sort of law is implicit in the Marbury claim that the "Constitution is superior to any ordinary act of the legislature." For, if the Constitution were "law" only in some technical, strictly "legal" sense, then what could justify its absolute supremacy over all future legislation? The difference between the Constitution and traffic law is not just one of degree of importance, but a difference in kind. The Constitution, by its nature, enshrines principles that make up the fabric of American society. Law that encapsulates inalienable rights and fundamental values is clearly different in both purpose and structure from law that coordinates the details of particular day-to-day activities like traffic. Conceptualized this way, the Constitution is of course still the law, but it is a higher sort of law.

There is no reason, then, to expect that the interpretation of these two different kinds of law will be at all the same sort of task, or that the two should be entrusted to the same people. The fact that judges decide cases of the lower, technical law does not entail that they also have dominion over the higher law of the Constitution. There is tension between the conception of the Constitution used to justify judicial review and the conception of the Constitution necessary to justify its supremacy. It cannot be, as judicial supremacy requires, that the two kinds of law are fundamentally the same and yet one always supersedes the other.

Originalism, the theory that the interpretation of the Constitution should consist of an investigation of the original public meaning of the text, frames the role of judges as something like historians.[8] Liberal theorist Ronald Dworkin staunchly opposed originalism on the

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6. *Marbury v. Madison*, 5 U.S. 137 (1803).

7. Corey Brettschneider, "The Origins of Judicial Review," in *Governmental Powers: Cases and Readings in Constitutional Law and American Democracy* (New York N.Y.: Wolters Kluwer Law & Business, 2014).

8. At least, this is essentially how Scalia thinks of his own originalism (see footnote 10).

grounds that the Constitution has moral values embedded into it, and that therefore the important task left to judges is not the historical investigation of the text but rather decisions regarding what those values should be.[9] The above discussion embraces a Dworkinian moral interpretation of the Constitution precisely because there is a great deal of shared logic between non-originalism and popular constitutionalism.

Although an originalist might be able to endorse some of my arguments here, I think it is an explicit logical consequence of non-originalism that the Marbury syllogism is false. On this issue, I agree with Antonin Scalia. In "Originalism: The Lesser Evil", Scalia criticized non-originalist theories of interpretation by claiming that the "principal theoretical defect of non-originalism, in my view, is its incompatibility with the very principle that legitimizes judicial review of constitutionality."[10] In one way, he is exactly right: originalism and judicial review go hand in hand. As he claims, "central to [the Marbury] analysis is the perception that the Constitution… is in its nature the sort of 'law' that is the business of the courts."[11] The unification of the two kinds of law that Marbury relies on requires an originalist's conception of constitutional interpretation as a technical task akin to that of the interpretation of ordinary law, more a matter of philology than values. Of course, he is also seriously wrong, since this repudiation of the Marbury syllogism is a virtue of non-originalism, rather than a vice. As I have argued, the presumption Scalia is pointing to—that the Constitution is ordinary law—is wrong. Even without disputing that, however, this analysis gives rise to a serious problem for a judicial supremacist. Acceptance of judicial review is far more widespread than acceptance of originalism, and many supporters of judicial supremacy would be very unhappy to learn that their logic is an unknowing endorsement of originalism. Thus, if a defender of judicial supremacy must be saddled with the baggage of a full originalist theory of interpretation, then this burden deals a serious blow to the justificatory power of Marbury.

Not only does this way of looking at the Constitution refute the common Marbury line defending judicial supremacy in matters of interpretation, it invites the possibility of citizen interpretation. On the view outlined here, a very significant part of interpreting the Constitution involves the interpretation of moral, non-technical material, for example the protection of fundamental rights. Going to law school does not make one an expert in matters of morality, so when questions of interpretation center around questions of values, why should it be the lawyers and not the citizens to answer them? In these moral matters, interpreting what the Constitution says on the most fundamental issues is at heart an exercise in agreeing on the tenets of the social contract, a concept that belongs to the public.

We can see, then, that at least a non-originalist should be amenable to popular constitutionalism. Only an interpretational theory that centers the people can accurately reflect the nature of the interpretational task on the Dworkinian view. The non-originalist will agree interpretation often more closely resembles decisions on political values than ascertainment of some fixed, true meaning. There is also a certain irony in opposition between an "original public meaning" theory of interpretation like Scalia's and popular constitutionalism. The grounding of such a theory centers the people over the Framers. In other words, at the core of an original public meaning theory is a trust in the public. Any logic used to entrust the original meaning in the public as opposed

9. Ronald Dworkin, "Introduction: The Moral Reading and the Majoritarian Premise," in *Freedom's Law: The Moral Reading of the American Constitution*, (Oxford: Oxford University Press, 1999).

10. Antonin Scalia, "Originalism: The Lesser Evil," *Judges on Judging: Views from the Bench*, 2017, 209–17, https://doi.org/10.4135/9781071800942.n22.

11. Ibid.

merely to the minds of the few highly educated politicians who wrote the document itself is exactly the logic of popular constitutionalism. The burden is on the originalist to resolve this tension and explain why so much value must be placed on the opinions of the public of 1789 and so little on the public of today.

The aforementioned distinction between the types of law also demonstrates the nuances of popular constitutionalism. It would be absurd to think that there is no role for legal experts in the interpretation of the Constitution precisely because a significant element of the Constitution is indeed the ordinary, technical sort of law it is presumed to be in the Marbury syllogism. All that my arguments thus far have shown is that the Constitution is not only this sort of law. As it is a blend of the lower, technical law with the higher, society-building law, so too is its interpretation a collaboration between the people and the Court. It is therefore the goal of popular constitutionalism not to purge the Constitution entirely of the Court's influence but merely to temper the unfettered power the Court currently enjoys over interpretation by returning some of this power to the people.

The Political Philosophy of Departmentalism

The foregoing presents an argument for popular constitutionalism in terms of legal philosophy. A defender of judicial review might resist by claiming that the current system is politically necessary, especially as a required check on the power of the other branches. Popular constitutionalism is tied deeply to the notion of departmentalism: the idea that the branches of government are truly coequal, particularly in their interpretation and implementation of the Constitution. It is valid, then, to consider how popular constitutionalism and a more departmentalist structure of government would ultimately affect the nature of freedom and democracy in America.

In the most basic terms, the political issue solved by popular constitutionalism is the one Jefferson raised: the independent, and thus absolute, power of the judiciary. For any body of government to have absolute power is troublesome, but the problem is exacerbated by the fact that the judiciary is also the body furthest removed from the people. Despite the fact that the judiciary is selected by representatives of the people, the lengthy appointment and confirmation processes put significant distance between the will of the Court and the will of the people. One need look no further than the 2016 nomination of Merrick Garland to see how political maneuvering can significantly compromise the democratic element of the Supreme Court confirmation process. Departmentalism, then, looks to remove the independence of judicial power by involving the other branches of government in the process of constitutional interpretation.

Since this system shifts power away from the judiciary, many have worries about the increased power in other parts of the government, like the Presidency. One criticism, presented by Robert Post and Reva Siegel in response to Kramer's proposals for popular constitutionalism, involves a hypothetical anti-terrorist Sedition Law:

> "Assume that a citizen is convicted and imprisoned for violating the Sedition Law, and that the Court rules that the Sedition Law is unconstitutional because it violates the First Amendment. Does popular constitutionalism require us to believe that the President, as an agent of the people's sovereign will, can properly refuse to release the citizen from prison because the President interprets the First Amendment differently than the Court?"[12]

Post and Siegel think that it cannot be the case that the president can, in fact, keep the citizen in prison since this decision would "undermine the institution of judicially enforceable constitutional rights."[13] However, they have

12. Robert Post, and Reva Siegel, "Popular Constitutionalism, Departmentalism, and Judicial Supremacy," *California Law Review* 92, no. 4 (2004): 1027, https://doi.org/10.2307/3481316.
13. Ibid.

stacked the deck in this hypothetical by playing to our intuitions that the First Amendment does indeed bar such a Sedition Act. The reason the president cannot refuse to release the prisoner is not because he is contravening the Court's order to do so. Instead, it is precisely because the substance of the Constitution, in fact and in the genuine will of the people, demands that he be released.

What, then, of a modified example where it is less clear whether the president or the Court is on the right side of the relevant constitutional question? Claiming in such a situation that the president is not automatically obligated to obey the Court is not licensing the president to unbridled despotism. The ideal resolution to such a conflict is that the Constitution be executed according to its actual meaning, which is bound up tightly with the will of the people. The president, as an instrument of the people, can only ensure that execution by sometimes disobeying the Court. However, the Court is also a participant in the interpretational process, and the fair election of a president by no means guarantees his actions as true expressions of popular will. If it turns out that such a disobedience actually egregiously contravenes the will of the people, then there should be consequences. For example, Congress might legislate on the matter, there might be another case before the Supreme Court, or, in dire instances, the president might be justly impeached and convicted. Thus, the departmentalist ethos concludes that the president should be a participant in the process of constitutional interpretation, which might involve him not executing orders of the Court. It does not conclude, importantly, that judicial supremacy should be replaced by presidential supremacy. The president and the Court should both be subordinate collaborators of the people. This departmentalist answer is reflected in the presidential oath of office. The president swears to "preserve, protect and defend the Constitution of the United States." How can one faithfully execute this oath without also interpreting the Constitution of the United States? The same logic can be applied when the Court wrongfully interprets the Constitution and the other branches must intervene.

This hypothetical is an instance of a common, broader concern about departmentalism that equates the institution of the Court with the institution of rights. Since the Constitution is unchanging compared to the tumultuous landscape of legislation, it is often thought that we cannot rely on the legislature to protect the rights that we hold most dear. Instead, we rely on the Court to do so. Of course, this logic smuggles in judicial supremacy: since these rights are protected by the Constitution, the Court must be the most important body in their continued existence. What this line of thinking fails to appreciate is the fickle, fallible nature of the Court. Either one must deny that the Court can be wrong about issues of constitutional rights or one must admit that the two institutions come apart significantly.

Of course, the role of the Court in the preservation of rights is transformed, not eliminated, in a popular constitutionalist system. One must be very careful about making changes when it comes to matters of constitutional interpretation, lest they endanger popular rights and protections. This need for caution does not mean, however, that an erosion of the power of the Court automatically leads to an erosion of rights. Currently, the grave duty of preserving rights rests only on the Court. In a departmentalist system where that task is shared, the duty to preserve rights is not diminished, but rather dispersed among all the participants.

The most ardent critic of a popular constitutionalist structure would claim that the anti-democratic nature of the Court is an advantage because, when unrestricted, the masses will crush the institution of rights. This criticism is

a perversion of the original Federalist Papers argument that a republican government with checks and balances is necessary to prevent mob rule.[14] It is true that the nation's founding republicanism repudiates direct democracy, but this line does little to justify the particular strain of anti-democratic practice embodied by the unchecked nature of the Court's power. Although this power can be used to protect the rights of the minority, so too can it be used to deprive them of those rights, as it undeniably has in many cases (for example, few would disagree that the Court's sanctioning of Japanese internment in Korematsu stripped away equal protections from Japanese-Americans.) There is no guarantee that the Court will use its interpretational power to preserve the institution of rights, and concentrating such power into a bench of nine members is, as Jefferson put it, oligarchy.

Popular Constitutionalism in Practice

Even having settled the theoretical grounds of popular constitutionalism and departmentalism, many will still pose objections that the framework is not viable practically. In modern America, we can barely conceive of a constitutional system that does not rely on judicial supremacy. Indeed, even someone amenable to the arguments presented above might have serious misgivings about the implementation of the popular constitutionalist program. Criticisms of the Supreme Court would be hollow if their only resolution involved tearing the institution down completely. The problem in front of the popular constitutionalist, then, is to integrate a program that strengthens the will of the people into our pre-existing form of government that includes the Supreme Court.

The first observation to be made about popular constitutionalism in practice is that it allows for a clear-eyed view of the current functioning of the Court. As an example, look at the recent Dobbs v. Jackson opinion that overturned Roe v. Wade. Almost nothing in either decision bears directly on the central issue at hand: morally and politically what should be done about the legal status of abortion in America? Instead, a series of proxy wars were carried out over how significantly stare decisis binds matters, whether there are sufficiently significant "reliance interests" on the past decision, and so forth. The fact that the central question is a moral one, in fact, is used by Alito in Dobbs to argue that the issue should not be decided by the courts and instead should be up to individual state legislatures.[15] The Roe decision, too, makes very little mention of the fundamental moral and political questions involved (i.e. the moral status of a fetus, or how this consideration should be weighed against the needs of the mother).[16] Judicial discussion of abortion is invariably buried under mountains of legalese, only ever elliptically hinting at the real moral issues.

The Justices' avoidance of moral and political issues suggests that real engagement with these moral questions is actually poisonous to the Court—it would threaten the Court's "legitimacy." It is extremely telling that the legitimacy of the Court hangs by such a thread that in order to protect it the Court must conceal the true issues central to each case. The legitimacy of the Court is under such threat exactly because its authority to decide such issues absolutely is so tenuous. The most crucial aspect of the preservation of the public view of the Court as legitimate is that no one thinks for too long about judicial review. The discontinuity between the official line on Supreme Court justices as judge-experts and the actual public reaction to major Supreme Court cases, which almost always centers on the relevant questions of value, is a reflection of the farcical nature of judicial supremacy.

14. James Madison, *Federalist* No.10, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961).

15. *Dobbs v. Jackson*, 597 U.S. __ (2022).

16. *Roe v. Wade*, 410 U.S. 113 (1973).

The theoretical tension in judicial review must always be reflected this way in public cognitive dissonance over the role of the Court.

The farce extends to the appointment and confirmation processes of the justices as well. Not coincidentally, the party most opposed to the political outcomes of a candidate's nomination will be the one most extensively concerned about the candidate's qualifications. Debates about qualifications, in this sense, are usually another proxy war. The worry over the "politicization" of the Supreme Court is not a concern that the Supreme Court is too political. The Court's political involvement is immense, and defenders of the status quo have no intent on changing that. Instead, this "politicization" worry is a concern that the true political nature of the Court will be openly recognized, and the revelation will undermine the institution. The Supreme Court is political not because it is "politicized," but because of its political power. Popular constitutionalism, then, involves a resolution of this cognitive dissonance. If we recognize the political nature of the Court, we need not be afraid of some of the Court's workings being undermined by it. We can publicly shape a new vision of the Court that does not deny its political nature, and instead openly mitigates its excesses.

This, then, gives insight into how a popular constitutionalist approach to the flawed body of the Supreme Court might look. We must dispense with the idea of the Court as a sacred, perfectly legitimate body whose historical practices are unquestionable. Instead, we approach these practices with fresh eyes and attempt to incorporate as much popular will into them as possible. This method thus allows for a synthesis of popular constitutionalism and the current system of American government.

Popular Constitutionalist Institutions

Now, this popular constitutionalist lens can be used to examine the practices of the judiciary and see how they may be transformed in a popular constitutionalist system. Let us turn first to the aforementioned process of appointment and confirmation. In our current system, the members of the bench are crucial to the political direction of the nation. This fact is not lost on those involved in the process of selecting those members. However, exactly because of the charade that undergirds judicial supremacy, it can also never be acknowledged. In addition to the aforementioned proxy battles over the "qualifications" of appointees, we can see that retirements are perfectly timed so as to maintain maximum political control for the retiring justice's preferred side. The key role that the personal politics of potential judges plays in appointment choices is ever present, but always unspoken.

This intolerable state of affairs would be remedied under popular constitutionalism in a few ways. First, the importance of the identity of the judges would be diminished. No longer would the choice of a single Supreme Court Justice have the potential to change the course of American politics for multiple decades, as it does now. Discussion of how to structure a system in which the role of a Supreme Court Justice is diminished in this way will shortly follow, but it is a clear goal that any implementation of popular constitutionalism would strive towards. Secondly, there is no farce or self-deception about the Court under popular constitutionalism. A system in which Justices are seen not as the sole authority on the law of the land but rather one route through which the people's will is manifested has much less need to worry about its own legitimacy. The political nature of appointments is inherent to this democratic nature of the Court and thus does not need to be hidden. Questions of qualifications and expertise will still play a significant role in the selection of

judges, but there is no need to be coy about the fact that a justice whose politics are in line with the political will of the people is far superior to one with fringe views on moral and political questions. The legislature and executive make these tests of personal politics anyway, but under popular constitutionalism they are an intended part of the system. In this way, popular constitutionalism acknowledges what was previously unspoken. Judges ultimately represent the people. Granted, they do so differently from elected officials, but this political element of judgeship can be openly acknowledged to the same extent it has been privately true under our current system.

This manner in which popular constitutionalism can be farce-breaking applies equally well to actual judicial practice. Opinions are often cagey. As discussed with the example of Roe v. Wade, central issues are often danced around because of doublethink where the Court must be neutral on the political and moral issues which are in fact the crux of many decisions. If, instead, the legitimacy of the Court is not in such question, then the process of opinion writing could be more transparent.

Implementation and Practice

I imagine that the above will still be met with skepticism about the actual implementation of popular constitutionalism, so let us examine some concrete proposals. Of course, one manifestation of the people's will on constitutional matters is protest and civil disobedience. The strongest public moral beliefs will be embodied in such demonstrations. However, this manifestation would be impracticable as the primary organ of popular constitutionalism. The governmental system itself, within the bounds of the Constitution, can also be changed.

Firstly, popular constitutionalism provides a theoretical foundation for the expansion of the Supreme Court. That initiative, bandied about for decades and sometimes pejoratively known as "court-packing," mostly meets resistance that stems from judicial supremacist thinking. It is rejected on "legitimacy" grounds, and the idea of Congress exerting any power at all over the judiciary engenders a great deal of public angst. However, on our departmental view of the American government, such a check on the power of the judicial branch is a good and healthy function of government. On an expanded Court, any particular justice is less impactful. This model of judgeship would move towards political representation. The common argument that the Court is not apart from democracy because of the appointment and confirmation process would also ring truer on an expanded Court, where appointments are much more regular. This change would make it difficult for the overall balance of the Court to stray as far from the public will as the current Court can.

Another concrete proposal is an increased willingness by the legislature to impeach judges who have grossly contravened the will of the people. The current state of affairs is that judicial impeachment, and particularly conviction, is reserved only for the rarest of occasions, with the only occurrence so far in American history being Justice Samuel Chase's 1804 impeachment. Article III Section 1 of the Constitution states that "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour."[17] It is not unreasonable to interpret this good behavior standard as being significantly more stringent than it has previously been used. If it is an explicit consideration that the Court is subordinate to the people, then it follows that forceful and repeated insubordination against the popular will should be grounds for removal from office. In this way, there is at least some check on the lifetime nature of seats on the bench.

Increased willingness of the legislature to impeach is

17. U.S. Const. art. III, § 1.

continuous with a more general change in the attitude the legislature takes towards the Court, including with respect to public statements. Under judicial supremacy, it is rare to see anyone but the most rabidly dogmatic politicians publicly disagree with the Court's interpretation of the Constitution, especially in comparison to the plentiful attacks that legislators and Presidents launch against each other. Under a departmental, popular constitutionalist model, part of a legislator's job would be advancing a theory of the Constitution when they have such an opinion, including in situations when this responsibility involves pushing back against decisions of the Court. With all the talk of "checks and balances" in the American system of government, there are very few explicit checks on the power of the judiciary. If the other branches embrace their departmental role, the judiciary's power will become less independent and absolute.These solutions would go a long way to improving the quality of the Court. As Kramer puts it, "a great irony of making clear that we can and should punish an overreaching Court is that it will then almost never be necessary to do so."[18] Of course, the most successful popular constitutionalist program would also have judges as collaborators. A judge's self-conception as a servant of the people rather than as an expert above them is crucial towards a healthy popular constitutionalist judiciary. Thus, another way to ensure the long-term success of such a push would be to select judges subscribing to the tenets of popular constitutionalism during the appointment and confirmation process. To be clear, a commitment to popular constitutionalism does not necessarily need to be immediately reflected in any particular way in a judge's first-order decisions. However, it is clear that a move towards popular constitutionalism would eventually require the support of the judiciary.

Conclusion

A shift in self-conception is necessary not just by judges but also by the people, who must accept their role in the interpretation of the Constitution. Returning to the example of Roe v. Wade, judicial supremacy makes it difficult to understand the relationship of protesters to the Constitution. The meaning of the Constitution rests absolutely with the Court, but these protesters are opposed to its opinion. Do they think Dobbs was wrongly decided on its own interpretational terms? Do they think that the right to abortion should be maintained despite such a decision, rebelling against the power of the Court? Without popular constitutionalism, protest against the Court typically has a certain emptiness to it. Many people are merely unhappy with the consequences of the decision but in endorsing judicial supremacy have tied their hands in actually disagreeing with the decision itself. Popular constitutionalism adds life to the protest, since on this theory public backlash against a decision actually helps clarify the public opinion, and thus the very meaning of the Constitution, on the issue.

This, then, is the outline of a popular constitutionalist America: a public that seizes back its seat at the table of constitutional interpretation, a departmentalist legislature that channels the popular will and explicitly checks the power of the judiciary, and a federal bench that collaborates with, rather than dominates, the people. Jefferson noted that there is "no safe depository of the ultimate powers of the society, but the people themselves."[19] The only way for the true spirit of democracy to be fulfilled is for the farce of judicial supremacy to be broken and for the public to have a role in the interpretation of the highest law of their land.

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18. Kramer, 253.

19. Thomas Jefferson, "Letter to William Charles Jarvis," *Founders Online*, National Archives, September 28, 1820, https://founders.archives.gov/documents/Jefferson/03-16-02-0234.