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Sarah K. Harding

*IIT Chicago-Kent College of Law*, [sharding@kentlaw.iit.edu](mailto:sharding@kentlaw.iit.edu)

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## KRAMER'S *POPULAR CONSTITUTIONALISM*: A QUICK NORMATIVE ASSESSMENT

SARAH HARDING\*

### INTRODUCTION

Larry Kramer's book, *Popular Constitutionalism*, and this Symposium focus on the historical origins and development of judicial review in American constitutional law. Most of the papers either challenge or congratulate Kramer on his historical exploration. It is not until the last chapter of the book that Kramer begins explicitly to unfold the motivation behind the prior eight chapters. Here he makes it clear that the recent shift to "judicial supremacy"—or as Robin West understands it, "judicial exclusivity"—is not, when one examines the historical record, sustainable, nor is it acceptable. It is here where Kramer's thinly veiled disapproval of judicial supremacy is exposed. He states:

Supremacy is an ideological tenet whose whole purpose is to persuade ordinary citizens that, whatever they may think about the Justices' constitutional rulings, it is not their place to gainsay the Court. It is a device to deflect and dampen the energy of popular constitutionalism. That energy cannot ever be wholly contained, and history has repeatedly demonstrated how irresistible political pressures will be brought to bear against a Supreme Court that goes "too far."<sup>1</sup>

It is the revelation of this disapproval that seems to have led some historians who presented papers at the Symposium to wonder whether Kramer isn't massaging the history a little too much.

Given that I am neither a historian nor a constitutional scholar, I cannot really contribute to these critiques in any way. I am, however, interested in this last chapter. I am intrigued by Kramer's normative end point, or beginning point, as some might argue. Does the Court, as Kramer argues, need to have a little more humility when it comes to its understanding of judicial review and its authority over constitutional interpretation? Should the Court have more respect for legislative decision making? As

\* Associate Professor, Chicago-Kent College of Law. My thanks to the symposium organizers, particularly Dan Hamilton, for a marvelous discussion.

1. LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 233 (2004).

much as I am interested in these questions,<sup>2</sup> I have no intention of trying to expand on the already rich body of philosophical material expressing skepticism about judicial supremacy, or even more fundamentally skepticism of judicial review. But I do think it is useful to bring some of the ideas in that material into this discussion. Put in question form, why, beyond the details and logic of American constitutional history, is popular constitutionalism a good idea? What are the values that are embedded in this conception of constitutionalism?

With that in mind there are two things that I hope to accomplish in this very short commentary. First, as just stated, I want to incorporate a few ideas from one of the leading judicial review skeptics. In the context of this skepticism, I hope to provide some comparative context for this debate. Second, I want to raise two questions that flow from Kramer's ideas, questions that are obvious but were not focal points of the Symposium. My comments will admittedly be divorced from the specifics of American constitutionalism, but they will, I hope, nonetheless provide yet more angles from which to evaluate this marvelous book.

#### I. RIGHTS, COURTS, AND INEVITABILITY OF DISAGREEMENT

An appropriate beginning place for this brief discussion is an observation about the discussion at the Symposium. As an outsider to these issues it quickly became apparent that there is a good deal of rational disagreement on the topic of the development and natural place of judicial review. There is disagreement about what the history tells us about judicial review; disagreement on the meaning of something like "popular constitutionalism"; disagreement on what this means for constitutional theory and interpretation; and more than anything else, disagreement about who is a legitimate or the ultimate constitutional interpreter within American constitutional experience. One cannot observe this disagreement without pausing on Kramer's reference in his last chapter to Jeremy Waldron's book, *Law and Disagreement*.<sup>3</sup>

Waldron is not a historian, as most of us know, nor is he an American constitutional scholar. He is a legal philosopher, and as such he approaches questions relating to the role of judicial review from the perspective of the nature of rights. One of his basic concerns in *Law and Disagreement* is the

2. See generally Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 YALE J. INT'L L. 409 (2003) (comparing the Canadian and American Supreme Courts on their use of foreign law and more broadly their approaches to judicial review).

3. KRAMER, *supra* note 1, at 236-37 (citing JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999)).

excessive reliance on courts to resolve carefully and deliberately disputes about rights. He simply does not accept the idea that a commitment to rights requires a commitment to constitutional rights and judicial review.<sup>4</sup> One of the reasons for Waldron's skepticism regarding courts and rights is the complexity of the connection between rights and judicial review. What many present as one logical leap he argues is a series of very complicated questions. According to Waldron, the move from rights to judicial review obscures a number of very important steps, and each step requires analysis and justification. And of course, each step is riddled with disagreement.

To begin, a commitment to rights does not necessarily mean a commitment to any specific set of rights.<sup>5</sup> For example, to say that we are all deserving of a basic set of rights says nothing about what specific rights should be a part of that set. As we might expect, there is significant disagreement about what belongs in that set. Some rights, such as freedom of speech and religion, might be more settled, while others, such as a right to bear arms, may be at the fringes of an agreed-upon core set of rights. The disagreement about this core set of rights is all the information that Waldron needs in order to confidently say that we need to be cautious about and that we must justify a move from the agreed-upon position—that we are all deserving of basic rights—to one that identifies concrete rights.

Even if we could identify a set of agreed-upon rights, Waldron argues that we still need to justify a move from an agreed-upon set of rights to a commitment to legal rights.<sup>6</sup> So while we may agree on the idea that everyone is entitled to freedom of religion, it is not so clear that this right always manifests itself as a legal right. In other words, we may agree on the importance of certain rights without necessarily agreeing on whether it is the place of a legal system to protect the rights in question.

And then there is the move from legal rights to constitutional rights.<sup>7</sup> The Ninth Amendment of the U.S. Constitution, whatever it means,<sup>8</sup> lends support to the idea that not all rights, whether legal or not, will necessarily reach constitutional form.<sup>9</sup> A marvelous example of this idea in another setting is the absence of a right to property in the Canadian Constitution. Clearly Canada embraces the right to property within its basic set of legal

4. WALDRON, *supra* note 3, at 212.

5. *See id.* at 214–16.

6. *See id.* at 217–19.

7. *See id.* at 219–21.

8. As Kramer suggests, there is a good deal of confusion about the Ninth Amendment. KRAMER, *supra* note 1, at 43–44.

9. U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

rights. This is evident in a variety of statutory and common law doctrines, similar to those we would recognize as the basic canon of property law in the United States. But a right to property is conspicuously absent from the Canadian Charter of Rights and Freedoms, Canada's constitutional bill of rights.<sup>10</sup> Another example of a Western nation that certainly recognizes and protects legal rights but refuses to put them in constitutional form is Australia. The Australian Constitution does not contain a bill of rights, and, aside from a limited protection of property and an implied right of political speech, the High Court of Australia has no significant constitutional judicial review with respect to rights.<sup>11</sup>

The final move in this chain of rights-based arguments is the move from constitutional rights to judicial review. As with all the other moves, Waldron argues that while we may come to some agreement on a set of constitutional rights, this does not necessarily justify judicial review of legislation regarding those rights. Because most arguments in favor of constitutional rights presume that such rights should be enforced through courts, Waldron seems to tie this issue closely to the previous move, from legal to constitutional rights. But there are indeed examples of places with clear constitutional rights and liberties and no significant judicial review regarding those rights. France is an example of a nation that sets out a basic set of rights and liberties in its Constitution and yet has given the courts, in particular the Conseil Constitutionnel, only a very limited role in interpreting those rights.<sup>12</sup>

So if we piece this all together, Waldron argues that a commitment to rights does not necessarily mean a commitment to a specific set of rights. A commitment to a specific set of rights does not necessarily mean a commitment to legal rights. A commitment to legal rights does not necessarily mean a commitment to constitutional rights. And a commitment to constitutional rights does not necessarily mean a commitment to judicial review

10. See generally Alexander Alvaro, *Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms*, 24 CAN. J. POL. SCI. 309 (1991).

11. See Adrienne Stone, *Australia's Constitutional Rights and the Problem of Interpretive Disagreement*, 27 SYDNEY L. REV. 29, 31-34 (2005). There is a related point here: even if we can justify the move to constitutional rights, how much do those rights encompass? How much of our moral and legal arguments should we constitutionalize? Should more things be left untouched by the Constitution? Should we be "constitutional skeptics"? See Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006).

12. France's Conseil Constitutionnel ("Constitutional Council") is limited to pre-promulgation review of legislation, and there is no individual complaint mechanism. See Doris Marie Provine, *Courts in the Political Process in France*, in COURTS, LAW, AND POLITICS IN COMPARATIVE PERSPECTIVE 177, 179 (1996). While this limited jurisdiction has historically marginalized the Constitutional Council, the Constitutional Council has more recently utilized its jurisdiction to establish itself as an important constitutional voice. See generally Cynthia Vroom, *Constitutional Protection of Individual Liberties in France: The Conseil Constitutionnel Since 1971*, 63 TUL. L. REV. 265 (1988).

of those rights. According to Waldron, there are four separate steps that we must explore and legitimate between a commitment to rights and judicial review. And of course there is disagreement at every step along the way.

To Waldron's series of steps, Kramer adds one more: judicial supremacy. A commitment to judicial review does not necessarily lead to a commitment to judicial supremacy. So just because the U.S. courts have the authority under *Marbury v. Madison*<sup>13</sup> to reject legislation that is found to be contrary to the Constitution does not necessarily mean that they should always have the final or the only say. The closest, if not the best, example of a constitution that embraces judicial review but denies the courts final authority over constitutional interpretation is the Constitution of Canada. Within Canadian constitutional law there are multiple mechanisms for balancing the constitutional interpretation of the courts and the legislatures, but perhaps the most direct and controversial of these mechanisms is section 33, the Notwithstanding Clause. Section 33 provides that "[p]arliament or the legislature of a province may expressly declare in an Act . . . that the Act or a provision thereof shall operate notwithstanding a provision" included in the key sections of the Charter of Rights.<sup>14</sup> This Canadian compromise between the authority of the courts and legislatures is part of what Stephen Gardbaum has labeled "commonwealth constitutionalism."<sup>15</sup> The U.K. and New Zealand are the other two nations that Gardbaum places within this new category of constitutionalism, each of them finding separate mechanisms for reaching their own balance between legislative and judicial authority.<sup>16</sup>

So the steps, as they unfold, look something like this:

Rights ⇒ Specific Rights ⇒ Legal Rights ⇒ Con. Rights ⇒ Jud. Rev. ⇒ Jud. Sup.

The point of breaking this chain down into a series of analytical steps or moves is twofold. The first is to make it clear that each of these steps requires exploration. In short, the idea that rights, or specific rights, or legal rights, or even constitutional rights necessitate judicial review—let alone judicial supremacy—omits a number of crucial analytic steps. Second, pulling the chain apart reveals the extent of disagreement regarding the protection of rights. There is inevitable disagreement along every step of

13. 5 U.S. (1 Cranch) 137 (1803).

14. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 33.

15. See generally Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001).

16. *Id.* at 727–39.

the way. Waldron tells us that the natural and interminable debate over rights includes disagreement about what interests should be protected as rights, how we balance and prioritize those rights, who should be rights-bearers, and finally, who decides all of these issues. Disagreement, according to Waldron, is simply an important reality about rights. Furthermore, these are not just philosophical disputes; they are embedded in political deliberations. They are at the core of “conscientious civic discussion.”<sup>17</sup>

That being the case, Waldron argues, we should choose institutions for resolving disputes about rights that take account of these disagreements. Judicial review is not, in Waldron’s analysis, compatible with this reality about rights.<sup>18</sup> Accepting that we are all rights-bearers of some sort but that in politics all decisions are made within the context of inevitable and pervasive disagreement, Waldron focuses on the importance of participation—the right of individuals to have a voice on issues that affect them through some sort of democratic process.<sup>19</sup> For Waldron, this right of participation is the “right of rights.”<sup>20</sup> If judges struggle with decisions over rights, and if there is no definitive way to resolve disputes about rights and no definitive answers, then we should err on the side of a deliberative process that allows for the greatest participation.

Even if you are not familiar with Waldron’s book, you know where this is going. According to Waldron, legislatures are better than courts in resolving disputes over rights, because in the face of inevitable disagreement about rights, we should at least opt for the dispute mechanism that most protects and encourages the right of participation.

Note that Waldron is not arguing against courts and in favor of legislatures because legislatures will reach better decisions. Nor is he arguing that legislatures always reach “right” answers, especially since we do not have an agreed upon methodology for arriving at or assessing a “right” answer. Legislatures are better simply because—perhaps only because—they are more respectful of the right of participation.

Embedded in this argument is a deep debate about moral realism: are there objectively right and wrong answers to disputes over rights?. But Waldron does not take us there. His point is that even if there are right and wrong answers, we do not have a methodology for finding them, making disputes over rights both ubiquitous and interminable.

17. WALDRON, *supra* note 3 at 225–29.

18. *Id.* at 181.

19. *Id.* at 235–36.

20. *Id.* at 232.

## II. THE RIGHT OF PARTICIPATION

While thinking about rights and the irreducible significance of participation might provide reasons to reject judicial review, or at least judicial supremacy, over more popular forms of constitutional decision making, what do we do when the people choose to give up their power of participation? What do we do when the people want the courts to speak on their behalf rather than resolving issues through the legislative process? Kramer says that this has already happened: “‘We the People’ have—apparently of our own volition—handed control of our fundamental law over to what Martin Van Buren in an earlier era condemned as ‘the selfish and contracted rule of a judicial oligarchy.’”<sup>21</sup> Maybe, as Kramer argues, this popular acceptance of the courts is based on a mistaken history and false assumptions. To him this matters,<sup>22</sup> but to those who are concerned about judicial review as a normative matter, does it matter? Shouldn’t we be able to use our “right of rights” to transfer our voice to the courts?

Waldron is very clear on this point. We cannot legitimate the authority of the courts over the legislatures in this fashion. We cannot give away our right of participation by handing everything over to the courts any more than a democratically elected dictator is a democratic institution—the nature of rights requires active preservation of the right of participation. But what if the courts themselves are the best protectors of this right of participation? What if courts are best at preserving the sovereignty of the electorate? This is the position taken by Samuel Freeman in his defense of a strong form of judicial review. He argues that judicial review is indeed compatible with democracy once one understands it as a kind of shared precommitment by sovereign citizens to maintaining their equal status in the exercise of their political rights.<sup>23</sup>

Waldron, ever the judicial skeptic, responds by going back to his emphasis on disagreement. He argues that we cannot rely on the courts to protect our democratic rights because we cannot even agree on what democracy requires. We cannot agree on what is entailed in this right of participation—what rights promote democracy. So in the face of all this disagreement, the only thing that remains constant as a clear uncomplicated

21. KRAMER, *supra* note 1, at 233–34.

22. And as Professor Nahmod discusses in his contribution to this Symposium, it cries out for more education. Sheldon Nahmod, *Constitutional Education for The People Themselves*, 81 CHI.-KENT L. REV. 1091 (2006).

23. Samuel Freeman, *Constitutional Democracy and the Legitimacy of Judicial Review*, 9 LAW & PHIL. 327, 329 (1990).



fact is the importance of participation itself, and that can only be reflected through the legislative process.

### III. THE PEOPLE

So far Waldron's judicial skepticism seems to be providing ample support for Kramer's concerns about an overreaching Supreme Court and his attachment to the legislative process. But there is one more pause here. Kramer expresses what must be on the minds of all readers as they near the end of the book: maybe we are no longer worthy of being decision makers. Maybe the reality is that "the people" are not educated or informed enough to make rational decisions, and for that reason, we need to pass things off to the courts. Perhaps this helps explain our current infatuation with the courts. As Kramer says, maybe we are "emotional, ignorant, fuzzy-headed, and simple-minded . . . foolish . . . irresponsible [and] self-interested," and so while in the best of circumstances we need to focus on decision-making by "the people," these aren't the best of circumstances.<sup>24</sup>

Waldron explores this possibility too. He observes that maybe "politics is just an unholy scramble for personal advantage"<sup>25</sup>—an entirely plausible pronouncement. But, he says, if we resign ourselves to this, the consequences are much more grave than simply deferral to the courts. If the courts need to step in because "the people" are no longer up to, or capable of, the task of deciding about rights, "then individual men and women are not the creatures that theorists of rights have taken them to be."<sup>26</sup> While it may be tempting to fall back on the supposed wisdom of judges in the face of assumptions about the inadequacy of "the people," the logical consequences of this are just too grim. If we are not worthy of the right of participation, are we worthy of any rights? This is a path we are not willing to go down.

### IV. THE REACH OF POPULAR CONSTITUTIONALISM

The last thing I want to do here is comment on the reach of these arguments. Here we are leaving Waldron, his deep judicial skepticism, and his rejection of judicial review behind and returning to Kramer's more limited concerns about supremacy. In Kramer's analysis, judicial review is indeed an important and justifiable reality of American constitutional law, even if judicial supremacy is not. But if popular constitutionalism is a con-

24. KRAMER, *supra* note 1, at 242.

25. WALDRON, *supra* note 3, at 304.

26. *Id.*

straint on judicial review, then it must be so in ways beyond the question of final authority. Popular constitutionalism must affect not just who has the final say over debates about rights, but, to the extent judges are involved, it must affect how judges approach cases and what they rely on. Are there methods of judicial reasoning that reflect the importance of popular constitutionalism? Are there sources that are more respectful of “the people” and sources that are less so?

While popular constitutionalism may have ramifications for many current issues regarding constitutional interpretation, perhaps the issue I am most intrigued by in this regard is the use of foreign law. Is the use of foreign law as non-binding authority contrary to popular constitutionalism? Is it somehow less democratic? Should we be concerned, as Justice Scalia indicates in *Sosa v. Alvarez-Machain*, that “[f]or over two decades now, unelected federal judges have been usurping this lawmaking power by converting what they regard as norms of international law into American law”?<sup>27</sup> I certainly do not have the answers to these questions, but my guess is that there are no clear answers and that there is at least room for arguing that reliance on multiple kinds of authorities is compatible with the ideas underlying popular constitutionalism.

#### CONCLUSION

Much of this short paper has just been a regurgitation of Jeremy Waldron’s skepticism of judicial review as articulated in *Law and Disagreement*. But this is valuable in two ways. First, it indicates that this is an important and indeed an intractable debate as a philosophical matter. Aside from whatever American ideals and history tell us, it is not so clear that we should take judicial review, let alone judicial supremacy, as a given. We have come to assume that constitutional rights require judicial oversight, and here in the U.S. supreme judicial oversight, but this is not a logical necessity. The second useful observation that emerges from this discussion of Waldron is that other places get along quite well without judicial supremacy. Indeed some places are respectful of rights without constitutionalizing those rights. One need only take a quick glance at the vast material questioning whether Australia should adopt a bill of rights to realize that we should not blindly assume that respect for rights requires the constitutional and judicial framework that we have come to embrace here in the U.S.

27. 542 U.S. 692, 750 (2004) (Scalia, J., concurring).

How we express rights, how they are manifest in legal protections, and how they play out at the constitutional level are all deeply contested issues. One does not need to read Waldron to understand the existence of pervasive disagreement about rights; one need only have attended this Symposium on Kramer's book. To the extent there was such rich disagreement about Kramer's book, about constitutionalizing rights, and about appropriate decision makers, perhaps this is itself support for the idea that collective, participatory decision making is the only core and clear principle we can rely on in a democracy.