

JUDICIAL REVIEW AND JUDICIAL SUPREMACY

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1. Introduction

We are told in the Bible that ancient Israel was governed for a while by judges—“God raised up judges for them”¹—before they were ruled by kings. And even in the modern world the idea of rule by judges—the sovereignty or supremacy of judicial office—has an enduring fascination for intellectuals of a certain kind. I mean intellectuals who fancy that they can see in the character of the judge education and abilities and interests that match their own, and which they definitely cannot see in the self-governing people of a democracy. Of course they may also be flattered by Plato’s image of the philosopher-king.² But as Plato himself acknowledged,³ the prospect of a philosopher-king is not particularly plausible. Apart from a handful of figures like Marcus Aurelius, monarchs are not

¹ Judges 2:16-18.

² Plato, *Republic*, 473c: “Until philosophers are kings, or the kings and princes of this world have the spirit and power of philosophy, and political greatness and wisdom meet in one, and those commoner natures who pursue either to the exclusion of the other are compelled to stand aside, cities will never have rest from their evils, --nor the human race, as I believe”

³ Plato, *The Statesman*, 301e: “In real life countries aren’t like hives of bees: they don’t simply grow a king—an individual whose mental and physical attribute make him stand out from the rest.”

known for their intellectual interests or acumen. But a philosopher-judge, or a panel of philosopher-judges in what Ronald Dworkin called a “forum of principle”⁴—that offers a realistic prospect for the rule of reason, if only the judges can be given power over the people and authority over the kings.

For others among us, by contrast, the prospect of judicial sovereignty is no better than any other kind of sovereignty and considerably worse than forms of rule that are disciplined ultimately by accountability to the people. However inferior the judgments of the people seem to the judgments of a judge, we like the idea of self-governing republic and we are not at all sure that that is compatibility with the ultimate authority of courts in the Constitution.

I don’t think I can cite biblical authority for this last point, but I can invoke what (for an American) is the next best thing: the sayings of Abraham Lincoln. In 1861, in his first Inaugural Address as President of the United States, just before the onset of the Civil War, Lincoln reflected on the methods that might be used to settle disputed questions about slavery. They are not settled by the Constitution, because the Constitution doesn’t explicitly say whether slavery may be permitted or must be permitted in the territories that have not yet become states. They may be settled by voting, by a

⁴ Dworkin, *A Matter of Principle* (Harvard University Press, 1985), p. __

division into majorities and minorities: “If the minority will not acquiesce, the majority must, or the Government must cease,” and the matter be resolved by war. (Which of course is what happened, in the bloodiest conflict in American history.) Lincoln added: “I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court, nor do I deny that such decisions ... are ... entitled to very high respect and consideration....” But he went on,

[a]t the same time, the candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

There we have it, in the words of the man who was perhaps greatest President the United States has ever had: if we allow the judges to decide the key questions that the republic faces, then “the people will have ceased to be their own rulers,” having abdicated their authority and their government “into the hands of that eminent tribunal.”

As I said, there may be some people who welcome that prospect of judicial supremacy. But Abraham Lincoln did not and I think that we should not welcome it either.

I am sure that this view of mine is not a surprise. I am known as a critic of the practice of judicial review of legislation.⁵ I am known as a critic of constitutional arrangements that empower unelected and unaccountable judges to strike legislation from the statute book or refuse to apply legislation that has been duly enacted in a representative assembly. I believe there are strong and compelling reasons—democratic reasons—against giving judges this authority. I am opposed to the arrangement that Portugal shares with the country where I live—the United States—the arrangement that empowers ordinary courts to control legislation for its constitutionality and to refuse to apply measures that are perceived to be in violation of constitutional provisions.

But mine is a minority view on these matters. Many people—from United States and Canada, to Portugal and Germany, to South Africa and Philippines—many countries and many people welcome the association of constitutionality and human rights and a degree of judicial responsibility for ensuring that the measures of the government conform to these standards. They like the fact that

⁵ Jeremy Waldron, “The Core of the Case Against Judicial Review,” 115 *Yale Law Journal* (2006) and *Law and Disagreement* (Oxford University Press, 1999).

there are limits on what their government or parliament or congress can do; they like it that these limits are expressed in the very document or charter that empowers the parliament or congress in the first place; and they like the fact that these are not just “parchment barriers” but substantial restraints that may be enforced through the deliberative processes of law.

What I want to do this morning, however, is to explore the space—if there is space—between this idea of judicial review of legislation, which at its best can operate as a modest restraining power—and the idea of judicial supremacy in a constitution, the idea that the judges should be supreme or even sovereign in the polity and that all other powers in the constitution should be subordinated to them. I believe that whatever we say for or against judicial review, it is not the same as judicial supremacy. And it is judicial supremacy that I want to consider today; I want to explore the ways in which judicial authority might rise to level of supremacy and ways in which that particular sort of judge-based rule may be prevented.

2. Types of Judicial Review

Judicial review, as we know, it, comes in all sorts of shapes and sizes.⁶ It can involve judicial review of executive action or judicial review of legislation. (I believe that judicial review of executive action is an important part of the rule of law and those who favor judicial review of legislation think it is important to bring the rule of law to this level as well.)⁷

There are a variety of practices all over the world that could be grouped under the general heading “*judicial review of legislation.*” They may be distinguished along several dimensions.

(a) There is a distinction between judicial review by ordinary courts and there is the more Kelsenian idea of judicial review by a specialized constitutional court. Portugal, as I understand it, has both. (b) Sometimes there is provision for a constitutional court to review legislation during the process of its enactment or after its enactment but before there is any attempt to apply it in a particular case. In other jurisdictions, ex ante of this kind is not permitted: all review is of legislation or other governmental acts that have given rise to some “case or controversy” between litigating parties, including the agencies of the state. (c) The reference point of judicial

⁶ This is adapted from pp. of Waldron, “The Core of the Case against Judicial Review.”

⁷ Much of what is done by the European Court of Human Rights is judicial review of executive action. Some of it is judicial review of legislative action, and actually some of it is also judicial review of judicial action.

review is sometimes a free-standing Bill of Rights (as in the UK and in New Zealand) and sometimes the text of a constitution. (d) In the latter case, judicial review may be based on rights alone or on other features of the constitution as well—including structural features like federalism or separation of powers principles.⁸ (e) When they make their decisions, multi-member courts use different decision-procedures. In the United States most courts use majority-decision: 5 votes beat 4 on the US Supreme Court.⁹ There are one or two outliers (Nebraska, North Dakota), however, that require a supermajority of judges to overturn legislation.¹⁰ Many European courts do not publicize disagreements among their judges, so that any decision-procedures they use are informal and not set out in the presentation of their determinations. (f) Connected with this are differences in the spirit in which judicial review is carried out: it may be more or less activist or more or less deferential to the institution whose actions are being reviewed. There may, for

⁸ The most famous judicial defense of judicial review, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), had nothing to do with individual rights. It was about Congress's power to appoint and remove justices of the peace.

⁹ See Waldron, "Five to Four: Why Majorities Rule on Court," 123 *Yale Law Journal* 1626 (2014)

¹⁰ The Constitution of the State of Nebraska (Article V.2) ordains that the state's "Supreme Court shall consist of seven judges." But it says: "A majority of the members sitting shall have authority to pronounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges." The supermajority requirement was enacted in 1920. The Constitution of North Dakota is even more stringent: it requires four out of five justices to strike down legislation (Article VI, section 4).

example, be a presumption of constitutionality for legislation. A Nebraska-style supermajority requirement before legislation can be overturned may represent such a presumption.

All this is very interesting. But I do not think these various distinctions in themselves determine or condition the distinction we are looking for, as between “mere” judicial review and practices that amount to judicial supremacy. But one or two of these points will be invoked again in what follows.

Much more important is (g) the difference between what I shall call *strong* judicial review and *weak* judicial review. In a system of strong judicial review, courts have the authority to decline to apply a statute in a particular case (even though the statute on its own terms plainly applies in that case) or to modify the effect of a statute to make its application conform with individual rights (in ways that the statute itself does not envisage). A form of even stronger judicial review would empower the courts to actually strike a piece of legislation out of the statute-book altogether. Some European courts have this authority.¹¹ American courts do not, but the real effect of their authority is not much short of it.

In a system of weak judicial review, by contrast, courts may scrutinize legislation for its conformity to individual rights but they

¹¹ See Mauro Cappelletti and John Clarke Adams, “Judicial Review of Legislation: European Antecedents and Adaptations,” *Harvard Law Review*, 79 (1966), 1207, at p. 1222.

may not decline to apply it (or moderate its application) simply because rights would otherwise be violated.¹² Nevertheless, their scrutiny may have some effect. In the United Kingdom, the courts may review a statute with a view to issuing a “Declaration of Incompatibility” in the event that “the court is satisfied that the provision is incompatible with a Convention right”—i.e. with one of the rights set out in the European Convention of Human Rights as incorporated into British Law through the Human Rights Act. The latter statute provides that a declaration of this kind “does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and ... is not binding on the parties to the proceedings in which it is made.”¹³ But still it has an effect: a minister may use such a declaration as authorization to initiate a fast-track legislative procedure to remedy the incompatibility.¹⁴

A form of even weaker judicial review would give judges not even that much authority. As you know, I come from New Zealand, where the courts may not decline to apply legislation when it violates human rights (in New Zealand, the rights set out in the Bill of Rights Act of 1990); but they may strain to find interpretations

¹² See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

¹³ Human Rights Act, 1998 (UK), section 4 (2) and (6).

¹⁴ *Ibid*, section 10.

that avoid the violation.¹⁵ Although courts there have indicated that they may be prepared on occasion to issue declarations of incompatibility on their own initiative, such declarations in New Zealand do not have any legal effect on the legislative process.

There are intermediate cases. In Canada, there is provision for the review of legislation by courts, and courts there, like their U.S. counterparts, may decline to apply a national or provincial statute if it violates the provisions of the Canadian Charter of Rights and Freedoms. But Canadian legislation (provincial or national) may be couched in a form that insulates it from this scrutiny: Canadian assemblies may legislate “notwithstanding” the rights in the Charter.¹⁶ In practice, however, the notwithstanding clause is rarely invoked.¹⁷

¹⁵ New Zealand Bill of Rights Act 1990, section 4: “No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), ... [h]old any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or ... [d]ecline to apply any provision of the enactment—by reason only that the provision is inconsistent with any provision of this Bill of Rights.” However, section 6 requires that “[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

¹⁶ Canadian Charter of Rights and Freedoms, section 33. The full text of the provision reads: “(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter. (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.”

¹⁷ When it has been invoked, it has mostly been in the context of Québécois politics. See Tsvi Kahana, “The Notwithstanding Mechanism and Public Discussion: Lessons from the

It is tempting to say that the distinction between weak and strong judicial review corresponds to the distinction between mere judicial review of legislation and assertions of judicial supremacy. Maybe strong judicial review amounts to a muscular assertion of judicial supremacy. If someone said this, I guess we would know what they meant. The term *judicial supremacy* has no canonical definition, so people are bound to use it in different ways. But in the America debate, I don't think this use of it has been found helpful. Instead it is assumed that even among practices of strong judicial review, or ways of practicing strong judicial review, we might want to identify a subset of them that amount to judicial supremacy. And then we might want to urge or counsel those entrusted with the power of judicial review to avoid any move in the direction of judicial supremacy.

I am not saying that the American courts have never tilted towards judicial supremacy. Actually, I think in various ways they have. But it is not just because they have practiced strong judicial review. It is because of *the way* they have practiced strong judicial review.

Ignored Practice of Section 33 of the Charter," *Journal of the Institute of Public Administration in Canada*, 44 (2001), 255.

3. What's the problem?

It may help to ask: what is the problem with judicial supremacy?

What is wrong with judicial supremacy? This sounds like a backwards way of proceeding: but if we can figure out what is supposed to be wrong with judicial supremacy—what particular evil the category is supposed to encompass—then we might have an easier job defining what it *is*.

(a) The displacement of self-government.

The concern that Abraham Lincoln voiced in this First Inaugural Address seemed to indicate a danger that the Supreme Court might take over the general power of government from the people or their representatives.

if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, ... the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.

The example he had in mind of a “vital question affecting the whole people” was the whole broad policy of the United States on the westwards spread of slavery—a massively important question that needed to be decided. Was slavery to be left to languish in the

southern states or was it to be part of the dynamic of the country's expansion.

It is hard to pin down, but we might say that judicial supremacy is the tendency of any arrangement that allows such vital and divisive questions to be settled by the courts. Of course in a system of strong judicial review the courts are always settling important questions—questions about abortion, affirmative action, criminal justice, free speech, the character of religious freedom and so on. Some of these are more important than others, more vital to the character of the country than others. Anyone who believes in strong judicial review believes that it is appropriate for the court to settle some such questions. But they might believe that there are limits. If the courts start determining whether the country is capitalist or socialist in its character, or whether it is to be warlike or isolationist, whether labor unions are to be allowed or not, or whether the country is to have an advanced knowledge-based culture or a narrow culture of ignorance, or—as in Lincoln's example, whether a large or a small part of this economy is to be a slave as opposed to a free economy, then the people of the country have really lost their broad power of self-determination and the future direction of their social, economic, and political arrangements is taken out of their hands.

In Europe, if the courts were to determine whether a country remains inside or leaves the European Union, or if courts were to decide whether some European countries (like Spain, the Netherlands, or the United Kingdom) should retain or abandon constitutional monarchy, or adopt a pure free market as opposed to a mixed economy, or remain inside or outside NATO—then that would amount to judicial supremacy and not just the practice of judicial review.

It would be a matter of degree and therefore a matter of judgment. But we might think that courts practicing judicial review should be conscious of this spectrum of possibilities and anxious to remain at the small-scale piecemeal end of it. I shall say more about this towards the end of the lecture—and more about the strategies of avoidance that a court might use.

(b) Judicial sovereignty: the reproduction of Hobbes’s problem.

“Judicial supremacy” is one phrase; another phrase that might be associated with it is “judicial sovereignty.” Judicial sovereignty might be something that we want to avoid, ironically for the sake of the rule of law. Let me explain.

Thomas Hobbes notoriously believed that a well-organized society would have at its apex a sovereign law-giver—an uncommanded commander (maybe a monarch, maybe a sovereign

parliament), which would rule by law but would not itself be subject to legal restraint. How could it be? As the source of all restraint and legitimate coercion in the society there would be no one to restrain it but itself. As Hobbes put it, in Chapter 26 of *Leviathan* (1651):

The Sovereign of a Common-wealth, be it an Assembly, or one Man, is not Subject to the Civil Lawes. For having power to make, and repeale Lawes, he may when he pleaseth, free himselfe from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before. For he is free, that can be free when he will: Nor is it possible for any person to be bound to himselfe; because he that can bind, can release; and therefore he that is bound to himselfe onely is not bound.

It sounds like a convincing argument, and its ruthless Hobbesian logic seemed to indicate that it would be impossible to drive the rule of law into the apex of a society's sovereign.

We think we know better. We think that it is possible to limit the sovereign with a constitution and patrol that limitation with a court, or with courts. But Hobbes rejected the logic of constitutionalism. It is, he said, a mistake to think that you can limit sovereignty with a constitution, because you have to do it with some other political entity—in this case a court...

Which error, because it setteth the Lawes above the Sovereign, setteth also a Judge above him, and a Power to punish him; which is to make a new Sovereign; and again for the same reason a third, to punish the second; and so continually without end, to the Confusion, and Dissolution of the Common-wealth.

It is an infinite regress argument. Either you have a legislative monarch or parliament which is an uncommanded commander, or have that entity being controlled by a court, which is an uncommanded commander; and if that court is not be an uncommanded commander, there must be some other entity that controls it, and so on. As Hobbes wrote in an earlier work, *De Cive*,

in every City there is some one man, or Councill, or Court ... that is, supreme and absolute, to be limited onely by the strength and forces of the City it selfe, and by nothing else in the world: for if his power were limited, that limitation must necessarily proceed from some greater power; For he that prescribes limits, must have a greater power than he who is confin'd by them; now that confining power is either without limit, or is again restrained by some other greater than it selfe, and so we shall at length arrive to a power which hath no other limit, but that which is the terminus ultimus.... (II. vi. 18)

Constitutionalists—particularly in America—have thought it is possible to break out of this rigid Hobbesian logic, by empowering a court to review legislation without giving it the full power of a sovereign. All it can do is to check and restrain the law-makers on various issues; it has no real power of law-making itself; it is not a Hobbesian super-sovereign. As Alexander Hamilton said in *The Federalist Papers* (number 78), “[t]he judiciary ... has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever.” True, it is an uncommanded commander on the particular issues that it addresses but that is far from being a sovereign with plenary power. The constitutional separation of powers sees to that.

This solution—if it is a solution—to the Hobbesian problem is precarious. We can quickly be plunged back into the Hobbesian regress whenever the court which reviews legislation takes on the power of making laws or other powers associated with sovereignty. So that is a grim prospect of judicial supremacy. A supreme judiciary is in danger of becoming a Hobbesian sovereign or super-sovereign—in danger of ruining the anti-Hobbesian solution to the problem of applying the rule of law to the apex power in a society.

This issue of whether judicial power represents the rule of law or represents a sort of judicial super-sovereign that itself escapes

the authority of the rule of law is a perennial problem in rule-of-law studies. Should we regard strong judicial review as the epitome of the Rule of Law or as yet another part of the problem that the Rule of Law is supposed to solve? If we believe in the rule of law not men, does “men” include black-robed judges sitting in a courtroom? Some will say that—short of the fantasy that the laws themselves might rear up and render their own decisions—the most that the rule of law could possibly entail at this level is decisions by judges after due deliberation in a courtroom (including unreviewable decisions by judge sitting in the highest court in the land). This is, as I said, a precarious solution to the problem of the rule of law, and judges must take care that they don’t begin behaving in a way that creates the impression that they are the final unreviewable sovereign power in the constitution.

(c) Usurping the role of *pouvoir constituant*.

If a self-governing society has a constitution, it is often because the constitution has been framed and ratified (and occasionally amended) by a power within the society. Very rarely is that power the power of the judiciary. Sometimes it is a constitutional convention; sometime it is the legislature, particularly for countries like the United Kingdom, which have a piecemeal rather than a codified constitution. When there is a codified constitution, it is

often said to be enacted by the will of the people, assembled, consulted, or represented for the purposes of ratification. The people, we say, are the constituting power, “*le pouvoir constituant*,” in the language of European constitutionalism). “We the people” make a constitution for ourselves, and if it needs amending, we the people undertake that task too. The courts, even the highest court, is not *le pouvoir constituant*.” It is a constituted power, set up by the constitution. It is un *pouvoir constitué*.

One of the earliest theorists of the relation between *le pouvoir constituant* and *les pouvoirs constitués* is “the great constitutional architect of revolutionary France,” l’Abbé Emmanuel Joseph Sieyès.¹⁸ Sieyès developed a quite aggressive theory about the character of *le pouvoir constituant*.¹⁹ He thought it was or should be impossible to pin down the constituting power to any particular form. A formal procedure for constitutional amendment like the one set out in Article 161 of the Constitution of Portugal or in Article V of the U.S. Constitution may be intended to define and control the exercise of popular sovereignty. But its status (the status of the defined amending power) is still that of *un pouvoir constitué*. It is

¹⁸This description of Sieyès is by Carl Schmitt, as quoted in John P. McCormick, *Carl Schmitt’s Critique of Liberalism: Against Politics as Technology* (Cambridge: Cambridge University Press, 1997), p. 243.

¹⁹ Sieyès, *What is the Third Estate?* in Emmanuel Joseph Sieyès, *Political Writings*, ed. Sonenscher (Hackett Publishing, 2003)

something that the primal constitutive power has wrought, rather than something which defines what the primal constitutive power now amounts to. The people—if they are the *pouvoir constituant*—can chose any means they like to modify the constitution. The proposition that the constitutive power of the popular sovereign defies constitution and may be exercised in any manner and through any channels that the people chooses, I shall call *the positive Sieyès principle*.²⁰ It is a very radical thesis; and it is fortunate that we do not have to consider it here today.

Today, I am more interested in a negative thesis that he propounded. The negative Sieyès principle is this: a constitutional system must be ordered in such a way as to prohibit (and to reduce the prospect and plausibility of) any constituted power taking upon itself the mantle of *le pouvoir constituant*. The idea is that no constituted power may be identified—or identify itself—directly or

²⁰ I call it a thesis of Sieyès, but it was equally current during the framing of the American constitution. In 1790 James Wilson described popular sovereignty as "the vital principle" of American government. "[T]he supreme or sovereign power of the society," he said, "resides in the citizens at large; and ... they always retain the right of abolishing, altering, or amending their constitution, at whatever time, and in whatever manner, they shall deem it expedient." Robert Green McCloskey (ed.) *The Works of James Wilson*, Volume I (Harvard University Press, 1967), p. 93.

Sieyès' principle, or something like it has also had an impact on modern constitutional theory in the United States as well: Bruce Ackerman, for example, is really invoking the positive principle when he insists on the importance of constitutional moments that are inherently irregular relative to existing constitutional arrangements. See Bruce Ackerman, *We the People: Volume 1. Foundations* (Cambridge: Harvard University Press, 1991), pp. 40-57 and *Volume 2: Transformations* (Cambridge: Harvard University Press, 1998), 99-119.

indirectly with the people or claim the credentials of the popular sovereign. For Sieyès, the point of the negative principle is partly to vindicate the unique right of the people to speak in their capacity as popular sovereign. But it is also a matter of maintaining balance and integrity in the constitutional scheme: we want to avoid a situation in which any one institution claims a pre-eminent place by virtue (say) of its representative or directly elective character. Of course, if the popular sovereign has constituted a democracy, then some of *les pouvoirs constitués* will be elective or representative, and it may be tempting to say that their voice is the voice of the people. It is important to avoid this impression, according to the negative principle, particularly if the claim goes beyond simply asserting a popular mandate for some policy or legislative program. The legislature may be representative in character; but if it speaks for the people (in relation to legislative matters), it does so only according to its constituted procedures. As Sieyès put it, “the Assembly of Representatives which is entrusted with the legislative power ... exists only in the form which the nation has chosen to give it. It is nothing outside the articles of its constitution; only through its constitution can it act, conduct its proceedings and govern.”²¹

Politically, the point was a delicate one for Sieyès, for he envisaged the possibility that the popular sovereign might have to

²¹Sieyès, p. 123.

do its work through a special assembly of representatives.²² Such a convention of extraordinary representatives might closely resemble a representative legislature; and precisely for that reason it was crucial to insist on the distinction: “[A]n extraordinary representative body is different from the ordinary legislature. ... The latter can move only according to prescribed forms and conditions. The former is not subjected to any procedure whatsoever: it meets and debates as the nation itself would do if we assumed a nation consisting of a tiny population that wanted to give its government a constitution.”²³

The negative principle is clearly reflected in the architecture of American constitutionalism. The framers were adamant that from the fact some—but not others—of the instituted branches of government were elective or representative, it was important not to infer anything about their special status in the constitutional scheme. This helps explain why Madison insisted on a form of election to the presidency which would be indirect (at best), rather than directly populist, and why at least initially he thought it unwise to have direct elections to the national legislature—giving up the

²²Ibid., p. 130: “Since a large nation cannot physically assemble when extraordinary circumstances make this necessary, it must entrust extraordinary representatives with the necessary powers on such occasions.” This was a major point of difference between Sièyes and Rousseau: see Bronislaw Baczko, “The Social Contract of the French: Sièyes and Rousseau,” *Journal of Modern History*, 60, suppl. (1988), S98, at S118 ff.

²³Ibid., p. 132.

point (in the case of the House of Representatives) only when it became clear that the national legislature would have to compete for legitimacy with directly elected state legislatures.

The discussion so far about the application of the negative Sieyès principle to elective institutions leads us naturally to expect that the principle's main implication for the debate about judicial review will be to undermine some of the claims that are made in behalf of legislatures. However, the negative principle does not apply *only* to elective or representative institutions. It applies to all *les pouvoirs constitués*. It applies, for instance, to the army, which in some countries and in some revolutionary situations has been known to take on the mantle of the people and to claim a unique or ultimate right to speak and act for national salvation in the name of the popular sovereign.²⁴ It applies also to political parties. Certain political parties have been known to regard themselves not just as one competitor among others in electoral politics, but as “*the revolutionary party*”—the party whose organization, discipline, determination, and sacrifices led the nation to the possibility of liberty and a constitution in the first place. And on that basis they assert a special claim to the support of the voters and special privileges in the organization of the state. Claims of this sort have been made not only by the Bolshevik party in Russia and by

²⁴See S.E. Finer, *The Man on Horseback: The Role of the Military in Politics* (Praeger, 1962).

Communist parties in East Asia and Central and Eastern Europe, but also by revolutionary parties in the Western hemisphere (by the PRI in Mexico, for example).

Of course what interests me in this lecture is the application of the negative Sièyes principle to the judiciary as *un pouvoir constitué*. Even if we cannot argue—against judicial review—that the legislature speaks for the people, still we may ask the following question: to what extent are *the courts* claiming to speak for the people (and thus violating the negative Sieyès principle) in the way they exercise their powers of judicial review? To what extent are they taking on the mantle of the people, when they set up their own interpretations and repudiate interpretations of the constitution which emanate from the other branches?

There are some legal and political theorists for whom such a posture is attractive. Hannah Arendt once wrote that the Supreme Court is “the true seat of authority in the American Republic,” adding that “this authority is exerted in a kind of continuous constitution-making, for the Supreme Court is indeed, in Woodrow Wilson’s phrase, ‘a kind of Constitutional Assembly in continuous session.’”²⁵ I find this view of the role of the courts deeply disturbing. It is a version of judicial supremacy that I think we should be very wary of.

²⁵ Hannah Arendt, *On Revolution* (Penguin Books, 1973), at 200; the Wilson quotation, she says, is from Edward S. Corwin, *The Constitution and What it Means Today* (Princeton University Press, 1958), p. 3.

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So now we have three accounts of what might be wrong with the ascendancy of the judiciary—(a) its displacement of self-government, (b) its reproduction of the Hobbesian problem of the rule of law, and (c) its usurpation of the role of *pouvoir constituant* so far as the constitution is concerned. I have presented them as three separate possibilities, but they are obviously connected and any one of them might be described in the language appropriate to the others. In all of them, there is a sense of danger that judicial authority might unbalance the constitution—taking advantage of the courts' power to review the work of other institutions to establish its ascendancy in the constitutional scheme. Our three possibilities give us different ways of describing that ascendancy: (a) domination of government; (b) hegemony above the law; and (c) power to define and redefine the constitution.

In what follows I shall assume that these are things to be avoided. But they are roles that the courts can easily slip into, and it is now time to consider how that might happen and what can be done to avoid it.

(4) How the judiciary might try to make itself supreme

It would be a mistake to think that this is a problem that can be solved simply by counselling judges not to be too activist in their

work and stick tightly to the letter of the text of the constitution that they are supposed to be upholding. “Activism” in this context has many meanings and often is simply a way of disparaging judicial decisions that one does not approve of. Besides, as Ronald Dworkin has argued, the terms of the constitution may require a court to be activist: fidelity to the constitution and judicial activism may be ideas that operate on the same side. It all depends on the constitution itself and what has been enacted therein. Still, the judiciary may view its role more or less expansively and we shall begin with that in our catalogue of the methods by which an aspiration to judicial supremacy may be pursued.

The practice of judicial review is characteristically associated with a bill of rights, mostly listing discrete things that the branches of government must not do. It is interesting that these items present themselves usually as a list, rather than as an integrated platform or coherent policy. I think that is important and valuable and it may help us understand how things can go wrong in judicial review, how things can tilt towards judicial supremacy.

So long as the courts confine themselves to the particular items on the list—free speech, freedom of religion, due process, privacy, non-discrimination, reproductive rights, and so on—and deal with them one by one as they crop up in particular cases, then there is no great danger of judicial supremacy. Of course, even with respect to

the items on the last, there may still be democratic objections—along the lines that I have pursued in *Law and Disagreement* and “The Core of the Case Against Judicial Review” and elsewhere. The courts will be settling issues that matter to the society, and on which there is serious division, among the people, among their representatives, and indeed among the judges themselves. I am not abandoning that criticism, but I said we would set it aside for the purposes of this lecture. My strategy is to ask when the anti-democratic character of judicial review rises to the level of an assertion of judicial supremacy—and I am assuming, for today, that that is the greater abuse.

My first suggestion, then, is that judicial review tilts towards judicial supremacy when the courts begin to think of themselves and present themselves as pursuing a coherent *program* or *policy*, rather than just responding to particular abuses identified as such by a Bill of Rights as they crop up. I know this goes against the grain of a great deal of constitutional theory. Theorists often say that judges should have an overall view of the constitution as a whole—as a coherent program of principle—and they should seek in successive cases to move that program forward on a broad front. The program in question might embody a broad progressive or liberal vision, or perhaps an overall vision of a conservative free market society. I believe that the more the judge think of their work in this way, the

more they are in danger of asserting themselves and their particular unreviewable power as the ascendant platform from which the overall shape of good governance is to be determined.

I think judges have to be particularly careful about this when the constitution embodied positive social and economic rights as well as civil and political rights, because it may be more difficult to hold social and economic rights apart from a programmatic vision. But it can be done. I don't want this first point to be heard as disparaging the insertion of social and economic rights in a constitution. (I mean, for example, Articles 53 to 79 of the Portuguese Constitution.) These rights are very important. But their presence in the constitution should not be read as empowering the judges to pursue an overall vision of social justice or anything of the sort.

This is not quite the point that Abraham Lincoln made in the passage from the First Inaugural Address that I quoted at the beginning of this lecture. In that passage, Lincoln contrasted the particular and general dimension of judicial making in a slightly different way. He said that when the courts settle a constitutional dispute, it must of course be binding on particular parties who have come to law to have their dispute put to rest: "such decisions must be binding in any case upon the parties to a suit as to the object of that suit." But he implied that that was where the true authority of

the court must end. Of course the thinking that court brought to the particular dispute is “entitled,” Lincoln said, “to very high respect and consideration in all parallel cases by all other departments of the Government.” The danger is that it will become a broad precedent, and then if it is mistaken, it will be much harder to overrule it.²⁶ He came close, then, to implying that it is precedent—*stare decisis*—where the decision of one court becomes an authority for all the others—that converts judicial review into judicial supremacy. I think he is wrong about that.²⁷ The operation, in an

²⁶ Lincoln said: “And while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice.”

²⁷ For similar reasons I shall not adopt the definition of judicial supremacy that my NYU colleague Barry Friedman provides. Judicial supremacy, says Friedman, means “that a Supreme Court interpretation binds parties beyond those to the instant case, including other state and national governmental actors.” Barry Friedman, “The History of the Counter-majoritarian Difficulty, Part One: The Road to Judicial Supremacy,” 4 *New York University Law Review* 333 (1998), at 352. The idea seems to be that a court has supremacy whenever its determination of the constitutionality of a legislative measure, L, in case C₁, has force beyond C₁. It would seem, on this definition, that we have to be willing to talk about judicial supremacy whenever judicial interpretations are cited as authoritative for cases other than those in which they are issued. If a federal court in C₂ defers to the decision of a higher (or, for that matter a coordinate) court in C₁ concerning the constitutionality of L, that would seem to satisfy Friedman’s definition. This is unsatisfactory for the following reason.

First, as judicial review is ordinarily understood, a decision in C₁ to the effect that L is unconstitutional has the effect of “striking down” L and preventing it (or the part of it that has been found unconstitutional in C₁) from having any effect in any other case. Now strictly speaking, that is a misconception. An American court has no power to remove a law from the statute books, or to enter a judgment against a statute; even in the case of a facial challenge, the court has no power formally to repeal the measure or (as in some continental systems) to order anyone to repeal the measure. L remains formally on the books and the prudent statute compiler will even include it in subsequent editions. See Richard H. Fallon, “As-applied and Facial Challenges and Third-party Standing,” 113

American-style legal system, of something like *stare decisis*—whereby lower courts are bound by the decisions of higher courts, and higher courts are supposed to give great weight to their own previous decisions is not itself the key to judicial supremacy. This is because precedent too can operate on a narrow front, consistent with the anti-programmatic discipline I am talking about here. One can accept the precedential force of a particular ruling—for example, an earlier court’s ruling that striptease dancing amounts to free speech—without embarking on or subscribing to a general program of social action. It is only when judicial review begins to implicate that sort of programmatic vision that it heads in the direction of judicial supremacy. If it does, then I think it gives rise to concerns about judicial supremacy along the lines of Lincoln’s concern about the displacement of self-government, or the concern that we are raising the court to the level of an unreviewable Hobbesian sovereign.

Harvard Law Review 1321 (2000), at 1339. Indeed, dissenting judges may occasionally threaten to apply the statute in question to later cases, despite its having been “struck down” by a majority of their brethren. Cf. the closing words of Justice Scalia’s dissent in *Dickerson v. United States* 530 U.S. 428 (2000), at 465: “I dissent from today’s decision, and, until § 3501 is repealed, will continue to apply it in all cases where there has been a sustainable finding that the defendant’s confession was voluntary.”

If there is any meaning to the popular notion of a statutory provision (L) being “struck down” by the courts, it is that subsequent courts (in C₂, C₃, ... etc.) will follow the court in C₁ in refusing to apply L in the cases that come respectively before them. Since this is ordinary judicial review as it is commonly understood, I think we may infer that C₁’s operation as a precedent cannot define judicial *supremacy*.

So: judicial review should not be understood as an opportunity to implement a broad social program through decisions in successive cases.

Equally, the judges should not take it upon themselves to oppose the vision or overall program or policy of the elected branches. It is the responsibility of the elected branches of government to form and pursue social programs on that scale. The task of the judges is simply to spot and identify particular abuses, to oppose the program as a whole, which is none of their responsibility. Here I have in mind the stance that the Supreme Court of the United States took against social and economic legislation in what we call the *Lochner* era. We define it with reference to a particular case: *Lochner v. New York*, 198 U.S. 45 (1905). But it was a long period of American constitutional history, from the 1880s to the late-1930s in which state and federal courts struck down statute after statute—about 170 in all—that constituted a progressive program of economic and social amelioration. The court marked out a stance of broad opposition to the program pursued by the elective branches of government, establishing in effect a “stand-off”—a tussle of power—between those branches and itself. In my view, the court should not have gotten itself into that situation.

One thing that happened during the *Lochner* era was that the legislatures continued to enact statute after statute, even in the face of the judge's exercise of the power of judicial review to strike the successive statutes down more or less as soon as they were enacted. The elected branches evinced thereby not only that they were determined to persevere with their progressive vision, but that they believed for their part that their program was constitutional. The judicial majorities who kept striking down these statutes were evidently deaf to that message; they were not prepared to consider that other branches of government—indeed a minority of their fellow judges—held an interpretation of constitutional law that was different from their own.

So that is another way in which judicial review can tilt towards judicial supremacy: it happens when the judges pay attention only to their own thought about the constitution, as though they were the *owners* of it, and the other branches of government and the people in general were not entitled to a view. This attitude may be evinced in the repetitious case-after-case aspect of the *Lochner* era, or it may emerge in some momentous individual case where the courts treat constitutional views held and expressed by other branches of government with disdain.

The term “constitutional populism” is sometimes used in the United States to convey the point that the courts should not be

regarded as having a monopoly on constitutional thought and constitutional interpretation. Mark Tushnet, who teaches at Harvard, has written an excellent book called *Taking the Constitution Away from the Courts*.²⁸ It is not about throwing the constitution away or abandoning any sense of constitutional restraint: it is about ways in which the people themselves and the elected branches of government might take on responsibility for interpreting and applying the constitution in their own deliberations rather than ceding those powers to the courts.

Now, we all know that it is not going to happen; there is no way of taking the constitution away from the courts. But we can encourage popular constitutionalism *anyway*, by allowing the elective branches also to make their own rulings and conduct their own debates and—like the judges—vote on the constitutionality of the measures that come before them. Then the question is: what attitude should the courts take towards the popular constitutionalism of the people or their representatives? And that, again, is where the prospect of judicial supremacy rears its ugly head.

In the United States certainly, which parades itself as the most developed constitutional republic in the world, the courts have

²⁸ Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton University Press, 2000). See also Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2005).

taken on a disdainful attitude towards the constitutional views of the other branches of government. In the 1958 case of *Cooper v. Aaron* the Supreme Court asserted its supremacy in the following terms. It talked about “the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution,” and it said that this principle of judicial supremacy has “been respected by this Court and the Country” ever since the beginning of the nineteenth century “as a permanent and indispensable feature of our constitutional system.”²⁹

Here’s an example to illustrate. In 1990, in a case called *Employment Division v. Smith*,³⁰ the Supreme Court of the United States changed the way the Constitution’s guarantee of religious freedom was understood. Liberal philosophers have long been torn between two conceptions of religious freedom: (1) it is a right to be free from legislation that is intended to burden religious practice; or (2) it is a right to be free from legislation which burdens one’s religious practice, whether such burden is intended or not. The text of the constitution is non-committal on these options, but any society which respects religious freedom has to make a choice between them. Before *Smith*, it seemed that the American courts

²⁹*Cooper v. Aaron* 358 U.S. 1, at 18 (1958).

³⁰*Employment Division v. Smith*, 494 U.S. 872 (1990).

were committed to something like (2),³¹ but the majority in *Smith* seems to have turned its back on (2) and adopted the less generous interpretation of religious freedom, viz. (1). However, the American legislature had its own view on the matter. In 1993, in response to the decision in *Smith*, the U.S. Congress passed the Religious Freedom Restoration Act, which stated that (2) was the better understanding of religious freedom.³² Four years later, however, when the issue came before the Supreme Court again, in *City of Boerne v. Flores*,³³ the Supreme Court stuck to its determination to adopt approach (1), brushing aside Congress's view, in the following terms. (These are the words of Justice Kennedy):

Our national experience teaches that the Constitution is preserved best when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of

³¹*Sherbert v. Verner*, 374 U.S. 398 (1963).

³²United States Code—Title 42, Chapter 21b: Religious Freedom Restoration §2000bb: “(a) Findings: The Congress finds that ... (2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise; (3) governments should not substantially burden religious exercise without compelling justification; ... §2000bb-1. (a) Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability.... (b) Exception - Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”

³³*City of Boerne v. Flores*, 521 U.S. 507 (1997).

the Judicial Branch, which embraces the duty to say what the law is. ... When the political branches act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases or controversies the Court will treat its precedents with the respect due to them under settled principles, including stare decisis, and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.³⁴

That is what I mean by an assertion of judicial supremacy: the nation faces an important choice about how to conceive a core value; the constitutional text offers no explicit guidance; in a series of cases the courts find themselves faced with the issue; as that series of cases unfolds, the national legislature debates the issue and offers its view; but although that opinion by the legislature plays an important role in the national debate on a watershed issue, the highest court hold that it is *its own* reasoning and *its own* precedents and *its own* doctrine that should prevail; an important matter that

³⁴Ibid., at 535-6 (Kennedy J.).

had never been explicitly settled in the constitution is now to be settled decisively and exclusively by the reasoning of a court.

I have been pursuing these assertions of judicial supremacy primarily in terms of the displacement of popular self-government and the possibility that the Court is becoming a sort of Hobbesian entity—keeping the sovereign legislature in its place, to be sure, but constituting itself as an unreviewable super-sovereign whose power over the other branches is not matched by any concession that the other branches themselves may have a view about the constitutionality of their actions. The last case that I want to quote takes us also in the direction of the peril identified by Sieyes’s negative principle—the third of the dangers that I mentioned in the middle of the lecture. I mean the danger that the courts will begin to think of themselves as the voice of the Constitution or of the people who made the Constitution.

In an extremely important and thoughtful decision about abortion—*Planned Parenthood of South East Pennsylvania v. Casey*, decided in 1992, 505 U.S. 833 (1992)—a plurality of justices on the US Supreme court reflected on the obligations of their office, particularly as concerned the maintenance of some sort of constancy and adherence to precedent in constitutional cases. I won’t go into the substantive details—it concerned whether they should be willing to revisit the 1973 decision in *Roe v. Wade*—but here is what

the plurality said about their own responsibility in the matter, “explaining why overruling *Roe's* central holding ... would seriously weaken the Court's capacity to ... to function as the Supreme Court of a Nation dedicated to the rule of law,” and diminish “the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.”

Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases *and speak before all others for their constitutional ideals*. [my emphasis]

It is an intriguing passage because it not only identifies the rule of law with the court's ascendancy (in defiance of the Hobbesian argument), but it insists that the nation needs to accept that the court must “speak before all others” for the constitutional ideals of the people.

----new from here----

If the prospect of judicial supremacy is a matter of concern, then it would be better if the courts would not speak of themselves in this way. It would be better if they did not trumpet their

ascendancy over other branches of government in the way they appear to be doing in *Casey* and *City of Boerne* and *Cooper v. Aaron*. But the problem is not just judicial rhetoric—the rhetoric of constitutional guardianship. The Court’s view of its role becomes particularly problematic when it is associated with what is sometimes called a “living tree” version of the constitution that it is administering. The living tree conception understands the role of the courts as including the power to revise our understanding of the constitution, to advance it and adapt it to new realities and new values. It treats the courts, then, as constitution-framers or constitution-amenders who have the right not only to “speak before all others” for the constitution as it is, but also to speak before all others for the constitution as it is becoming or as it now ought to be. If that places the constitution beneath the court, then it establishes the court as the true apex of the constitutional system, with constitutional law at least partly under its control. And this raises legitimate concerns about the Hobbesian sovereignty of the court and about its Sieyèsian usurpation.

It is a delicate matter. Not everything that is called a “living tree” or a “living constitution” approach falls into this difficulty. Those terms are sometimes used to refer to the view that courts must take seriously—must not flinch from—the invitation, implicit in the vague or evaluative language that constitutions sometimes

use, to make moral judgments in their own voice about (e.g.) the “cruelty” of punishment or the “unreasonableness” of search and seizure. I accept Ronald Dworkin’s argument that when language like this is used (e.g. in the US Constitution’s 8th and 4th amendments respectively), it is the responsibility of 21st century judges to make the relevant value-judgments for themselves: they are not required or even permitted to defer to the way in which such judgments would have been made in 1791, when these amendments were adopted.³⁵ That is not judicial supremacy: that is the judges’ carrying out the instructions that the constitution gives them.³⁶

But if the court goes *beyond* this, to develop new views about what (the court thinks) the constitution ought to have forbidden (though it did not) and to act on those views—to bring the constitution up to date—then the constitutional document is no longer the constraining basis of the court’s power. The court is now unconstrained, and is to that extent a Hobbesian sovereign, beyond the reach of the rule of law. The court is now imposing its view of

³⁵ Ronald Dworkin, *Freedom’s Law: the Moral Reading of the American Constitution* (Harvard University Press, 1996).

³⁶ So, when the US Supreme Court says, as it said in *Trop v. Dulles* (1958) that “the words of the [Eighth] Amendment are not precise, and that their scope is not static” and that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” I do not regard that as a problematic form of living tree document. For the Amendment requires the judge to make a judgment about what is cruel; it does not limit him or her to making a judgment about that was thought cruel in the past.

what a 21st century constitution ought to be, and to that extent it is taking on the role of *pouvoir constituant*.

Those who adopt the living tree theory or the theory of the living constitution seldom say whether they are happy about the judicial supremacy it implies. They say simply that we cannot just be stuck with the frozen formulations of a century or more ago (or in the case of the Canadian Charter of Rights and Freedoms, we cannot be stuck with the frozen formulations of a few decades ago).

The ‘frozen concepts’ reasoning runs contrary to one of the most fundamental principles of Canadian constitutional interpretation: that our Constitution is a living tree which, by way of progressive interpretation, accommodates and addresses the realities of modern life....³⁷

We must allow the constitution to grow, they say. It would be absurd to be governed now by the doctrines of times past. Maybe so. But one would like to hear some acknowledgment of the costs that attend this approach. And what I have been doing, in these last few moments, is to say that we must understand those costs not just in the currency of activist judicial review but in the more problematic terms of judicial sovereignty and judicial supremacy.

³⁷ *Reference re Same-Sex Marriage* 2004 SCC 79 at par. 22, [2004] 3 SCR 698 (9 December 2004)

Then a page or two, concluding the lecture with various grim warnings against people who allow their approval for judicial review or at least their acceptance of its necessity to metastasize into an enthusiasm for judicial supremacy, that gives the judges governing power. Conversely a warning against allowing any acceptance of the limits on democracy and democratic legislation to grow into a general indifference as to whether the position of the elected branches is being wholly displaced and the constitution unbalanced as a result

5. Self-government, the rule of law, and popular sovereignty.

All powers of strong judicial review of legislation involve some cost in terms of democracy. A particular issue is taken out of the hands of the people or their elected representatives and subjected to the filtering veto of a non-elective institution. Many people believe that this is justified for the protection of rights and the prevention of majoritarian tyranny.

A discussion of judicial supremacy must go beyond the familiar terms of this debate about judicial review. If the judges are arrogating to themselves a broad-based and fundamental veto over the general policy of the government and over the terms of the constitution, then the costs is not just to be measure din terms of a discrete loss to democracy. It is a loss to the broader enterprise of

self-government; it is a loss in terms of the prospects for the rule of law at the highest apex of society (now understood to be the judges), and it is a loss in terms of popular sovereignty which ought to be locus of ultimate responsibility for the constitution.

I hope that by emphasizing these three dimensions and the connections between them, I have been able to indicate why judicial supremacy, or a tilting of judicial review in the direction of judicial supremacy, must be regarded as a distinctive evil in a country's institutional arrangements.