A Constitution for Everyone

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This article was adapted from my speech entitled “A Constitution for Everyone.” Our Constitution is for everyone, but perhaps not in the way people assume. Our federal constitution protects everyone in the sense that all citizens may rely upon it in court, if necessary. But the Constitution is also for everyone in the sense that constitutional interpretation itself is a public and popular responsibility -- and ought to be such.

We can approach these issues by asking what is, and what should be, the relationship of law to democracy in America. On the level of positive law -- statutes, regulations and so forth -- the relationship of law to democracy is easily stated. Democracy is the selection by a majority of the voters of representatives who, in turn, make the laws. Presumably these laws represent the will of the majority. Law at this level is how the people rule.

In terms of constitutional law, however, the relationship of law to democracy is different. The Constitution puts limits on what the majority, through their representatives, may enact as law. Some of these limits are structural, such as the provision of separate constituencies for electing Presidents, Senators, and representatives. Some of these constitutional limits are substantive, however, such as the protection of free speech from Congressional regulation by the First Amendment. We refer to these limits on the majority as “Madisonian Democracy,” after James Madison, considered by many to be the father of the Constitution.

The text of the Constitution does not resolve what institution, if any, has the authority to interpret what these constitutional limits on the majority mean. Over time, Americans have come to accept that the courts, and the United States Supreme Court pre-eminently, interpret the Constitution in a binding way.

Therefore, we may say that in our system, the relationship of law to democracy is that in many areas of life, the majority rules through its authority to select government representatives; in

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other areas, the majority is not permitted to rule. The courts define the difference.

Not only would most lawyers agree that this is an apt description of our current system, most lawyers and judges would add that this is a good system, one much better than simple and universal majority rule. They would say that the majority should not be permitted to interpret the Constitution, both because ordinary people lack the technical expertise to interpret in accordance with precedent, text and history and because the majority is potentially self-interested, and thus might grant to itself illegitimate authority to legislate, or even grant to itself permanent political advantage. But our Constitution and its system of interpretation is not actually centered in the courts. Our system is already more democratic than we generally assume, and is already a Constitution for Everyone.

In one sense it is obvious that the people rule in the matter of the content of the Constitution. The power to amend the Constitution gives to a large voting majority the authority to add to or change the language of the Constitution. A constitutional amendment regarding gay marriage, for example, would require the vote of at least two-thirds of each House of Congress or of at least three-quarters of the states. Whether one believes that the Constitution should be amended in this way, or not, everyone here would agree that the people as a whole will ultimately decide this issue.

The amendment power goes beyond the power of the majority to add subjects to the Constitution, as in the case of a proposed prohibition on gay marriage. The amendment power also allows the majority to, in effect, reverse decisions of the United States Supreme Court interpreting the Constitution. The power of the majority to amend the United States Constitution has been used for this purpose throughout American constitutional history, one of the earliest episodes being the Eleventh Amendment to the Constitution,\(^1\) which effectively overruled the United States Supreme Court’s decision in *Chisolm v. Georgia.*\(^2\) The ability of the majority to amend the constitution is a power so great that it has been suggested by Chief Justice Rehnquist that the protection of free

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1. The Eleventh Amendment provides: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." U.S. Const. Amend. XI.
2. 2 U.S. (2 Dall.) 419 (1799).
speech -- certainly a core constitutional value -- could be removed from the Constitution by amendment.

But is the amendment power the only way that the people rule in regard to the meaning of the Constitution? Are the only two choices available to the people when they disagree with the Supreme Court either to accept the dictate of the Court or to amend the Constitution? One of our great Justices -- John M. Harlan -- answered that question in the negative in a classic quotation of American legal/political thinking. In his view, the people ultimately control the interpretation of their Constitution. In other words, the Constitution is not for everyone only when the people engage in amendment. The Constitution is always for everyone.

Justice Harlan, usually referred to as "the younger" to distinguish him from his grandfather, who also served on the high Court, was appointed to the Supreme Court in 1955 and served sixteen years, until 1971. Justice Harlan served during the years of the liberal Warren Court and was thought of as a conservative minority voice.

This is not, however, an entirely accurate understanding of Justice Harlan. He was not a conservative because he was not any sort of ideologue. He was cautious and did have a sense of the limits of the judicial craft. But he did not locate that limit in a theory. Justice Harlan's most important insight for our purposes was in describing the way law operates in a democratic society. He stated this insight in the context of what is today called substantive due process -- the area of constitutional interpretation where the Justices are least constrained by text and history. Justice Harlan did not believe that indiscriminate resort to the courts to decide social problems was wise or prudent. But he did not shy away from the exercise of judgment. In the context of the following quotation, Justice Harlan was urging his fellow Justices to decide the issue of Connecticut's criminalization of the use of birth control information and devices as applied to a married couple. Of course, the right to birth control information or the privacy of a married couple is not expressly mentioned in the Constitution, but Justice Harlan was willing to address these matters anyway.

Justice Harlan condemned the Connecticut anti-birth control statute in his dissent in *Poe v. Ullman:* "a statute making it a criminal offense for married couples to use contraceptives is an intolerable and unjustifiable invasion of privacy in the conduct of

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3. *367 U.S. 497, 539 (1961).*
the most intimate concerns of an individual's personal life." But, of course, that language invites the challenge, by what right does the Court decide this matter? There is nothing in the text of the Constitution about birth control, or even literally about privacy. How does the Court, then, avoid undue interference with democratic decision-making?

Justice Harlan's response to this charge set the matter in a larger context. Harlan wrote this about the Court's decisions generally:

"Through the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. [The] balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint."

Notice that in terms of how constitutional meaning unfolds, for Justice Harlan, judicial decisions have only a limited part to play. The "Nation" and the "country" strike the balance of that tradition, rather than the Court. Judicial decisions are just one part -- and not the most important part -- of the way this balance comes about. And if the decisions of the Court are far out of step with the country's understanding, the decisions do not survive. Justice Harlan is not saying that this is how things should be. He is saying that this is how they are. We are already democratic. The people already rule.

Justice Harlan does not describe how judicial decisions outside the tradition are eroded and overturned. But we can surmise that it is public opinion that accomplishes this result. As Abraham Lincoln said about our democratic community in the Lincoln-Douglas debates of 1858:

"In this and like communities, public sentiment is everything. With public sentiment, nothing can fail; without it, nothing can

4. Id. at 542.
succeed. Consequently, he who moulds public sentiment goes deeper than he who enacts statutes and pronounces decisions.\footnote{Abraham Lincoln, First Lincoln-Douglas Debate, Ottawa, Illinois, in Abraham Lincoln: Speeches and Writings, 1832-1858, at 495, 524-35 (Douglas E. Fehrenbacher ed., 1953).}

We can call this understanding of Constitutional meaning one of democratic consensus. Over time, certain important constitutional decisions are fully accepted by the people. Conversely, other decisions are rejected. No judicial opinion can fail in the one instance or succeed in the other. This understanding of the role of democratic consensus should be a liberating insight for law, which has struggled over its supposed right to rule the people in a democracy. Many theories have been proposed to justify law’s power. Justice Harlan’s response is very different. He says that law does not rule over the people.

There are many examples of powerful interaction between judicial decision and democratic consensus. For example, the power of \textit{Brown v. Board of Education}\footnote{547 U.S. 483 (1954).} was that it achieved deep popular acceptance. This happened even though the decision was, and remains, widely recognized as badly reasoned and even though the decision sparked massive resistance. Without that political support, \textit{Brown} would never have had the impact that it did. Even where heroic Federal District Judges acted to implement \textit{Brown} in the face of strong local opposition, they acted against a backdrop of powerful and growing national political support. Conversely, \textit{Roe v. Wade}\footnote{410 U.S. 113 (1973).} -- the abortion decision -- has never achieved popular legitimacy. Consequently, \textit{Roe} has been eroded over the years.

When the public really cares about something, the Court can sometimes respond quickly to public opinion. This occurred when the Court struck down the death penalty in 1972.\footnote{447 U.S. 238 (1972).} By 1976, the Court got the message of widespread public opposition and reversed itself.\footnote{447 U.S. 238 (1972).} Even when it looks like the Court is acting in the face of public opposition, the public ultimately gets its way. So, the Warren Court decisions protecting criminal defendants, which coincided with an increase in the crime rate, sparked a widespread public feeling that the courts had gone “too far.” What happened next illustrates Justice Harlan’s point. The process of retreatment was not dramatic. President Nixon ran for office in part
against the Court in 1968 (for “law and order”) and Nixon’s subsequent nominations to the federal bench began to alter the balance in judicial opinions among defendants, victims, and society. No Justice really changed his or her mind on Fourth, Fifth, or Sixth Amendment issues in the face of public opposition, but the case law ultimately was affected by public response.

Later, the public began to change its view about constitutional protections in criminal cases and began to favor judicial restriction of the powers of the police. By the year 2000, when the Court belatedly discovered that Congress earlier had attempted to overturn the Miranda decision, the public appeared to have endorsed Miranda warnings as a healthy restriction on police overreaching. Chief Justice Rehnquist’s opinion in Dickerson v. United States10 upholding Miranda makes little sense doctrinally, given that the warnings were never regarded as actually required by the Fifth Amendment. In nevertheless reaffirming Miranda, Justice Rehnquist as much as endorsed the theory of democratic consensus in interpreting the Constitution. The warnings were upheld in light of the fact that they had “become embedded in routine police practice to the point where the warnings have become part of the national culture.”11

The notion of a Constitution for everyone is a surprise for lawyers to hear. The current Justices on the Supreme Court, though divided over what the Court should decide and how, would probably all reject Justice Harlan’s insight. They believe that once they decide a matter, if their decision is a “proper” one, the matter is closed, without regard to what the public thinks about it. Liberal Justices believe this as well as conservative ones. This perspective is also true of law professors and maybe the bar in general. Law as a profession seems much less committed to democracy than it used to be. As an example, every year the American Association of Law Schools holds a January convention over three days with several main presentations and numerous smaller scale workshops. An informal survey of the 2003 convention yielded not one presentation with the word “democracy” in the title.

On the other hand, some legal voices, Professor Charles Black of Yale Law School for one, have also said that, in a democracy, there must be some ultimate way that the people rule over the meaning

11. Id. at 443.
of their Constitution. Professor Black thought that limit lay in the power of Congress to control the jurisdiction of the courts. Today, voices as politically diverse as those of Mark Tushnet and Robert Bork argue for restrictions on the Court’s power of constitutional interpretation in the name of democracy. Justice Harlan teaches us that a democratic limit on the Court already exists and that we do not need to worry about changing structure in order to provide democratic control over constitutional interpretation.

The understanding of law as controlled by democratic consensus is admittedly vague in many ways. For one thing, how does the public keep a case in mind once the Court decides it? Until a case begins to have dramatic effects that the public sees, the decision will not generate effective national outrage. Second, often there are political ways to undercut an unpopular constitutional decision, so that the issue decided does not come up again. Third, most constitutional decisions appear to be technical constructs whose very terms frustrate public understanding. Even media interpreters sometimes have trouble understanding cases with shifting majorities spread over fifty or sixty pages of the United States Case Reports.

Nevertheless, although democratic control over the courts is subtle, it does exist. The public has the last word in important constitutional interpretations. It might be objected that the long-term weight of public opinion and correction does not justify the Court’s illegitimate decision-making. Even if the people rule in the long run, they do not rule in the short run. The consensus necessary to undercut a judicial decision is greater than a mere majority that could be said to have a right to rule. For instance, there have been abortions that might not have taken place had Roe not been decided. If Roe was in some sense wrong, either by its method of interpretation or by result, the decision about abortion law should have been made in the legislative branch.

This is a legitimate concern. Justice Harlan was not suggesting in this quote that because the people rule, the Justices can do anything they want, relying on the people to correct their mistakes. Only certain matters are fit for judicial decision. That division of deciding is itself part of the tradition of which he speaks. Harlan

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was describing what inevitably happens when the Court does decide a matter, especially when the Court decides wrongly. It should be added that we don’t know ahead of time whether decisions by the Court are “right” or “wrong.” Those who say that constitutional law is about finding a proper method of constitutional interpretation are mistaken. Constitutional interpretation is not an esoteric professional engagement, but a matter of governance. In a democracy, the sentiment of the people is always the key element, and should be the key element, in governance. So, public response to Supreme Court decisions is the best method we have for assuring democratic legitimacy on the part of the Court.

The real power of democratic consensus in our society should change our way of thinking about the correctness of judicial decisions. Because lawyers and law professors think that courts control, and should control, interpretation of the Constitution, constitutional law books do not address the relationship of the courts to democracy, except to repeat the misleading formula that the courts are anti-majoritarian compared to the legislature. If courts are subject to the will of the people, then they are not completely undemocratic. Indeed, given the relationship of judicial decisions and democratic consensus, we can ask whether the courts are in fact less democratic than legislatures. In one recent example, the Texas anti-sodomy statute, which the Court struck down in 2003, was not an expression of the will of the people of Texas. We know this because the statute was hardly ever enforced. We also know this because when the Court struck down the statute, there was almost no fallout on the issue of criminalizing homosexual sex (though there was plenty of fallout on the issue of homosexual marriage). It was the Court, rather than the Texas legislature, that represented the will of the people in this instance.

How did that happen? How could an unelected Court be more in touch, not just with where the people are, but where they are going? In his book, The Future of Freedom, Fareed Zakaria, wrote that institutions that do not directly represent the people, like the Supreme Court and the Federal Reserve Board, can be more capable of leadership than are legislatures. This was certainly true in the original Connecticut birth control cases, out of which Justice

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14. Fareed Zakaria argues that it is in part this very insensitivity to public opinion that gives the Federal Reserve Board and the Supreme Court their prestige with the public. See Fareed Zakaria, The Future of Freedom: Illiberal Democracy at Home and Abroad, 248 (2003).
Harlan spoke. In Connecticut, at that time, the Catholic Church was too politically powerful to allow repeal of a largely unenforced, symbolic ban on contraceptives. When the Court finally struck down the Connecticut anti-birth control statute, there was no political fallout in Connecticut.

What both the Texas sodomy example and the Connecticut birth control example suggest is that Justice Harlan was not just presenting his understanding of the relationship between law and democracy. Rather, his understanding of democratic consensus is also an interpretation of democracy itself. For, just as this society forms democratic consensus around particular judicial decisions, so too do we form such consensus around other political issues. And when the people do form such an organic consensus on an issue, whether it be the retention of social security or the engagement with Communism, all institutions of government bend in that direction. At such a point, even elections are not the key democratic event. In the face of democratic consensus, the problems of special interests, the political influence of the wealthy and negative political advertising and even low voter turnout, cease to present essential threats to democracy. As long as the conditions of freedom of speech, freedom of the press and freedom of association exist, we will have the basis for the formation of democratic consensus -- and thus the basis of a democratic society.

Today, not only is our Constitution a Constitution for everyone, but our entire system of government is a government for everyone -- not as a dream or a hope but in reality. And although this is surely reassuring to a democratic people, it places the responsibility for governing in all areas directly on us -- on we the people.