SYMPOSIUM

Popular Constitutionalism and Fisher's Dialogues

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As other contributors to this symposium have noted, Louis Fisher has played a major role in shaping debates in such diverse policy battlegrounds as federal budgeting, war powers, and the use of legislative and presidential vetoes. Fisher is also widely (and fairly) credited with spurring interest in "constitutional dialogues"—the "process in which all three branches" along with "the states and the general public" offer separate, competing, and sometimes complementary visions of the Constitution and the values it embodies (Fisher 1988, 3).

One measure of any scholar's influence is the degree to which his or her early propositions, once perceived as iconoclastic, become ubiquitous. Certainly Fisher's perspective on political life and the give-and-take dynamics between the American people, their governing institutions, and constitutional law is not universally accepted within political science or the legal academy, never mind our wider society. Nevertheless, his judgment that "constitutional law is produced by many forces: political and legal, non-judicial and judicial, national and local, public and private" (Devins and Fisher 2004, 217) has become, in the twenty-first century, a baseline assumption driving many research agendas, rather than a set of disciplinary "fighting words."

This article considers Fisher's ongoing relevance to a vital subset of "constitutional dialogues" scholarship, namely the contemporary interest in "popular constitutionalism." Widespread scholarly attention to how social movements, public opinion, and citizen activists shape constitutional law is of relatively recent vintage (see, e.g., Adler 2006; Eskridge 2002; Kramer 2004; Teles 2010). Reviewing Fisher's long-standing engagement with these issues helps chronicle his influence on today's debates, including his ongoing relevance to emerging and unaddressed problems in this field.

LONG-STANDING INSIGHTS

There are four core ways in which Fisher's work provides guidance for scholars pursuing "popular constitutionalism" as a research topic. Again, many of these insights are now fundamental, largely unchallenged precepts of this scholarly area, an observation that underscores, rather than diminishes, his early and distinctive contributions.

First, Fisher's writings make the case that in any number of areas of legal development, the real drivers of change have come from popular movements, the force of public opinion, and beliefs developed within a broader "political culture" often far removed from courtrooms, lawyers, and legal nomenclature (Devins and Fisher 2004, vii). The power of these popular impulses can be seen both in contexts where the judiciary is relatively quiescent as well as where it has staked out an active agenda and jurisprudence that is still significantly informed and tempered by social movements and popular values.

Thus, Fisher points to the definitive role of churches and interest groups (such as the American Anti-Slavery Society) in combating slavery and advancing the latent rights of African Americans in the antebellum period (Fisher 2011, 106–7). Similarly, he illustrates the contributions of Quakers and other civic groups in tapping popular values to shape the law governing conscientious objection—decades before courts entered this substantive area (Fisher 2002, 99–104). Writing with Neal Devins, Fisher makes the more general case that "[s]ocial and political forces … played a defining role in the [Supreme] Court's reconsideration of decisions" in important areas of law including economic regulation, reproductive rights and privacy, the death penalty, free speech, busing, gay rights, the legislative veto, voting rights, and religious liberty (Devins and Fisher 2004, 228; Fisher 1987, 11–15). As the two authors conclude, "[w]ithout popular support" the court decisions on these topics "settled nothing" (Devins and Fisher 1998, 95).

As a second and related contribution, Fisher's work frequently makes the case that the public has not consistently accepted judicial supremacy, the doctrine that the courts have ultimate if not exclusive authority to decide constitutional questions. Indeed, his work depicts numerous instances in which Americans have openly resisted individual court decisions and the judiciary's wider authority to serve as the "last word" in policy struggles and legal debates. Fisher documents, for example, how efforts to regulate child labor in the first half of the twentieth century resulted in a protracted contest between the Supreme Court (which initially invalidated these laws), Congress, and citizen and voter groups such as Progressives, ultimately resulting in the Court's capitulation to nonjudicial opinion (Fisher 1988, 251; Fisher 2011, 92–97). He sketches a similar picture of popular resistance in reviewing the Court's abortion and flag salute decisions (Fisher 2008, 2). Ordinary citizens "refused to accept" the Court's ruling in *Minersville School District v. Gobitis* (1940), upholding compulsory flag salutes and reciting of the pledge of allegiance (Fisher 2011, 146–52). To the pertinent publics, the Court did not provide "the last word on constitutional meaning" and they "bluntly told the Court that it did not understand the Constitution, minority rights, or religious liberty" (Fisher 2011, 151).

Fisher buttresses his claims about popular opposition to judicial supremacy with historical evidence and his contention that the "Constitution's text, its original intent, and intervening practice" all mitigate against this doctrine (Devins and

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Fisher 1998, 86). As he puts it, the "overriding value promoted by the framers was not judicial supremacy but popular sovereignty and a system of checks and balances, with each branch and the public weighing in to shape a final resolution" (Fisher 2008, 3). Stated differently, in Fisher's vision, popular constitutionalism does not operate in the shadows of the court's authority; instead it represents a robust, independent force for impelling change and directing our supreme law.

A third pertinent claim advanced by Fisher's body of work addresses how courts treat and respond to popular opinion and movements. His basic contention is that the values and judgments of the people form a boundary—sometimes a rather close fitting one—for court action, including judicial efforts to "resolve" contentious issues. Although judges may sometimes breach this boundary, they do so at considerable risk to themselves and their institution. In short, the practical effect of popular constitutionalism is to establish a fairly "modest and circumscribed role for the courts" (Devins and Fisher 1998, 3). This can be seen, for example, when a court reverses "itself to conform its decisionmaking to social and political forces beating against it" (Devins and Fisher 1998, 94). As Fisher has long documented, the courts have a variety of tools at their disposal, including "threshold" tests and "gatekeeping rules," to cede subjects and disputes to political majorities, popular opinion, and elected officials (Fisher 1988, 85–118).

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Implicit in many of these prior points is a fourth and final claim coming out of Fisher's scholarly work that completes his picture of popular constitutionalism. According to this view, the rule of law, our ability to resolve and process contentious political issues, and our adherence to vital governing values are all advanced by acknowledging (and supporting) the role of "the people" in developing constitutional law and individual rights. Countering critics who have argued that challenging judicial supremacy will undermine law's capacity to provide stability and "settlement" to legal and political controversies (see, e.g., Alexander and Schauer 1997), Fisher argues that fostering a dialogue between the courts, "elected government, and the American people is as constructive as it is inevitable and therefore more stable" (Devins and Fisher 1998, 104).

Fisher identifies several purported advantages of a more diffuse and inclusive political dialogue (as opposed to judicial monologue) on constitutional topics. First, the "absolutism" of judicial supremacy combined with courts' emphasis on resolving discrete disputes and announcing "winner-take-all" outcomes cuts against the compromise, incrementalism, and inclusiveness we normally associate with our complex political order based on popular sovereignty and fragmenting power (Devins and Fisher 2004, 235). To put it differently, Fisher's model of constitutional pluralism presumes that popular contributions to constitutional law ultimately promote both greater political stability as well as the rule of law. His second and related contention about the benefits of popular constitutionalism, is that the people's participation in our constitutional dialogues "add legitimacy and meaning" (Fisher 1998) to citizens' understanding of our legal system and its seminal texts and traditions.

Finally, Fisher makes the case that our elected "political branches," sometimes as a result of constituent and interest group pressure, are often better than courts in protecting individual and minority rights. For example, many American citizens who found slavery "repugnant to fundamental constitutional principles" and worked tirelessly for abolition and legal emancipation, operated mostly outside of government and were "untutored in the fine points of law" (Fisher 2008, 1).

LEGACY AND AN AGENDA FOR FUTURE RESEARCH

These four aspects of Fisher's research outlined here include the role of popular constitutionalism in shaping legal meaning independently of courts, the related capacity of social and political movements to resist court decisions and claims about judicial supremacy, the degree to which courts react to (and accommodate) expressions of popular constitutionalism, and, finally, a series of normative propositions about the advantages of public discourse about constitutional law. These four precepts, articulated over the past four decades, describe an important portion of Fisher's specific contributions to political science and legal scholarship. These ideas also inform and help delineate several existing and emergent research currents related to popular constitutionalism.

Thus, Barry Friedman's important recent work (2009) chronicles how the Supreme Court's rulings come into line with settled American public opinion "over time" (382). Although Friedman's analysis includes many original and important insights, his core claim that judges and courts "do not decide finally on the meaning of the Constitution" but rather that such meaning emerges through a "dialogic process" owes at least an indirect debt to arguments made by Fisher more than two decades earlier.

Similarly, Larry Kramer's *The People Themselves: Popular Constitutionalism and Judicial Review* (2004) reclaims a picture of our founding in which law and politics are intertwined and the Constitution, even after ratification, remained "the people's charter" (7). Kramer contends, however, that this vision of popular constitutionalism has retreated in the face of judicial supremacy, with the result that our understanding of law today is somewhat constricted and even hostile to democratic values. Again, while not all of Kramer's conclusions are fully consonant with Fisher, both thinkers fit into an identifiable family

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of scholars who highlight the interdependence of law and politics (Fisher 1988), rely on historical tools and legal analysis to defend "the people's" capacity for constitutional interpretation, and highlight the costs of judicial supremacy.

Fisher's long-standing claim that legislators, popular movements, and the conscience of ordinary American citizens are often more effective than courts in protecting rights is a proposition that also echoes widely in today's scholarly debates. An important line of research stretching from Gerald Rosenberg (1991), William Eskridge (2002), Michael Klarman (2004), and to many others (Epstein and Kobylka 1992; Siegel 2006) has both corroborated and developed Fisher's contentions about the critical role of nonjudicial forces and agents in shaping the emergence, articulation, and effective defense of civil liberties and civil rights.

Louis Fisher, therefore, has made a remarkable imprint on a far-flung range of scholarly conversations about the nature, prominence, and significance of popular contributions to constitutional dialogues. As we look ahead to the next generation of research on popular constitutionalism, we can identify four major areas where his scholarly agenda needs to be developed and cast in new directions.

To begin, scholars need to refine their theoretical accounts and empirical conceptions of what popular constitutionalism looks like—that is, what behavior, proclamations, movements, and political and legal expressions "count" for identifying and tracking this phenomenon. The primacy of this question should be readily apparent; after all, some critics have implicitly challenged the notion of popular constitutionalism by questioning our ability to identify a cognizable "people" who can engage in reading and articulating the Constitution's text and values (Forbath 2010).

Some research projects have turned to public opinion polling (on legal values or specific judicial cases) as a way to operationalize "the public" and capture popular "snapshots" on constitutional issues (Persily and Egan 2008; Woolley and Peabody 2012)—but this approach is hardly exhaustive or without flaws. Therefore, political scientists and legal scholars need to think through and develop typologies and tools for describing and measuring the range of circumstances (judicial elections? Presidential elections in which constitutional issues feature prominently? Environments in which the people's judgments and voices are relatively unmediated?) in which the people shape our supreme law (see, e.g., Kramer 2004; Pozen 2010).

In a related vein, Fisher has advanced the view that we should not conflate the public's contributions to constitutional dialogues with its ability to mimic what the Court has said about our supreme law (Fisher 2011). But suggesting that the public's constitutional interpretation can be substantively distinct from the judiciary's leaves considerable ambiguity about how to identify popular statements about supreme law and what kinds (and combinations) of legal argument and political judgment comprise this phenomenon. Fisher contends that popularizing and politicizing "constitutional discourse will contribute to partisan, value-laden constitutional analysis" (Devins and Fisher 1998, 36) that will yield some system-wide benefits (such as greater legitimacy and pragmatism in accommodating "charged and highly divisive issues").

This view leaves essential questions unresolved. Are there forms of partisan-inflected constitutional expression that fail to promote desirable ends, or that drop below a level of sufficient constitutional literacy? In other words, what are the limits of the public's ability to combine its preferred vision of political life, its legal values, and our fundamental law?

A second, closely related, set of questions that future scholarship needs to address concerns how we assess the quality and specific contributions of popular constitutionalism. When we have a more thorough understanding of the different forms that popular constitutionalism can assume, we can better evaluate its purported benefits and impact.

As indicated, Fisher identifies greater rights protection and more effective accommodation of divisive political interests as some of the goods that popular constitutionalism can promote. Other scholars have pointed to different objectives that can be advanced when the public is more involved in constitutional debates. These include promoting "civic virtue" (Jacobsohn 1986, 110), reducing institutional attacks on the judiciary (Burgess 1992, 13–17), and promoting common values by transcending the people's "narrow interests" (Macedo 1986, 59). With a more vivid sense of the goals of popular constitutionalism in hand, future scholars can generate clearer metrics for assaying when and where these ends are most likely to be achieved, or threatened.

A third area for ongoing research development pertains to identifying the preconditions for popular constitutionalism. We need to map the mix of elite behavior, institutional arrangements, and social and psychological factors that can induce or inhibit the public's identification and articulation of constitutional ideals. Several researchers have already delved into these questions, but the lines of analysis and debate are just beginning to be teased out. Kramer, for example, has argued that the rise of judicial supremacy has diminished the public's sense of ownership of our supreme law. In contrast, Fontana and Braman (2012) use a national sample of Americans' views on constitutional issues to build the case that judicial supremacy "is not the entrenched feature of public opinion that so many have assumed" and that the public may well support a greater congressional role in developing constitutional law. Understanding the circumstances (un)favorable to popular constitutionalism entails a range of both historical and macro-level analyses as well as scrutiny of individual, micro-level triggers that prime the public to challenge judicial supremacy and develop its own constitutional voice.

Fourth and finally, future research on popular constitutionalism should seek a greater understanding of the relationship between the people's expressions of our fundamental law and the core concern of Fisher's work: fostering a more robust constitutional dialogue within our political community—among the people as well as government officials in and outside of the judiciary. Devins has argued that waning interest in legislative hearings related to constitutional topics (and the low profile of congressional constitutional analysis in the debate over the Affordable Care Act) can be traced to party polarization (Devins 2011; 2012). Assuming this analysis holds some power, we need to ask what sorts of changes in the electorate, including its shifting views about constitutionalism, are needed

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to induce greater attentiveness to constitutional issues in Congress (Peabody and Morgan 2013).

CONCLUSION

Over the past four decades, a scholarly interest in constitutional interpretation outside of courts has flourished in political science and law. Historically, this research has been variously described as "departmentalism," "coordinate construction," and "governance as dialogue," among other labels. Reflecting this terminology, much of this work has focused on government institutions and personnel—especially how members of Congress and presidents offer alternatives and challenges to judicial supremacy (see, e.g., Paulsen 1994).

More recently, some scholars have turned their attention to popular constitutionalism, expanding our picture of how constitutional meaning is shaped by political movements, public opinion, and civic engagement with our fundamental law. To some scholars, this approach seemed fairly novel, representing a departure from the earlier institutional orientation. But as this article has endeavored to show, interest in how the public communicates its views about constitutional principles and contributes to the arc of constitutional development has been an important part of Louis Fisher's long-standing research agenda. Fisher's work consistently demonstrates that "constitutional law is not a monopoly of the judiciary" (Fisher 1988, 3) and should not be limited to "highly complex and abstract judicially created 'rules' and 'standards'" (Fisher 2011, 228). Instead, our efforts to describe and comprehend the Constitution (and its impact on our lives) must include the intricate, iterative, dynamic, pluralistic, and never-completed struggle over our fundamental values and law—a contest in which the people play a primary role. As Mitchel Sollenberger's entry to this symposium explains, Fisher's scholarship "begins with a basic premise that the Constitution's source of legitimacy and authority is the people," a perspective that promotes our recognition of popular expressions of constitutional law.

Like the participants in constitutional dialogues, Fisher does not retain the first or last word on the subject of popular constitutionalism. Nevertheless, Fisher's emphasis on interpretation as political process has decisively shaped how we understand and talk about the people's role in discussing our supreme law, and his sustained and uniquely informed research has valuably focused the attention of several generations of scholars and pointed the way for a productive and vital set of research projects to come. ■

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