Presidential Polling and Constitutional Law – What Happens Next - 12.13.2020

Rick Banks:

Leading off will be the current president of the William and Flora Hewlett Foundation. Also, my former dean of Stanford Law School, Larry Kramer. Larry is a graduate of Brown and University of Chicago. He is well-traveled as a law professor. Before coming to Stanford, he taught at Harvard, University of Chicago, NYU, the University of Michigan, and Columbia. He was one of the very shortlist of faculty that we long sought to recruit to Stanford. The entire faculty in fact, could not have been more delighted when he agreed to join the faculty as the dean.

Rick Banks:

He is the author of the landmark book, very directly related to our topic today, The People Themselves, Popular Constitutionalism and Judicial Review. When Larry left Stanford a few years back to assume his philanthropic role at the Hewlett Foundation, I joked with him sometimes that he was assuming the enviable, yet challenging task of spending, given the size of the Hewlett Foundation endowment, literally $1 million every day. Well, Larry took to that task enthusiastically. I am delighted that on this day, he has chosen to take a break from that task to join us in this important conversation. Thank you so much, Larry, for joining us.

Rick:

Larry, I turn it over to you.

Larry Kramer:

Thank you, Rick, and also for that very kind introduction. So, we assume today that if the Court has the power of judicial review, that is the power to say a law is unconstitutional and so unenforceable in the case before the Court, that the Court's interpretation of the Constitution must also be final and binding on everyone else. No matter how controversial or debatable, everyone else in government and society is supposed to accept and get in line behind the decision of these nine judges in all other instances. We call this stronger notion judicial supremacy. The courts are supreme over the other branches of government in interpreting the Constitution. It's actually a pretty weird idea, if you think about it. We say we have a system of democratic self-government, meaning the people have final say over the meaning of their laws, except for the really important one, control stops at our most important law, which is controlled by nine judges appointed for life.

Larry Kramer:

Having fought a revolution whose whole purpose was to replace monarchical power with popular control, it would have been bizarre for the founding generation to create what amounts to a mini monarchy over their most important law. Yet, today, people nod when told that the most important reason to vote for this or that presidential candidate is that he or she will choose Supreme Court justices. Really? Doesn't that signal something very awry in our democracy? In fact, judicial supremacy has been generally accepted only in the past 50 years or so. For most of us history, the rule was not that courts had final say over the Constitution.

Larry Kramer:

Think about it this way. When designing a democratic constitution, you need to balance two considerations, accountability and independence. On the one hand, you need government to be

accountable to the people. That's the very definition of representative democracy. On the other hand, you need government to be independent enough to make hard decisions and act on them. The US Constitution does this balancing by creating multiple branches that have shared and overlapping authority. Each branch balances independence and accountability differently. Different electorates choose them. They have longer or shorter terms, and so on, so that they respond in different ways to political events and can check and balance each other. When they disagree and act differently, the solution comes through whoever the public ultimately supports, which is what makes this system democratic. Political leadership means acting and then persuading the democratic people that your position is right. When it came to courts, the framers went for strong independence by giving federal judges lifetime appointments and salary protection. That's because they were thinking about the role judges play deciding individual cases, which was the experience that they had. They weren't imagining judges playing an important policy role, because almost no one yet understood the possible role of judicial review, which is why it wasn't explicitly included in the Constitution.

Larry Kramer:

When such a world did emerge, the Court's independence needed to be balanced with accountability. That was done by using tools the Constitution clearly makes available, tools like Congress's power to determine the Court's size and makeup, to fix its budget, to decide the scope of its jurisdiction, and to determine its rules of procedure. And these tools were used throughout American history whenever the Court pushed a political agenda, by presidents like Thomas Jefferson, Jackson, Lincoln, and both Roosevelts, not to mention the reconstruction Congress, so hardly a rogues' gallery here. The idea was that the Court could exercise judicial review and its decisions will be final in the case before the Court, but not final as precedent for the other branches, which could act differently if they believed that the Court was wrong. If the Court went along, as it usually did, the issue was settled. If not, the political branches might break down, as also happened a lot.

Larry Kramer:

But if the issue mattered enough, the political branches and the Court stuck to its guns, the political branches could push back by adding judges, shrinking jurisdiction, and so on. If, that is, there was political support for it. Attacking the Court is always controversial and takes a lot of political will, but it did happen on occasion, and the mere possibility that it could happen produced a nice balance that kept the Court's power in check. In this way, disputes over constitutional meaning were decided through the same system of checks and balances as other questions. Different branches of government with different understandings pushing for their views, with the issue ultimately decided by whose views were most persuasive to the nation as a whole.

Larry Kramer:

So, what changed? How did judicial supremacy become the norm? It's a political story. The idea of judicial supremacy actually emerged in the 1790s, championed by conservative federalists who were fearful of democracy as represented by the French Revolution. It was repudiated in the election of 1800, which brought the progressive Jeffersonians to power, a point made clear in the 1803 Marbury decision, which was actually a retreat by John Marshall to the progressive Jefferson's position of judicial review without supremacy. But the idea never went away completely, and for the next 150 years, conservatives, however defined by the politics of the moment, supported aggressive claims of judicial supremacy, while progressives, however understood at the time, rebuffed them. Mostly the Court avoided the conflict by restraining itself. In the few instances where it pushed the issue, the other

branches pushed back, and the Court backed down. Those are the instances I mentioned before with Jefferson, Jackson, Lincoln, and FDR, and so on.

Larry Kramer:

Then came the Warren Court, which was something we'd never seen before, an activist Court that was also progressive. And the left flipped, embracing the opportunities judicial intervention suddenly afforded to advance their agenda. Conservatives, for their part, continued to support judicial supremacy, objecting to what they saw as the Warren Court's kind of Footloose method of interpreting the Constitution, but without denying that the Court's word is final. And the debate shifted from who has final say over the Constitution, the Court, everyone now agreed, to how that say should be exercised. This is a point, I should say, first made by Mark Tushnet. There was a little debate over constitutional interpretation before judicial supremacy became the norm. Once the Court became final, however, how it interprets became a lot more important, hence today's debate over originalism versus a so-called living Constitution, which really only started in the 1980s.

Larry Kramer:

As a practical matter, judicial supremacy was made operational by de-legitimating the devices that had been historically used by the political branches to push back. That is to say, de-legitimating ideas like Court packing, jurisdiction stripping, and so on, and fostering an ideology that the Court is supposed to have final say over the meaning of the Constitution. Not surprisingly, the role of the judiciary grew exponentially, an expansion that has continued uninterrupted, whether the Court has been liberal, like the Warren Court, moderate like the Burger Court, or conservative like the Rehnquist and Roberts Courts. Given the mess we have today with the Court expected to settle so many plainly debatable issues and the huge controversy this creates around every appointment and the bad incentives it creates to appoint children to the courts so that they will last there forever, it seems pretty clear this has been a mistake and we should restore the legitimacy the devices whose constitutional authority is clear, and that's served us well in the past, restoring a constitutional balance that works considerably better than the one we have today. Thanks.