

Lawrence Sager

Adding strength to strength, UT captured this constitutional law luminary on the eve of the publication of his most important work.

Sager, a constitutional theorist who joined the faculty of The University of Texas after a prominent career at New York University, holds the Alice Jane Drysdale Sheffield Chair. This spring, Yale University Press published his book Justice in Plainclothes: A Theory of American Constitutional Practice. In this excerpt from the penultimate chapter, Sager defends the constitutional judiciary against the charge that it is undemocratic. This charge, raised by groups on both ends of the political spectrum, threatens to unravel the faith of citizens that their judiciary represents an accountable and deliberative body. Sager argues here that the judicial process itself is in an important way democratic.

ONE WAY in which a member of a political community can participate as an equal in the process of resolving disputes over what rights members of that community have is by being equally entitled to vote for political representatives, who will in turn make decisions about rights. This is certainly not an unimportant way to participate in rights contestation, but it is in some respects a thin way and a dangerous way. It is thin and dangerous because elected political representatives are inevitably drawn in some not insubstantial degree to respond to the power of votes or of dollars as opposed to the force of an individual's or group's claim that they have right on their side. To be sure, the competition among electoral contenders for support will often push the powerful to include the interests of the less powerful in their political agendas. Driven in part by their location at the margins of power, "discrete and insular minorities" may through coordination of their determined energy acquire substantial political muscle. But this is a function of what is expedient in shifting political circumstances, of the wavering hand of a process that is not accidental, but which proceeds far more readily by the logic of accumulated power than by that of reflective justice. No one can demand to be heard or to have their interests taken into account unless they can make themselves strategically valuable. In the real world of popular politics, power, not truth, speaks to power.

The second way that a member of a political community can participate as an equal in the process of rights contestation is to have her rights and interests—as an equal member of the political community and as an equal rights holder—seriously considered and taken account of by those in deliberative authority. Any member of the community is entitled, on this account, to have each deliberator assess her claims on its merits, notwithstanding the number of votes that

stand behind her, notwithstanding how many dollars she is able to deploy on her behalf, and notwithstanding what influence she has in the community. Implicit in this form of equal participation is the right to be heard and to be responded to in terms that locate each person's claim of rights against the backdrop of the community's broad commitment to and understanding of the rights that all members have.

Legislatures, obviously, are preferred venues for the first mode—the electoral mode—of participating as equals in the process of choosing among conflicting views of what rights we should all have. Less obviously, perhaps, courts are preferred venues for the deliberative of participating in that process. Any person injured in the right sort of way is entitled to be heard by courts, entitled to present her claims and the arguments on their behalf, and, at worst, entitled to a reasoned statement of why her claims were not deemed by a majority of the judges to be persuasive. Judges may well be flawed deliberators, of course, and the very independence that makes them impartial also makes them relatively impervious to electoral correction. But when a constitutional protagonist turns to the courts, she can be anyone; she can represent a minority of one or be a member of a group that is widely ridiculed or deplored. Much of what is good in constitutional law, in fact, has been provoked by the claims of such groups. What matters is the strength of her argument in the eyes of the judges, and, failing her success, she is entitled to an explanation of why her claim was found wanting.

COURTS, OF COURSE, ARE FAR FROM PERFECT, and I do not mean to invite the comparison of the real world of popular politics—its blemishes made prominent—with a Pollyannaish vision of the constitutional judiciary at its best. The point, though, is this: popular politics and constitutionalism represent fundamentally different faces of democracy, different democratic modalities. In an important sense, these two institutional arrangements aspire to different democratic virtues. To be sure, no society without a robust place for popular politics can be counted as democratic or just. And it may be

sensible to speak of trade-offs between these democratic virtues in the course of institutional design. But it is a mistake to think that there is a blunt opposition between process and outcome—between the fair and democratic process of popular politics and the potential for just results offered by constitutional practice in the United States.

Constitutional adjudication embodies a distinct process that is itself fair and democratic, fair and democratic in a way that popular political institutions cannot realistically be.

Lawrence Sager is regarded as one of the leading constitutional scholars of his generation.

Courts, argues SAGER, promise an important form of democratic process, not merely justice-favoring outcomes.

