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A HISTORIOGRAPHY OF THE PEOPLE THEMSELVES AND POPULAR CONSTITUTIONALISM

MORTON J. HORWITZ*

Dan Hamilton asked me to lead off with a discussion of the historiography of *The People Themselves*.¹ My dominant focus will be on situating Larry Kramer's historical claims among the various interpretative arguments about the history of judicial review. But before I do that, let me first underline the obvious point that Larry is intervening in a growing contemporary debate about the role of the Supreme Court in our constitutional system that began to emerge after the end of the Warren Court and reached a crescendo with *Bush v. Gore*.² For the second time since *Lochner v. New York*³ was decided, some liberals have begun once again to switch sides on the virtues of judicial review. Many recent liberal books and articles inevitably bring to mind the flood of Progressive attacks on the democratic legitimacy of judicial review written between 1905 and 1937.

For those who believe that "principle" transcends politics and context—I don't count myself among them—the current revival of anti-judicial review sentiment among liberals smacks of political opportunism and, as a result, they dismiss as "present-minded" any constitutional history that advances the new liberal agenda. But once we recognize that revisionist constitutional history has almost always been triggered by fundamental challenges to whatever paradigms were then dominant in constitutional law, it should remain possible for us to evaluate that history on its own terms, independent of its effect on current debates.

The People Themselves can be approached independently of its clear effort to advance one version of the current anti-judicial review agenda. Yet, while I entirely acknowledge that most paradigm-shattering books on the history of the Supreme Court have always been intimately connected to contemporary debates, I do wish that Larry had split off one or two chapters on contemporary debates in order to appease the still widespread fear

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1. LARRY D. KRAMER, *THE PEOPLE THEMSELVES* (2004).

2. 531 U.S. 98 (2000).

3. 198 U.S. 45 (1905).

that historians with a political agenda will inevitably succumb to the temptations of present-mindedness.

I found the book's historical claims to be bold, exciting, and illuminating, its evidence to be grounded in wide reading of the historical sources, both primary and secondary, and its nuanced portrayal of historical change to be very impressive, especially for a law professor. Kramer has two overall goals. The first is to establish that a legitimate practice of popular constitutionalism—of the “people outdoors” exercising a separate and independent voice in constitutional debate—was well in place by the time of the American Revolution. The second goal is to demonstrate that the arguments for judicial supremacy—expressly articulated in *Cooper v. Aaron*⁴ and acted upon in *Bush v. Gore*⁵—have been drowned out until recently by a “departmental” theory of judicial review. The claim that judicial supremacy is a very recent development in constitutional history is not new, but Kramer's elaboration of the various paths to judicial supremacy and the real life significance of the competing theories of judicial review left behind is a real eye-opener.

We begin with what seems to me to be Kramer's most original—and controversial—claim: that during the colonial period “popular constitutionalism” endowed the “people out of doors” with the legitimate power to interpret an unwritten, customary constitution embodying fundamental law as English Whigs had understood it during and after the Glorious Revolution of 1689. What were the institutional mechanisms for realizing popular constitutionalism? Popular constitutionalism certainly did not include judicial review of legislation, which, at least in a form we would recognize today, was not practiced during the colonial period. His reading of Coke's opinion in *Dr. Bonham's Case*⁶ as an instance of statutory interpretation, not judicial review, is now standard. But he also contests both Raoul Berger's further assertion that, whatever the correct reading, the case “became a rallying cry for Americans” during the 1760s,⁷ as well as Tom Grey's claim that the case was treated as authority for a “judicially enforceable higher law” and became a direct forerunner of judicial review.⁸ “Practically the only evidence ever cited” for these propositions, Kramer maintains, is

4. 358 U.S. 1 (1958).

5. 531 U.S. 98.

6. (1610) 77 Eng. Rep. 646 (K.B.).

7. KRAMER, *supra* note 1, at 21 (citing RAOUL BERGER, CONGRESS V. THE SUPREME COURT 25 (1969)).

8. Thomas C. Grey, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 STAN. L. REV. 843, 868 (1978).

the argument of James Otis in the *Writs of Assistance Case*.⁹ And he argues still further that even Otis should be read to espouse the limited version of what was held in *Bonham's Case*. “[T]he most telling fact,” he concludes, “is how *little* evidence supports the idea that Coke or *Dr. Bonham* were important to Americans in developing the principle of judicial review.”¹⁰

These are unorthodox conclusions that await confirmation of Kramer’s evidentiary claims. One thing that does give me pause is Kramer’s treatment of *Bonham's Case* as standing alone in England. He jumps more than a century to Blackstone’s effort to interpret Coke’s statement even more narrowly so as to render it compatible with the emerging doctrine of parliamentary supremacy.

But, as Gough notes, in the seventy-five years between the Glorious Revolution and Blackstone’s *Commentaries*, there were a number of statements by English jurists who did read Coke as authority for judicial review based on fundamental law.¹¹ While political practice during this period did increasingly trend towards acknowledgement of the supremacy of Parliament, Blackstone was the first to theorize this practice as illustrative of an uncontested constitutional principle of parliamentary supremacy. On Gough’s reading, then, English constitutional theory never completely abandoned fundamental law through most of the period leading up to the American Revolution. That is why Bailyn is able to portray Otis as driven mad by the contradictions in English constitutional theory.¹² Moreover, is it plausible that eighteenth century colonials could have been so wedded to the English Whigs’ version of a customary constitution without also grabbing onto suggestions that it did imply judicial review? Still, if Kramer is right that *Bonham's Case* was rarely cited in America, it is hard to believe that he could be wrong in ignoring the significance of Gough’s collection of eighteenth century English jurists who did cite the Case as authority for “judicially enforceable higher law.”

Another possible problem with Kramer’s formulation is that it marginalizes the theory of mixed government, which dominated English constitutional theory after the Glorious Revolution, and which John Adams continued, right up to the Revolution, to believe was the true model of the eighteenth century British constitution. The prevalence in eighteenth century England of an idealized version of a mixed constitution may provide

9. See M.H. SMITH, *THE WRITS OF ASSISTANCE CASE* 543 (1978).

10. KRAMER, *supra* note 1, at 23.

11. See generally J.W. GOUGH, *FUNDAMENTAL LAW IN ENGLISH CONSTITUTIONAL HISTORY* (1955).

12. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992).

the explanation for why no one talked of parliamentary supremacy before Blackstone. And even evolving political practice was largely about the relations between Crown and Parliament, not about the role of judges vis-à-vis Parliament. It may also explain why the not infrequent references to higher law in Blackstone's *Commentaries* coexist uneasily with his clear statements in support of parliamentary supremacy.

It is also possible that judicial review entered the American consciousness through another, more indirect route that Kramer does not mention. If, as Kramer says, eighteenth century colonial legislatures emulated Parliament in passing few general laws, then perhaps we need to refocus our attention on the bulk of its activity that today we would call private laws. Without going so far as to extend McIlwain's idea that medieval and early modern Parliaments thought of themselves as courts and of the passage of private laws as adjudications,¹³ we need to recall that the Massachusetts legislature is still called the Great and General Court. And as Barbara Black has shown,¹⁴ the Massachusetts legislature did actually serve as the highest court of appeals during the colonial era and until several decades after the Revolution. This practice also continued in most of the New England states until the 1820s. *Calder v. Bull*,¹⁵ let us remember, was brought to the Supreme Court after the Connecticut legislature, acting as the state's highest court, ordered a new trial. Many of the earliest cases of conventional judicial review in the states were assertions by their supreme courts that separation of powers barred legislatures from serving as appellate courts. To overstate the point for emphasis, if most colonial legislation consisted of private laws, which were once thought of as adjudications, they could have been reviewed by legislatures acting as courts, under the radar screen of modern conceptions of separation of powers.

If Kramer is correct in claiming that during the colonial period "the people outdoors" were expected to enforce a customary Whig constitution, what institutional mechanisms were deployed for that purpose? Many of his examples of appeals to the people as guardians of fundamental law can be taken as no more than abstract Lockean rhetoric, but Kramer insists that they were more than mere Lockean appeals to nature after dissolution of the social contract. "It was, rather," he emphasizes, "the invocation of a specific set of legal remedies by which 'the people'—conceived as a col-

13. See generally CHARLES HOWARD MCILWAIN, *THE HIGH COURT OF PARLIAMENT AND ITS SUPREMACY* (1910).

14. See Barbara Aronstein Black, *Massachusetts and the Judges: Judicial Independence in Perspective*, 3 *LAW & HIST. REV.* 101 (1985).

15. 3 U.S. (3 Dall.) 386 (1798).

lective body capable of independent action—were empowered to enforce the constitution against errant rulers.”¹⁶ First and foremost, were elections.

It is essential for Kramer that elections not be reduced to legislative supremacy but instead be conceived of as one of many regular means of forcing governmental officials, including legislators, to adhere to constitutional values. Together with petitioning and “mobbing,”—crowd actions—elections were among the “specific legal remedies” for enforcing the customary constitution by the “people outdoors.” After elections, perhaps the most effective remedy of the people against the unconstitutional action of their governors was the undoubted power of many colonial juries to determine both law and fact, including passing on challenges to the constitutionality of laws.

Enough has been said to see how different Kramer’s picture of colonial constitutionalism is from the now standard accounts of Bailyn and Wood. All agree that in England on the eve of the American Revolution, judicial review had been marginalized and parliamentary sovereignty had become the constitutional norm. But both Bailyn and Wood emphasize that the small “c” English constitution was then understood not as a body of fundamental law but as a frame of government. For them, the emergence of the idea of a Constitution as embodying fundamental law is one of the paramount achievements of the American Revolution.¹⁷

For Kramer, on the other hand, colonial Americans continued to take seriously the seventeenth century Whig idea of fundamental law as a set of what he calls enforceable “political-legal” constraints on governors,¹⁸ not including judicial review.

If for Bailyn and Wood the basic change in political theory brought about by the American Revolution was the shift from British parliamentary to American popular sovereignty, for Kramer popular sovereignty was already a powerful force even before the conflicts leading up to the Revolution. If Bailyn and Wood see the first post-revolutionary written state constitutions as expressions of the recent emergence of the idea of popular sovereignty, Kramer significantly down-plays their significance. He sees their having been written down as primarily an effort to avoid ambiguity, not as the first recognition of their legally binding authority.

It is at this point that a major gap in Kramer’s argument appears. Though it would seem that provision for constitutional amendment would

16. KRAMER, *supra* note 1, at 25.

17. See generally BAILYN, *supra* note 12; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969).

18. See generally KRAMER, *supra* note 1, at 9–34.

follow from his conception of popular constitutionalism, he points out that by 1780 fewer than half of the states had included such a provision in their constitutions, and that even by 1787 five states still had no amendment clause.¹⁹ What is one to make of this omission?

Perhaps it illustrates Michael Kammen's idea that prevailing Newtonian ideas led the state framers to believe they were creating a "machine that would go of itself."²⁰ Perhaps it represents a conception of fundamental law as static and unchanging. Or perhaps it illustrates the continuing vitality of natural law ideas as expressions of "self-evident truths" derived from "the laws of nature and nature's God."

This last point requires some elaboration. Before Bailyn and Wood placed sovereignty at center stage in their renditions of the political theory of the American Revolution, most of the distinctive features of American constitutionalism had been explained as a result of American attachment to natural law/natural rights ideas. In the course of the eighteenth century, it was argued, while English jurists marginalized natural law arguments, Americans had continued to immerse themselves in the natural law philosophies of Grotius, Vattel, and Puffendorf. The Declaration of Independence was thus regarded as the culmination of American natural law ideas that were waiting in the wings to be invoked beginning with the Stamp Act Crisis of 1763. Thus, the greatest of American constitutional historians, Edward Corwin, could write a book entitled *The "Higher Law" Background of American Constitutional Law*.²¹

As with so many paradigm shifts in scholarly fields, Bailyn and Wood never confronted this earlier historiography; they simply ignored it. Kramer does initially acknowledge the complex relationship between fundamental law and natural law ideas, but then follows John Reid's insistence that "[n]atural law simply was not a significant part of the American Whig constitutional case; certainly not nearly as important as some twentieth-century writers have assumed."²² Perhaps Reid is correct. At least he seriously confronted this alternative historiography. But after more than a generation of mostly silence on this question, we need to take another serious look at the role of natural law/natural rights thinking in the period leading up to the Framing. It is certainly hard to understand the Bill of Rights without it. On

19. *Id.* at 273 n.87.

20. See MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF: THE CONSTITUTION IN AMERICAN CULTURE* (1986).

21. See EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW* (Cornell Univ. Press 1955) (1928-1929).

22. KRAMER, *supra* note 1, at 37 (quoting JOHN PHILLIP REID, *CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 14 (abr. ed. 1995)).

the other hand, Kramer is the first scholar ever to make sense of the Ninth Amendment. It does seem to presuppose a special agency for the people in vindicating constitutional rights, not simply the higher law versions of Rutledge and Murphy in *Adamson*²³ as refocused by Justice Goldberg in *Griswold v. Connecticut*.²⁴

Beginning with the discussion of judicial review after the Revolution, the second thesis of Kramer's book begins to emerge. He draws a sharp distinction between judicial supremacy—or the view that the Supreme Court possesses the exclusive authority to decide the meaning of the Constitution—and more decentralized modes of constitutional interpretation, of which the departmental theory, allocating interpretative authority to each of the three branches of government, represents the most prominent alternative. The latter, he immediately concedes, is an authentic expression of popular constitutionalism; judicial supremacy is not. The book seeks to trace the gradual emergence of judicial supremacy.

The early discussion is marked by a healthy suspicion of claims to an unspoken consensus on the legitimacy of judicial review and an emphasis on the continuing vitality of constitutional interpretation by the “people outdoors.” But as judicial review finds ever wider acceptance, Kramer begins to concede more ground, finally attaching himself to the departmental theory as the major institutional expression of popular constitutionalism. In a while, we will ask how much practical difference there is between judicial supremacy and the departmental theory.

Kramer's rich discussion of state judicial review between the Revolution and the Philadelphia Convention follows the accounts of Gordon Wood, William Nelson, and William Treanor, among others. He rightly emphasizes the considerable popular (or is it legislative?) resistance to judicial review. And, like others, he sees the first signs of a modern theory of judicial review in James Iredell's argument in the North Carolina case of *Bayard v. Singleton*²⁵ and in James Varnum's pamphlet on the Rhode Island case of *Trevett v. Weeden*.²⁶ He sharply contrasts these cases with Judge Duane's narrow *Bonhams*-like effort at statutory interpretation in the New York case of *Rutgers v. Waddington*.²⁷

23. *Adamson v. California*, 332 U.S. 46 (1947).

24. 381 U.S. 479 (1965).

25. 1 N.C. (Mart.) 5 (1787).

26. See JAMES M. VARNUM, *THE CASE, TREVETT V. WEEDEN (1787)*, reprinted in 1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY* 417 (1971).

27. See 1 *THE LAW PRACTICE OF ALEXANDER HAMILTON: DOCUMENTS AND COMMENTARY* 392 (Julius Goebel Jr. et al. eds., 1964) (reprinting *Rutgers v. Waddington*, a 1784 case before the New York City Mayor's Court).

The long-standing interest in the dozen or so state cases involving judicial review during the eleven years before the meeting in Philadelphia had once been driven by the question of the Framers' intentions concerning judicial review. Gordon Wood, instead, highlighted the shift on the eve of the constitutional convention to a theory of popular sovereignty as the justification for judicial review.²⁸ Anticipating the arguments of Hamilton in *The Federalist No. 78*²⁹ and John Marshall in *McCulloch v. Maryland*,³⁰ the theory of popular sovereignty was appropriated by the Federalists to develop an agency theory of separation of powers.

Because Kramer is so eager to read *The Federalist No. 78* as compatible with a departmental theory, he is not sufficiently skeptical of the ideological character of the Federalists' turn to popular sovereignty to justify judicial review in the first place. It was not the last time in American history that conservatives invoked the will of the people to justify restrictions on democracy. And because Kramer's mega-thesis has led him to see popular constitutionalism as "there all along," he is not listening for a shift from parliamentary to popular sovereignty that, according to Wood, triggers the Federalist theory of judicial review.

His excellent account of the Constitutional Convention and the state ratifying debates is very illuminating. He rightly focuses on the Great Silence in the constitutional text concerning judicial review, which must make any conscientious originalist writhe with anxiety. He shows in the specific context of the debates in Philadelphia that while the Framers self-consciously addressed the question of judicial review of state legislation when they adopted the Supremacy Clause, their failure to be at all explicit about so-called horizontal review of congressional legislation—in the face of James Wilson's explicit promptings—should lead us to suppose that it was unintended. Moreover, he rightly criticizes Raoul Berger's overreading of many comments made at the Philadelphia convention as favoring judicial review. According to Kramer's count "no more than ten out of fifty-five" delegates even expressed themselves on the question of judicial review, though many of the most thoughtful delegates were among the ten.³¹ He also presents a rich survey of the voluminous state ratifications debates, concluding that there was only "a smattering of references to judicial review" in all of the state discussions.³²

28. See generally WOOD, *supra* note 17.

29. THE FEDERALIST NO. 78 (Alexander Hamilton).

30. 17 U.S. (4 Wheat.) 317 (1819).

31. KRAMER, *supra* note 1, at 73.

32. *Id.* at 83.

The traditional debates on the legitimacy of judicial review always ended with an originalist inquiry into the framing and ratification of the Constitution between 1787 and 1789. What occurred after those dates was treated as hardly relevant in shedding light on the framer's intentions, even if it did prepare the way for *Marbury v. Madison*.³³

Because Kramer is intent on showing the primacy of a departmental theory even before *Marbury v. Madison*, he is sensitive to the post-Ratification shift—at least among the Federalist legal elite—in favor of judicial review, and, even more important, towards the Hamilton-Marshall view of separation of powers as the people's delegation of limited powers to each of the three branches. This is the so-called agency theory from which the departmental theory of judicial review is also ultimately derived. Kramer makes another very important related point. He maintains that it was only in the 1790s that the Federalists, making their last stand, developed the argument for judicial review as protection against tyranny of the majority. By the time *Marbury* is decided, Kramer acknowledges, judicial review had come to enjoy widespread support that it never had during the constitution-making period. Certainly, at the state level, despite the early protest of Judge Gibson of Pennsylvania, there was relatively smooth sailing towards judicial review of state legislation by the 1820s.

The account of the gradual triumph of judicial review, however, often fails to take account of another striking silence in constitutional history, almost the equivalent of the silence about judicial review in the constitutional text. Whatever the persuasiveness of Marshall's justification for judicial review in *Marbury v. Madison*, how do we explain the fact that it took fifty-four years, until the *Dred Scott Case*,³⁴ before the Supreme Court next exercised its power to declare congressional statutes unconstitutional. Too eager to see in the departmental theory the next phase in popular constitutionalism, Kramer accepts judicial review before the Civil War as more well-established and legitimate than the facts would indicate.

Kramer's treatment of federalism as a central structural expression of popular constitutionalism raises a theoretical problem that pervades Kramer's exposition. Though he is not at all insensitive to the relationship between theory and practice or between the law in books and the law in action, federalism is a place where I feel his acceptance of states' rights arguments as expressing Jeffersonian localism fails to correct for the distorting mega-influence of slavery on Southern constitutional theory. Just as there is reason to question the Federalists' embrace of popular sovereignty

33. 5 U.S. (1 Cranch) 137 (1803).

34. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

to legitimate judicial review, so too one must be skeptical about the origins in popular constitutionalism of nullification and the compact theory of the Constitution.

Likewise, aside from his excellent synthesis of the scholarly literature on colonial mobs, Kramer's development of popular constitutionalism is seriously lacking in grounding in colonial social history. Suppose we accept the standard version of a colonial society that was based on hierarchy and social deference. In such a society, it would be difficult to believe that constitutional forms, however they might be interpreted, would be expressing, above all, a commitment to popular constitutionalism.

To borrow from Morgan's *Inventing the People*,³⁵ which Kramer frequently cites, the idea of the people is a fiction that has been deployed under radically different circumstances. It succeeded in the eighteenth century absorption of Locke's social contract theory into a Whig system of elite rule resting on the narrowest of electoral bases. This raises the question of whether Kramer needed to go the full length of establishing "popular constitutionalism" in order to legitimate the departmental theory. Hamilton, after all, was able to derive judicial review from the fact that each of the three branches of government were agents of the people, who had delegated to each of the three departments limited shares of the people's plenary power. For Hamilton, it was enough that popular sovereignty could express itself in a one-time-only ratification process. That was enough to justify a departmental theory of judicial review on agency grounds.

Finally, I wonder if Kramer's success in demonstrating widespread antebellum acceptance of the departmental theory as the true interpretation of the power of judicial review makes all that much difference. I do recall my teachers, both in graduate school and law school, focusing on the statement of judicial supremacy in *Cooper v. Aaron*³⁶ and emphasizing the rarity of its claims. They did emphasize that the departmental theory was an alternative interpretation that had always been available and had often been invoked by presidents. Kramer acknowledges Madison's skepticism of the practicality of the departmental theory, given the fact that courts usually have the last word based on the typical sequence of controversies. As a result, most successful claims under the departmental theory will result from no more than the accidents of timing.

I wish Kramer had spent more time on the details of the congressional debates over the constitutionality of the extension of slavery from the Mis-

35. EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* (1988).

36. 358 U.S. 1 (1958).

souri Compromise of 1820 to the Kansas-Nebraska Act of 1854. During that period, until a desperate, deadlocked Congress appealed to the Supreme Court to resolve the question in the Dred Scott Case, we have perhaps the only real example of the departmental theory in action, where, over a thirty-four year period, there was arguably an actual consensus that Congress represented the primary authority for resolving the constitutional questions concerning extension of slavery into the territories. In Kramer's terms, it represented a "politico-legal" perception of the constitutional question. But it didn't work, in part, because it represented too unstable and impermanent a resolution. Kramer acknowledges that the attraction of judicial supremacy is that it holds out promise of authoritative resolution of constitutional questions that the departmental theory could never promise.

I'm not sure I come away from reading this book quite understanding all of the real world consequences of a departmental theory as compared to judicial supremacy. As Madison saw, having the last word makes you, as a practical matter, supreme in fact. Moreover, because the most frequent exponents of the departmental theory are presidents, I wonder whether the practical effect of a departmental theory is not primarily to strengthen the legitimacy of the claim to unfettered executive power in an Imperial Presidency. Indeed, compared to an expanded political question doctrine, the departmental theory seems too random in its effect on limiting judicial power. A political question doctrine sensitive to whether particular powers "have been committed by the Constitution to another department of Government" would seem to map more closely onto our concerns with judicial supremacy than the more fluctuating and spasmodic appeals of the departmental theory.

