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JUDICIAL REVIEW WITHOUT JUDICIAL SUPREMACY: TAKING THE CONSTITUTION SERIOUSLY OUTSIDE THE COURTS

James E. Fleming*

INTRODUCTION

Larry Sager and Larry Kramer have written important books that, in quite different ways, call for taking the Constitution seriously outside the courts. Sager's *Justice in Plainclothes*¹ and Kramer's *The People Themselves*² nonetheless join issue in significant ways, and therefore it is illuminating to analyze them as a pair.

To get a handle on the differences between the two Larrys' books, I have concocted the following fanciful hypothetical. Imagine a law school with a faculty that includes Ronald Dworkin: court-centered constitutional theorist extraordinaire and proponent of a liberal moral reading of the American Constitution.³ Further imagine that the faculty includes two Larrys, each of whom is quite brilliant. And imagine that this law school has an omnipotent dean who can dictate to faculty members what scholarly projects they shall undertake.

Let us posit that this dean gives each Larry an assignment. She charges one Larry with developing a broadly speaking Dworkinian constitutional theory, but one that is better grounded in our actual constitutional practice and scheme of institutions than is Dworkin's moral reading of the Constitution. She says Ronnie has given us justice tailored on "Savile Row," not ready-made on "Seventh Avenue."⁴ But, she continues, we need "justice in plainclothes."

* Professor of Law, Fordham University School of Law. I prepared this Essay for the Symposium on Theories of Taking the Constitution Seriously Outside the Courts, Fordham University School of Law, November 19, 2004. Thanks to Sot Barber, Abner Greene, Linda McClain, and Ben Zipursky for helpful comments concerning a draft, and to John Ferejohn, Willy Forbath, Larry Kramer, and Larry Sager for incisive remarks at the symposium.

1. Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* (2004).

2. Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (2004).

3. See, e.g., Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (1996) [hereinafter Dworkin, *Freedom's Law*].

4. See Ronald Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* 29 (1993) [hereinafter Dworkin, *Life's Dominion*].

She assigns the other Larry the project of formulating the antithesis of a Dworkinian constitutional theory, one that rejects Dworkin's "curious notion of the judiciary as a 'forum of principle'" along with its implication that courts should protect the Constitution and the people from the people themselves.⁵ Our esteemed dean observes that some have proposed that we take the Constitution away from courts altogether.⁶ Instead, she states, we need a theory of "judicial review without judicial supremacy."

In carrying out these assignments, what might our two hypothetical Larrys come up with? The first might write a book like our real Larry Sager's *Justice in Plainclothes*. And the second might write a book like our real Larry Kramer's *The People Themselves*. I should make clear that I have not gone through this hypothetical because I think it describes the actual practice of any dean at any law school or the actual motivations of either Larry. Rather, I have done so to craft a lens through which to view these two remarkably fine books.

I. THE JUSTIFICATIONS FOR PAIRING THE TWO BOOKS

What are the justifications for pairing these two evidently quite different books—in particular, in a program entitled "Theories of Taking the Constitution Seriously Outside the Courts"? We might offer three basic reasons. First, one might pair them precisely because they are diametrically opposed theories: Sager as court-loving justice-seeker versus Kramer as court-bashing populist who rejects court-loving justice-seeking as elitist and aristocratic. I have encapsulated this opposition with my hypothetical involving the omnipotent dean.

Second, one might pair these two theories because they complement one another and provide the ingredients necessary for an adequate theory of taking the Constitution seriously outside the courts. I shall take this tack in this Essay, pursuing reconciliation between these two evidently opposing theories.

The third reason for pairing them is that they illustrate different versions of popular constitutionalism. I shall distinguish five versions of popular constitutionalism, ranging from conceptions that reject judicial review altogether through conceptions that are compatible with judicial supremacy. Doing so will sharpen our understanding of Larry Kramer's project and enable us to get a handle on its differences from, as well as its similarities to, Larry Sager's project. I do this also because I fear that there is a lot of loose and unrigorous talk about what it is we are talking about when we speak of popular constitutionalism. The five versions are:

1. Populist anti-constitutionalism that at bottom opposes constitutional limits on popular self-government, not to mention

5. Kramer, *supra* note 2, at 222.

6. See Mark Tushnet, *Taking the Constitution Away from the Courts* (1999).

rejects judicial review enforcing such limits. Perhaps no one actually espouses this view, but Richard D. Parker at least comes close to doing so.⁷

2. Popular constitutionalism that accepts constitutional limits on self-government, but rejects judicial review to enforce those limits. This view is illustrated by Jeremy Waldron, for example, in *Law and Disagreement*⁸ and by Mark Tushnet in *Taking the Constitution Away from the Courts*.⁹

3. Popular constitutionalism that accepts constitutional limits on self-government and accepts judicial review, but rejects judicial supremacy. This view is represented by Larry Kramer. He rejects judicial supremacy in favor of both departmentalism and populism. By departmentalism, I mean the idea that legislatures and executives share with courts authority to interpret the Constitution and indeed are the ultimate interpreters on certain questions. By populism, I mean the idea that the people themselves are the ultimate interpreters over and against the departments. Note that Kramer, unlike Waldron and Tushnet, does not propose “taking the Constitution away from the courts” altogether. Instead, Kramer proposes “judicial review without judicial supremacy.”¹⁰

4. Departmentalists who are not populists. For example, Keith Whittington embraces constitutional construction by legislatures and executives alongside constitutional interpretation by courts.¹¹ Less obviously, Larry Sager comes within this category of popular constitutionalism, because his underenforcement thesis commits him to the idea that certain constitutional norms are judicially underenforced; their fuller enforcement is left to legislatures and executives, who share with courts the authority to interpret the Constitution, i.e., in the Constitution outside the courts.¹² We could put Cass Sunstein (and certainly me) in this category, too.¹³

5. Social movement popular constitutionalism that does not challenge judicial supremacy at all, but focuses on how popular social movements outside the courts transform the norms that

7. Richard D. Parker, “Here, the People Rule”: A Constitutional Populist Manifesto (1994). Here I should also mention the progressive anti-constitutionalism of Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (2004).

8. Jeremy Waldron, *Law and Disagreement* (1999).

9. Tushnet, *supra* note 6.

10. Kramer, *supra* note 2, at 249-53.

11. See Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999); Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999).

12. Sager, *supra* note 1, at 84-128.

13. See, e.g., Cass R. Sunstein, *The Partial Constitution* (1993); James E. Fleming, *The Constitution Outside the Courts*, 86 Cornell L. Rev. 215 (2000).

ultimately are accepted by the courts. This view is illustrated by Reva Siegel, Robert Post, and William Forbath.¹⁴

And so, from the standpoint of my typology, we can see that the two Larrys, despite their considerable differences, are just one step away from each other. That, of course, may be a rather large step.

In reflecting upon the two books, I plan to take two comparative, constructive tacks, the first comparing Sager and Dworkin, the second Sager and Kramer. First, I shall show how Sager helps make a Dworkinian moral reading of the Constitution the best it can be. Critics of Dworkin's conception of the moral reading characteristically charge that it is a theory of the perfect liberal Constitution, a theory that (1) fails to fit our actual imperfect Constitution and doctrine, and (2) is not adequately grounded in an account of our constitutional practice and scheme of institutions. Sager's justice-seeking account of our constitutional practice helps rebut such charges. Nonetheless, Sager's account is too court-loving and too skeptical about legislatures, executives, and the people themselves for its own good.

Second, I shall suggest that Kramer helps remedy certain shortcomings of Sager's account in this respect. At the same time, Sager helps fill in certain gaps in Kramer's development of popular constitutionalism. Thus, I shall suggest that the two Larrys' theories together—compounded in the right measure—provide the ingredients for an adequate theory of taking the Constitution seriously outside the courts. Let me preview three examples of such compounds. The first concerns *the domain of popular constitutionalism*: Kramer calls for revitalizing popular constitutionalism, yet he gives no account of the domain of popular constitutionalism as distinguished from, on the one hand, ordinary politics and, on the other, political justice. Sager provides an insightful account of the domain of constitutional justice as distinguished from ordinary politics and political justice.¹⁵ Kramer should refine his account in light of Sager's.

The second involves *the partnership model as a moderate departmentalism*: Sager proposes a model of legislatures and courts as partners in seeking constitutional justice,¹⁶ yet he gives no account of how legislatures will go about interpreting the Constitution. Worse yet, his picture of legislatures leaves one to worry that they will not be up to the challenge of giving full constitutional protection to judicially

14. See Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 Cal. L. Rev. 959, 975-85 (2004) (analyzing scholarship by Siegel, Post, and Forbath). There are other versions of popular constitutionalism, such as Matthew Adler's group-relative account of constitutional law, but they do not fit so tidily into my continuum. See Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?* (unpublished manuscript, on file with author).

15. See Sager, *supra* note 1, at 129-60.

16. *Id.* at 70-83.

underenforced constitutional norms.¹⁷ Kramer defends a conception of departmentalism within which we can readily comprehend legislatures as partners with courts in interpreting the Constitution and seeking constitutional justice.¹⁸ Sager would do well to refine his model of partnership to embrace a moderate departmentalism within which the coordinate branches of the national government share authority to interpret the Constitution and are presumed to have the capacity to do so.¹⁹

The third, related point concerns *constitutional interpretation outside the courts*, by legislatures, executives, and citizens generally. Both Larrys need an account of such interpretation. Each calls for it, though in different domains: Sager with judicially underenforced norms that are to be more fully enforced by legislatures and executives,²⁰ Kramer with departmentalism and populism in general and with the structural Constitution in particular.²¹ Neither gives an adequate account of constitutional interpretation outside the courts. To develop an adequate account, we need to combine Sager's judicial underenforcement thesis (when it comes to liberty-bearing provisions) with Kramer's arguments against aggressive judicial enforcement of the structural Constitution (when it comes to federalism and separation of powers). We need more beyond that, as we shall see.

II. MAKING THE MORAL READING OF THE CONSTITUTION THE BEST IT CAN BE

Sager provides a justice-seeking account of our constitutional practice. We will take up its main features as we go along: (1) the partnership model versus the agency model; (2) the underenforcement thesis; (3) the account of the domain of constitutional justice; and (4) the idea that the obduracy of Article V to constitutional amendment is a virtue, not a vice.

Dworkin advances the "moral reading" of the American Constitution: the Constitution embodies abstract moral principles rather than laying down particular historical conceptions, and interpreting and applying those principles require fresh judgments of political theory about how they are best understood.²² Sager's justice-

17. *Id.* at 195-207.

18. See Kramer, *supra* note 2, at 106-11 (one way of conceiving Kramer's project is that of revitalizing departmentalism over and against judicial supremacy).

19. I put state governments to one side, leaving it to Aaron Saiger to probe this dimension of partnership in his account. See Aaron Saiger, *Constitutional Partnership and the States*, 73 Fordham L. Rev. 1439 (2005).

20. See Sager, *supra* note 1, at 84-128.

21. See generally Kramer, *supra* note 2; Larry Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 Colum. L. Rev. 215 (2000) [hereinafter Kramer, *Putting the Politics Back*].

22. Dworkin, *Freedom's Law*, *supra* note 3, at 1-38; Dworkin, *Life's Dominion*, *supra* note 4, at 118-47.

seeking account is unmistakably a moral reading. Here I want to show how Sager helps make the moral reading of the Constitution the best it can be.

Dworkin's development of the moral reading makes it sound (1) more utopian and (2) more philosophical than it should. Therefore, he triggers objections that he propounds (1) a theory of the "perfect Constitution"²³ and (2) a theory that entails that judges should be philosophers.²⁴ To be fair to Dworkin, he does not claim that the moral reading is a moral realist reading: a reading that is prior to and independent of our own political and constitutional order and practice, and true to the moral order of the universe.²⁵ Rather, he contends that the moral reading is constrained by the requirements of fit and integrity: thus, it is bound to account for the legal materials of our existing constitutional order and practice.²⁶ And so, even if Dworkin's theory of constitutional interpretation aims to provide the best interpretation of these legal materials—to make the Constitution the best it can be—it is not unbounded.

Nonetheless, some critics charge that Dworkin's moral reading is utopian in two senses. One, it is a moral reading for a perfect liberal utopia: he would interpret the Constitution to protect every right and produce every outcome that his liberal political philosophy would entail. And two, it is literally a theory for no place: he would give the same moral reading irrespective of the actual history and practice of the constitutional scheme, for example, the same for Britain as for the United States. I do not believe that such critics are right about Dworkin's moral reading, but they certainly are persistent and warrant a fuller response than simply directing them to read Dworkin more carefully.

Dworkin himself, in *Freedom's Law*, when confronted with the "perfect Constitution" challenge,²⁷ basically pleaded: "I do not believe our Constitution is perfect. For example, while I do believe that justice requires welfare rights, I do not believe that our Constitution protects such rights." He continued in essence: "Your challenge applies to Frank Michelman—not me—because he—not I—believes that our Constitution does protect welfare rights."²⁸ Dworkin

23. See, e.g., Henry P. Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. Rev. 353 (1981).

24. See, e.g., Christopher L. Eisgruber, *Should Constitutional Judges Be Philosophers?*, in *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (Scott Hershovitz ed., forthcoming 2005).

25. For such moral realist accounts, see, for example, Sotirios A. Barber, *The Constitution of Judicial Power* (1993); and Michael S. Moore, *Justifying the Natural Law Theory of Constitutional Interpretation*, 69 Fordham L. Rev. 2087 (2001).

26. See Dworkin, *Freedom's Law*, *supra* note 3, at 10-11; Ronald Dworkin, *Law's Empire* (1986) [hereinafter Dworkin, *Law's Empire*].

27. See Dworkin, *Freedom's Law*, *supra* note 3, at 36. In this paragraph I draw upon James E. Fleming, *Lawrence's Republic*, 39 Tulsa L. Rev. 563, 581 (2004).

28. See Dworkin, *Freedom's Law*, *supra* note 3, at 36 (citing Frank I. Michelman,

might just as well have pointed his finger at Larry Sager in this context. Beyond that, Dworkin is at pains to make clear, as noted above, that the constraints of fit and integrity entail that our actual Constitution is imperfect when measured against the standards of any normative political philosophy or conception of justice.

My tack for responding to the perfect Constitution challenge to Dworkin's moral reading is to show how Sager's justice-seeking account helps meet the challenge, in particular, through its accounts of the thinness of constitutional justice and more particularly of the moral shortfall of judicially enforceable constitutional law. Sager argues that certain constitutional principles required by justice are judicially underenforced, yet nonetheless may impose affirmative obligations outside the courts on legislatures, executives, and citizens generally to realize them more fully.²⁹ Sager's view is an important component of a full moral reading or justice-seeking account of the Constitution. For it helps make sense of the evident thinness or moral shortfall of constitutional law. For example, instead of saying that the Constitution does not secure welfare rights—the move that Dworkin makes—Sager says that the Constitution *does* secure welfare rights, but it leaves their enforcement in the first instance to legislatures and executives.³⁰ Once a scheme of welfare rights and benefits is in place, courts have a secondary role in enforcing it equally and fairly.³¹

Furthermore, if Dworkin's moral reading of the Constitution, though it embodies abstract moral principles, does not incorporate all the important principles of justice, we need an account of the difference between the two. Because Dworkin does not offer such an account, he may leave his readers wondering whether his theory entails that the American Constitution is a perfect liberal Constitution. To be sure, the constraints of fit and integrity entail a gap between the Constitution and justice. But Dworkin says little about any such gap, and what he does say implies that the gap may be narrow. For example, he says that the Constitution is abstract, and therefore it should come as no surprise that any right we can argue for as a matter of political morality we can also argue for as a matter of constitutional law.³² And where he does acknowledge a significant gap between the Constitution and justice, for example, with welfare rights, he does not provide a general account of why the Constitution as he conceives it does not incorporate elements of justice like welfare rights.

Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969)).

29. Sager, *supra* note 1, at 84-128.

30. *See id.* at 84-88.

31. *See id.* at 95-102.

32. Dworkin, *Freedom's Law*, *supra* note 3, at 73.

Sager's account of the domain of constitutional justice helps in this regard. He distinguishes (1) judicially enforceable constitutional law from (2) constitutional justice, which he in turn distinguishes from (3) political justice and (4) morality generally.³³ Imagine a series of progressively thicker concentric circles representing these four domains. Dworkin's highly general formulation of the "moral reading" may seem to blur the distinction between constitutional law and constitutional justice, as well as that between constitutional justice and political justice, and indeed that between constitutional law, on the one hand, and political justice and morality generally, on the other. Sager's justice-seeking account underscores just how thin a moral reading of the Constitution has to be—as compared to our thicker conceptions of political justice and morality—in order to be credible as an account of our constitutional practice.

Sager's frequent co-author Christopher Eisgruber, in an essay entitled *Should Constitutional Judges Be Philosophers?*, has argued that Dworkin's theory of constitutional interpretation is "significantly incomplete."³⁴ I shall examine two gaps that Eisgruber identifies, and that I believe Sager helps fill. First, according to Eisgruber, Dworkin lacks a theory of our institutions: "Dworkin's presentation of his theory relies too heavily upon claims about hermeneutics—claims about the interpretation of language and law in general (as opposed to claims about American constitutional procedures and institutions in particular)."³⁵ Second, Dworkin lacks a theory that would account for our abstract Constitution's obduracy to constitutional amendment: "Dworkin's arguments about moral principle and the Constitution presuppose an unarticulated, controversial theory about the purpose of written constitutions and super-majoritarian . . . procedures" for amending them.³⁶ Eisgruber links these two gaps: "[W]e must know what purposes are served by having an American-style constitution. And to know that, we must have Dworkin's theory of constitutional institutions, a theory he has not yet given us."³⁷ The implication of Eisgruber's critique, as he develops it, is that Dworkin's moral reading needs to be supplemented by a theory like his own theory of constitutional self-government.³⁸ I shall mimic Eisgruber's approach and contend that his critique shows that Dworkin's moral reading needs to be supplemented by a theory like Sager's justice-seeking account to fill these two gaps. Now let us turn to the two gaps.

33. Sager, *supra* note 1, at 129-60; *see also* Lawrence G. Sager, *The Why of Constitutional Essentials*, 72 *Fordham L. Rev.* 1421, 1423-29 (2004) (using concentric circles to illustrate these four domains).

34. *See* Eisgruber, *supra* note 24, at 3.

35. *Id.* at 29.

36. *Id.* at 2.

37. *Id.* at 30.

38. *See* Christopher L. Eisgruber, *Constitutional Self-Government* (2001).

In recent years, many constitutional theorists have railed against the Constitution's, in particular Article V's, obduracy to amendment. Dworkin for the most part has ignored this movement. Sager shows how the Constitution's obduracy to amendment is a virtue, not a vice.³⁹ It is a virtue not only because it encourages and requires the right kind of deliberation about constitutional change—it “causes popular constitutional decision-makers to take account of their own future interests and those of their children and their children's children”⁴⁰—but also because it encourages and fosters wide-bodied interpretation of the highly abstract Constitution we have (interpretation of the sort that Dworkin argues for and that the moral reading entails).⁴¹ It fosters the partnership model, as contrasted with the misguided agency (or instruction-taking or originalist) model.

Relatedly, Sager's book helps answer the charge that Dworkin would have constitutional judges be philosophers. Sager provides an account of a justice-seeking practice in which judges, instead of being moral philosophers, are pragmatic, forward-looking partners with founders/amenders and contemporary legislatures in pursuing constitutional justice. The partnership is both vertical—with founders/amenders—in seeking justice over time, and horizontal—especially with Congress—in giving fuller protection to judicially underenforced constitutional norms at any given time.

One aspect of the horizontal partnership—Sager's underenforcement thesis—may entail a conception of legislative responsibility congenial to the conception that Dworkin's early work promised but never fully provided. I refer to the “doctrine of political responsibility” that Dworkin argued (in “Hard Cases”) is incumbent on legislatures as well as courts.⁴² The doctrine of political responsibility implies that legislatures have an obligation to engage in coherent, responsible legislating with integrity (not precisely as coherent, responsible, and constrained as judging with integrity, but legislating with integrity nonetheless). And in *Law's Empire*, he speaks of integrity in legislation as well as integrity in adjudication.⁴³ It is an underappreciated aspect of Dworkin's theory that it contains the seeds of a conception of legislating with integrity that Dworkin himself never has fully delivered. Many critics and sympathizers alike just lump Dworkin in with court-lovers and legislature-disparagers. Obviously, his (overdrawn) distinction between courts as “the forum of principle” and legislatures as the “battleground of power politics”⁴⁴

39. Sager, *supra* note 1, at 8, 179, 214-19.

40. *Id.* at 217.

41. *Id.* at 218; see also James E. Fleming, *We the Unconventional American People*, 65 U. Chi. L. Rev. 1513, 1533-34 (1998).

42. See Ronald Dworkin, *Taking Rights Seriously* 87 (1977).

43. See Dworkin, *Law's Empire*, *supra* note 26, at 167, 176-84, 217-28.

44. See, e.g., Ronald Dworkin, *A Matter of Principle* 69-71 (1985) [hereinafter Dworkin, *A Matter of Principle*].

encourages this view. But in his early work Dworkin expects more from legislatures than do most court-lovers and legislature-disparagers.

Jeremy Waldron opens *The Dignity of Legislation* by suggesting that he aspires to do for legislation what Dworkin “purports to [have done] for adjudicative reasoning.”⁴⁵ I interpret Waldron to mean that he aims to develop a conception of legislating with integrity, if not integrity in legislation.⁴⁶ Admittedly, Dworkin himself has not done this. Nor for that matter has Waldron fully accomplished it. Nor has Sager, but his work, intentionally or not, carries us along in that direction. I view his idea of judicial underenforcement, coupled with his notion that legislatures have the obligation to enforce constitutional norms and seek constitutional justice, as furthering Dworkin’s unfinished business regarding legislating with responsibility and integrity. For one thing, Sager views legislatures as constrained by the Constitution outside the courts, not just as legislating in constitutionally gratuitous ways. For another, Sager views legislatures as partners with courts in pragmatically pursuing constitutional justice.

Sager’s distinction between the partnership model and the agency model helps free us from the grips of what I have called “the originalist premise”: “the assumption that originalism, rightly conceived *is* the best, or indeed the only, conception of fidelity in constitutional interpretation.”⁴⁷ Indeed, his distinction suggests a sense in which Dworkin’s moral reading ironically seems too much like an abstract originalism: too much like an instruction-taking account (understanding the instructions to be abstract moral principles). Dworkin, always a master rhetorician, tries to turn the tables on the originalists, arguing that commitment to fidelity in constitutional interpretation entails that we embrace the moral reading and that the narrow originalists are the real “revisionists.”⁴⁸ Because of this move, Dworkin can come across like an abstract originalist. Indeed, interpretations of Dworkin as an abstract originalist have prompted the question, “Are We All Originalists Now?”⁴⁹ No one would characterize Sager as an abstract originalist, although he does ask, rhetorically, “Are we all justice seekers?” and, “Are we all agency theorists?” (i.e., originalists of one stripe or

45. See Jeremy Waldron, *The Dignity of Legislation* 1 (1999).

46. See Jeremy Waldron, *Legislating with Integrity*, 72 Fordham L. Rev. 373, 373 (2003) (distinguishing between legislating with integrity and integrity in legislation).

47. James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 Fordham L. Rev. 1335, 1344 (1997) (emphasis added).

48. Dworkin, *Freedom’s Law*, *supra* note 3, at 74-76; Dworkin, *Life’s Dominion*, *supra* note 4, at 125-29.

49. See James E. Fleming, *Are We All Originalists Now? I Hope Not!*, Alpheus T. Mason Lecture in Constitutional Law and Political Thought (Sept. 19, 2002), available at <http://web.princeton.edu/sites/jmadison/events/archives/FlemingTalk.pdf>.

another).⁵⁰ Sager answers both of these questions with an emphatic “No!,” just as I have answered the question, “Are We All Originalists Now?,” with a pointed “I Hope Not!”⁵¹

Furthermore, Sager develops a conception of constitutional justice that has advantages over Dworkin’s conception, both in structure and content. First, Sager interprets Dworkin’s account as “democratarian,” with a structure that is parallel to that of John Hart Ely’s process-perfecting theory in *Democracy and Distrust*:⁵² it justifies judicial review to reinforce the preconditions for democracy. On democratarian views, the domain of constitutional justice is justice-seeking in a limited sense: we should interpret the Constitution to seek justice to the extent of perfecting the preconditions for democracy.⁵³ Dworkin, as I have argued elsewhere, has taken a page out of Ely’s book, framing all of our basic liberties as preconditions for democracy, or packing all of the requirements of constitutional justice into preconditions for democracy.⁵⁴ But it is strained to present all of our basic liberties, both substantive and procedural, as preconditions for democracy. The structure of Sager’s justice-seeking account, like that of my own Constitution-perfecting theory,⁵⁵ does not require such recasting of substantive liberties into a democratarian mold. Instead, Sager offers a justice-seeking view in which the preconditions for democracy are part but not the whole of constitutional justice.

Second, the substance of Sager’s justice-seeking account of the domain of constitutional justice also is an advance over the substance of Dworkin’s moral reading. Elsewhere, I have argued that Dworkin never has developed a moral reading as a general substantive liberal theory of our Constitution and underlying constitutional democracy. To be sure, he has written powerfully and cogently about the major constitutional issues of the day, and has done so from a coherent and consistent viewpoint. Indeed, no one has made greater contributions to constitutional theory than Dworkin has. But Dworkin has not worked up a comprehensive yet elegant account of our basic liberties and constitutional essentials as a substantive theory to beat Ely’s process-perfecting theory.⁵⁶ Sager makes a powerful stab at doing so through developing a substantive conception of constitutional justice with four concerns—equal membership, fair and open government,

50. Sager, *supra* note 1, at 23-26, 26-28.

51. Fleming, *supra* note 49.

52. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

53. See Sager, *supra* note 1, at 132-37.

54. See Fleming, *supra* note 47, at 1341.

55. See James E. Fleming, *Securing Constitutional Democracy* (forthcoming 2006).

56. James E. Fleming, *The Place of History and Philosophy in the Moral Reading of the American Constitution*, in *Exploring Law’s Empire: The Jurisprudence of Ronald Dworkin*, *supra* note 24.

opportunity to thrive, and independence⁵⁷—just as I have attempted to do so through developing my Constitution-perfecting theory with two themes of deliberative democracy and deliberative autonomy.⁵⁸ In sum, Sager's justice-seeking account has advantages over Dworkin's moral reading with regard to both structure and substance.

III. TAKING THE CONSTITUTION SERIOUSLY OUTSIDE THE COURTS

A. *Kramer's Conception of Popular Constitutionalism*

Above, I suggested that Sager's and Kramer's accounts are complementary: together they provide the ingredients for an adequate account of how we might take the Constitution seriously outside the courts. In this part, I shall develop this tack. Initially, I want to ponder why Kramer devotes so much of his book to history: the origins of judicial review and arguments throughout our history for departmentalism over and against judicial supremacy? As I read the book the first time, I wrote in the margin on the first page of Chapter 8: "It's page 207 out of 253 and we are still in the early 1840s! When are we going to get to Kramer's indictment of the hubris and arrogance of the Rehnquist Court?" Here are several reasons one might have written the historical book Kramer wrote, together with my assessment of whether they seem apt here.

1. *Antiquarian*: simply because he has an interest in the history of judicial review for its own sake? No.

2. *Originalist*: because he believes that we are obligated to be faithful to the original understanding of judicial review? Decidedly not.

3. *Birth Logic*: because he holds a view of the birth logic of judicial review analogous to what Sager calls views of "the birth logic of a democratic constitution,"⁵⁹ and accordingly thinks that the circumstances of the birth of judicial review have implications for its later manifestations? Again, no.

4. *Anti-necessitarian* (to recall a long-forgotten but just revised idea of Roberto Unger)⁶⁰: because he wants to shake up people who believe that judicial supremacy is natural or necessary? Yes, emphatically.

57. Sager, *supra* note 1, at 145-60.

58. See generally Fleming, *supra* note 56.

59. Sager, *supra* note 1, at 161-93.

60. Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (rev. ed. 2004).

5. *Retrieval*: because he wants to excavate popular constitutionalism to show its possibility and to suggest how we might apply it today? Yes, most emphatically.

6. *Lessons of experience*: because he wants to present popular constitutionalism as the norm throughout our nation's history, and judicial supremacy the exception, and to show that the lessons of our experience are that popular constitutionalism repeatedly rebuffs and triumphs over judicial supremacy? Yes, definitely.

7. *Hortatory*: because he wants to exhort us to reconstruct popular constitutionalism for our time and to overthrow judicial supremacy? Yes, most certainly.

To combine 4, 5, 6, and 7, Kramer's historical analysis is in service of a veritable "populist constitutional manifesto" (to adapt the subtitle of Richard D. Parker's book, *"Here, the People Rule": A Constitutional Populist Manifesto*⁶¹). If I am right in my interpretation, I want to commend Kramer for writing the kind of constitutional history he has written.

Kramer develops a conception of popular constitutionalism that rejects judicial supremacy in favor of both departmentalism and populism. By departmentalism, as stated above, I mean the idea that legislatures and executives share with courts authority to interpret the Constitution and indeed are the ultimate interpreters on certain questions. By populism, I mean the idea that the people themselves are the ultimate interpreters of the Constitution over and against the judicial, legislative, and executive departments sharing authority to interpret it. As noted above, Kramer, unlike Waldron and Tushnet, does not propose "taking the Constitution away from the courts" altogether. Instead, Kramer proposes "judicial review without judicial supremacy."⁶²

Thus, I want to distinguish two strands of popular constitutionalism: departmentalism and populism. They are not one and the same. One can be a departmentalist without necessarily being a populist. On this view, one might argue (1) that legislatures and executives, no less than courts, have a duty conscientiously to interpret the Constitution, and (2) that each coordinate branch is to be the ultimate interpreter regarding certain matters, while yet believing (3) that legislatures and executives will be capable of discharging their responsibilities only if they can distance themselves from the interests, wants, and beliefs of the people themselves. I hold this view.

And one can be a populist without necessarily being a departmentalist. On this view, one might be a populist through and through, (1) believing that the people themselves are conscientiously

61. Parker, *supra* note 7.

62. Kramer, *supra* note 2, at 249-53.

committed to interpreting the Constitution and are capable of doing so, while (2) distrusting the departments of government (legislatures and executives to say nothing of courts) when it comes to commitment and capacity to interpret and enforce the Constitution. Richard Parker seems to exemplify this view.⁶³ One catches more than a whiff of such populism in Kramer's work, especially at the beginning and at the end of his book, (1) in his explication of early American history and the origins of judicial review and (2) in his attack on the hubris and triumphalism of the Rehnquist Court.⁶⁴

B. *Kramer + Sager: The Domain of Popular Constitutionalism*

Kramer does not articulate the domain of popular constitutionalism (to adapt Sager's term): that is, he does not adequately differentiate popular constitutionalism from, on the one hand, ordinary politics and, on the other hand, political justice. Thus, he does not delineate and articulate *what* the people themselves talk about, or *how* they talk about it, when they themselves engage in constitutional interpretation (in particular, when they act as ultimate interpreters of the Constitution above and beyond courts, legislatures, and executives). And he does not articulate how such popular constitutional discourse differs from people's discourse about, on the one hand, their wants and interests and, on the other hand, their conceptions of justice and morality.

Furthermore, Kramer does not make clear in what sense the people themselves are the ultimate interpreters of the Constitution. For one thing, it is not clear that the Constitution, or constitutionalism, is doing much work in popular constitutionalism. For another, it is not clear that the people themselves, when they triumph over judicial supremacy, are ultimately interpreting the Constitution, as distinguished from it simply being the case that public opinion about wants, interests, or justice has prevailed as a fact of political power over judicial interpretations of the Constitution.

I want to sharpen the difference between (1) Kramer's conception of popular constitutionalism over and against judicial supremacy and (2) familiar calls for courts to defer to democratic self-government. Constitutional scholars are used to hearing that courts should defer to democratic self-government. And they are used to hearing pleas to let the people rule concerning certain matters. But these pleas are usually coupled with views that the Constitution "does not say anything about" the matter in question, and indeed *for that reason* the people are free to rule: (1) as they like (aggregating interests or preferences through ordinary politics) or (2) as they think best

63. See generally Parker, *supra* note 7.

64. See Kramer, *supra* note 2, at 35-72, 225-48; Larry D. Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 4, 130-58 (2001) [hereinafter Kramer, *Foreword*].

(pursuing justice). In neither case are the people, in ruling, to be guided by their own interpretation of the Constitution; instead, they are to be guided either by interests or by justice, respectively. These views simply do not leave space for a conception of popular constitutionalism: a space within which the people deliberate about the meaning of the Constitution and how its commitments guide and bind them in democratic self-government as well as their agents in governmental office.

Kramer's account is importantly different from these views. On his conception, the Constitution *does* speak to the matter in question, the people themselves are to offer and be guided by their own interpretation of the Constitution, and indeed the people themselves are to be the ultimate interpreters of the Constitution. Thus, Kramer's conception is importantly distinctive, and promises an important contribution to constitutional theory. That being the case, Kramer owes us a fuller account of what the domain of popular constitutionalism looks like.

Now, Kramer does give us a good sense of what *departmentalism* looks like. Most of his historical examples of popular constitutionalism illustrate arguments for coordinate review or departmentalism as against judicial supremacy.⁶⁵ We need a clearer picture of the people themselves in popular constitutionalism over and against departmentalism, or at least as distinguished from departmentalism. Kramer's examples of popular constitutionalism over and against departmentalism are scarce: mainly, they amount to hortatory and ominous proclamations that the people themselves should control their agents in the departments of government, and that the people themselves always ultimately triumph over the courts.⁶⁶

Kramer's account of popular constitutionalism would be sharpened if he were to develop it in light of Sager's account of domains (or concentric circles) from (1) the judicially enforced Constitution, to (2) constitutional justice, to (3) political justice, and finally to (4) morality generally. Presumably, Kramer would contemplate that the people themselves are the ultimate interpreters and decision makers in all of these domains, most notably in the realm of the judicially enforced Constitution. After all, he criticizes Rehnquist Court decisions coming within the judicially enforced Constitution from the standpoint of popular constitutionalism.⁶⁷ Of course, part of his criticism of the Rehnquist Court for its hubris and triumphalism is that it has expanded the domain of the judicially enforced Constitution beyond what it should be on a proper conception of judicial review

65. Kramer, *supra* note 2, at 106-11.

66. *See id.* at 24-28, 227.

67. *See id.* at 229-31; Kramer, *Foreword*, *supra* note 64, at 130-58.

without judicial supremacy: it has made the judicially enforced Constitution practically coterminous with the Constitution itself.⁶⁸ Indeed, the Rehnquist Court practically denies that there is, in Sager's terms, a gap between the judicially enforced Constitution and the Constitution itself.⁶⁹

Presumably, Kramer would contemplate that when the people themselves deliberate about our constitutional commitments, they partly deliberate about commitments that are within the judicially enforceable Constitution, and partly deliberate about commitments that are binding outside the courts upon legislatures and executives as a matter of constitutional justice. I imagine that Kramer would not put as much stock as Sager does in the distinction between the domain of constitutional justice and that of political justice. That is, presumably on his view the people themselves, when they deliberate about constitutional justice, may well spill over into deliberating about political justice beyond the Constitution—and thus popular constitutionalism may well become simply popular self-government.

I raise the matter to suggest once again that the constitutionalism in Kramer's conception of popular constitutionalism is underdeveloped. All of Kramer's historical examples of popular constitutionalism provide answers to the question of *who* may interpret—and involve rejection of claims that courts rather than other departments or the people themselves are the ultimate or exclusive interpreters of the Constitution. None of them gives us any idea of *what* is the content of the constitutionalism in popular constitutionalism and how it binds and guides the people themselves.⁷⁰ Thus, it is not clear that there is any particular content to popular constitutionalism that constrains the people themselves. Indeed, Kramer practically concedes as much when he speaks of popular constitutionalism as a commitment to a democratic process itself, not to any "particular substantive" program.⁷¹ The upshot of all this is that it is not clear that there is a domain of popular constitutionalism as distinguished from the domains of ordinary politics and justice.

Tushnet, in *Taking the Constitution Away from the Courts*, acknowledges that the content of the "thin Constitution" of populist constitutionalism has got to be mighty thin to be credible: basically, a commitment to realizing the purposes of the Preamble to the Constitution and the principles of the Declaration of Independence.⁷² Within such a populist constitutionalism, the thin Constitution does

68. Kramer, *supra* note 2, at 225.

69. Sager, *supra* note 1, at 86-92, 109-24.

70. I was confirmed in this interpretation by both Kramer's and Willy Forbath's comments at the Symposium on Theories of Taking the Constitution Seriously Outside the Courts, Fordham University School of Law (Nov. 19, 2004).

71. See Kramer, *supra* note 2, at 196.

72. Tushnet, *supra* note 6, at 11-13.

not manifest a substantive vision. Instead, it expresses an attitude of conscientious faith in the project of realizing the commitments of the Declaration and the Preamble—whatever the people themselves may decide they turn out to be.⁷³ Kramer should tell us whether his conception of the Constitution is similarly thin and, more generally, should tell us what is the constitutionalism in his popular constitutionalism.

All this about the content or the thinness of popular constitutionalism may trouble constitutional theorists who are judging the persuasiveness of Kramer's book. They will want to know in what sense, if any, the people themselves are constrained by constitutional commitments. And if the people themselves are not, these theorists probably will think either (1) that Kramer has simply showed us something about the fact of political power as such (that a strong majority determined to rule ultimately can do that, and its ability to do so does not necessarily imply that doing so is just or even legitimate) or (2) that his notion of popular constitutionalism at the end of the day is simply a conception of popular self-government that for all practical purposes leaves the Constitution out of it. If so, it is not as distinctive as I posited above.

Kramer needs not only an account of the domain of popular constitutionalism, but also an account of what I would call "the people themselves' two selves": (1) their ordinary political selves and (2) their constitutional selves. Here I would recall my critique of Christopher Eisgruber's and Jed Rubenfeld's theories of constitutional self-government in the first symposium in this series: "The Missing Selves in Constitutional Self-Government."⁷⁴ Bruce Ackerman, in elaborating his theory of dualist democracy, provides an account of the people's two selves presupposed by his dualism: (1) the ordinary selves engaged in ordinary politics and (2) the constitutional selves engaged in constitutional politics.⁷⁵ But his account narrowly limits the people's constitutional selves to their role in amending the Constitution (inside or outside the formal procedures of Article V). And Ackerman evidently does not conceive the people's constitutional selves as having a role as the ultimate interpreters of the Constitution, either before they amend it or after they do so. Once the people's constitutional selves amend the Constitution, inside or outside Article V, courts are the ultimate interpreters who preserve the higher law of the Constitution against encroachment by the ordinary law of legislation.⁷⁶

73. See Fleming, *supra* note 13, at 236.

74. James E. Fleming, *The Missing Selves in Constitutional Self-Government*, 71 Fordham L. Rev. 1789 (2003).

75. See Bruce Ackerman, *We the People: Foundations* 230-65, 266-94 (1991).

76. *Id.* at 60, 72.

Kramer, because of his commitment to popular constitutionalism, needs an account of the people's constitutional selves of the sort that Ackerman lacks. For Kramer, unlike Ackerman, sees the people themselves as being the ultimate interpreters of the Constitution, before and after amendment, and not just during the process of amendment. Not surprisingly, Kramer specifically says that Ackerman is not a popular constitutionalist in his sense.⁷⁷ The scholars and judges whom Kramer conceives as "elit[ists]" or "aristocrats"⁷⁸ fear or hate the people's ordinary political selves as engaged in ordinary politics, and they doubt the capacity or indeed the possibility of the people's constitutional selves to be ultimate interpreters of the Constitution. It is this possibility that Kramer needs to bolster. To do so, again, he needs an account of the domain of popular constitutionalism, including an account of the constitutional selves of the people themselves.

C. Sager + Kramer: Partnership and Departmentalism

If Kramer's conception of popular constitutionalism could be refined in light of Sager's account of the domain of constitutional justice, Sager's partnership model could be refined to embrace a moderate version of what Kramer calls departmentalism. Sager advances a partnership model, as contrasted with an agency model, of the relationship between the founders/amenders and judges.⁷⁹ On this view, judges interpreting the Constitution are partners with founders/amenders in seeking justice. By contrast, on originalist views, judges interpreting the Constitution are the agents of founders/amenders and accordingly are duty bound to carry out their instructions. In other words, Sager argues that judges should be justice-seekers, not originalists (whether narrow or broad). (Sager also contrasts a partnership model with a guardianship model, in the obligatory move by moral readers and justice-seekers to deflect the predictable objection that he conceives judges as Platonic guardians or philosopher-judges.)⁸⁰

Let us distinguish between two dimensions of a partnership model. First, the vertical dimension over time: the relationship between founders/amenders and interpreters. Both are partners in pursuing justice. Second, the horizontal dimension at any given time: the relationship between judges, on the one hand, and legislatures and executives (and ultimately the people themselves), on the other. All are partners in pursuing justice.

77. See Kramer, *supra* note 14, at 961 n.3.

78. Kramer, *supra* note 2, at 242, 247.

79. Sager, *supra* note 1, at 14-16.

80. *Id.* at 16.

Sager's analysis of partnership includes both dimensions, but I think it is fair to say that he develops the vertical dimension more fully than the horizontal dimension. He elaborates the vertical dimension in fending off originalists of various stripes.⁸¹ I would have expected him to give a fuller account of the horizontal dimension, given the centrality of the underenforcement thesis in his justice-seeking account. That is, Sager's own account would seem to call for explicating this dimension of the partnership, in particular, in his notion of judicial underenforcement and the gap between the judicially enforced Constitution and the whole Constitution that is binding outside the courts upon legislatures, executives, and citizens generally. We need to know more about the character of the partnership between courts, on the one hand, and legislatures, executives, and citizens, on the other, in fully enforcing constitutional norms.

I want to develop the horizontal dimension more fully in exploring how legislatures and executives should take the Constitution seriously outside the courts. In particular, I shall explore (1) whether Sager's partnership model presupposes, and should explicitly incorporate, a moderate form of departmentalism concerning *who* may interpret the Constitution, and (2) whether we can say more than Sager himself does about *how* legislatures and executives are to engage in constitutional interpretation.

Sager should refine the horizontal dimension of the partnership model to embrace a moderate departmentalism. Why so? First, it accords with the better reading of *Marbury v. Madison*⁸² championed by Kramer: the narrow rather than the broad interpretation. On the narrow reading, courts as well as other departments are charged with the responsibility of interpreting the Constitution; they are not set up as the special guardians of constitutional norms (whether as the ultimate or the exclusive interpreters).⁸³ Thus, departmentalism accords with the best justification for judicial review. Furthermore, it accords with the best understanding of a partnership, i.e., a conception of courts, legislatures, and executives as coordinate branches who share authority, as contrasted with an understanding of courts as special guardians of constitutional norms over and against a distrustful conception of legislatures, executives, and the people themselves as violators of constitutional norms. What is more, departmentalism puts teeth or structure into the idea of a partnership, which otherwise is at risk for sounding like little more than a metaphor from a presidential fireside chat or state of the union message. Finally, departmentalism is right, both historically and normatively.

81. *Id.* at 30-41.

82. 5 U.S. (1 Cranch) 37 (1803).

83. See Kramer, *supra* note 2, at 114-27.

Would Sager resist departmentalism in favor of judicial supremacy? I suppose that would depend on the form of departmentalism we are talking about. Perhaps a strong theory of coordinate review or departmentalism like those championed by Presidents Jefferson and Jackson⁸⁴ would be too strong for Sager's court-loving tastes. But a more moderate departmentalism—a version fully compatible with the narrow reading of *Marbury* concerning the scope and justification of judicial review—should accord well with the general outlines of his partnership model.

Strikingly, Sager does not give us an account of *how* legislatures and executives are to engage in conscientious constitutional interpretation in discharging their obligations more fully to protect judicially underenforced constitutional norms. It is worse than that. His account of and presuppositions concerning legislatures are so skeptical, if not disparaging, of their capacities and incentives that he gives us little reason to believe, or even hope, that they are up to their responsibilities to enforce the Constitution.⁸⁵ Indeed, his presuppositions about legislatures give us reason to fear that they are not up to their responsibilities to do so. And he certainly does not give us reason to have confidence that legislatures, like courts, are capable of being what Dworkin once called “guardians of principle.”⁸⁶ As is well known, Dworkin said that courts are to be a “forum of principle.”⁸⁷ It is less well known that he said that legislatures too are to be “guardians of principle.”

Unlike Sager, other scholars have provided accounts of legislatures as institutions that have the capacities and incentives to enforce the Constitution. Indeed, according to Sunstein, legislatures and executives, historically, have been superior fora of principle to courts.⁸⁸ Tushnet's account of an “incentive-compatible” or self-enforcing Constitution is arguably the best of such accounts (which is not to say that one should go all the way with him in “taking the Constitution away from the courts”).⁸⁹ Again, Sager is too much of a court-lover and legislature-skeptic for his own good, given his own theory. For his own account of judicial underenforcement and thus of the enforcement of the Constitution outside the courts presupposes that legislatures and executives are capable of reflecting conscientiously upon the meaning of the Constitution and upon how more fully to enforce constitutional norms.

In sum, Sager does not provide an adequate account of how legislatures, as partners with courts in enforcing the Constitution, will

84. *See id.* at 106-07, 171-72, 183, 189.

85. *See generally* Sager, *supra* note 1.

86. Dworkin, *Freedom's Law*, *supra* note 3, at 31.

87. Dworkin, *A Matter of Principle*, *supra* note 44, at 69-71.

88. *See, e.g.*, Cass R. Sunstein, *Legal Reasoning and Political Conflict* (1996).

89. *See* Tushnet, *supra* note 6, at 95-128.

be capable of engaging in, and in fact will engage in, constitutional interpretation (however conceived). Nor does Kramer, as noted above, but Kramer's account of legislatures does give us reason not just to hope, but indeed positively to believe, that legislatures—and ultimately the people themselves—will be up to the challenge of seeking justice. He provides a realistic, concrete assessment of the capacities and incentives of courts as well as of legislatures.⁹⁰ He also provides a constructive comparative assessment of courts and legislatures. Law professors are used to comparing a somewhat idealized vision of courts with a rather jaded vision of legislatures; not surprisingly, courts come off well through such comparisons. Kramer neither makes this move nor makes the opposite move of comparing a jaded view of courts with a somewhat idealized view of legislatures. He engages in a fair comparison and gets things about right. In light of his comparison, we can genuinely view legislatures and courts as partners in seeking justice.

That said, neither Larry gives an account of constitutional interpretation outside the courts. To be sure, Sager's theory does not promise, and does not require, as much in this regard as Kramer's. Still, Sager owes us an account of how legislatures and executives will conscientiously and responsibly interpret the Constitution—and not merely do ordinary politics on the one hand or political justice on the other—when they politically enforce constitutional norms that are judicially underenforced. Sager, as a justice seeker, may have less difficulty providing such an account—or at least all the account he needs—than would most constitutional theorists. After all, for most constitutional theorists, constitutional interpretation is quite court-centered and thus peculiarly legal (on their view, in Kramer's terms, the Constitution is a “lawyer's contract,” not a “layman's document”⁹¹). Such theorists presumably would be at a loss to say how legislatures and executives should or could engage in constitutional interpretation. For one thing, most probably view constitutional interpretation as something technical, lawyerly, and judge-like, an enterprise that is simply beyond the ken of legislatures and executives. For another, constitutional theorists typically have such a disparaging view of legislatures that they would be loath to credit them with the capacity and incentives to take the Constitution seriously, even to follow it, let alone independently to interpret it conscientiously.

Why might Sager have less difficulty providing an account of constitutional interpretation outside the courts than such typical constitutional theorists? On his view, the Constitution is a charter of abstract moral principles, our constitutional practice is justice seeking,

90. See Kramer, *supra* note 2, at 237-41.

91. See *id.* at 207, 217.

and legislatures and executives are partners with courts in seeking justice. Legislatures and executives presumably are more capable of engaging in wide-bodied interpretation of such a constitution of principles than they would be of engaging in peculiarly legal interpretation of a lawyer's contract or a code of detailed historical rules. Nonetheless, Sager still owes us an account of what legislatures do—and how it differs from or is similar to what courts do—when they give fuller enforcement to judicially underenforced constitutional norms.

Does Kramer's account help in this regard? Above, I suggested that Kramer does not give an adequate account of the domain of popular constitutionalism: What will the people themselves talk about, and how will they talk about it, when they serve as the ultimate interpreters of the Constitution? Does Kramer do anything more than exhort us to have more trust or confidence in the people themselves—and in legislatures and executives—rather than subscribing to the view that judicial supremacy is natural or inevitable?

One, Kramer exhorts us to believe in the capacity of the people themselves to be the ultimate interpreters of the Constitution. What arguments does he make for believing in the possibility of such a popular constitutionalism? Most importantly, he makes the historical case that popular constitutionalism has always ultimately triumphed over judicial supremacy. I am reminded of the story of the man who was asked whether he believed in baptism. He answered, "Yes, I've seen it done." Likewise, if I am asked whether I believe in popular constitutionalism, I can answer, "Yes, I've seen it done—I have read Kramer's book." Kramer, going beyond exhortation, practically presents the triumph of popular constitutionalism over judicial supremacy as inexorable or inevitable. Rhetorically, his move here is powerful in combating assumptions that judicial supremacy is not only natural but indeed inevitable. It should also be powerful in making liberal judicial supremacists worry that they are being myopic, and in warning them that judicial supremacy has more often furthered conservative commitments than liberal or progressive ones.

Two, Kramer frames the choice between popular constitutionalism and judicial supremacy in terms of what Parker has called "a matter of sensibility":⁹² populist or elitist. To the extent that it is in fact a matter of sensibility, Kramer's project of popular constitutionalism may have a tougher row to hoe than I had thought. For it may be harder to argue scholars and judges out of their elitist court-loving sensibilities (and to accept that the people themselves have the capacities for popular constitutionalism) than to argue them out of their theoretical positions (for example, to persuade them to renounce judicial

92. *Id.* at 241 (quoting Parker, *supra* note 7, at 4).

supremacy for departmentalism). After all, sensibility may be what it sounds like: sensibility. People, by the time they are adults, may have developed either populist sensibilities or elitist sensibilities. And there may be little point—and little prospect of success—in trying to argue them out of such sensibilities.

IV. KRAMER + SAGER: THE RIGHT MIX OF INGREDIENTS FOR AN ADEQUATE THEORY OF TAKING THE CONSTITUTION SERIOUSLY OUTSIDE THE COURTS

It is striking that Kramer does not discuss Sager's notion of judicial underenforcement in his arguments against judicial supremacy. He does discuss notions with affinities to it, including the idea that deferential "rational basis scrutiny" is "a rule of judicial restraint, not substantive constitutional law,"⁹³ and Herbert Wechsler's famous argument regarding the political safeguards of federalism.⁹⁴ One might also mention separation of powers here, that is, the assumption or argument that the Constitution is self-enforcing through the national political processes when it comes to separation of powers.⁹⁵ Notably, Kramer does not present these as instances of judicial underenforcement, or of the Constitution outside the courts. Why this omission?

At the same time, it is striking that Sager includes little discussion of federalism and separation of powers in his explication of judicial underenforcement. He discusses *United States v. Morrison* and mentions *United States v. Lopez*, two Rehnquist Court decisions that have revitalized aggressive judicial protection of federalism-related limitations on Congress's powers.⁹⁶ But he does not mention the arguments against aggressive judicial enforcement of federalism and separation of powers. Granted, in presenting the underenforcement thesis, Sager puts the focus on enforcement of the liberty-bearing provisions of the Constitution rather than on structures and powers. Still, why this omission?

93. Kramer, *supra* note 2, at 219.

94. *Id.* at 224 (discussing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954)). Such arguments have been championed, for example, by Justice White in dissent in *New York v. United States*, 505 U.S. 144, 188 (1992) (White, J., dissenting), by Justice Blackmun in the majority opinion in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), and by Jesse H. Choper, *Judicial Review and the National Political Process* (1980), not to mention by Kramer himself. See Kramer, *Putting the Politics Back*, *supra* note 21.

95. This argument also has been championed by Justice White and Jesse Choper. See *INS v. Chadha*, 462 U.S. 919, 967 (1983) (White, J., dissenting); Choper, *supra* note 94.

96. Sager, *supra* note 1, at 109-14, 122, 125-26 (discussing *United States v. Morrison*, 529 U.S. 598 (2000); and mentioning *United States v. Lopez*, 514 U.S. 549 (1995)).

Perhaps we can just talk about separation of powers and federalism—(1) in Madisonian terms of ambition counteracting ambition and the like without need for courts to be special guardians of constitutional norms,⁹⁷ or (2) in Tushnet's terms of constitutional self-enforcement through the political processes,⁹⁸ or (3) in terms of the Constitution being "a machine that would go of itself"⁹⁹—without needing to bring in Sager's more specific idea of judicial underenforcement. Here, perhaps, is the difference between judicial underenforcement and constitutional self-enforcement, or the difference between Sager's and Tushnet's theories of taking the Constitution seriously outside the courts.¹⁰⁰ That is, maybe Sager's judicial underenforcement thesis is a specific conception that stems from the institutional limitations of courts, whereas the political safeguards of federalism argument and the argument against aggressive judicial enforcement of separation of powers stem from broader conceptions of the Constitution as being self-enforcing through the political processes.

In any event, Kramer's account of popular constitutionalism should include Sager's judicial underenforcement thesis. And Sager's account of judicial underenforcement should include a notion of federalism and separation of powers as being self-enforcing through the national political processes. In conclusion, if we put the two Larrys' theories together, we get the right mix of ingredients for an adequate conception of taking the Constitution seriously outside the courts!

97. See generally *The Federalist* No. 51 (James Madison).

98. See Tushnet, *supra* note 6, at 95-128.

99. See Michael Kammen, *A Machine That Would Go of Itself* (1986).

100. See the exchange between Sager and Tushnet in the Symposium on The Constitution and the Good Society. Compare Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 *Fordham L. Rev.* 1989 (2001), with Mark Tushnet, *Constitution-Talk and Justice-Talk*, 69 *Fordham L. Rev.* 1999 (2001).