COMMENT: POPULAR LAW AND THE DOUBTFUL CASE RULE

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Among Dean Kramer's aims in *The People Themselves* is historical recovery—specifically, of popular-law conceptions of the Constitution.[1] But of course he has further, transacademic ends in view, and among them is support for some sort of movement or movements away from stronger, more supremacist forms of judicial review toward weaker, more collaborative forms. If you have read Mark Tushnet on this topic, you will know there are numerous variations in institutional practice by which judicial review may be counted as stronger or weaker in form.[2]

As one of those variations, one thinks immediately of the regularity and extent of adherence by reviewing courts to the "doubtful case" rule, as Kramer's early American interlocutors are given to calling it.[3] That, of course, is the rule that says the court should just go ahead and give effect to the statute unless repugnancy to the Constitution is clear beyond argument. The greater the salience and efficacy of a doubtful case rule in the stream of the reviewing court's work, it would seem, the "weaker" the form of judicial review that is in use.[4] One supposes that devotees of popular constitutionalism would generally welcome movement in that direction.

I do not myself wish to speak right now either for or against such a movement. The narrow question I wish to raise here, as a way of probing the notion of the Constitution as popular-not-ordinary law, is what the connection is, if any, between that notion and support of a doubtful case rule. I am going to suggest that the answer is none at all. To repeat, I do not mean thereby to imply that a doubtful case rule is insupportable. There are prudential, jurisprudential, and normative grounds on which one might plausibly contend in favor of such a rule, but I will argue below that none of them

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1. LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004).

2. *See generally* Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781 (2003).

3. *See, e.g.*, KRAMER, *supra* note 1, at 65, 102–03.

4. Tushnet treats "Thayerian" or "deferential" review as a weak-form "allocational strategy" available to judges constitutionally endowed with strong-form powers, and raises problems the strategy can be expected to encounter. *See* Tushnet, *supra* note 2, at 2781, 2792–93, 2797–2801.

is specially connected to, or favored by, the idea of the Constitution as popular-not-ordinary law.

Is there, then, any connection between that idea and espousal of a doubtful case rule? Without himself asserting such a connection, Kramer does report that Americans of the era under consideration thought that one existed.[5] For reasons I am about to present, I am not clear about why they did or how they could. Perhaps some further explanation of their thinking could enrich recovery of the old conception of the Constitution as popular—not ordinary—law. Viewing *The People Themselves* through the lens of legal theory, one sees an effort to put readers in touch with various ways in which the Constitution used to be conceived of as a species of law, but not the sort of law we now routinely consider it to be. These days, Larry Kramer says, we think of the Constitution as "ordinary" law, meaning law that may be somewhat specialized in subject matter—it "sets the boundaries within which politics takes place"[6]—but that in its administration and its workings differs from other law only by outranking it in the hierarchy of legal norms.[7] Kramer's book aims to reacquaint us with some older, different conceptions of the constitution as law. I put that in the plural because the book presents a time-series of evolving, overlapping conceptions. An earlier conception of the Constitution as "fundamental" law[8] morphs into a later conception of it as "popular" law,[9] both of those as opposed to "ordinary" law. Here I want to focus on the later, "popular law" conception, the one that takes shape in the wake of the introduction of written constitutions and the concomitant crystallization of the idea of popular sovereignty.[10] It is this conception of the Constitution as popular law that Kramer places in the forefront as he goes about explaining the widespread acceptance of judicial review in the decades spanning the turn of the nineteenth century.[11]

How does the Constitution conceived as popular law differ from the Constitution conceived as ordinary law? The basic or starting-point difference—the distinguishing trait of "popular" law from which all other differences spring (assuming there are any that matter in practice, which in a way is going to be my question)—is that popular law is law emanating directly from a sovereign people, designed to regulate the operations of the people's

5. *See* KRAMER, *supra* note 1 at 65, 103–04.
6. *Id.* at 7.
7. *See id.* at 7–8, 24.
8. *See id.* at 9–29.
9. *See id.* at 44, 49, 56.
10. *See id.* at 39–44, 50–51, 54–56.
11. *See id.* at 91–109.

constituted governmental agents, including the judiciary.[12] As a corollary, oversight of those operations to ensure compliance with that law cannot finally be entrusted to the judicial branch of constituted officialdom any more than to the legislative or executive branch. Rather, that work of oversight remains with the people themselves whose law it is.[13] By contrast, "ordinary" law emanates not from the people but from their constituted agents. Its object domain is not the conduct of those agents as such, but rather that of you and me, actors in civil society. And the work of saying definitively what that law means, when meanings are debated or contested, does belong by rights (a "government of laws") to the judiciary in a separated-powers system.

One can offer pragmatic grounds for a doubtful case rule, as Judge Posner recently has done in the pages of the *Harvard Law Review*.[14] One might think that things will work best overall for the country if we leave our federal and state legislatures with maximum latitude to act on their views of what public policy requires under current conditions.[15] "Their" views may of course be shaped by their understandings of constituency views, and "public policy" may include a due regard for constitutional values. One could take the further step of reading this prudentialist view into the Constitution, and so conclude that the Constitution *means* there should be no obstruction to contemporaneous choices by legislatures in the absence of a clear and gross mistake or an act of flagrant contempt of the Constitution. Hence, a doubtful case rule.

Go ahead, if you like, and presume this prudentialist dimension of constitutional meaning: the legislature to be left to do as it decides absent gross mistake or sheer contempt, because that is what will work out best overall for the country. The presumption then will be no less cogent for popular than for judicial constitutional interpreters; no less cogent, say, for potential nullifiers in a petit jury box than for the judge presiding on the bench. The Constitution, on this reading, does not *want* resistance to debatably unconstitutional choices by legislatures; it only wants resistance to grossly contemptuous ones. This possible, prudentialist ground for a doubtful case rule is perfectly independent of the idea of the Constitution as popular-not-ordinary law.

12. *See id.* at 29–31, 44–45.

13. *See, e.g.*, *id.* at 30, 45–47, 58–59.

14. *See* Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 54–56, 90 (2005); *id.* at 102 (speaking of "Bickelian prudence minus Bickelian teleology").

15. *See* MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).

Now consider a second, quite different way to get to a doubtful case rule. You might think that your constitution, even though written, simply is not meant to be "expounded" in the manner of, let's say, a will. The point of a will, when there is one, is to lay down the law of the estate—subject, we may allow, to some outer constraints of public policy. The corollary is that, within the wide space left open by such constraints, choices respecting distribution of the estate should come entirely out of the will, and not at all out of the judge. (Such, at any rate, is the conventional view.) Judges accordingly are obliged to squeeze out of the instrument every last drop of instruction that exegesis can find there.

But of course a constitution is not a will. Depending, no doubt, on the text and the circumstances, you might not have to regard a written constitution as being, in all of its parts, an originary act laying down afresh, for the future, the basic laws of government—from which, therefore, meanings to cover the full run of future cases will have to be drawn by whatever exegetical exertion may be required. You might rather regard a constitution, or some of it, as a codification or "positivization"—an enactment into a more visible form of law—of customary expectations already well understood.[16] You might think of its texts on powers, limits, and rights as merely confirmatory, in substance, of "fundamental law," meaning a finite set of well-known historic precepts of free government, immutable and embedded in common understanding—like the right of trial by jury.[17] You might accordingly think that if a legislative or executive act is not immediately apprehensible as a violation of one of those precepts in the sight of everyone inside the culture, it is not unconstitutional in the sight of a court of law.[18] In the account offered by Sylvia Snowiss, something like that was the early American view, persistent into the age of written constitutions.[19] Hence, the doubtful case rule.[20]

As far as I can see, it would be a mistake to confuse Kramer's "popular law" with a body of "fundamental" law conceived in the backward-looking way I have just been trying to reconstruct. In the popular law idea developed by Kramer, I find no suggestion that the people's written constitution is to be applied with anything less than full force, in accordance with its fully unfolded meaning as a forward-looking law deliberately drafted

16. *See* Sylvia Snowiss, *From Fundamental Law to the Supreme Law of the Land: A Reinterpretation of the Origin of Judicial Review*, *in* 2 STUD. AM. POL. DEV. 1, 12–13, 15–16, 29–30 (1987).

17. *See id.* at 27; *see also* KRAMER, *supra* note 1, at 12–14 (comparing "fundamental law" and "ordinary law").

18. *See* Snowiss, *supra* note 16, at 17–19, 22–24.

19. *See* sources cited *supra* notes 16–18; *see also* Snowiss, *supra* note 16, at 24–25.

20. *See* Snowiss, *supra* note 16, at 24–25.

and enacted as such—in that regard not all that different from a will. Along with written constitutions, Kramer relates, there came a "heightened awareness of popular sovereignty—the sense of 'the people' as a palpable, active entity making conscious choices."[21] And with this awareness there came a transformed understanding of

> the nature of a constitution. . . . Infused with revolutionary fervor, the new American understanding of constitutionalism was active, reformist, optimistic, and progressive. In short, the customary constitution metamorphosed in to something that could, for the first time, truly be called a popular constitution. . . . Now, Americans looked eagerly forward, toward the future, instead of backward—trusting in their abilities to adjust and adapt and improve.[22]

A *popular* constitution thus was a deliberated, legislative intervention, whose requirements government officials were duty-bound not only to follow, but, in pursuit of that duty, to "do their best to ascertain"[23]—albeit subject to correction, if need be, by the people themselves.

Now here is an observation concerning our first two possible grounds for a doubtful case rule. Neither of these grounds applies any differently to judicial than to popular interpreters. With the second, "fundamental law" ground, there is no interpreting, no "ascertaining," to be done by anyone; either the repugnancy is self-evident or it is not. With the first, prudential ground, everyone including the people themselves should be keeping out of the legislature's way except *in extremis*. By contrast, any doubtful case rule *to be drawn from the idea of the Constitution as popular law* will have to differentiate popular from judicial authority to interpret. It will be a rule for the judges only, not a rule for the people. It will be, in fact, a rule about judges deferring to the people. Roughly, the idea will be that judges are to stand aside in the face of doubts about a statute's unconstitutionality, because resolving such doubts is the people's business, not the judges'.[24]

In order to test out this idea, we must now review very briefly the reasons, as recounted by Kramer, that can lead to acceptance of judicial review even at a time when the Constitution is viewed as popular-not-ordinary law. And the first point here is a negative one: the case for judicial review then does *not* rest on any notion of the judiciary's superior calling to expound constitutional meanings.[25] Denial of such a special judicial call-

21. KRAMER, *supra* note 1, at 56.
22. *Id.* at 56.
23. *Id.* at 53.
24. *See id.* at 65, 104.
25. *See id.* at 63, 98–99.

ing, it turns out, is a large part of what is meant by excluding the Constitution from the category of "ordinary" law.[26]

So what, then, is the old-fashioned, early-republic, positive case for judicial review? It rests on two claims, one primary, one secondary. The primary claim is that judges, too, are constituted agents of the people bound to abide by the people's law—the Constitution. For judges to issue coercive decrees based on laws they honestly find repugnant to the Constitution would be for *them* to act disloyally to their principal. In refusing, judges simply accept the proposition that the Constitution is law applicable to them.[27] The secondary claim is that by so acting, judges perform a valuable service to the polity of a political rather than a legal nature. They stand in for the people, saving the country the costs, which could be heavy, of full-scale popular revolt against the offending statute.[28] If I may speak a bit figuratively here, they save the country from having to run the risk of riot in order to vindicate the Constitution.

Can you get a doubtful case rule for judges out of either branch of this old-fashioned account of the necessity and propriety of judicial review?

You could get one out of the secondary claim, if that were all there was. The judiciary's riot-prevention service really comes into play only when unconstitutionality is clear and gross. If the case is debatable, riot is not in the offing. What rather will happen (if not sheer passivity) is that the country will engage in the debate, and there is certainly no harm in that.[29]

The problem comes when we put the primary claim back in. If a judge acts faithlessly by enforcing laws repugnant to the Constitution, why should the judge—how dare the judge—stop short of deciding fully whether there is repugnancy?[30] The only sort of answer to that question I can see is one that springs from the prudentialist line of thought that, I have pointed out, ought in all logic to hold regardless of whether the Constitution is viewed as law that is in any way out of the ordinary.[31] Of course, I see that the popular-not-ordinary law conception does carry an implication

26. *See id.* at 24, 29, 39, 107.

27. *See id.* at 62–63, 71, 99–100, 103.

28. *See id.* at 63, 98–99, 101.

29. *See, e.g.*, *id.* at 65–67, 91–92.

30. *See id.* at 45 ("As [the people's servants], acting with proper intentions and exercising their best judgment, [the legislature and the judiciary each] must try to comply with the constitution."); Snowiss, *supra* note 16, at 24–25 (reporting the view of Judge John Gibson in *Eakin v. Raub*, 12 Serg. & Rawle 330, 343 (Pa. 1825) (Gibson, J., dissenting)). For a forceful, present-day expression of the same logic, see Luc B. Tremblay, *The Legitimacy of Judicial Review: The Limits of Dialogue Between Courts and Legislatures*, 3 INT'L J. CONST. L. 617, 645 (2005).

31. *See also* Kamper v. Hawkins, 3 Va. (1 Va. Cas.) 20, 61 (1793) ("[T]he violation must be plain and clear, or there might be danger of the judiciary preventing the operation of laws which might be productive of much public good."), *quoted in* KRAMER, *supra* note 1, at 102.

of judicial deference to *the people* to resolve interbranch interpretative conflicts, assuming the people corporately find some way of speaking to the point.[32] But that is not what the doubtful case rule is about. What the doubtful case rule calls for is judicial deference *to Congress*, which is an entirely different matter.

Or is it? We approach, now, a third possible ground for a doubtful case rule: not prudential *á la* Posner, not jurisprudential *á la* Snowiss, but rather normative-democratic *á la* Bickel.

By the very act of passing the law, has not Congress construed the Constitution favorably to the law? Is not Congress closer to the people, a better simulacrum of the people, than is the Supreme Court? Then if interpretation finally belongs to the people, ought not the Court to defer to Congress when unconstitutionality is debatable, on the theory that Congress speaks for the people? Is that not the very gist—forgive the presentism—of Bickel's famous "difficulty"?[33]

Maybe it is, but then one does not find in Bickel any hint of appeal to an antique or lost conception of some special sort of law the Constitution is! What one rather finds there is a thoroughly timeless, transcendental reflection on what sort of judicial practice would best fit the demands of aptness and prudence in "our system" of constitutional-democratic government,[34] with a bit of a stress on democratic.[35] What is more to my point: Bickel's is a reflection that is thoroughly foreign—even hostile—to the imaginative construction of the people as a distinct, corporate, active, present, sovereign body on which, Kramer reports, the old idea of the Constitution as popular-not-ordinary law was reared.[36] In that construction—by

32. *See, e.g.*, KRAMER, *supra* note 1, at 46–47, 109.

33. *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 16–23 (1962) (explaining the "counter-majoritarian difficulty").

34. *Id.* at 16.

35. *See id.* at 17 ("[A]lthough democracy does not mean constant reconsideration of decisions once made, it does mean that a representative majority has the power to accomplish a reversal. This power is of the essence. . . ."); *id.* at 20 (endorsing the "idea that coherent, stable—and *morally supportable*—government is possible only on the basis of consent, and that the secret of consent is the sense of common venture fostered by institutions that reflect and represent us and that we can call to account" (emphasis in original)).

36. *Compare* KRAMER, *supra* note 1, at 7, 30, 55–56 (referring to "the people" as "a collective body capable of independent action and expression" and as "a palpable, active entity making conscious choices" whose "heightened awareness of popular sovereignty . . . transformed certain implicit understandings about the nature of a constitution"), *with* BICKEL, *supra* note 33, at 16–17:

> [T]he word "people" [used to designate the constitutional lawgiver] is an abstraction . . . obscuring the reality that when the Supreme Court declares unconstitutional a legislative act or the action of an elected executive, it thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it. That, without mystic overtones, is what actually happens . . . and it is the reason the charge can be made that judicial review is undemocratic.

stark contrast to Bickel's—Congress most decidedly is *not* a best approximation to a necessarily absent (because fictive) people, any more than the Court is; rather, both branches equally are the real, live people's subordinate agents bound by the real, live people's law. You cannot possibly get from there to a rule of interpretative deference by the Court *to Congress*—nor, hence, to a doubtful case rule.[37]

What you rather get to is departmentalism.[38] For example:

> When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution. . . . [But] [w]hen the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles . . . .[39]

Departmentalism lives, it seems, and perhaps along with it, by implication, the idea of the Constitution as law laid down by a real, live people. And of course, what we see there is an antithesis of the doubtful case rule: not deference, surely;[40] not exactly "impudence," either;[41] but distinctly closer in spirit, I would say, to the latter than to the former.

37. *See* KRAMER, *supra* note 1, at 58 ("[N]o one was saying that the authoritative interpreter of the constitution was the legislature rather than the judiciary. That would have been inconsistent with the whole framework of popular constitutionalism because it would have assumed that final interpretive authority rested with one or another of these public agencies. In fact, neither branch was authoritative because interpretive authority remained with the people.").

38. *See id.* at 106–09.

39. City of Boerne v. Flores, 521 U.S. 507, 535–36 (1997); *see* Tremblay, *supra* note 30, at 642–44.

40. *See* KRAMER, *supra* note 1, at 106–08.

41. *See generally* Charles Fried, *Impudence*, 1992 SUP. CT. REV.155 (1992).