PRE-REVOLUTIONARY POPULAR CONSTITUTIONALISM AND LARRY KRAMER'S *THE PEOPLE THEMSELVES*

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Because my expertise is in early American history, I will concentrate on Larry Kramer's portrait of pre-Revolutionary popular constitutionalism, which acts as a baseline against which to measure nineteenth-century developments. Before examining pre-Revolutionary constitutionalism, however, I want to note two features of Kramer's style of historical argument that make the book a particularly sophisticated treatment of its subject.

I. STYLE OF ARGUMENT

A. Kramer Employs Contrapuntal Rather Than Strictly Contextual Analysis

Historians often explain one thing by reference to a second, which forms the context or background for the first thing. A historian might treat judicial review as a practice that evolved within the context of popular constitutionalism. In this approach, judicial review would be the object to be explained, and popular constitutionalism would be the background or context. But Kramer's approach is not just contextual in this way. It is contrapuntal. I say "contrapuntal" because judicial review and popular constitutionalism each stand, at different points in the book, as objects to be explained and as backgrounds or contexts for the other's evolution. Both serve not only as contexts, but as challenges to the other. Each provokes intellectual and political changes to the other which, in the process, alters both. The contrapuntal engagement of judicial review and popular constitutionalism is not only the subject of the book, but it is also an engine that drives change.

B. Kramer Pursues a Social History of Constitutionalism

Kramer does not just show changing constitutional and political positions and the tensions between them. He continually asks what makes a

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particular position plausible and salient. What were the social, intellectual, and political preconditions for its emergence? The book is a social history of constitutional ideas insofar as it inquires into the conditions for the reception and flourishing of a particular position. The book is ingenious in pointing to developments that served as background conditions facilitating changes in judicial review decades later. An example would be Kramer's analysis in Chapter 6 of how the growing assimilation of constitutional law into ordinary law laid the groundwork for those who would, years later, advocate judicial supremacy in constitutional interpretation.[1]

II. PRE-REVOLUTIONARY CONSTITUTIONALISM

Kramer's portrait of pre-Revolutionary constitutionalism is built on two dichotomies that are valuable yet exclude middle positions.

A. Distinction Between Fundamental Law and Ordinary Law

Kramer's reconstruction of pre-Revolutionary popular constitutionalism claims that fundamental law, interpreted by the people, regulated the government, while ordinary law made by the government regulated the people. Yet there was a middle position. Ordinary law regulated the people but also was a part of the constitutional regulation of government. Eighteenth-century colonists restrained their rulers by insisting that the government act according to established procedures, or impose preexisting rules and sanctions. The minutiae of standing law and "due process," which were in the first instance created by government, became a restraint on governmental activity.

There is another problem with Kramer's sharp distinction between the law regulating the people and the law regulating the government, a problem that David Konig suggested to me in conversation. What does it mean for "the government" to enforce ordinary law in colonial America when unpaid amateurs conducted nearly all law enforcement? When a cobbler acting as a constable for a year executed or quietly ignored an order issued by a tobacco planter acting as a justice of the peace for a year, did "the government" act or did "the people" act? In a colonial system where professional legal interpreters and enforcers were so rare, and where the overlap of state and society was so profound, can one maintain a distinction between ordinary law by which government regulates the people and fundamental law by which people regulate the government?

1. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 145–69 (2004).

B. Distinction Between Judges as Supreme Constitutional Authorities and Judges as No More Authoritative Than Other Constitutional Interpreters

Kramer argues that the middle eighteenth-century Anglo-America constitutional tradition assumed that the constitution was a species of "law" yet judges had no "special role in determining its meaning."[2] This formulation admits of two possibilities: either (a) judges are supreme constitutional interpreters; or (b) judges had no "special role" in determining the constitution's meaning. Kramer's quite proper rejection of judicial supremacy in the pre-Revolutionary Anglo-American constitutional order does not mean that option (b) is correct. There was a middle position. Consider the importance in Anglo-American constitutionalism of great cases decided by judges, such as, to pick a few, *Calvin's Case*,[3] cases on taxation and prerogative before the English Civil War, *Bushnell's Case* on jury coercion,[4] cases that determined the reach of English statutes and common law into the American colonies, and so forth. These decisions had a "special role" in Anglo-American constitutionalism and became fixed points that other actors felt compelled to address. Debates centered on the interpretation of these judicial landmarks because they could not be ignored or brushed aside. Judges who sat on high tribunals, though not supreme, were honored and particularly important constitutional interpreters. They were not supreme, but they had a special role that elevated them above Privy Councilors, royal governors, members of Parliament, and colonial assemblymen, let alone justices of the peace, customs collectors, and other low-level constitutional interpreters.

III. WHAT IS AT STAKE IN REVISING KRAMER'S PICTURE OF PRE-REVOLUTIONARY CONSTITUTIONALISM

What is at stake in complicating Kramer's two sets of strong distinctions and in emphasizing middle positions—emphasizing, that is, the centrality of ordinary law in constitutional restraint of government and the authoritativeness, though not utter supremacy, of judges?

2. *Id.* at 24.
3. (1608) 77 Eng. Rep. 377 (K.B.).
4. (1670) 124 Eng. Rep. 1006 (C.P.).

A. How Pre-Revolutionary Constitutionalism Functioned at Ground Level

Kramer insightfully points out that significant popular input into pre-Revolutionary constitutional decision-making would, to modern eyes, suggest instability in the system. How, then, did it work for so long? He gives two explanations, which are helpful, but incomplete.

Kramer's first explanation: There were limited opportunities for constitutional conflict given the modest role of colonial government. But, pervasive uncertainties in the colonies' domestic constitutions and the imperial constitution meant that low-level conflicts (over such things as custom service rules, support for the clergy, juror selection, and so forth) kept spiraling into grand constitutional controversies.

Kramer's second explanation: The deference and dependency of common people put a damper on constitutional disputes. But, many constitutional disputes involved different factions of the elites. Elite groups in conflict could not mobilize deference and dependency to restrain each other as they could to quiet down the middling and lower sort.

Here's where the "middle positions" overlooked in Kramer's dichotomies come in handy. They suggest mechanisms for steadying the pre-Revolutionary constitutional order at ground level. The mass of quotidian ordinary law and procedure developing in the colonies over the eighteenth century, which was part of the colonial constitutions, acted as a stabilizing force. The special role of judges did likewise by restraining the centrifugal dangers of polities suffused with so many constitutional interpreters.

There is a further reason to emphasize the importance in ground-level constitutionalism of ordinary law and the special role of judges: the "people at large" that do so much work in Kramer's pre-Revolutionary popular constitutionalism do not seem all that well-suited to the task. This is not clear in the first chapter of the book, where Kramer artfully lays out his vision of robust popular constitutionalism.[5] For me, doubts began to arise in Chapter 4.[6] At this point, Kramer's nicely demonstrates how early national judicial review could be accommodated to an emerging democratic public sphere and the valorization of public opinion, to the decline of deference in politics, and to a new self-confidence by the common people in their political and constitutional judgments. Here we see the formation of a public immersed in newspapers, debating societies, political parties, and politically-expressive celebrations. Yet if the capability of the people to act

5. KRAMER, *supra* note 1, at 9–34.
6. *Id.* at 93–127.

as constitutional monitors grew so dramatically in the early national period, how did the people discharge their responsibilities in the robust popular constitutionalism that Kramer finds before the Revolution? The downward estimation in the skill, education, and confidence of the mid-eighteenth-century populace that results when one considers the growing knowledge and legal sophistication of the early national populace underscores how important were ordinary law and judicial authority in the practical functioning of colonial constitutionalism.

B. Periodization and What Needs to Be Explained

The second thing at stake in revising Kramer's portrait of pre-Revolutionary constitutionalism is that one then receives a different understanding of periodization. Kramer importantly emphasizes that in the 1830s, advocates of the departmental view of judicial review (like James Madison) began to concede to the judiciary priority (though still not supremacy) in constitutional interpretation. Given Kramer's depiction of eighteenth-century and early nineteenth-century history, this turn in the 1830s appears as a departure from the vigorous attachment to popular constitutionalism held by almost all except the high Federalist fringe. But if one sketches pre-Revolutionary constitutionalism in the ways I suggested, Madison's turn in the 1830s is not a novelty but an allusion in a different context to pre-Revolutionary practices of honoring judicial interpretations of constitutional issues as authoritative and important (if not supreme). Changing our accounts of pre-Revolutionary constitutionalism changes our perception of critical questions: What is anomalous? What calls out for explanation? In Kramer's formulation, the turn by Madison and others away from a dominant eighteenth-century and early nineteenth-century robust theory of popular constitutionalism is an anomaly that needs explanation. In my view, the turn in the 1830s has important similarities with pre-Revolutionary Anglo-American constitutionalism. The modest judicial authority over constitutional judgments in the period between the Revolution and 1830 stands out as anomalous, as the thing needing explanation.

CONCLUSION

I have concentrated on pre-Revolutionary constitutionalism because that is what I know something about. The danger is that I am like the man who is asked to describe an elephant and speaks for fifteen minutes about the animal's feet because the man happens to be a podiatrist and finds feet interesting. Let me end by looking upwards from the feet to the elephant as

a whole. The book as a whole is a major achievement. It problematizes the post-*Cooper v. Aaron* constitutional order by exploring the historical relationship of judicial review and popular constitutionalism in a contrapuntal fashion and through a social history of constitutionalism that continually asked what political and intellectual conditions made arguments plausible and salient.