

2005

Courting Disaster

Lawrence G. Sager

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Lawrence G. Sager, *Courting Disaster*, 73 Fordham L. Rev. 1361 (2005).

Available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss4/3>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Courting Disaster

Cover Page Footnote

Alice Jane Drysdale Sheffield Regents Chair in Law, University of Texas at Austin

COURTING DISASTER

Lawrence G. Sager*

I. FOUNDATIONS OF JUDICIAL REVIEW

At bottom, Larry Kramer's book¹ is a history of the interaction between courts and other political actors over contentious questions of fundamental justice in the United States. In Kramer's hands, there are no magic moments of empowerment, but rather, bits of an ongoing story of contention and fleeting resolution. Judicial authority to interpret and enforce the Constitution did not spring whole from the enactment of that document. Important foundations for the authority of courts to take up questions of justice were laid before the Constitution came into being and made itself heir to their influence. And the ratification of the Constitution—and its reparative caboose, the Bill of Rights—did not instantiate judicial review in anything like its full modern form, notwithstanding the Supremacy Clause,² which clearly directs state judges to measure state behavior against the Constitution's terms. Throughout much of our constitutional history, serious questions have been raised about the scope and finality of the Supreme Court's judgments. Some of those challenges have raised honest questions of institutional authority; others have been borne primarily on the shoulders of brute political force.

The history of all this is undoubtedly too easily neglected by many of us, and less than fully understood even by those who are careful not to neglect it. I am far from competent to judge, but my strong suspicion is that Kramer's history makes a fine contribution to the ongoing project of placing our nation's political life in useful historical perspective. I have no doubt that his history, like all histories—even very good histories—will suffer or enjoy the fruits of revisionary visits by subsequent historians. That, after all, is in the nature of the discipline. But *The People Themselves* will rightfully be regarded as an important contribution to our self-understanding, and with it, Kramer will have cemented his already strong reputation as an original and deep observer of our political past.

* Alice Jane Drysdale Sheffield Regents Chair in Law, University of Texas at Austin.

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

2. U.S. Const. art. VI, cl. 2.

Kramer's book ends on a different note. In what amounts to a heated postscript, he decries the sad state in which we find ourselves, with "the people" and their elected officials in the habit of supine acceptance of the judgmental authority of the Supreme Court;³ and he calls for a much greater willingness to strike back at an errant Court.⁴ Only at this point is there a collision between Kramer's history and the account of American constitutional practice that I set out in *Justice in Plainclothes*.⁵ But Kramer's history is meant to create an atmosphere that is congenial to the embrace of his heated concluding observations, and my deep doubts about those observations reflect back on the history. It is with these reflected doubts that I will begin.

II. TEMPORAL BIAS

One obvious feature of Kramer's history is the degree to which it is temporally loaded. Kramer may have thought that his audience needed to be drawn away from a presentist bias, pursuant to which we imagine that things have always been as they are, and distort our past to reduce its distinctiveness. He, in any event, has strained to do precisely the reverse. His history is like Saul Steinberg's map of the United States through the eyes of a New Yorker, where everything west of the Hudson River is compressed to a nub.⁶ Kramer dwells lovingly over our time before the enactment of the Constitution proper,⁷ sees much that is important in our experience with courts as spent by the time of *Marbury v. Madison*,⁸ and is only fleetingly interested in events that postdate the nineteenth century.⁹

When I turned fifty, I was jolted by the realization that the Constitution was only about four times my age. Optimist that I am, I took from this epiphany not the fear that old age loomed, but the insight that our national experiment in constitutional democracy is still remarkably young. Kramer has effectively lopped off the second half of our life under the Constitution, which makes less plausible his history-wise discomfort with where we—on his account—suddenly find ourselves.

The one twentieth-century ganglia of events that does figure importantly in Kramer's narrative is the approach to constitutional questions forged during the New Deal and famously announced in footnote four of the Court's decision in *United States v. Carolene*

3. See Kramer, *supra* note 1, at 228.

4. *Id.* at 247-48.

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

6. See Saul Steinberg, *View of the World from 9th Avenue*, *New Yorker*, Mar. 29, 1976, at cover, available at http://www.cartoonbank.com/prints_steinberg_0376.asp.

7. See Kramer, *supra* note 1, at 9-34.

8. 5 U.S. (1 Cranch) 137 (1803); see also Kramer, *supra* note 1, at 114-16, 127.

9. See Kramer, *supra* note 1, at 214-48.

*Products Co.*¹⁰ The *Carolene Products* approach is binary: In most areas of constitutional concern, the Court would give the decisions of other governmental actors substantial deference and seldom intervene; but in the enforcement of familiar modern civil rights, the Court would pursue an active and independent role of enforcement.¹¹ Kramer characterizes this as a “settlement,” and seems on first meeting to endorse the Court’s posture of self-limitation.¹² By the time we get to his angry postscript, however, Kramer seems to be inviting legislative attacks on the Court in precisely those areas of judicial activity that the settlement endorses.¹³ We will look in on that question when we turn to the postscript itself.

III. MISSING WARTS

There is another obvious feature of Kramer’s history that bears mention. Presumably, that history is meant in part to make what Kramer calls “popular constitutionalism”—which we will consider below—more credible and palatable by reminding us that the Republic did just fine in times when that form of constitutional authority prevailed in practice.¹⁴ But history can do that only if it fairly represents our national experience under popularly-inflected constitutionalism, warts and all. In Kramer’s rendition of our past, the popular constitutional warts are strangely suppressed. Where, for example, is the First Amendment of World War I, when the courts were inclined to defer to popular legislative judgment and permit the repression of political speech on the grounds that it might harm the war effort?¹⁵ Or, for that matter, what of the First Amendment in the McCarthy era, when the Supreme Court bent its judgment to national hysteria?¹⁶ What of the Court’s deference to congressional and military judgment in World War II that linked national security to the forced relocation of Japanese-Americans into concentration camps?¹⁷ And how is it that Kramer lingers critically over *Cooper v. Aaron*—where, in response to naked, armed defiance of judicial mandate, the Court famously declared itself “supreme in the exposition of the law of the Constitution”¹⁸—but somehow fails to remind us that Governor Faubus’s military stand at the schoolhouse door in Little Rock was merely a particularly vivid manifestation of the century-long pattern

10. 304 U.S. 144, 152 n.4 (1938); see also Kramer, *supra* note 1, at 219-20 (discussing the New Deal settlement).

11. See *Carolene Prods.*, 304 U.S. at 152 & n.4.

12. See Kramer, *supra* note 1, at 219-20.

13. See *id.* at 227-33.

14. See *id.* at 8.

15. See, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925); *Abrams v. United States*, 250 U.S. 616 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

16. See, e.g., *Dennis v. United States*, 341 U.S. 494 (1951).

17. *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944).

18. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); see also Kramer, *supra* note 1, at 221.

of intense, mean-spirited, and violence-prone resistance by states in the South to the commands of constitutional equality?

IV. ALPHA LIONS AND BETA LAMBS

These concerns about the completeness and fairness of the historical record in Kramer's hands are, as I have said, pretty obvious, and they are likely to be common critical grist in responses to *The People Themselves*. But let us take the record as given, for a moment, and consider how it should be read. There is one not-so-obvious feature of that record that goes unremarked by Kramer and which may be quite important. Suppose we draw a rough distinction between two sorts of constitutional disagreements. In "Alpha" conflicts, a governmental act or practice is found by the Supreme Court to be *unconstitutional*, but other governmental actors disagree. In "Beta" conflicts, a governmental act or practice is found by the Supreme Court to be *constitutional*, and other governmental actors disagree. Alpha and Beta disagreements have very different valences in our constitutional practice.

Alpha disagreements are where the wild things are. They create true conflicts between the Court, which mandates X, and another governmental actor that insists on doing something at sharp odds with X. Alpha disagreements are often driven by strong popular resistance to the Court's rulings. And it is Alpha disagreements—over the pledge of allegiance, gay rights, flag burning, abortion, school prayer, and racial integration of the public schools—that can produce the impulse to strip the courts of jurisdiction, to pack the Court, to impeach a Justice or two, or to order National Guard troops to brace themselves against the peril of black students entering a racially-pristine high school.

By their nature, Beta disagreements are far more benign. What they tend to create is a proliferation or redundancy of veto-gates in the name of the limited number of claims of political justice that plausibly can be attributed to the Constitution. Their benign character can be brought out by several observations. Consider first state liberty-bearing constitutional provisions that have federal equivalents—say free speech or equal protection. State courts are perfectly free to read state liberty-bearing provisions as underwriting constitutional intervention in circumstances under which the federal courts would find no federal constitutional warrant for intervention. The only limitation on this freedom is at the point at which a state reading puts the state constitution in conflict with federal provisions. At that point, Beta disagreements become Alpha disagreements. This would have been true, for example, if California shopping center owners had been correct in their assertion that the application of state

free speech provisions to their private establishments violated property interests protected by the United States Constitution.¹⁹ State courts even are free to enlarge on federal court interpretations of the Constitution if their rulings are protected by independent and adequate state grounds.

But leave state courts and state constitutions to the side, for the moment. Now imagine that we are unsure as to whether Congress, the President, state actors, and the people at large are or are not free to expand upon the Supreme Court's understanding of the Constitution. Consider, from the vantage of the justifications for behavior and the consequences of that behavior, how relatively modest is the difference between a regime in which nonjudicial actors are so free and one in which they are not. In the not-free-to-act-on-Beta-disagreements-with-the-Court regime, Presidents would veto on the grounds of great political injustice; Congress would similarly restrain itself from enacting measures that were in some particular fundamentally unjust; the people would vote offenders out of office, and state courts and actors would find similar conceptual equivalents, including, where appropriate, state constitutional restraints on state and local actors. Now, if we permit all of those actors access to the federal Constitution for justification, not so very much will have changed.

Beta disagreements can be seen to some extent as reflecting different institutional capacities or sensitivities, and as fulfilling a division of labor among constitutional actors. This is made explicit by the political question doctrine, for example, and by the underenforcement thesis, which I advance in *Justice in Plainclothes*.²⁰ It is all but impossible to imagine a world where nonjudicial actors like Congress were deprived of independent constitutional authority and/or absolved of independent constitutional responsibility, or even a world in which Congress were, as a practical matter, largely unconcerned with matters of constitutional substance.

As with state courts and state constitutions, Beta disagreements about the content of the Federal Constitution can, under special circumstances, become Alpha disagreements. This can happen when an extension of the liberty-bearing provisions of the Constitution is perceived by the Court as violating the Constitution. For example, Chris Eisgruber and I are inclined to agree with Justice Stevens, who sees the Religious Freedom Restoration Act's radical privileging of more-or-less orthodox religious belief over other deep human commitments as transgressing the Establishment Clause.²¹ They can

19. See *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

20. See Sager, *supra* note 5, at 84-128.

21. See *City of Boerne v. Flores*, 521 U.S. 507, 536-37 (1997) (Stevens, J., concurring); see also Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act Is Unconstitutional*, 69 N.Y.U. L. Rev. 437 (1994).

become Alpha disagreements in a somewhat less direct way as well: When, as now, the Court adopts a fairly strict reading of Congress's authority under Section Five of the Fourteenth Amendment,²² an attempt by Congress to legislate an enlarged reading of a provision of the Constitution becomes, in the Court's eyes, an overreaching of Congress's authority to legislate, as an enumerated powers matter.

Now here is the point of this Alpha/Beta ramble: The bulk of Kramer's evocations of our constitutional past—in both practice and articulated theory—are Beta rather than Alpha instances of the refusal to give the judiciary decisive authority over matters of constitutional substance. This is true, for example, even of Kramer's three introductory examples of how "Americans of the Founding era" took themselves to be constitutionally responsible agents: constitutionally-inspired jury nullification; mob disdain for Hamilton's call for confidence in the judgmental capacity of the President and the Senate regarding the Jay treaty; and popular state repudiations of the Alien Act.²³ It is true of the various examples of grand and petit juries balking at the enforcement of what were perceived to be unconstitutional laws, including the famous acquittal of John Peter Zenger;²⁴ and even of the exercise of "mob" authority on the occasion of the Boston Tea Party,²⁵ and James Wilson's ringing defense of the authority of a conscientious citizen to disobey an unconstitutional law;²⁶ and of the ratification debates, in which "[e]ven those sympathetic to judicial review emphasized politics as the primary, essential, and indispensable [constitutional] safeguard."²⁷

More to the point, perhaps, Kramer's most prominent examples of the rejection of "judicial supremacy" in the name of departmentalism, once judicial review had taken firm root in our constitutional tradition, are classic instances of Beta disagreement. Take, for example, Jackson's veto on constitutional grounds of the legislation that would have rechartered the National Bank, despite the Court's prior finding that the bank was constitutional. This event looms very large in Kramer's narrative.²⁸ But when Jackson renounces the authority of the "opinion of the judges" over Congress and the President,²⁹ this is classic Beta material. Jackson is not asserting the authority of either branch to defy the mandate of the Court or

22. U.S. Const. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

23. See Kramer, *supra* note 1, at 3-5.

24. See *id.* at 28-29.

25. See *id.* at 27.

26. See *id.* at 44.

27. See *id.* at 84.

28. See *id.* at 183-84.

29. See *id.* at 183 (quoting Andrew Jackson, Veto Message (July 10, 1832), in 2 A Compilation of the Messages and Papers of the Presidents 576, 582 (James Richardson ed., 1907)).

questioning the reach of the Court's mandate; he is merely insisting on the propriety of Congress declining to renew the Bank or his own veto of the Bank's renewal on constitutional grounds.³⁰ Even Van Buren, who is very much Kramer's hero, seems to have focused on the Beta independence of Congress and the President. Van Buren is lauded by Kramer as having quoted with favor a speech defending the veto of the Bank.³¹ And that speech, at its operational core, is pure Beta authority; in it, Senator Hugh Lawson White insists that a decision of the Supreme Court like that approving the Bank "does not bind either the Congress or the President," and that either is free thereafter to decline to perform an official act on the ground that to do so, in their conscientious belief, would be to act unconstitutionally.³²

Lincoln's refusal to be bound by the Supreme Court's view of black citizenship in *Dred Scott*³³ is an attenuated form of Alpha disagreement. But, as Kramer emphasizes, Lincoln's assertion of the prerogative of independent presidential judgment under these extraordinary circumstances was remarkably mild.³⁴ Where "vital questions, affecting the whole people" are at stake, and where the Court's judgment on those questions is made in "ordinary" "personal actions," then the President is not bound "the instant" the judgment is made.³⁵ Lincoln never suggested that governmental parties to public litigation are at all free to disobey the Court, and appears to have believed that a *firmly etched* line of Supreme Court judgments would be binding on all within its normative purview.³⁶ This puts Lincoln much closer to *Cooper v. Aaron*³⁷ and the dreaded "judicial supremacy" than it is to anything Kramer comes to advocate in the name of popular constitutionalism. Kramer explains the paleness of Lincoln's assertion of independent judgmental authority by noting that most of what the Court otherwise was prepared to do in the name of the Constitution involved bringing the states to heel, which Lincoln favored.³⁸ But there is more than a small trace of the ad hoc in this explanation, given the extraordinary disrepute into which the *Dred Scott* decision quickly fell.

30. *See id.*

31. *See id.* at 201.

32. *See id.* (quoting Martin Van Buren, *Inquiry into the Origins and Courts of Political Parties in the United States* 329-30 (1867)).

33. *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

34. *See Kramer, supra* note 1, at 212-13.

35. *Id.* at 212 (quoting Abraham Lincoln, *First Inaugural Address* (Mar. 4, 1861), in *Abraham Lincoln: His Speeches and Writings* 579, 585-86 (Roy P. Basler ed., paperback ed. 1946) (internal quotation marks omitted)).

36. *See id.*

37. 358 U.S. 1 (1958).

38. *See Kramer, supra* note 1, at 212-13.

We need to be clear on where we are in the historical bidding: Kramer is arguing that “judicial supremacy” in our constitutional practice has always been balanced or overwhelmed by various forms of popular constitutionalism, in particular by departmentalism.³⁹ On the Mount Rushmore of popular constitutionalism, Kramer would carve the visages of Jefferson, Jackson, and Van Buren.⁴⁰ But, on Kramer’s report, Jackson and Van Buren, the heroes of departmentalism, are classic Beta lambs, not Alpha lions. Lincoln is almost everyone’s hero; but his example lends no serious support to Kramer’s call for attacking the Court.

Now it may or may not be that the dense tapestry of our constitutional experience would yield convincing instances of Alpha disagreement were Kramer to take a second look. But whether Kramer could succeed in a second look is beside the point. Kramer’s history surely cannot persuade us as a matter of direct authority: Lots of things happened in our past, including quite bad things that we should not be tempted to repeat. That the Court was defied at some point in the past is not a claim for how the Court should be regarded today. But Kramer is not, I think, offering the past as *authority* for his complaint about the present. Kramer echoes Richard Parker in suggesting that at bottom these questions about the division of constitutional labor are “a matter of sensibility.”⁴¹ The examples of Jackson and Van Buren are meant to stoke our popular political sensibilities. To do that, they have to be appealing events, not merely past events. But if Jackson and Van Buren are appealing, it is precisely because they represent Beta redundancy of judgment, not Alpha defiance and disorder. And for just that reason, they cannot offer support for the litany of Alpha strokes of discord, the absence of which is lamented by Kramer—impeaching the Justices, packing the Court, stripping it of jurisdiction, blighting it with consuming burdens, or neutering it with disabling procedures.

Setting history aside, the Alpha/Beta distinction is important going forward. I have avoided using the phrase “judicial supremacy,” which is so important to Kramer,⁴² because I am unsure what is or is not entailed in that phrase. To the extent that “judicial supremacy” is a theory that condemns Beta judgmental redundancy, Kramer and I agree that “judicial supremacy” is a mistake. The political question doctrine, the underenforcement thesis,⁴³ and the phenomenon of judicial deference all depend upon and fortify the license of nonjudicial actors to apply the Constitution more stringently than

39. *See id.* at 106-11, 208.

40. *See id.* at 208.

41. *See id.* at 241-45 (quoting Richard Parker, “Here, the People Rule”: A Constitutional Populist Manifesto 4 (1994)).

42. *See id.* at 128-44.

43. *See Sager, supra* note 5, at 84-128.

would the Court. I doubt that there are good arguments against such Beta license; and Beta license does not require that we fold, spindle, or mutilate the constitutional judiciary.

V. UNFORTUNATE RHETORIC

Perhaps because Kramer is of the view that questions of institutional authority and responsibility are at bottom questions of populist and anti-populist sensibility, he permits a bit of inflammatory rhetoric to serve as the heart of the argument in his prescriptive postscript:

Simply put, supporters of judicial supremacy are today's aristocrats. Once [sic] can say this without being disparaging, meaning only to connect modern apologists for judicial authority with that strand in American thought that has always been concerned first and foremost with "the excess of democracy."

....

The question Americans must ask themselves is whether they are comfortable handing their Constitution over to the forces of aristocracy: whether they share this lack of faith in themselves and their fellow citizens, or whether they are prepared to assume once again the full responsibilities of self-government.⁴⁴

(All those in favor of aristocracy and against self-government, please raise your hands!)

Now we are into territory where Kramer and I clearly disagree, not least about the characterization of our disagreement. There are three questions that need to be explored: (1) Do courts have some epistemic advantage in the enterprise of realizing the fundamental requirements of political justice? (2) Is the robust use of courts in furtherance of this enterprise consistent with a commitment to democracy? (3) Would we be better or worse off if Congress were more disposed than it presently is to act on its disagreements with the Supreme Court by impeaching Justices, stripping the Court of jurisdiction, shrinking or expanding the size of the Court, or encumbering the Court with disabling procedures or responsibilities? None of these questions is illuminated, I believe, by the oppositional vocabulary of aristocracy and self-government.

In *Justice in Plainclothes*, I argue that courts are reasonably well-suited—and in some respects, better suited than legislatures—to pursue questions concerning the fundamental requirements of political justice.⁴⁵ I base this claim on three propositions. First, *impartiality*: Federal judges (and world-wide, many high court judges)

44. Kramer, *supra* note 1, at 247.

45. See Sager, *supra* note 5, at 199.

are appointed rather than elected; more importantly perhaps, judges in many legal systems are made impartial by virtue of their obligation to articulate reasons for their decisions and to abide by those announced reasons in other cases.⁴⁶ Second, *specialization and redundancy*: Constitutional judges are like narrowly-focused quality control inspectors.⁴⁷ And third, *reflective equilibration*: Common law judges enjoy the epistemic discipline of coherence.⁴⁸

Now, in no useful way can these claims on behalf of courts be characterized as emanating from a case of aristocratic jitters. They are arguments on behalf of a set of political institutions that are structured so as to give us reason to hope that they will arrive at sound decisions in a narrowly circumscribed but important set of cases. This case for the epistemic virtues of adjudication is not beyond question. But it is sufficiently formidable to demand a response. The rhetoric of *we/they* or *elite/masses* does not offer a response. We are all in this political soup together, whether we sit as judges, serve as legislators, educate those who do these things, or merely assume the office of voter and participate in elections. In none of these roles are we entirely free to govern ourselves as individuals, as forty-nine percent of the people who participated in our recent presidential election are painfully aware.⁴⁹ In none of these roles are we or those in our judgmental cohort free from mistakes. But the different settings in which we as a people make decisions have different epistemic virtues and liabilities, which may help explain why constitutional courts were so attractive to the nations of Europe in the wake of World War II, and why they are so attractive to most of the democratic world today.

In *Justice in Plainclothes*, I argue that courts offer a distinct set of democratic virtues that we cannot realistically expect from legislatures.⁵⁰ There is nothing mystical or perverse about this claim. The idea is simply that when a constitutional claimant stands before a court, the force of her claim does not turn on the number of votes or dollars she can muster for her cause.⁵¹ Instead, the force of her claim consists in the success of her appeal to a scheme of articulate propositions of political justice embraced by the court in the name of the Constitution.⁵² The court is obliged to offer reasons for accepting or rejecting her claim that she is the beneficiary of that scheme,⁵³ and the court, in turn, is generally bound in future cases by the reasons it

46. *See id.* at 199-200.

47. *See id.* at 200.

48. *See id.* at 200-01.

49. *See* CNN.com, Election Results, at <http://www.cnn.com/ELECTION/2004/pages/results/president/> (last visited Jan. 24, 2005).

50. *See Sager, supra* note 5, at 203-05.

51. *See id.* at 203.

52. *See id.*

53. *See id.*

has given in past decisions, which is a discipline that not only encourages epistemic impartiality but that also encourages the democratic virtue of a careful response to the merits of the constitutional claim.⁵⁴ Just as legislatures offer the hope of *electoral* equality, courts offer these virtues, the virtues of *deliberative* equality.⁵⁵ The idea is not that courts are ipso facto more democratic than legislatures, or that democracy can only be realized by the inclusion of courts.⁵⁶ Rather, the argument is simply that democracy is not compromised by a nation that includes a robust constitutional judiciary within its portfolio of political institutions.⁵⁷ At most, there is involved in this institutional decision a trade-off between modes of participation in the processes by which the fundamentals of political justice are identified and secured within a political community.⁵⁸

Once again, this is an argument that could be put to contest. Perhaps Kramer is not moved by the virtues of deliberative equality. Or perhaps Kramer somehow believes that legislatures or the electorate at large are as capable of respecting those virtues as are courts. These do not strike me as plausible views, and they have not persuaded those charged with the responsibilities of shaping constitutional practice, especially in those countries where democracy has been hard and recently won. But there is surely room for illuminating discussion of these matters, especially if we abandon the shibboleths of aristocracy and self-rule.

VI. KRAMER'S WEAPONS OF CHOICE

If matters rested just here, and were rhetoric set to the side, Kramer and I would not seem in the end to be so very far apart. For all of his faith in the constitutional judgments that could emanate from the electorate via the officials they elect, Kramer purports to support judicial review. He only draws the line at something he calls “judicial supremacy.”⁵⁹ And I, notwithstanding the epistemic and democratic virtues of constitutional adjudication, believe that most important political questions belong to legislatures, not courts, that only a subset of those questions that fall within the rubric of political justice can properly be assigned to the Constitution, and that only a subset of those questions that are properly assigned to the Constitution are appropriate matters for judicial enforcement. But for Kramer, the abstract line between judicial review and “judicial supremacy” gives on to a recipe for institutional conflict that finds justification in neither his history nor his discussion, a prescription that I find hard to fathom:

54. *See id.* at 211-12.

55. *See id.* at 202-06.

56. *See id.* at 205-06.

57. *See id.*

58. *See id.* at 205.

59. *See Kramer, supra* note 1, at 128-44.

The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures.⁶⁰

"Judicial supremacy," it turns out, consists not in any substantive constitutional doctrine, or even in any general stance of the constitutional judiciary with regard to the questions before it. Rather, "judicial supremacy" consists of reluctance on the part of Congress to make war on the Court. The Court, Kramer insists, has become hopelessly "activis[t]"⁶¹ and has made its "grab for power."⁶² It is time now for the people (for which we can read Congress and the President) to assert the supremacy of their judgment over the meaning of the Constitution.⁶³

So let us imagine that there exists a group within our political community that thinks that a number of the Supreme Court's decisions are wrong. This group strongly disagrees with (a) the school prayer decisions;⁶⁴ (b) the abortion rights decisions;⁶⁵ (c) the women's right to equal treatment decisions;⁶⁶ (d) the First Amendment flag-burning decisions;⁶⁷ and (e) the gay rights decisions.⁶⁸

This group becomes, in current parlance, a critical part of one of the two major political parties' "base," and comes thereby to have significant influence on the behavior of that party's elected officials. There then comes a moment when that party (we can call it the R Party) narrowly elects the President—say by a ratio of 51% to 49%. Further, the Rs find themselves in control of both houses of Congress. What *worries* Kramer is that the Rs will be unduly preoccupied with the niceties of institutional stability and the perceived virtues of an independent judiciary. "Judicial supremacy" consists of not a doctrine but a political predisposition, pursuant to which open attacks on the judiciary are resorted to only *in extremis*. On Kramer's reading of our current collective disposition, the Rs are unlikely to spend the months following their electoral victory in crafting and enacting legislation that would, say, add three Justices to the Court, followed by the

60. *Id.* at 249.

61. *See id.* at 227.

62. *Id.* at 249 (quoting Larry Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 4, 169 (2001)).

63. *See id.* at 247-48.

64. *See, e.g.*, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

65. *See, e.g.*, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).

66. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190 (1976).

67. *See, e.g.*, *Texas v. Johnson*, 491 U.S. 397 (1989).

68. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003).

appointment of three Justices who are likely to reverse the offending decisions.⁶⁹ The Rs, he thinks, are unlikely to strip the federal judiciary of jurisdiction over these areas of constitutional disputation, and are even unlikely to find occupations for or impose procedural burdens upon the Court that will effectively disable it.⁷⁰ This for Kramer, remarkably, is a misfortune.⁷¹

There are several features of Kramer's argument that may be misleading in this respect, which may obscure exactly what he is asking for. One diversion is Kramer's apparent embrace of the New Deal (*Carolene Products* footnote four⁷²) "settlement," pursuant to which the Court robustly enforces its view of a select set of individual liberties, but defers broadly to state and federal legislative judgment in other areas.⁷³ Kramer's complaint is that the Court has overruled these announced boundaries,⁷⁴ by denying Congress Commerce Clause authority in *United States v. Lopez*⁷⁵ and *United States v. Morrison*,⁷⁶ and by tightening up on Congress's authority under Section Five of the Fourteenth Amendment⁷⁷ in the *City of Boerne v. Flores* line of cases.⁷⁸ This is a reasonable complaint—in large measure I agree with it, though it is by no means irresistible—and if what it meant to be in favor of popular constitutionalism and in opposition to "judicial supremacy" were that one opposed these recent decisions, then the only serious criticism of Kramer's thesis would be that his rhetoric was overblown. But though departure from the New Deal settlement disturbs many in the professoriate, there is no groundswell in the popular electorate to make the world safe for grandstanding federal legislation banning guns near schools. If the end of "judicial supremacy" means the beginning of dismemberment of the judiciary, it will be hot button issues in the domains of speech, religion, and equality that will be its target. So much for the New Deal settlement.

Another diversion from the brute thrust of Kramer's claim is his frequent suggestion that it is the "doctrine" of "judicial supremacy" that is at fault.⁷⁹ This suggests that there is in fact a legal doctrine

69. See Kramer, *supra* note 1, at 231.

70. See *id.*

71. See *id.* at 231, 249.

72. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

73. See Kramer, *supra* note 1, at 219-20.

74. See *id.* at 225-26.

75. 514 U.S. 549 (1995).

76. 529 U.S. 598 (2000).

77. See *supra* note 22.

78. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel, Jr. v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997); see also Christopher L. Eisgruber & Lawrence G. Sager, *Congressional Power and Religious Liberty After City of Boerne v. Flores*, 1997 Sup. Ct. Rev. 79 (1997); Eisgruber & Sager, *supra* note 21.

79. See, e.g., Kramer, *supra* note 1, at 253.

specifying various results in named circumstances that needs reshaping. In fact, though, all that Kramer has to complain about by way of this “doctrine” are expressions of judicial authority—and worse, claims about our constitutional history—within opinions of the Supreme Court. His prime exhibits are *Cooper v. Aaron*⁸⁰ and Justice Rehnquist’s opinion for the five-Justice majority in *United States v. Morrison*.⁸¹ Kramer’s allergy to this rhetoric seems extreme. In context, *Cooper v. Aaron* seems at worst a forgivable insistence on the robust, non-deferential role of the judiciary with regard to critical issues of racial justice, in the heartland of the New Deal settlement. Even *Morrison* has a complicated but plausible relationship to this settlement, because what Rehnquist is actually asserting is that it is appropriate for the Court in Section Five cases to insist that Congress’s legislation be reasonably understood as addressing what the Court would regard as a constitutional mandate in the area of individual rights. I find it hard to believe that this rhetoric has had much effect on anyone, least of all Congress and its constituencies, which is where Kramer seems to think that the real trouble lies.

VII. COURTING DISASTER

Having laid such great emphasis on rhetoric, Kramer seems at one point to locate his complaint about “judicial supremacy” in actual judicial outcomes, if not in anything that properly amounts to a “doctrine of judicial supremacy.” Referring again to Rehnquist’s opinion in *Morrison*, he describes his charge against the Court as follows:

The Chief Justice’s history is, as we have seen, deeply problematic. But that matters less than the neat way this passage encapsulates the overriding jurisprudence of the modern Supreme Court: a jurisprudence that treats constitutional limits as synonymous with judicial enforcement and that, as a result, calls for the Court to adopt an aggressive stance vis-à-vis the political branches.⁸²

But what are the instances of this “aggressive stance” that merit a congressional response on the drastic order of jurisdiction-stripping, court-packing, and more generally, court-crushing? Here, Kramer is oddly elusive. At one point, however, he finds it useful to characterize the Burger Court as the court that “fabricated the law of sex equality” and “invented a right to abortion.”⁸³ And perhaps this is Kramer’s real complaint: The Court has rendered a series of controversial decisions implicating religious liberty, speech, equality, and autonomy.

80. 358 U.S. 1 (1958).

81. 529 U.S. 598; see also Kramer, *supra* note 1, at 221, 225-26.

82. Kramer, *supra* note 1, at 226.

83. *Id.* at 229.

These decisions offend the political base of the Republicans, and perhaps Kramer himself. What seems to bother Kramer most is that he knows groups upset about these decisions have failed to seize the legal pitchforks available to them and wreak vengeance on the Court. If so, then we are back to the view that “judicial supremacy” consists of the failure of those who disagree with the Court to lash out at the Court as an institution.

If there is a set of decisions with which Kramer is willing to announce his disagreement on the grounds of “judicial supremacy,” it is *Lopez*, *Morrison*, and the *Boerne* line of Fourteenth Amendment, Section Five cases.⁸⁴ These cases he sees as trespassing directly on the judgment of Congress and as threatening the New Deal settlement.⁸⁵ Again, there is ample room for criticism in these cases; but it seems a bit on the order of Chicken Little to characterize them not just as wrong but as catastrophically wrong. After all, the Court has always insisted that the Commerce Clause⁸⁶ is not a warrant to do whatever Congress wants to do, and *Lopez* and *Morrison* addressed legislation that pushed at the margins of its already generous envelope; and subsequently, in *Pierce County v. Guillen*, the Court displayed a far more accommodating stance toward Congress.⁸⁷ And the *Boerne* line, despite its faults, has also taken a more accommodating turn in *Nevada Department of Human Resources v. Hibbs*.⁸⁸ In *Justice in Plainclothes*, I have written at some length about these cases.⁸⁹ As a group, they fall far short of the best adjustment of institutional responsibility. But they do not call for the strong medicine Kramer insists upon, and, as we have already observed, no one but us academics cares much about them. These cases, it bears emphasis, will not be the target of an aroused Congress; *Lawrence v. Texas*⁹⁰ and the rights of gays will.

Not surprisingly, *Bush v. Gore*⁹¹ also enters Kramer’s story, but in an odd way. Kramer pointedly declines to take sides on the merits of the case, but nevertheless sees in the failure of the Democrats to ignore or punish the Court proof positive of the degree to which the Court is being accorded too much authority in our political affairs.⁹² This is a curious position, one which somewhat undermines Kramer’s vision of popular deliberation over matters of constitutional substance. His assumption is that every member of Congress who wanted Gore to prevail in the election should have been willing to

84. *See id.* at 225-26.

85. *See id.*

86. U.S. Const. art. I, § 8, cl. 3.

87. *See Pierce County v. Guillen*, 537 U.S. 129 (2003).

88. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

89. *See Sager, supra* note 5, at 114-26.

90. 539 U.S. 558 (2003).

91. 531 U.S. 98 (2000).

92. *See Kramer, supra* note 1, at 231-32.

attack the Court, notwithstanding their view of the constitutional merits, their sense of the importance of orderly transitions of power, and their sense of the probable outcome if the Supreme Court had refused to act⁹³ (which I have no doubt would have been the better course). Having prescind from the merits, Kramer cannot see the case as an instance of overreaching. What *Bush v. Gore* seems most prominently to represent for these purposes is Kramer's unrequited taste for institutional discord.

Kramer's preferred response to *Bush v. Gore*—ignore or punish the Court for backing the wrong candidate—indicates much of the problem with his rough-and-ready prescription for popular constitutionalism. It is an open and fair question whether we or other constitutional designers would be better or worse off if there were a provision for a sober, reflective override of the constitutional judiciary by a popular political process. For reasons I set out in *Justice in Plainclothes*, and offer here only in a highly abbreviated form, I am not on the whole drawn to such an arrangement;⁹⁴ but governments are only beginning to experiment with such mechanisms in the United Kingdom and Canada, and they may prove themselves in the field. What I am more convinced of is that there is no failure of democracy, no dominance of an unhappily aristocratic sensibility, no deep structural shortcoming in our present institutional arrangements. And what I am most firmly convinced of is that Kramer's call for congressional attacks on the Court is deeply misguided.

Most of Kramer's book is devoted to history, and much of that history is attractive and interesting. But at the last moment comes his call for Congress to take up arms against the Court. And it is easy to read that call as the point of the book. The weapons that Kramer calls on Congress to take up do not invite or facilitate deliberation. Far from selecting for reproof those judicial decisions that are inconsistent with the New Deal settlement, those weapons will surely target the Court's unpopular decisions on behalf of liberty and equality. Far from prompting dialogue or encouraging deference, those weapons are intended to silence or displace the Court on the strength of brute political force. An open call for their deployment is at best perverse and at worst irresponsible.

93. *See id.*

94. *See Sager, supra* note 5, at 213.