

2005

## Tempering Supremacy

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### Recommended Citation

Benjamin C. Zipursky, *Tempering Supremacy*, 73 Fordham L. Rev. 1463 (2005).  
Available at: <https://ir.lawnet.fordham.edu/flr/vol73/iss4/8>

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## Tempering Supremacy

### Cover Page Footnote

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# TEMPERING SUPREMACY

*Benjamin C. Zipursky\**

## INTRODUCTION

Larry Kramer's *The People Themselves*<sup>1</sup> appears to argue the following: the Constitution has, until the past few decades, been understood as a repository of fundamental law that was made and was to be interpreted by the people themselves. Since shortly after the founding, Americans and their politicians and constitutional theorists have recognized some place for judicial review on constitutional questions, but this was not generally understood to involve judicial supremacy. The people themselves were normally taken—despite frequent movements to the contrary that were unsuccessful—to be ultimate interpreters of the Constitution. But in the past few decades, and in particular, in the past ten years, the United States Supreme Court has seized the power not only to engage in judicial review, but also to be the ultimate arbiter of constitutional meaning. And the Court has falsely represented that this has always been our nation's constitutional understanding of the allocation of ultimate interpretive authority. This shift in ultimate interpretive power has been proceeding, without argument or precedent, and has transferred, in effect, a significant amount of power to the nine individuals on the Court. Kramer's critique culminates in a demand that the Court should stop engaging in its power-usurping and unjustifiable decision making practices and, in any case, the public should stop passively putting up with it.

My main critical claim is that Kramer's critique cannot be sustained within the framework that he advances. On the other hand, I argue that some of the spirit of his critical conclusions can be sustained, at least in significant part, within a somewhat less innovative framework of constitutional theory. I shall argue that at least for the provisions that seem to concern Kramer the most—Article I powers—the Court should be understood to have—at least *prima facie*—supreme authority in interpreting the Constitution. However, I will also contend that the materials of Kramer's argument suggest that the Court should understand itself as having a responsibility to temper its

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

conception of its own supremacy so as to display proper respect for the project of constitutional democracy. In short, I shall argue against the more aggressive version of Kramer's thesis that the people themselves are the supreme constitutional interpreters, but offer some support (at least in principle) for a weaker version of it: that the Court ought to take seriously the reasons for deference sounding in constitutional theory. The Court ought to credit a view in which its supremacy in review of Article I powers is tempered by respect for Congress and the people, by understanding the congressional ability to capture the people in a broad sense, by awareness of its own fallibility as decision maker, and by recognition of the peculiar status of constitutional law and judicial supremacy in our national experience.

I have two questions with regard to Kramer's effort to argue that interpretive supremacy in constitutional law belongs to the people themselves. The first is whether Kramer's idea of the people themselves interpreting the Constitution can withstand scrutiny. The second is whether Kramer fully confronts the strength of the argument for judicial supremacy, at least in certain domains of constitutional law.

## I. WHO IS "THE PEOPLE THEMSELVES" AND WHAT HAVE THEY SAID?

### A. *The People Themselves*

Kramer offers a depiction of the framers' understanding of constitutional law that is in some ways quite conventional and in other ways quite ambitious. A central—and I believe quite plausible—claim is that constitutional law was understood as fundamental law, or basic law. What is meant by fundamental law, according to Kramer, is complex, but it is in significant part norms that together constitute an understanding of what shall have the status of law.<sup>2</sup> "Fundamental law" does not, contra some other constitutional theorists (Kramer seems to have Dworkin in mind), connote anything about fundamental moral precepts that courts are well equipped to interpret.

A second contention is that the meaning of the Constitution is to be determined by the people themselves. Now this second contention could be taken in a few different ways. At one level is the claim that the status of constitutional law as positive law depends not on whether some sovereign has commanded it, but whether the people themselves

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2. See *id.* at 10, 19. Kramer's effort to downplay the significance of *Dr. Bonham's Case* is not about whether constitutional law is fundamental in this sense, but about whether the courts have the authority to use the Constitution to strike down legislation. See *id.* at 19-20.

have agreed to it. It is the people's ratification that counts, or counted. At another level is the assertion that what parts of the Constitution mean is a matter of what the people meant or understood or intended in ratifying it. Let us assume that both of these are true.

Where Kramer seems to want to arrive is a third contention: that what the people today interpret the Constitution as meaning is what ought to be considered most authoritative on what the Constitution means.<sup>3</sup> Now I believe there are several problems with drawing this conclusion. At the moment, I want to look at two such problems: (1) the view of the people (today) regarding what the Constitution means has no clear relevance to (or probativeness of) what the Constitution means, and (2) it is difficult to ascertain what view the people (today) hold of what the Constitution means, because it is difficult to know what counts as an expression of such a view.

The first should be obvious: It does not follow from the fact that the people ratified the Constitution that what the people believe now is meant by constitutional provisions ought to be considered authoritative. This is so for any number of reasons. Obviously, the people then and the people now are different. There is, of course, continuity. But if the premise of the argument is the privilege attaching to self-knowledge about meaning ("I know what I meant"; "we know what we meant"), continuity is not enough. Obviously Kramer would want to concede that the public body is not especially expert in the history of the intentions of the framing generation. In addition, he does not push an account according to which the key is to understand the intentions of *the people at that time*. The problem is that the observation that the Constitution is the people's law does not yield any obvious payoff for the authority of "the people" now. The most straightforward route for getting there does not work, for it depends on an equivocation in what "the people" refers to.

Let me make this argument a bit more specific. First, if the written Constitution is law—and I believe that Kramer and I agree that it is<sup>4</sup>—and if we assume for the purposes of argument that the beliefs or intentions of the maker of the law is relevant to what the content of the law is, then it would be the actual maker, not the successor, whose views count especially heavily. While it may well be that there is great legal authority in a post (like Congress or the President) whose actual occupant changes over time, and while I would be willing to accept that "the people" could be understood in this manner, it does not follow that interpretive authority on the meaning of the law goes with the post. A natural, though not necessary, inference might be that the

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3. *Id.* at 227, 248.

4. *Id.* at 24.

prerogative to amend travels with the post, but this is not what Kramer is suggesting.<sup>5</sup>

One might think that the criticism I have articulated—“the people now are not competent to say what the people then thought”—is improperly tied to a version of original understanding involving the people as ratifiers. I do indeed believe that the lure of Kramer’s position may be related to this sort of slippage. But this is not to say that my critique would diminish in strength if Kramer’s view were attached to another sort of understanding of what determines constitutional meaning (as it is). Consider a textualist account of constitutional meaning. Why should the people be expert on what the text of the Constitution means? The idea that it is “their” text carries no particular weight, for it is not true in any meaningful sense; they did not speak it in any sense pertinent here, and while it is theirs in the sense that it is the people and the people alone who can change it, we are not talking about amendment. Of course, one might argue that the Court is not any more expert on the text—that there is no expert on the meaning of the text. But here, again, I am not sure that this is true. The Court is able to do more detailed history, more detailed interpretation, repeated applications, and, of course, it has much greater familiarity with law.

Indeed, I (like Kramer and most other lawyers and theorists) am skeptical that any pure version of originalism or textualism will be adequate.<sup>6</sup> Interpretation of the Constitution is a particular kind of activity subject to a wide variety of practical norms, which point to history, text, intention, coherence, and many other considerations. To be sure, lawyers do a lot of it, and their activity is in many ways better developed than non-legal interpretation of documents like constitutions. As Sanford Levinson has pointed out, views about expertise in interpretation involve their own judgments (political, moral, institutional, and other) in a variety of ways.<sup>7</sup> But this is far from an argument that the people (today) do have great expertise. And it is far from denying that courts have greater expertise than the people (now). The tempting idea—that because we are a democracy and were designed as such, because the framers understood the people’s ratification as central, and because there was among legal constitutional theorists well-justified concern about too arrogant and too aggressive a judiciary—does not add up to an argument that the people (now) have a special competence in constitutional interpretation. They do not even add up to an argument that their competency is greater than or equal to that of courts. This is not to say that I have an argument for judicial prerogative in interpretation (that will come later) or that I reject arguments for certain forms of

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5. *Id.* at 52-54.

6. *Id.*

7. See generally Sanford Levinson, *Constitutional Faith* (1988).

judicial deference and attentiveness to the people; I accept such arguments, but that, too, will come later.

### B. *Expressions by the People Themselves*

A second problem is that Kramer does not adequately explain how the people could express their interpretive views. The most obvious suggestion is that they do so through Congress, but then it seems we are talking about a conflict between branches, not between the judiciary and the people. And, of course, by putting the phrase “the people themselves” in his title, Kramer is deliberately emphasizing that he does not mean to be referring to the people “through” another body, such as a legislature. Perhaps the ratification of the Constitution, as well as the amendment procedures, by not depending on any one body, are meant to be instances of “the people themselves.” But then, of course, we have Article V, and we are not talking about interpretation any longer.

At some points in the book, Kramer mentions events in which the people express themselves on the occasion of particular elections, and these moments are ones that he sees as expressing the people’s will on a certain issue.<sup>8</sup> Yet these moments are few and far between both in the book, and, I would conjecture, in American history. And on such occasions, the decisions are not expressly issue-specific, and so it is hard to believe that Kramer really wants to commit himself to the view that these episodes can safely be understood as interpretive acts of the people themselves.

At certain points in the book, Kramer expresses the interesting view that the people manage to retain primacy not by virtue of any one special branch, but by virtue of the fact that no branch (or process) is special.<sup>9</sup> In this sense, one might say, “the people themselves” refers to the distillate of the people through a variety of different branches. If Kramer’s view were simply that Congress must be “preferred” (no branch, as such, is preferred, even—or especially—the judiciary) as the authentic expression of the people, this view would have its own problems. But that, apparently, is not quite Kramer’s view. Yet even if this view escapes some problems, it more deeply entrenches the problematic dependency of Kramer on the interpretation of the phrase “the people themselves.” For it makes the views of “the people themselves” virtually impossible to identify, as a practical matter. And as a theoretical matter, it casts serious doubt on the already problematic idea that there is such a thing as an interpretation accepted by “the people themselves.”

Much of the most interesting history and the most evocative political discourse in the book would appear to address this precise

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8. See Kramer, *supra* note 1, at 49 (discussing the election of 1800).

9. See *id.* at 109.

problem, but in fact creates further confusion. Thus, for example, Kramer refers at several junctures to public protests, to mobbing, and to a variety of other expressive activities of “the people,” in response to their dissatisfaction with judicial interpretations of parts of the Constitution.<sup>10</sup> It appears that these are examples of the people themselves expressing their views of constitutional meaning. And, indeed, Kramer invites the twenty-first century American public to take to the streets, to say, like William Holden in *Network*, that “we are not going to take it (judicial usurpation of power) anymore!”<sup>11</sup> These seem to be reported (and proposed) instances of the people themselves engaging in constitutional interpretation. But there is no way to read constitutional interpretation by the people from such episodes. Rather, these are acts of public resistance to the courts, and expressions with public disapproval of, and disagreement with, the courts’ approach. They may or may not be warranted, but they do nothing to answer the problem of how the Court should be ascertaining what the people think the Constitution means.

## II. AN ARGUMENT FOR JUDICIAL SUPREMACY IN CONSTITUTIONAL INTERPRETATION

I turn now to an affirmative argument for judicial supremacy in at least some areas of constitutional interpretation. The argument draws from a recent article by Matthew Adler and Michael Dorf.<sup>12</sup> I shall ultimately offer a qualified defense of part of their thesis.

If a court is asked to resolve a controversy between litigants brought before it, the court will have to decide what the law is. Implicit in this task is deciding whether what litigants assert the law to be is in fact valid law. For if it is not valid law, then it cannot be applied as law. But determinations of whether the putative law is valid law frequently require determinations of whether the putative law violates the Constitution. On this question, the courts are required to engage in judicial review. If the judiciary is supposed to resolve the case or controversy definitively, which Article III contemplates, then its decision must be supreme. In Adler and Dorf’s terms, constitutional provisions express conditions for the existence of statutory law as valid law, they express “existence conditions.”<sup>13</sup>

My argument, like Adler and Dorf’s, is a variation on a quite widely adopted interpretation of Justice Marshall’s argument in *Marbury v. Madison*:<sup>14</sup> as the judiciary must apply the law and doing so sometimes integrally involves pieces of constitutional interpretation, the judiciary

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10. *See id.* at 27-28.

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

12. Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 Va. L. Rev. 1105 (2003).

13. *See id.* at 1108-09.

14. 5 U.S. (1 Cranch) 137 (1803).

must weigh in on constitutional interpretation. Add to this that, as to particular cases and controversies, the judiciary is supreme, and one has an argument for judicial supremacy on at least some issues of constitutional interpretation. Kramer confronts closely related arguments; he offers a fascinating account of *Marbury* as a political finesse by Marshall (rather than as a true argument in constitutional theory), and he offers many arguments against treating constitutional law as ordinary law, but I am not persuaded that he confronts this basic argument.

One of the reasons Kramer finds the judicial supremacy argument implausible is that so many other countries—like Canada—have found it entirely plausible to permit judicial review but not judicial supremacy. If it really is essential to the very idea of constitutional rights, why is it that the world is full of intelligent and thoughtful legal systems that have constructed something that more adequately recognizes the ultimate power of the people, and nevertheless conceives of itself as a constitutional democracy with judicial review?

It seems to me that the Adler/Dorf argument for judicial review depends on the claim that the constitutional provision in question is what H.L.A. Hart called a “power-conferring rule”<sup>15</sup> or, more generally, a power-constraining provision. More precisely, it must be a constitutional provision that the judiciary could only plausibly understand as constraining, conferring, or defining the power to make law of whichever body in question created the law the application of which is properly before the Court. In such cases, the argument for judicial review is a very powerful argument for *de jure* judicial supremacy, not simply for judicial review. For if the Court is required to apply the putative law, and if the status of the putative law as law is at issue by virtue of questions about the power of the relevant entity to make law (such as that before the Court), then it follows that the Court’s power to decide the case entails the power to decide upon the status of the law as valid law.

I hope it is evident why I think that this is not a particularly palatable line of argument for most liberal constitutional theorists. It is because the argument is especially promising as a means for defending judicial supremacy where the scope of Article I powers is at issue, as in *Lopez*<sup>16</sup> or *Morrison*.<sup>17</sup> In those cases, a litigant has asked the Court to affirm lower court action premised on the defendant’s having violated a law that Congress claimed Article I (or Fourteenth Amendment Section Five) power to create. The defendant argued to the Court that the putative law was not valid, because it went beyond congressional power. The Court’s Article III power to decide whether

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15. See generally H.L.A. Hart, *The Concept of Law* (1994).

16. *United States v. Lopez*, 514 U.S. 549 (1995).

17. *United States v. Morrison*, 529 U.S. 598 (2000).

Congress had the power to make the law is implicit in its Article III power to decide whether a federal law was violated. Indeed, the people themselves granted the power to create federal law, but granted limited power. The rights of the litigants to the resolution of the case as a matter of law requires a decision on whether the putative law is valid law, absent some affirmative reason to defer on the question of validity or to presume validity. But then there is a decision on the validity of law, albeit one encompassed within a framework of deference or presumption. And that decision is supreme. I am not arguing against such deference or presumption (and indeed, I am inclined to argue for it), but it is the judiciary's power to choose to defer. This is what I mean by "de jure judicial supremacy." It may well be that an adequate understanding of our constitutional system would lead, ultimately, to a judicial adoption of congressional supremacy on these issues, as James Bradley Thayer perhaps would have liked.<sup>18</sup> But this would be, in an important sense, a lack of "de facto judicial supremacy," as I shall call it.<sup>19</sup>

Now what I believe is most interesting about this line of analysis is that it does not necessarily lead to de jure judicial supremacy on all issues of constitutional interpretation. Most strikingly—and perhaps, again, most disappointingly—it does not necessarily lead to judicial supremacy for some provisions of the Bill of Rights. The Fourth Amendment, for example, provides that people shall be secure against unreasonable searches and seizures.<sup>20</sup> This is quite naturally interpreted as imposing a (negative) duty upon the government to refrain from engaging in certain kinds of actions against private persons, and, correlatively, conferring a right upon individuals against such governmental conduct. One need not interpret this as conferring, constraining, or limiting, any lawmaking power. Of course one could do so; one could view it as rendering invalid laws requiring public employees to submit to drug searches, for example. Indeed, I happen to be very sympathetic to understanding Fourth Amendment rights as having extensive implications regarding the validity of various laws, and the propriety of judicial review and judicial supremacy for them. But I see a cogent way (in principle, if not, perhaps, given longstanding doctrine) to understand the Fourth Amendment as leaving open this question: We do not have to understand the people themselves as having limited Congress's lawmaking powers by enacting the Fourth Amendment.

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18. See Lawrence G. Sager, *Justice in Plainclothes: A Theory of American Constitutional Practice* 89-90 (2004) (discussing Thayer's rule of clear mistake).

19. As I understand it, decisions like *Lopez* and *Morrison* are part, but not all, of what Kramer believes displays an unjustifiable attitude toward judicial supremacy on the Rehnquist Court. See Kramer, *supra* note 1, at 225; see also Larry D. Kramer, *Foreword: We the Court*, 115 Harv. L. Rev. 4 (2001).

20. U.S. Const. amend. IV.

It would be wrong to think, however, that just because some rights provision is duty imposing, it is not also power constraining. The Free Speech Clause of the First Amendment states specifically that Congress shall make no law abridging the freedom of speech.<sup>21</sup> This clause is most naturally understood as both duty imposing and as power constraining. And note that one might very naturally adopt a general interpretive norm, for historical, moral, political, jurisprudential, or other reasons, saying that duty-imposing provisions of the Bill of Rights are to be understood as simultaneously power constraining (indeed, it appears that the Court has done so). But it strikes me that to the extent that this is an open issue, and that there is no independent argument for supremacy on that issue, it cannot be established that there is *de jure* supremacy on those rights provisions.

If this account is along the right lines, then we can see why judicial supremacy is, at least *de jure*, a strong part of the American system but not part of many other nations' systems. It is because the federal government was created by the framers as a government of limited powers. To the extent that Kramer is right to view the Constitution as fundamental law, a significant part of the fundamental law is defining the powers of Congress to make law. In conjunction with a broad Article III, that fundamental law entails judicial supremacy.

Insofar as a country like Canada includes a "notwithstanding clause," it is not geared to power-conferring or power-constraining rules as such. It is geared to constitutional provisions as duty-imposing rules. A court that interprets this sort of constitutional provision is, arguably, like a court interpreting a statute forbidding a certain kind of conduct, so that the constitutional provision is understood as an importantly entrenched, initially judicially reviewable, but not ultimately legislatively immutable provision forbidding conduct of the legislative branch itself. Then the legislature holds the power to interpret the Constitution, *qua* norms governing state conduct, in the way it chooses: in this sense, it has placed in the Constitution something that is applicable to itself and interpretable by the judiciary, but can be overridden by the legislature. It is therefore not a power-constraining rule. It is true that Dworkin and others have argued that the whole idea of rights sometimes entails protection from majority expression of will. But even if we assume that this insight militates against a constitutional structure that would permit the people (via a legislative body) to be supreme, the insight is not directly responsive to the claim that it is *legally cogent* to treat the people (or Congress) as supreme in this respect.

The reason that our system requires some modicum of judicial supremacy is that the central provisions of Article I are power-

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21. U.S. Const. amend. I, cl. 2.

conferring rules, and that Congress is treated, by the people's constitution, as having its powers because of Article I. One could do what Ackerman does, and claim that Article I was amended informally in the New Deal years by the people.<sup>22</sup> I do not accept that, and I doubt that Kramer does either. If this is right, then *Lopez* and *Morrison*, like *Marbury*, are squarely in the area of judicial supremacy. The Eleventh Amendment cases are closer, but in the end, it is very plausible that the Eleventh Amendment diminishes the judiciary's power under Article III, and relatedly diminishes Congress's power under Article I to create federal law that leads to certain kinds of cases under Article III. If that is so, then Eleventh Amendment questions are proper ones for judicial supremacy (note that the key to this argument for judicial supremacy in constitutional interpretation has nothing to do with a branch's being the judge in its own case).

Of course, Kramer's comment about other nations' constitutional systems (and the lack of supremacy) is only one among many arrows he aims at judicial supremacy. But I think this model permits us to evaluate a broader set of reasons and arguments. First, insofar as state judicial review, and historical conceptions of judicial review are part of his basis for arguing that we have abandoned the historical understanding of judicial review, this is not necessarily fully on point; state constitutions did not, in the way the Federal Constitution did, create the power to make law, so much as constrain it and/or declare obligations of the states. Second, during the early period of the nation, it was not as obvious as it is now that the people who created the Constitution (and who knew what they meant) were no longer in existence. More to the point, it is not clear to me that those who railed against judicial review and judicial supremacy grasped the fact that a day would come when the Constitution as law was detached from those who in fact made it, so that the phrase "the people themselves," apart from Article V, did not have any clear referent.

Third, some of Kramer's arguments about judicial supremacy and court-centered views of constitutional interpretation express a sort of skepticism about the lawyers' and judges' culture of legal interpretation. It is as if some thinkers believe the methods of legal reasoning taught in law school and practiced by judges and lawyers really do get to meaning better than an intelligent person's interpretation. Kramer is wary of such claims, and seems to believe a sort of dogmatic faith in this contingent and conventional methodology is part of the reason for judicial supremacy in constitutional interpretation. I share some of Kramer's skepticism about methods of legal reasoning, but I think the argument I have drawn from *Marbury*, and from Adler and Dorf, casts the debate in a

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22. See Bruce Ackerman, *We The People: Foundations* (1991).

different light. When we are bringing constitutional interpretation into the discussion not (as, for example, Lawrence Sager sometimes wishes)<sup>23</sup> for inspiring or undercutting legislative or executive projects, but actually for determining the validity of a piece of law in the context of judicial application to which litigants have a right, then the issue of constitutional interpretation is placed, by virtue of the question, within a judicial setting in which norms of legal reasoning are in place. While this may leave open a variety of questions about the Constitution outside the courts (perhaps about the permissibility, appropriateness, or requiredness of conduct), it does not leave open questions about cases like *Lopez* and *Morrison*, or, more generally, cases where the validity of law must be decided in order to determine a litigant's legal rights, because what is at issue is whether putative laws are valid in light of what the litigant asserts was a limitation on the power of the government making law.

I take it that the largest set of reasons motivating Kramer's rejection of judicial supremacy is none of those mentioned above. It is, rather, a set of political theoretic concerns that he would advocate with full force now and that do not particularly track the power/validity issues. As to the concerns that really motivate him, it is not just the facts of history as a matter of original understanding as authority to which he is appealing. It is that these political theoretic concerns are sound and are far more continuous with understandings throughout our history than the current views of judicial supremacy. As indicated below, I do not believe that my acceptance of what I call *de jure* or *prima facie* judicial supremacy precludes my acceptance of this larger set of reasons. I turn to these now.

### III. A SOFTER ARGUMENT AGAINST JUDICIAL SUPREMACY

There is a softer interpretation of what Kramer is up to. Although less provocative, this softer view is far more defensible, is fairly widely held, and is a view that Kramer himself has articulated and embraced here, and which an earlier essay of his nicely anticipates.<sup>24</sup> The softer view is that it has always been part of our shared understanding of the political culture of constitutionalism that the judiciary should be hesitant to exercise its power to interfere with what is in the first instance the activities of other branches. It should be judicious. The reason is that the very idea of a constitutional democracy carries with it tensions between the system as a system of the people, and the system as an enforceable system of law. Because the root idea is that through representative democracy something will happen which is

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23. See generally Sager, *supra* note 18.

24. See Larry Kramer, *Judicial Asceticism*, 12 *Cardozo L. Rev.* 1789, 1797-98 (1991) (criticizing Justice Scalia for his unwillingness to accommodate the fact that constitutional adjudication ultimately requires exercises of judgment, and cannot rely upon firm objective rules).

called lawmaking and self-government, there is a *prima facie* worry about interference. To put it differently, given that every entity that has power sometimes exercises that power poorly, we can know in advance that the Court, if it interferes too often, will frequently exercise its raw power poorly. When it does, the result will be a usurpation of the people's proper power. This is a very serious kind of event in our system, one which the Court should strive mightily to avoid. That means that the Court has a substantial reason to hesitate in striking down legislation. In effect, therefore, it will often have good reason to abide by a norm of deference in interfering on these matters. The Court's New Deal openness on Article I powers was not an innovation, in this view. It was a return to a well-entrenched, fundamental norm of our popular democracy. In its recent foray of aggressiveness on Article I review, the Court has wrongly been dismissive of these norms. And note that in the Article I-power debate, the recognition of other means of state input on power-sharing issues is particularly apt (more apt, for example, than on individual rights).

Why do I call this view softer? It is softer for many reasons. First, and most importantly, it ultimately depends on a claim about a norm of deference. This is less aggressive and less sharp than a claim that the prerogative to interpret the Constitution lies, ultimately, with another branch. It is less aggressive because the power is ultimately the Court's and it is an affirmative decision to exercise it sparingly—as opposed to the power's being either nowhere at all to begin with, or with the people, or with Congress and Kramer's claim that the Court should not take it away. I do not want to overemphasize this point, for if the norm of deference is deeply rooted and fundamental enough, then it is somewhat misleading to say that, in the first instance, the power is with the Court.

Second, it is softer-edged because we do not know just what deference amounts to, what it means, or what "level" of deference is required. To this extent, we rely upon exercises of judgment. In discussions with Kramer, and in his writings, one can see that he is tremendously disturbed by the Rehnquist Court's display of poor judgment. He is sometimes quite candid in his book about the legal academy's lack of judgment too—as, for example, when he claims that it would be fatuous to deny that the Burger Court was activist.<sup>25</sup> Now of course we all want, in our theoretical work, to be able to go beyond saying that some legal actor is wrong because he or she has displayed poor judgment. But I think there are many ways to go beyond this. One of the points of providing history as rich and detailed as Kramer's is to place what we are doing in context, so that we do not display the vices of judgment that come with ahistoricity, self-centeredness, self-

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25. See Kramer, *supra* note 1, at 229.

importance, and self-absorption. To say that judicial supremacy must be tempered by judgment free of these vices is perhaps to be more vague and philosophical sounding than Kramer would like. But if it is really meant seriously, it is not a trivial claim at all.

Third, the tempered supremacy I am articulating is softer because it is rooted more in a historical self-understanding, and an entrenched practice, than in a political theory as such. This risks the objection that it is question begging, for one might argue there should be a political theoretical defense of the claim that historical self-understanding and entrenched practice has normative force. Again, because it is not only rooted in those, I do not want to overemphasize the softness point.

Together, these three kinds of “softness” regarding the tempering of supremacy are significant. For what they mean is that there is nothing categorically wrong or categorically illegitimate with judicial review or adherence to, and enforcement of, judicial supremacy. Not only is the raw power in the Court to declare legislatively enacted provisions of law unconstitutional and then to adhere to that determination in the face of public opposition, but it is entirely possible that the proper power to do so is there, too. The question of whether a Supreme Court that adheres to its own view in the face of public opposition has overstepped its legitimate bounds is not a matter that constitutional structure, political theory, or history will answer as a categorical matter. It will depend on how well the Court is exercising its judgment in declining to defer to what is frequently a more popularly expressive view. This is a judgment that must be exercised within a system that depends *both* on taking constitutional law seriously as a constraint on lawmaking *and* on judges as capable of appreciating the delicate balances involved in constitutional democracy and on deferring where an appropriate harmonization of these forces requires doing so. To the extent Kramer is suggesting that a judiciary is unlikely to exercise its judgment well if it fails to attend to a political and historical backdrop within which the harmonization must be realized, he is right. But unless the norms of deference to the people present themselves in a manner ready for application—and Kramer must, at some level, be aware that they do not—the tempering of supremacy is a messier business than Kramer sometimes concedes. More precisely, the current Court’s failure to defer to Congress and other expressions of popular will does not, *contra* Kramer, reveal a misconception of the proper scope (and strength) of judicial review or judicial interpretive authority. To the extent that the Court ought to defer, its failure to do so manifests poor judgment on the issue of when judicial authority should be exercised in a manner that displays respect for the democratic process and

project, or, in a phrase of Martin Van Buren's that Kramer highlights, "a proper respect for the people."<sup>26</sup>

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26. *Id.* at 246 (quoting Martin Van Buren, *Inquiry into the Origin and Course of Political Parties in the United States* 352 (1867)).