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# Behind the Words (Book Review)

Gary L. McDowell
*University of Richmond*, gmcdowel@richmond.edu



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# Behind the words

GARY L. McDOWELL

Larry D. Kramer

THE PEOPLE THEMSELVES

Popular constitutionalism and judicial review
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In the United States, judicial review, the power of courts to declare legislative acts unconstitutional, has had something of a tawdry past. It was after all, the Supreme Court in Dred Scott *v* Sandford that prohibited Congress from dealing with slavery, leading, some argue, to the Civil War. So, too, was it the highest court that decreed in Plessy *v* Ferguson that racial separation was constitutionally permissible. And, of course, it was the Supreme Court that first created a new right of privacy in Griswold *v* Connecticut, then contrived a right to abortion in Roe *v* Wade, and, most recently, stumbled on a constitutional right to homosexual sodomy – none of which has textual support in the Constitution itself.

The political uneasiness that such decisions spawn derives from the absence of any explicit provision for judicial review in the Constitution. Nor do the records of the Constitutional Convention offer any clear evidence that it was intended. The first real argument for such a power came from Alexander Hamilton, late in *The Federalist*, and it would form the basis of Chief Justice John Marshall's landmark opinion in Marbury *v* Madison establishing judicial review in 1803.

From Marshall's day to our own, so argues Larry D. Kramer in *The People Themselves: Popular constitutionalism and judicial review*, it has largely been downhill. The power of judicial review has been transformed into an ideological doctrine of judicial supremacy – the belief that the Supreme Court, and the Supreme Court alone, has the final word on the meaning of the Constitution. Yet, by Kramer's reckoning, amid that gloom there was something of a golden age of "popular constitutionalism" – largely the Jeffersonian and Jacksonian periods – when the people took seriously the idea that they, not the courts, were to be the final authority on constitutional meaning. It is to this age that the neo-Jeffersonian Kramer would have the nation return.

Kramer's thesis is not that judicial review is illegitimate, but that it is not absolute. In place of what he sees as judicial supremacy, he would recover a notion of departmental review, in which each of the three branches of government, the legislative and executive as well as the judicial, would be understood to have a free hand to interpret the Constitution. Should there be a variance between them, it would then fall to the people in their collective capacity to clear up the confusion and establish the true meaning.

The problem is that the theory of "popular constitutionalism" advocated here rests on a primitive understanding of popular sovereignty. Kramer sees "the people" as a sovereign collectivity, but one that is constantly moving, regrouping, and responding to questions of constitutional meaning as they arise over time. For Kramer, "the people" is no mere abstraction; it means the real unwashed rabble of the moment. This stands in stark contrast to the leading Founders' deeper and more sophisticated notion of popular sovereignty. In their view, "the people" was understood as a collective entity with sovereign power but one that, for the sake of stability in constitutional matters, would come together only infrequently for the purpose of establishing constitutional meaning.

A written Constitution of enumerated and ratified powers and limitations was a way of expressing the sovereign judgments of the people, properly understood, and giving them concrete expression as the fundamental law. Those principles, once agreed, were to be "deemed fundamental" and "permanent", Chief Justice Marshall argued, and thus "the great duty of a judge" in interpreting the Constitution was to "find the intention of its makers". This was why Hamilton argued in *The Federalist* that the Constitution embodied "the intention of the people". And because it did so, he argued, mere interpretation could not change its original meaning. That could only be done by "the people" engaging in the "solemn and authoritative act" of formal amendment. It was the process of amendment that James Madison understood to be the "constitutional road to the people" that the Founders "marked out and kept open for certain great and extraordinary occasions", as opposed to his friend Jefferson's hope for a more frequent and direct resort to the people on fundamental questions.

But that direct and frequent resort to the people is what Kramer advocates. He would happily sweep away the cautious logic of Marshall, Hamilton and Madison in favour of leaving constitutional meaning dependent on the changing expression of the then-current will of "the people". The danger is that there would be no real stability, no real security for the rights meant to be protected by a limited Constitution of fixed and knowable meaning.

There is no doubt that judicial review has been, and will be, abused by judges who supplant the original constitutional meaning – the true "intention of the people" – with their own moral or political judgments. But the solution is to figure out a way to bind judges, to borrow Jefferson's words, by "the chains of the Constitution", not to reduce that fundamental law itself to nothing more than the fluctuating spasms of contemporary popular zeal. And indeed, the author may well come to regret even suggesting such a thing.

At least three proposals have recently been discussed in Congress that would strip the federal courts of certain aspects of their jurisdiction – the Pledge Protection Act, the Constitution Restoration Act, and the Marriage Protection Act. And all have applauded Kramer's central thesis that the meaning of the Constitution is to be decided by "the people themselves", rather than by life-tenured, politically immune judges. He has become the poster boy for conservative critics of the courts. And, given the ideological realities of American politics today, Larry Kramer's argument is far more likely to be used against views he and his fellow liberals deem correct than vice versa.