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# Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Culture

DONI GEWIRTZMAN\*

## INTRODUCTION

In 1981, Richard Parker, then an up-and-coming constitutional theorist at Harvard Law School, issued a call to arms to his academic colleagues from the “generation of the 1960s.”<sup>1</sup> A year earlier, John Hart Ely and Jesse Choper had released a pair of books that sought to reconcile judicial review with core principles of democratic self-governance.<sup>2</sup> Each had sought to limit the Supreme Court’s institutional role by allocating much of the responsibility for defining constitutional values to the representative branches, confining the Court’s mission to safeguarding democratic processes from malfunction.

Ely and Choper’s fatal error, according to Parker, was their conclusion that American representative democracy is—for the most part—alive and well.<sup>3</sup> Parker reminded them of the large numbers of Americans who do not participate in the political process, questioned whether citizens can rely upon their representatives to reflect their interests, and underscored the difficulty many citizens have in determining what their own interests actually are.<sup>4</sup> He accused them of “obscur[ing] our biased, withered politics in a fog of apologetic rhetoric,” and justifying a political system that “consecrates the domination of our polity by the politically effective few and the reduction of the rest to more or less passive consumers of the ministration of government.”<sup>5</sup>

Parker called upon his generational cohort to move constitutional theory in a new descriptive and normative direction, reminding his contemporaries that they “grew up in an era when it was virtually impossible to feel comfortable with the status quo.”<sup>6</sup> In response to Choper and Ely, he urged constitutional theorists to not only adopt a realistic and more critical view of American

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1. Richard Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981).

2. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980).

3. As Parker describes Ely and Choper’s theory, while governmental decisionmakers are responsive to majoritarian interests, minority interests are generally accounted for through shifting majority coalitions that require minority support for governance. In certain discrete cases of system malfunction, minorities are unable to compete on the same terms as other political interests. At those points, judicial intervention is appropriate. But in general, the representative democratic process is well equipped to resolve questions of constitutional meaning. Parker, *supra* note 1, at 240–41.

4. *Id.* at 242–44.

5. *Id.* at 253.

6. *Id.* at 257.

politics, but also to begin imagining how constitutional law might help to develop a polity that would better reflect classical republican ideals of equality, civic virtue, and a mobilized citizenry.<sup>7</sup>

Today, Parker's generation—and its immediate progeny—is ascendant. And under its watch, “the People” have become constitutional theory's hottest fashion. Yet these scholars, who saw more clearly than most how popular engagement can alter the course of history,<sup>8</sup> have retained their elders' limited perspective on popular engagement with political life.

A growing body of scholarship has coalesced around the concept of “popular constitutionalism.” Following a trail blazed by Robert Cover,<sup>9</sup> Bruce Ackerman,<sup>10</sup> Sanford Levinson,<sup>11</sup> and Parker,<sup>12</sup> among others, more recent works include a book by Larry Kramer,<sup>13</sup> a 2003 Foreword by Robert Post,<sup>14</sup> and other articles and books by Jeremy Waldron,<sup>15</sup> Kramer,<sup>16</sup> Reva Siegel,<sup>17</sup> William Eskridge,<sup>18</sup> Jack Balkin,<sup>19</sup> Keith Whittington,<sup>20</sup> Stephen Griffin,<sup>21</sup> James Gray

7. *Id.* at 258. For similar efforts aimed at integrating classical republican ideals into constitutional theory, see, e.g., Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 1 (1986); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

8. See generally TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* (1987).

9. Robert Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

10. BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998). Ackerman has argued that the People act outside the Article V amendment process during isolated “constitutional moments.” See ACKERMAN, *FOUNDATIONS*, *supra*, at 6–7; Bruce Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 YALE L.J. 1013, 1022 (1984). During other periods of “normal politics,” the People cede their interpretive authority back to political institutions. ACKERMAN, *FOUNDATIONS*, *supra*, at 263. Popular constitutionalists, by contrast, have advanced constitutional models that bring the People into play during eras of “normal politics.”

11. SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

12. RICHARD D. PARKER, “HERE, THE PEOPLE RULE” (1994).

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

14. Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003).

15. JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

16. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004) [hereinafter Kramer, *Popular Constitutionalism*]; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4 (2001) [hereinafter Kramer, *We the Court*].

17. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

18. William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002) [hereinafter Eskridge, *Effects*]; William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001) [hereinafter Eskridge, *Channeling*].

19. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

20. Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773 (2002).

Pope,<sup>22</sup> and Mark Tushnet.<sup>23</sup>

Each argues that the People and their elected representatives should—and often do—play a substantial role in the creation, interpretation, evolution, and enforcement of constitutional norms. This popular involvement takes place through the political process, but outside the formal confines of an Article V amendment or a “constitutional moment.”<sup>24</sup> At times, the People’s interpretive expression takes place through direct action, like protests, boycotts, and petitioning. At other times, the People act through electorally accountable institutions and political parties.

These alternative narratives seek to remove the constitutional lawmaking process from the judiciary’s exclusive dominion. Constitutional interpretation—in real or idealized form—is envisioned as the product of a “constitutional culture,”<sup>25</sup> a larger community-wide discourse that includes judicial and nonjudicial actors, a mixture of legal norms and political actions, and a wide range of interpretive expression.

But while constitutional theory has focused on reconstituting the People as a major player in constitutional interpretation, political scientists have been busy exploring how the People actually relate to politics and political institutions. Their work offers a much-needed snapshot of the political context in which constitutional norms are created.<sup>26</sup>

The results are not pretty. At precisely the same moment that some constitutional theorists are highlighting popular involvement in the mechanics of constitutional interpretation, political scientists tell us that participation and interest in politics are declining.<sup>27</sup> Moreover, popular interpretive opinions are often based on limited information, and are highly susceptible to manipulation by elites. Many citizens engage constitutional culture with a declining sense of their ability to grasp critical issues in public life, influence policy outcomes, and

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21. STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996); Stephen M. Griffin, *What Is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition*, 62 S. CAL. L. REV. 493 (1989).

22. James Gray Pope, *Labor’s Constitution of Freedom*, 106 YALE L.J. 941 (1997) [hereinafter Pope, *Labor’s Constitution*]; James Gray Pope, *Republican Moments: The Role of Direct Popular Power in the American Constitutional Order*, 139 U. PA. L. REV. 287 (1990).

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

24. See *supra* note 10.

25. Siegel, *supra* note 17, at 303 (defining “constitutional culture” as a “network of understandings and practices that structure our constitutional tradition, including those that shape law but would not be recognized as ‘lawmaking’ according to the legal system’s own formative criteria”); see also Post, *supra* note 14, at 8 (defining “constitutional culture” as “a specific subset of culture that encompasses extrajudicial beliefs about the substance of the Constitution”).

26. See, e.g., ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); STEVEN J. ROSENSTONE & JOHN MARK HANSEN, *MOBILIZATION, PARTICIPATION, AND DEMOCRACY IN AMERICA* (1993); SIDNEY VERBA, KAY LEGMAN SCHLOZMAN & HENRY E. BRADY, *VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS* (1995).

27. This disconnect is not surprising given the comparatively limited attention paid by legal academics to political science scholarship. See Keith Whittington, *Crossing Over: Citation of Public Law Faculty in Law Reviews*, 14 LAW & CTS. 5, 9 (2004).

perform basic self-governance tasks.

On one level, popular constitutionalists are simply—and I believe correctly—recognizing what historians and political scientists have long known: “[T]he Constitution lives a vibrant and consequential life outside the courts.”<sup>28</sup> This represents a great leap forward for constitutional theory, which has only recently begun to shift from the normative quest for a Grand Unified Interpretive Theory to models that display a deeper descriptive engagement with how our constitutional system actually operates.

But on another level, the divergence between legal academics and political scientists shows this academic generation falling into precisely the same trap as those that came before. If Ely and Choper’s sin was an inability to recognize the widening chasm between theory and practice, that gap remains stronger than ever.

The problem begins with “the People,” a term popular constitutionalists invoke with some regularity but are reluctant to define.<sup>29</sup> To the extent there is a shared definition, it apparently refers to any participant in constitutional interpretation who is not a federal judge. At different times, “the People” inhabit the shoes of, among other entities, the electorate, prominent interest groups, identity-based social movements,<sup>30</sup> the United States Congress,<sup>31</sup> the President,<sup>32</sup> political parties,<sup>33</sup> state government institutions,<sup>34</sup> or impact-litigation plaintiffs.<sup>35</sup> The result is an academic construction where “the People” look a lot like Woody Allen’s Zelig, inhabiting whatever incarnation is needed to conform with the theoretical backdrop.

This lack of definition allows scholars to claim democratic legitimacy and invoke a populist legacy for their interpretive narratives without having to examine the nuts and bolts of how our political system actually operates. It also permits popular constitutionalists to project all sorts of images onto this blank slate, including nostalgic portrayals of popular civic engagement from days long past.

Abstractions also dominate normative conversations about popular constitutionalism. Legal scholars have distilled perspectives on “the People” into two highly polarized visions: one that trusts the People to make interpretive deci-

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28. Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2022 (2003).

29. See L. A. Powe, Jr., *Are “The People” Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 891 (2005) (reviewing LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)) (describing Kramer’s definition of “the People” as “maddeningly ambiguous”).

30. See Eskridge, *Channeling*, *supra* note 18, at 423.

31. See Post & Siegel, *supra* note 28, at 2004.

32. See Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365 (2001).

33. See Balkin & Levinson, *supra* note 19, at 1077–78.

34. See Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 873–75 (1999).

35. See Eskridge, *Effects*, *supra* note 18, at 2071–72.

sions about what the Constitution means, and one that does not.<sup>36</sup> This stark distinction does constitutional theory a disservice by ignoring what is actually known about how real, live Americans think and behave. The individual citizen, and the actual nature of her relationship with constitutional culture, remains largely ignored.

By treating the People as a construction rather than a collection of real individuals who, as it turns out, we know quite a bit about, constitutional theory sidesteps many of the more complex and problematic aspects of how popular constitutionalism actually works. Hence, in using the term “the People,” this Article refers to citizens—not elected representatives, interest groups, political parties, or other intermediaries.<sup>37</sup> Citizens are, admittedly, only one part of a representative democratic culture in which an individual’s relationship with governance is often mediated by third parties. But defining their identity and isolating their distinct role apart from representative institutions is critical, both to understanding what popular constitutionalists mean when they use the word “popular” and to breaking down the abstractions upon which constitutional theory has grown far too reliant.

In turn, this Article is an effort to use political science to examine how the People relate to, engage with, and feel about constitutional culture. It concludes that constitutional culture:

- involves a relatively small number of engaged participants;
- often acts to reinforce judicial authority;
- operates with unstable popular preferences that are easily subject to elite manipulation;
- reflects wide disparities in wealth and power that exist within our larger political culture; and
- responds to long-term political trends, including declining civic engagement among younger generations.

These conclusions—none of which receive any significant treatment in the recent popular-constitutionalist literature<sup>38</sup>—raise descriptive questions about

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36. See J.M. Balkin, *Populism and Progressivism as Constitutional Categories*, 104 YALE L.J. 1935, 1950–54 (1995) (book review) (distinguishing “populist” and “progressive” influences on constitutional theory); PARKER, *supra* note 12, at 54–65 (distinguishing between “Populist” and “Anti-Populist” sensibilities); Kramer, *Popular Constitutionalism*, *supra* note 16, at 1003–04 (describing skepticism about people and democracy as a pervasive feature of contemporary intellectual culture); LEVINSON, *supra* note 11, at 27 (distinguishing between Catholic and Protestant perspectives on constitutional interpretation).

37. See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?* 118 HARV. L. REV. 1594, 1606–07 (2005) (reviewing LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) (distinguishing between “The People” as an “organic unity” and “the people”—the collection of human persons who are the citizens or residents of a particular polity”).

38. Among popular constitutionalists, Bruce Ackerman comes closest to addressing these realities. Under Ackerman’s theory, constitutional interpretation operates largely under conditions of “normal

how popular constitutionalism operates today and pragmatic concerns for its continued operation and viability.

Part I sets out two dueling narratives that have defined the current theoretical debate about how constitutional law is made and the interplay between law and politics. It provides a brief account of the Court's recent efforts to assert its interpretive supremacy, and describes popular constitutionalist efforts to cast the People as a systemic check on judicial power.

Part II sets out a conflict between current trends in constitutional theory and political science. It accuses popular constitutionalists of maintaining a nostalgic view of the People that ignores contemporary political trends, and sets out three points of contact between "citizen-interpreters" and constitutional culture: preferences, participation, and legitimacy.

Parts III, IV, and V examine efforts by political scientists to describe the People's relationship with constitutional culture. Part III explores the feasibility of popular constitutionalism under current levels of political participation and knowledge, arguing that the relatively distant relationship between the People and political life creates inhospitable conditions for placing increased interpretive burdens on ordinary citizens. Part IV addresses how interpretive norms obtain legitimacy. It uses studies about the People's perceptions of institutional processes and their own capacity for self-governance to suggest that popular accountability does not necessarily lead to more legitimate interpretive outcomes. Part V looks at constitutional culture in operation, focusing on how participation and knowledge levels affect popular representation, and the influence of elites on public opinion.

Part VI examines the theoretical implications of these political trends. It challenges popular constitutionalism's portrayal of contemporary politics, and questions whether the current political environment is hospitable to interpretive models that rely upon significant citizen involvement. Finally, it suggests an agenda for a new generation of constitutional scholars, one that draws on a shared experience with apathy and alienation from political life during our formative development in the years after Watergate.

This Article operates with two limiting principles in mind. First, in examining the People's role in constitutional culture, it is confined to an examination of what we know about how citizens determine, communicate, and legitimize their interpretive preferences. We do, however, live in a representative democracy. By constitutional design, interpretive preferences are filtered through representative institutions that, as many have noted, play a critical role in the evolution of

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politics," during which "the People simply do not exist" because their political attention and energies are focused on other, nonconstitutional matters. ACKERMAN, *FOUNDATIONS*, *supra* note 10, at 263. During these periods, the Court performs a preservationist function, representing the absent People by acting as "an ongoing representative" of constitutional commitments made during periods of heightened popular mobilization and involvement. *Id.* at 264–65. But by eliminating popular engagement in the interpretive process during wide swaths of constitutional history, Ackerman is no longer operating within the popular constitutionalist model. *See Kramer, Popular Constitutionalism*, *supra* note 16, at 961 n.3.

constitutional doctrine.<sup>39</sup> An in-depth examination of how other political actors, including the legislative and executive branches, respond to popular interpretive expression is well worthy of further examination, but is beyond the scope of this piece.

Second, popular constitutionalism is often connected to a normative debate about the countermajoritarian nature of judicial review. This Article deliberately avoids that well-traveled path.<sup>40</sup> Instead of focusing upon whether judge-made constitutional law is better or worse than law created from other sources, it operates from a more descriptive perspective, examining how popular engagement with constitutional culture actually operates. As Barry Friedman has noted, an accurate descriptive account of how our interpretive system functions has been all too absent from constitutional theory.<sup>41</sup> Indeed, such an account is necessary in order to fully assess the relative merits of competing normative models.<sup>42</sup> This is an effort to move that discussion from the realm of abstraction and ground it in the reality of contemporary American political life.

### I. JUDICIAL SUPREMACY, POLITICS, AND POPULAR CONSTITUTIONALISM

Contemporary constitutional theory is caught in a battle between two different stories about how constitutional interpretation occurs. The first—coined the “juricentric Constitution” by Robert Post and Reva Siegel—places constitutional interpretation exclusively in the hands of the judicial branch.<sup>43</sup> The second, offered in different forms by popular constitutionalist scholars, suggests a process that is far more complex and posits a greater interpretive role for the People.

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39. See, e.g., Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985); Scott E. Gant, *Judicial Supremacy and Nonjudicial Interpretation of the Constitution*, 24 HASTINGS CONST. L.Q. 359 (1997); Robert Nagel, *The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 380 (1988); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power To Say What the Law Is*, 83 GEO. L.J. 217 (1994); David A. Strauss, *Presidential Interpretation of the Constitution*, 15 CARDOZO L. REV. 113 (1993); Whittington, *supra* note 32.

40. For an exhaustive account of this long-running academic debate, see Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part II: Reconstruction's Political Court*, 91 GEO. L.J. 1 (2002); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383 (2001); Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971 (2000); Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153 (2002) [hereinafter Friedman, *History Part Five*].

41. See Friedman, *History Part Five*, *supra* note 40, at 257–58.

42. This assumes, perhaps incorrectly, that constitutional theorists offer theoretical models with the eventual goal of implementing these models in the real world.

43. Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L. REV. 1, 2 (2003).



## A. THE "JURICENTRIC" NARRATIVE

The act of unifying a diverse and growing body of scholarship under the "popular constitutionalism" mantle is something of a stretch. The works mix descriptive and normative assertions, encompassing historical interactions between law and politics, affirmative assaults on judicial supremacy, and speculation about the current Court's attentiveness to external political dynamics. The theoretical conversation also exists at a point of intersection for numerous constitutional dialogues, from the longstanding battle over the role of an unelected judiciary in a representative democracy to more recent academic hand wringing over the federal judiciary's conservative shift in the post-Reagan era.

Popular constitutionalism, as used here, describes a body of academic work that shares a common enemy. As Robert Post and Reva Siegel explain it, popular constitutionalist scholars are attacking a story about how constitutional law is made.<sup>44</sup> That narrative prioritizes stability, embraces legal terminology and categories, and above all, places federal courts generally—and the Supreme Court in particular—at center stage.

The story's primary components are two interrelated and reciprocally reinforcing assumptions that find little explicit support in modern academic literature, but are nevertheless pervasive within contemporary constitutional discourse: judicial supremacy (the notion that judges have the final say in questions of constitutional meaning), and the existence of a rigid division between the worlds of law and politics.

In this "juricentric" narrative, the judiciary stands as "the exclusive guardian of the Constitution" and the supreme expositor of constitutional meaning.<sup>45</sup> Aside from a few well-documented and oft-repeated exceptions,<sup>46</sup> and the Article V amendment process, the evolution of constitutional meaning is an entirely judge-driven process.

With judges in the interpretive driver's seat, constitutional law becomes nearly indistinguishable from "ordinary law."<sup>47</sup> As we do with a run-of-the-mill statute, we turn to the courts for answers when a question arises about the meaning of a constitutional provision. Judges, in keeping with their training and practice, then apply traditional tools of legal analysis that closely resemble those used to interpret ordinary statutes.<sup>48</sup>

The judiciary's pre-eminent role follows from the assumption that constitutional law is separate from politics, and that this separation is essential to the

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44. *See id.*

45. *Id.* at 2.

46. Standard examples include Thomas Jefferson's efforts to fight Federalist policies, Andrew Jackson's veto of legislation to recharter the Second National Bank, Abraham Lincoln's response to the Dred Scott decision, and Roosevelt's battles over New Deal legislation. *See* Whittington, *supra* note 32, at 369.

47. *See* Kramer, *We the Court*, *supra* note 16, at 8–9.

48. *See* STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO PRACTICE* 18 (1996); Kramer, *We the Court*, *supra* note 16, at 8–9.

very definition of constitutionalism.<sup>49</sup> If constitutions are a shared precommitment to preserve longstanding political processes and values in the face of impulsive popular and political movements,<sup>50</sup> judges—comparatively insulated from politics by constitutional design—are the only constitutional actors capable of interpretive actions consistent with the fundamental purpose of constitutionalism.<sup>51</sup>

The result is a vision of interpretive development that exists firmly outside the rough-and-tumble world of political life.<sup>52</sup> As Keith Whittington describes it:

There is a tendency to regard the Constitution as primarily a legal document: constitutional law substitutes for the Constitution, and the exercise of judicial review is regarded as tantamount to constitutionalism itself; the Constitution is considered relevant to politics as a consequence of and only to the extent that the judiciary is willing to enforce its terms and block the actions of government officials.<sup>53</sup>

In recent years, the Rehnquist Court has evolved into the juricentric narrative's strongest proponent. The primary vehicle for the Court's assertion of judicial supremacy has been the curtailment of legislative power under Section Five of the Fourteenth Amendment, which grants Congress "the power to enforce, by appropriate legislation," the Amendment's substantive guarantees.<sup>54</sup>

As numerous scholars have pointed out, judicial supremacy is an explicit component of the Rehnquist Court's Section Five jurisprudence,<sup>55</sup> bringing to an end a collaborative effort by Congress and the Court to expand constitutional rights during the New Deal and Great Society eras.<sup>56</sup> In a recent decision upholding the Family and Medical Leave Act against a Section Five challenge, Chief Justice Rehnquist asserted that "it falls to this Court, not Congress, to define the substance of constitutional guarantees."<sup>57</sup> This mirrors similar statements in *Garrett* and *Kimel*, where the Court held Title I of the Americans with Disabilities Act and the Age Discrimination in Employment Act inapplicable to state governments,<sup>58</sup> and *City of Boerne v. Flores*, where the Court held that Congress exceeded its Section Five authority in passing the Religious Freedom

49. See Kramer, *Popular Constitutionalism*, *supra* note 16, at 990–91.

50. See Laurence H. Tribe, *The People's Court*, N.Y. TIMES, Oct. 24, 2004, § 7, at 32.

51. See Post, *supra* note 14, at 11.

52. See Post & Siegel, *supra* note 28, at 1946.

53. KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING I* (1999).

54. U.S. CONST. amend. XIV, § 5.

55. See Kramer, *We the Court*, *supra* note 16, at 143–51; Post & Siegel, *supra* note 43, at 2; Whittington, *supra* note 20, at 776.

56. See MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 50–51 (2003).

57. *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 728 (2003).

58. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 81 (2000).

Restoration Act of 1993.<sup>59</sup> The end result is a clear division of labor between the legislative and judicial departments: the Court tells Congress and the People what the Constitution means,<sup>60</sup> and Congress can only pass legislation to remedy a pattern of discrimination that falls within the Court's interpretation.<sup>61</sup>

The current Court's assertion of supremacy is driven in no small part by its skepticism about democratic institutions and procedures.<sup>62</sup> Recent decisions cast a suspicious eye on congressional factfinding procedures<sup>63</sup> and reveal concern about the ability of democratic institutions to provide for their own stability without some form of judicially imposed order.<sup>64</sup>

The Court's internal discourse also reflects the juricentric narrative's pull across ideological divisions. For example, Justice Stevens's dissent in *Bush v. Gore* all but accuses the majority of grounding its decisionmaking in political considerations, thus undermining "the Nation's confidence in the judge as an impartial guardian of the rule of law."<sup>65</sup> Justice Scalia, in turn, in his dissent in *Lawrence v. Texas* charged the Court with "tak[ing] sides in the culture war, departing from its role of assuring, as neutral observer, that the democratic rules of engagement are observed."<sup>66</sup> Each dissent—from opposite ideological poles—asserts an ideal in which the judicial role is tied to a rigid separation between law and politics, and the judiciary stands fully immunized against the corrosive effects of political life.

#### B. THE POPULAR CONSTITUTIONALIST NARRATIVE

Against this doctrinal backdrop, popular constitutionalists have developed a very different story about how constitutional law is made. In this narrative, the People—in one incarnation or another—play an active role in the development of constitutional doctrine through a mixture of explicitly interpretive and political acts that occur both within and outside the courtroom.

In the eyes of popular constitutionalists, constitutional law is the product of a "constitutional culture" in which judges are only one of many interpretive actors.<sup>67</sup> As Post explains it, the Court is engaged in a "continuous dialogue with the constitutional beliefs and values of nonjudicial actors."<sup>68</sup> Nonjudicial

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59. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

60. *See, e.g., Dickerson v. United States*, 530 U.S. 428, 437 (2000); *Planned Parenthood v. Casey*, 505 U.S. 833, 866–67 (1992) (plurality opinion); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

61. *Garrett*, 531 U.S. at 374.

62. *See TUSHNET, supra* note 56, at 94 ("[A]s the Court sees it, politicians engage in grandstanding for their constituents, adopting legislation that seems 'good' in the abstract but that has no decent policy justification, and in which, again as the Court sees it, new forms of interest groups, labeling themselves as serving the public interest, push legislation forward.")

63. *See Ruth Colker & James J. Brudney, Dissing Congress*, 100 MICH. L. REV. 80 (2001).

64. *See Richard H. Pildes, Bush v. Gore: Democracy and Disorder*, 68 U. CHI. L. REV. 695 (2001).

65. *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Stevens, J., dissenting).

66. *Lawrence v. Texas*, 539 U.S. 558, 602 (2003) (Scalia, J., dissenting).

67. *See Post, supra* note 14, at 11; *Siegel, supra* note 17, at 302.

68. *Post, supra* note 14, at 41.

actors mobilize around and stake claims about constitutional meaning, using multiple “communicative pathways”—including Section Five—for interpretive expression that transcend the barrier between law and politics.<sup>69</sup>

In support of their model, popular constitutionalists offer an array of historical case studies in which interpretive outputs are produced by a dialogue between the Court and the People. These examples are rich with accounts of popular civic engagement, often expressed through large-scale social movements. In each, the People air interpretive claims through a range of acts inside and outside the courtroom, including social activism, mass mobilization, legislative lobbying, electoral preferences, and the acts of elected representatives.<sup>70</sup>

Reva Siegel, for example, recounts the multifront political offensive launched by the women’s movement in the 1970s to pass the Equal Rights Amendment and other pieces of legislation.<sup>71</sup> She describes a process in which the movement created constitutional meaning through “constitutional text, collective memory, mass action, the techniques of social movement organizing, the beginnings of a litigation campaign, the apparatus of the party system, and finally, the lawmaking resources of Congress itself.”<sup>72</sup> In the end, the movement successfully advanced a revised set of constitutional norms governing sex discrimination, despite its failure to formally amend the Constitution.<sup>73</sup>

Working in a similar vein, James Gray Pope details American unionists’ efforts to achieve constitutional recognition for their right to organize. These “constitutional insurgents” sought to alter constitutional meaning by communicating and operating outside formal political channels, exercising “direct popular power, for example through extralegal assemblies, mass protests, strikes, and boycotts.”<sup>74</sup> Pope’s protagonists act for reasons beyond mere self-interest, seeking instead “the public satisfactions of meaningful public action, historic immortality, and social interconnection.”<sup>75</sup> Other works explain constitutional change by focusing on the role of identity-based social movements in the latter half of the twentieth century<sup>76</sup> or the concept of “popular sovereignty” in

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69. Siegel, *supra* note 17, at 300.

70. *Id.* at 309, 324.

71. *Id.* at 307–13; *see also* Post & Siegel, *supra* note 28, at 1980–2020 (discussing the Family Medical Leave Act).

72. Post & Siegel, *supra* note 28, at 2001 (footnote omitted).

73. Siegel, *supra* note 17, at 311.

74. Pope, *Labor’s Constitution*, *supra* note 22, at 944.

75. *Id.* at 991.

76. William Eskridge, for example, describes a process of modern-day constitutional change in which constitutional norms are a direct function of the political progress made by a minority group. As twentieth century identity-based social movements (IBSMs) gained cohesion, political influence, and increased tolerance through social-movement organizing, the Court became more responsive to the factual narratives and innovative doctrinal theories that IBSMs offered in the courtroom. The relationship between the IBSMs and the Court proved to be mutually beneficial. New IBSMs, observing the political progress of their predecessors, focused their efforts on the Court. *See generally* Eskridge, *Effects*, *supra* note 18 (focusing on evolution of constitutional norms governing classifications based on race, sex, and sexual orientation). The Court, in turn, has gained “worldwide acclaim and admiration,

pre-Revolutionary conceptions of constitutional law.<sup>77</sup>

On the normative front, popular constitutionalism produces at least two purported benefits: enhanced legitimacy and a greater capacity for ongoing self-definition.<sup>78</sup> First, according to Post and Siegel, it generates greater “fidelity to constitutional values.”<sup>79</sup> The People “expect their own constitutional beliefs to matter,”<sup>80</sup> and the Constitution sustains its “legitimacy and authority”<sup>81</sup> by incorporating “the quintessentially democratic attitude in which citizens know themselves as authorities, as authors of their own law.”<sup>82</sup>

Second, popular constitutionalism advances a distinctive vision of the Constitution’s role in developing a contemporary national identity. The Constitution calls “into being a regime of republican self-government”<sup>83</sup> in which “constitutional understandings and commitments can be challenged, reinterpreted, and renewed.”<sup>84</sup> Rather than undermining a series of precommitments to core values, the intersection of law and politics within the interpretive process allows the Constitution to serve as “an expression of [our] deepest beliefs and convictions,” and a reflection of the current “political self-conception of the nation.”<sup>85</sup>

Within this broad normative framework, popular constitutionalists are far from a monolithic force,<sup>86</sup> and their work reflects a major descriptive rift in present-day constitutional interpretation over the division of interpretive power between the People and the Court. One camp—the “policentrists”<sup>87</sup>—see the

enhanced its legitimacy, and increased its power in our polity.” Eskridge, *Channeling*, *supra* note 18, at 505.

77. In Kramer’s account, the People offered interpretations about the constitutionality of state action through petitioning, protests, voting, “mobbing,” and popular pressure on local law enforcement authorities. While these actions predate the adoption of the Constitution, Kramer argues that pre-Revolutionary constitutionalism was based on a “customary constitution” that was based upon the consent of the governed and had its origins in English legal culture and practice. See Kramer, *We the Court*, *supra* note 16, at 16–33. Further, Kramer sees popular constitutionalism as entirely consistent with constitutional law’s traditional status as “a special form of popular law” that is fundamentally different from statutory or common law. See *id.* at 10.

78. I acknowledge here that, for constitutional theorists, the divide between descriptive and normative argument is often difficult, if not impossible, to discern. See Barry Friedman, *The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship*, 95 Nw. U. L. Rev. 933, 934 (2001). What follows is an attempt to dissect these elements from a body of literature that is often less than explicit about distinguishing between descriptive observations and normative assertions.

79. Post & Siegel, *supra* note 28, at 1983.

80. *Id.* at 1982.

81. *Id.* at 1952.

82. *Id.* at 1982.

83. Kramer, *We the Court*, *supra* note 16, at 165.

84. *Id.* at 15.

85. Post, *supra* note 14, at 36–37.

86. For efforts to describe the different strands of popular constitutionalist scholarship, see generally KRAMER, POPULAR CONSTITUTIONALISM, *supra* note 16; James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377, 1378–80 (2005).

87. Post & Siegel, *supra* note 28, at 1946. I use this term somewhat differently from Post and Siegel, who use it to describe those espousing a model of Section Five power that “attributes equal interpretive authority to both the Congress and to the Court.” *Id.*

Rehnquist Court as a poor autobiographer, its perspective skewed by the failure to acknowledge both the historic interrelationship between law and politics and the role of popular mobilizations in the development of constitutional law. For policentrists, the nation is awash in popular interpretive preferences advanced through a range of political activity, with American constitutional discourse emerging as a vibrant and multivoiced contact sport.<sup>88</sup> The Court finds itself immersed in a cacophonous mass of popular and institutional interpretive expression, where constitutional meanings are contested and redefined in a conversation that involves the Court and many other players.<sup>89</sup> This input is then “incorporated into the warp and woof of constitutional law,”<sup>90</sup> as political institutions—including the Court—act in ways that show their popular accountability.

Post, for example, describes the Court’s 2002–03 term as deeply intertwined with the beliefs and values of nonjudicial actors. In recent decisions upholding affirmative action and overturning state sodomy laws, “the Court has shaped the substance of constitutional law to meet the demands of a dialectical relationship to constitutional culture.”<sup>91</sup> Specifically, he portrays the Court’s recent sodomy decision in *Lawrence* as an “opening bid” in a larger dialogue between the Court and the People about the constitutional status of gay people, with the Court giving itself room to respond to the larger political consequences of its decision.<sup>92</sup>

The second camp—the “juridominants”—desire an increased role for the People, but are somewhat more skeptical about the role of extrajudicial interpretation in contemporary America. They view judicial supremacy as a largely accepted, if normatively flawed,<sup>93</sup> premise, and see the Rehnquist Court’s “power grab” for supremacy as the historical apex of judicial power.<sup>94</sup> As Kramer and others note, most Americans believe that the Court has the final say in what the Constitution means.<sup>95</sup> Judicial power receives reinforcement from numerous sources, including the popular media,<sup>96</sup> a public that takes the Court’s

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88. See Powe, *supra* note 29, at 866–83 (outlining seven examples of postwar popular constitutionalism, and concluding that “popular constitutionalism appears to be alive and well”).

89. See Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577, 653–54 (1993). Robert Cover describes courts as performing a “jurispathic” function, suppressing multiple interpretive visions that arise out of a process of “jurisgenesis.” See Cover, *supra* note 9, at 11, 40–44.

90. Post, *supra* note 14, at 8.

91. *Id.* at 105.

92. *Id.* at 104.

93. See, e.g., WALDRON, *supra* note 15, at 257–66.

94. See Kramer, *We the Court*, *supra* note 16, at 168.

95. MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 72 (1996); KRAMER, *supra* note 13, at 232; Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2621 (2003); Samuel L. Popkin & Michael A. Dimock, *Political Knowledge and Citizen Competence*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS 117, 126 (Stephen L. Elkin & Karol Edward Soltan eds., 1999) (presenting 1994 study finding that 67.3% of people think the Supreme Court has “the final responsibility to decide if a law is constitutional or not”).

96. Whittington, *supra* note 20, at 777 n.20.

supreme interpretive authority for granted,<sup>97</sup> and a legal-academic culture that inculcates the narrative in future generations of political elites.<sup>98</sup> Academic specialization helps too, by keeping political scientists and legal scholars operating in relative isolation.<sup>99</sup>

From this vantage point, the People's interpretive aspirations are sublimated by a cultural consensus about the Court's departmental role. And in response, critics, whether driven by a normative agenda or by outright frustration with the Court's current composition,<sup>100</sup> have developed various schemes to challenge judicial supremacy, either through structural change, overt extrajudicial challenges to existing constitutional norms,<sup>101</sup> or the elimination of judicial review.<sup>102</sup>

Both camps leave a series of critical questions about the People's interpretive role unanswered. For example, popular constitutionalists are—almost to a person—completely silent about what their theories demand from individual citizens in order to operate effectively. Does popular constitutionalism need, for example, a certain level of political participation in order to legitimize interpretive preferences or promote a national conversation about constitutional values? Are present levels of participation sufficient to achieve these normative goals, and if so, how can we tell? Should we care whether the participants accurately represent the entire polity? Does the theory require citizens to attain some minimum level of constitutional expertise to develop meaningful interpretive preferences? And, if so, what does a citizen need to be knowledgeable about? The constitutional text? The actions of their elected representatives? The Supreme Court? Do interpretive acts by popularly accountable branches actually confer greater legitimacy?

Political scientists spend a lot of time worrying about these sorts of questions, and their findings present challenges for both camps. For juridominant scholars who seek a greater role for the People in interpretive discourse, apathy and ignorance present concrete obstacles to aspirations for greater popular involvement in constitutional culture. For the policentrists, the People's perceptions about democratic institutions and processes call into question popular constitu-

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97. *Id.* at 777 n.21.

98. *Id.* at 777. As Barry Friedman recounts, academic "obsession" with judging and judicial review is a pathology that derives from now-distant historical events. The dialogue began during the Progressive Era, when the Court's efforts to strike down popular economic legislation raised concerns about the countermajoritarian nature of judicial review. Generations of academic inculcation have kept the eyes of constitutional scholars focused squarely on the courts, despite the massive expansion of executive power, the growth of the administrative state, the rise of social movements, and a host of other historical trends that had the potential to reframe—or at least expand—the institutional focus of constitutional theory. See Friedman, *History, Part Five*, *supra* note 40, at 156.

99. See Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314 (2002) (noting lack of interdisciplinary work in constitutional scholarship).

100. See Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013, 1023 (2004).

101. See KRAMER, *supra* note 13, at 249.

102. See generally TUSHNET, *supra* note 23.

tionalism's ability to confer legitimacy on interpretive outcomes. Finally, from a descriptive perspective, popular constitutionalism often operates in ways that enhance the role of nonjudicial elites in the interpretive process, rather than incorporating the voice of individual citizens.

## II. NOSTALGIA AND THE GENERATIONAL DIVIDE

It is hard not to admire poliocentric visions of American political life. In this alternate universe, civic engagement is high, social movements motivate a larger evolution of constitutional values, and political institutions respond to mobilization around constitutional issues. Juridominant aspirations also have significant appeal. In this hypothetical world, the People and their political institutions are empowered to challenge concentrations of interpretive power, and accept greater responsibility for resolving core disputes about constitutional meaning. Indeed, it is easy to see how constitutional scholars whose politically formative years occurred amidst the progressive social activism of the 1960s and 1970s would tell these stories and revere their protagonists.<sup>103</sup>

Yet this is not the America I know.<sup>104</sup>

To children of the post-Watergate era whose formative years occurred amidst widespread political apathy and ignorance, unprecedented amounts of money entering the political process, and the political mobilization of the religious right, popular constitutionalism seems nostalgic: "A collective dream that facilitates a primitive exchange of sentiments, while inhibiting a realistic appraisal of contemporary social relations."<sup>105</sup>

In reading the popular constitutionalists' work, I am drawn back to a conversation with my grandmother many years ago, listening to her describe a baseball game at Ebbett's Field in Brooklyn. Her vision is idyllic: it's a day game, the sky is blue, and the grass is perfectly groomed. The park itself is intimate, and there is a strong sense of spirit and community among the fans. In her recollection, the players exhibit a childlike love of the game, almost glowing in an aura of innocence. Her story is rich with history and emotion, a testimonial to a finer and more intimate time.

Looking back now, her vision—real or imagined—might as well have occurred on another planet. The games I attend are still fun, but somehow more complex and tarnished. Words like free agency and salary cap and steroids are

103. See, e.g., M. Kent Jennings, *Residues of a Movement: The Aging of the American Protest Generation*, 81 AM. POL. SCI. REV. 367, 381 (1987) ("Among more politicized, passionate, and skillful sub-populations . . . the residues of the formative experience may be strong indeed.").

104. I recognize it is somewhat unusual to insert a personal perspective into a theoretical piece. Here, however, I take to heart Jack Balkin's admonition that constitutional theory—at least for the constitutional theorist—begins at home. See Balkin, *supra* note 36, at 1952. Subjective factors and contextual dynamics in the theorist's life can and do influence the critic's perspective.

105. Fabio B. DaSilva & Jim Faught, *Nostalgia: A Sphere and Process of Contemporary Ideology*, 5 QUALITATIVE SOC. 47, 49 (1982). While the term nostalgia was originally used to describe homesickness, today it connotes "a longing for something far away and long ago." David S. Werman, *Normal and Pathological Nostalgia*, 25 J. AM. PSYCHOANALYTIC ASS'N 387, 387-88 (1977).



on people's lips, and many fans are on the road by the seventh inning to beat the traffic. While her story says a lot about history and aspiration, it says very little about either the game today or my experience at the ballpark, other than a lingering sense of longing for a golden age long past.

In time, nostalgia must give way to reality. While constitutional theorists have looked to the past by focusing on historical moments of popular mobilization,<sup>106</sup> contemporary political scientists have been amassing data about how the American people perceive their government, their sense of civic responsibility, and their own capacity for self-governance.

Their work presents a pessimistic vision for popular engagement in constitutional interpretation, with a polity that bears only a distant relationship to the images of vibrant civic life that animate policentrist narratives. Far from prepared for the massive shift in interpretive responsibility that popular constitutionalism entails, Americans are seen as increasingly turned off by politics and disengaged from civic life. Hence, the political scientists' work presents descriptive challenges to policentric accounts of the People's relationship with politics, and operational challenges to juridominant calls for a popular constitutionalist regime to counteract the Court's interpretive supremacy.

Popular constitutionalism's central theoretical premise is that citizens play an active role in the day-to-day business of constitutional interpretation outside of Article V. This occurs along two channels of communication. The first is through cultural expression and engagement.<sup>107</sup> A citizen who, for example, watches *Will and Grace* is a participant in a larger conversation about the legal status of lesbians and gay men in contemporary society. This dialogue engages constitutional culture by sending signals about social tolerance, stigma, equality, and other dynamics that contribute to the establishment and maintenance of constitutional norms. Its full exploration, however, is beyond our scope.

The second, and primary, means for accessing constitutional culture is through traditional political channels. The citizen who sends messages along these participatory pathways becomes a "citizen-interpreter" whose perspective is integrated into the interpretive process.

The citizen-interpreter engages the conversation about constitutional meaning in three distinct steps: preferences, participation, and legitimacy. For a citizen to engage with constitutional culture, she must first obtain information about, and then discern her preferences on, a given constitutional issue. Those preferences are, in turn, delivered into constitutional culture through one or more acts of political participation. Finally, the citizen-interpreter grants legitimacy through compliance with constitutional norms.

For years, political scientists have been exploring all three areas, and their

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106. See *supra* notes 71–77 and accompanying text.

107. Post, *supra* note 14, at 8–9 (distinguishing between culture and constitutional culture). *But see* Balkin, *supra* note 36, at 1947–48 (suggesting that the distinction between "popular culture" and "democratic culture" is dependent upon the theorist's perspective).

work presents some large pragmatic hurdles for popular constitutionalism. But empiricism, like any analytical lens, has its limitations. Questions of sample size, the phrasing of survey questions, data analysis, and methodology come with the territory. In reviewing the relevant literature, I do not mean to suggest that these snapshots reflect a perfectly accurate vision of contemporary American political life, or that the studies themselves are flawless. Instead, I am using their work to raise practical questions about both the feasibility and normative benefits of popular constitutionalism in contemporary America.

### III. APATHY AND IGNORANCE, OR, WHAT IF POPULAR CONSTITUTIONALISTS THREW A REVOLUTION AND NOBODY CARED?

Juridominants ask the People—either directly or through their representatives—to initiate a new interpretive regime that directly challenges existing assumptions about the Court’s role in defining constitutional meaning. As Kramer puts it, “[i]t means insisting that the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse.”<sup>108</sup> Along with spawning a revolution in interpretive responsibility, the People and their elected representatives are asked to assume a new role in the interpretive process, one that requires a more active engagement with constitutional law and politics.<sup>109</sup>

Yet this collides with studies showing that the People have little interest in increased civic responsibility or greater popular accountability in politics.<sup>110</sup> In a recent book, political scientists John Hibbing and Elizabeth Theiss-Morse sought to document Americans’ perceptions and feelings about their involvement in the political process. They concluded that “[t]he last thing people want is to be more involved in political decisionmaking: They do not want to make political decisions themselves; they do not want to provide much input to those who are assigned to make these decisions; and they would rather not know all the details of the decision-making process.”<sup>111</sup>

Their conclusions are backed up by numerous studies about political participation and knowledge that portray current political conditions as particularly inhospitable to a juridominant revolution in interpretive responsibility. If participation levels are any indication, exercising their interpretive influence is, at present, very low on the People’s “to-do” list. And if levels of political knowledge are any indication, the People appear content to allow constitutional interpretation to exist largely off their radar screen. Moreover, these trends are

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108. KRAMER, *supra* note 13, at 248.

109. *See id.* at 247–48; TUSHNET, *supra* note 23, at 57–65 (suggesting that Congress’s interpretive role is limited by the Court’s interpretive dominance).

110. The same might be said of Congress. *See* KRAMER, *supra* note 13, at 228.

111. JOHN R. HIBBING & ELIZABETH THEISS-MORSE, *STEALTH DEMOCRACY: AMERICANS’ BELIEFS ABOUT HOW GOVERNMENT SHOULD WORK* 1–2 (2002).

prevalent in contemporary American politics, and generational data suggest that they will remain in place for a long time to come.

#### A. PARTICIPATION

For the citizen-interpreter, political participation is the primary vehicle for accessing the communicative pathways across the law-politics divide.<sup>112</sup> Citizens send interpretive messages into constitutional culture through a range of electoral and political acts, creating a dynamic system where participant demographics, methods of communication, levels of civic engagement, and responsiveness of political institutions to participatory input change over time.<sup>113</sup>

As the most common form of political participation,<sup>114</sup> voting plays a significant role in any popular constitutionalist scheme. When interpretive power shifts from the exclusive province of the Court to political institutions that possess greater popular accountability, voting becomes the primary—though by no means the exclusive—vehicle for communicating popular interpretive preferences.

Today, America is in the midst of a five-decade-long decline in voter turnout.<sup>115</sup> According to the Federal Election Commission, 63% of eligible voters cast a ballot in the 1960 presidential election.<sup>116</sup> By 2000—a closely contested election—the turnout percentage had fallen to 51%.<sup>117</sup> The decline in nonpresidential elections is equally stark, with 47% turnout in 1962<sup>118</sup> falling to 36% in 1998.<sup>119</sup> While there was a slight resurgence in interest during the mid-eighties and a major upsurge in turnout for the 2004 election,<sup>120</sup> the overall trend is stark: participation in Presidential elections has decreased by one-quarter over the past forty years, with roughly the same decline for off-year elections.<sup>121</sup> The decline extends to state and local elections. One study reported a 26% decrease

112. I adopt here M. Margaret Conway's definition of political participation as "activities of citizens that attempt to influence the structure of government, the selection of government officials, or the policies of government." M. MARGARET CONWAY, *POLITICAL PARTICIPATION IN THE UNITED STATES* 3 (3d ed. 2000).

113. ACKERMAN, *FOUNDATIONS*, *supra* note 10, at ch. 9; CONWAY, *supra* note 112, at 6–12.

114. VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 50.

115. *But see* Michael P. McDonald & Samuel L. Popkin, *The Myth of the Vanishing Voter*, 95 AM. POL. SCI. REV. 963, 963 (2001) (arguing that apparent decline in voter participation is an illusion created by using the "voting age population" instead of eligible voters to determine turnout rate).

116. Federal Election Commission, *National Voter Turnout in Federal Elections: 1960–1996*, available at <http://www.fec.gov/pages/htmlto5.htm> (last visited Aug. 28, 2004).

117. Federal Election Commission, *Voter Registration and Turnout 2000*, available at <http://www.fec.gov/pages/2000turnout/reg&to00.htm> (last visited Aug. 28, 2004).

118. Federal Election Commission, *supra* note 116.

119. Federal Election Commission, *Voter Registration and Turnout–1998*, available at <http://www.fec.gov/pages/reg&to98.htm> (last visited Aug. 28, 2004).

120. *See* Committee for the Study of the American Electorate, *President Bush, Mobilization Drives Propel Turnout to Post-1968 High; Kerry, Democratic Weakness Shown*, at <http://fpc.state.gov/documents/organization/37992.pdf> (last visited Jan. 17, 2005) (estimating a turnout of 59.6% of eligible voters). It remains to be seen whether the increase was a one-time event or indicative of a larger trend.

121. PUTNAM, *supra* note 26, at 32.

between 1967 and 1987 in the number of people who say they “always vote in local elections.”<sup>122</sup>

When compared both with other periods in American history and with other democracies, contemporary turnout is low. Between 1840 and 1900, for example, turnout averaged 77.7%.<sup>123</sup> Reviewing the 1996 and 1998 elections, Robert Putnam concluded that it had been nearly two centuries “since so many American citizens freely abstained from voting.”<sup>124</sup> Further, when compared with twenty other democracies, the United States ranks next to last (ahead of Switzerland), with the highest-ranked democracies (Belgium, Austria, and Australia) sporting turnouts of 90% or more.<sup>125</sup>

The decline in electoral turnout has occurred despite tremendous strides in three areas that should have helped reverse the trend: increased access to education, decreased information costs, and the elimination of barriers to voter registration.

Education is a strong predictor of electoral participation: well-educated people are more likely to be interested and well informed about politics<sup>126</sup> and more likely to cast a ballot.<sup>127</sup> As a result, one would expect that increased access to institutions of higher education would bring an increase in voter interest and activism. Instead, just the opposite has occurred. Despite increased levels of educational attainment,<sup>128</sup> electoral turnout continues to decline.<sup>129</sup>

Moreover, political scientists have long speculated that the costs of obtaining and analyzing political information contribute to voter disengagement.<sup>130</sup> The decision to vote involves an assessment of costs and benefits, both tangible and intangible. Among the significant costs voters take on is an investment of time and energy in obtaining and analyzing information about the candidates or the pressing issues of the day. While developments in information technology, marketing, and mass manufacturing have made information easier to come by, better targeted, and cheaper to obtain than ever before, these changes seem not to have affected the American electorate.

Finally, access to the polls has never been greater. Since the 1960s, changes in voter registration systems have enhanced access to the franchise, including the abolition of poll taxes and literacy tests, the increased availability of

122. VERBA, SCHLOZMAN, & BRADY, *supra* note 26, at 72.

123. RUY A. TEIXEIRA, *THE DISAPPEARING AMERICAN VOTER* 8 (1992).

124. PUTNAM, *supra* note 26, at 33.

125. *Id.* at 7; see also Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 *AM. POL. SCI. REV.* 1, 5 (1997) (“[T]he United States ranks near the bottom of voting participation in comparative perspective . . .”).

126. RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES?* 19 tbl.2.2 (1980).

127. NORMAN H. NIE, JANE JUNN & KENNETH STEHLIK-BARRY, *EDUCATION AND DEMOCRATIC CITIZENSHIP IN AMERICA* 31 (1996).

128. *Id.* at 114–15.

129. VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 74.

130. See, e.g., *The Process of Becoming Informed*, ch. 11 of ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957).

multilingual materials, the decline in state residency requirements, and the creation of national standards for absentee registration.<sup>131</sup> Yet, while the Federal Election Commission estimates that the Motor Voter Act has added at least ten million registered voters to the rolls since 1993, turnout dropped by five million between 1992 and 2000.<sup>132</sup>

Voting is, of course, only one type of participation. The People assert their interpretive preferences through numerous other mechanisms, including work on political campaigns, writing letters to elected officials, donating money to campaigns or causes, running for public office, protesting, attending town meetings, or joining organizations that advance a particular viewpoint or agenda.

These other types of participation are particularly critical for citizen-interpretors who seek to influence constitutional culture. First, they are “information-rich” activities.<sup>133</sup> While it is difficult to use one’s vote to send a specific message beyond a preference for one candidate over another, other forms of participation allow a participant to target a specific interpretive message to a specific institutional or popular audience.<sup>134</sup> Second, these other activities allow participants to express the intensity of their preference, and to enjoy the increased responsiveness that comes from a greater volume of participation.<sup>135</sup> While a voter can only vote once, the resources a motivated individual can give to other participatory activities are relatively unconstrained. Compared with other forms of participation, voting is “a rather blunt instrument for the communication of information about the needs and preferences of citizens.”<sup>136</sup>

Robert Putnam, reviewing monthly polling results from 1973 to 1994 involving 410,000 respondents, found an across-the-board decline in almost every form of political participation.<sup>137</sup> In the 1990s, Americans were about half as likely to work for a political party or attend a political rally as they were in the 1970s.<sup>138</sup> Over the period of the survey, the number of office seekers declined by 15%, and attendance at public meetings on town or school affairs declined by 40%. Putnam also reported significant decreases in the number of people who report signing a petition or writing a letter to Congress,<sup>139</sup> and a one-third increase in the number of Americans who do not engage in any form of civic

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131. TEIXEIRA, *supra* note 123, at 29.

132. THOMAS E. PATTERSON, *THE VANISHING VOTER: PUBLIC INVOLVEMENT IN AN AGE OF UNCERTAINTY* 8 (2002).

133. VERBA, SCHLOZMAN, & BRADY, *supra* note 26, at 169.

134. *Id.*

135. *Id.*

136. *Id.*

137. PUTNAM, *supra* note 26, at 420.

138. *Id.* at 41.

139. *Id.* at 45 tbl.1 (noting a 23% decline in writing a letter to Congress and a 22% decline in signing a petition); see also ROSENSTONE & HANSEN, *supra* note 26, at 63 (reporting a decline in Congressional letter writing between 1973 and 1990). *But see* VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 73 (reporting increase in Congressional mail). See PUTNAM, *supra* note 26, at 449 nn.29–30 for an explanation of the discrepancy.

participation.<sup>140</sup>

Not surprisingly, interest in politics has declined alongside participation. National surveys reflect that the number of Americans who reported discussing politics “within the last week” fell from 51% in 1980 to 28% in 1996,<sup>141</sup> and the number who assert that they are “interested in politics” fell from 52% in 1975 to 42% in 1999.<sup>142</sup> The number reporting a “good deal of interest” in current events fell from 50% in 1974 to 38% in 1998.<sup>143</sup> Political conversations among high school students were about half as common in the late 1990s as they were thirty years earlier.<sup>144</sup>

While there is no shortage of explanations for participatory decline,<sup>145</sup> there is a significant body of evidence pointing to “generational replacement”—the replacement of engaged older citizens by younger, more apathetic citizens—as a primary factor.<sup>146</sup> This “generation gap in civic engagement,” driven by the increased role of baby boomers and their children, has driven turnout steadily downward.<sup>147</sup> Civic disengagement is concentrated in younger age cohorts, who are far less likely to write to members of Congress, sign petitions, work for political parties, or engage in any civic activity than their parents were at the same age.<sup>148</sup> This presents major challenges for reversing current trends, as younger cohorts begin to dominate the pool of eligible civic participants.

#### B. KNOWLEDGE

Time and attention are limited resources. As a result, citizens must make deliberate choices about what to focus on and gather information about.<sup>149</sup> In

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140. PUTNAM, *supra* note 26, at 44.

141. *Id.* at 448 n.13.

142. *Id.* The data are derived from the DDB Needham Life Style survey, conducted every year from 1975 with an annual sample of 3500–4500. *Id.* at 420.

143. *Id.* at 448 n.13. The data are derived from the Roper organization, which conducted an annual survey from September 1973 to October 1994 with approximately 2000 voting-age participants a year. *Id.* at 420.

144. *Id.* at 260.

145. The research in this area reaches a wide range of conclusions. *See, e.g.*, DOWNS, *supra* note 130, tbl.4.2 (rational voter behavior); FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 260 (1988) (restrictive voter registration laws); PUTNAM, *supra* note 26, at 260 (declining social connectedness); ROSENSTONE & HANSEN, *supra* note 26 at 162 (declining role of political parties in mobilizing voters); VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 129 (presenting a diverse list of reasons given in response to a survey, with “not enough time” and “taking care of myself and family” both polling slightly over one-third of respondents); Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in the United States*, 76 AM. POL. SCI. REV. 502–21 (1982) (weakening party affiliations and a declining sense of government responsiveness); Popkin & Dimock, *supra* note 95, at 142 (lack of political knowledge).

146. WARREN E. MILLER & J. MERRILL SHANKS, *THE NEW AMERICAN VOTER* 69 (1996).

147. PUTNAM, *supra* note 26, at 34.

148. *Id.* at 252; *see also* William A. Galston, *Political Knowledge, Political Engagement, and Civic Education*, 4 ANN. REV. POL. SCI. 217, 219 (2001) (revealing that in early 1970s, about half of 18-to-29-year-olds voted in presidential elections, compared with fewer than one-third in 1996).

149. *See* ARTHUR LUPIA & MATTHEW D. MCCUBBINS, *THE DEMOCRATIC DILEMMA: CAN CITIZENS LEARN WHAT THEY NEED TO KNOW?* 22 (1998).

the highly competitive market for our awareness, politics generally, and constitutional law specifically, occupies an extremely limited place in our collective consciousness.

General political knowledge exists along a continuum, with a “high variance in political awareness around a generally low mean.”<sup>150</sup> At one end is a small but influential minority of well-informed citizens who are highly engaged with the political process.<sup>151</sup> At the other end is a much larger minority of “know nothings.”<sup>152</sup> Ilya Somin, analyzing National Election Study data collected during the 2000 Presidential election, recently found that somewhere between 25% and 35% of Americans have virtually no political knowledge at all.<sup>153</sup>

Most Americans fall in between the two extremes, but even within this middle group average knowledge levels are quite low. Somin concluded, echoing numerous previous studies,<sup>154</sup> that Americans possess a low level of basic political knowledge.<sup>155</sup> For example, only 15% were able to successfully name at least one candidate for the House of Representatives in their own district, and only 11% were able to identify the post held by William Rehnquist.<sup>156</sup> On political issues with constitutional implications, voters were operating on shaky ground: only 46% of respondents knew that Gore was more supportive of abortion rights than Bush, and only 51% identified Gore as more supportive of gun control.<sup>157</sup>

Moreover, in a disturbing sign for the future,<sup>158</sup> political ignorance is growing among younger age cohorts: comparing voter knowledge in survey data from 1989 with Gallup polls from the 1940s and 1950s, Delli Carpini and Keeter found that the knowledge gap between 18-to-29-year-olds and older cohorts is “substantially greater” now than it was then.<sup>159</sup> According to Putnam, about half

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150. JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 18 (1992).

151. *Id.* at 16; Stephen Earl Bennett, “*Know-Nothings*” Revisited: *The Meaning of Political Ignorance Today*, 69 *SOC. SCI. Q.* 476, 482 (1988). There is a strong correlation between political knowledge and participation. In the 1988 presidential election, for example, among the most knowledgeable ten percent in Delli Carpini and Keeter’s surveys, nine out of ten voted. By contrast, among the least informed ten percent, only two in ten went to the polls. DELLI CARPINI & KEETER, *supra* note 95, at 224.

152. Bennett, *supra* note 151, at 482.

153. Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the “Central Obsession” of Constitutional Theory*, 87 *IOWA L. REV.* 1287, 1313 (2004).

154. *See, e.g.*, DELLI CARPINI & KEETER, *supra* note 95, at 62–104 (reviewing studies on Americans’ low level of political knowledge); ZALLER, *supra* note 150, at 18 (same); Ilya Somin, *Voter Ignorance and the Democratic Ideal*, 12 *CRITICAL REV.* 413, 416–20 (1998) (same).

155. Somin, *supra* note 153, at 1308 tbl.1. Somin analyzes data collected during the 2000 National Election Study. His survey items focus on different types of political knowledge, including specific policy issues, positions taken by major candidates, and facts about major political figures. *See id.*

156. *Id.*

157. *Id.*

158. *See* M. Kent Jennings, *Political Knowledge over Time and Across Generations*, 60 *PUB. OPINION Q.* 228, 249 (1996) (concluding that political knowledge among a particular age cohort remains stable over time across the life cycle).

159. DELLI CARPINI & KEETER, *supra* note 95, at 172. The data are derived from the 1989 Survey of Political Knowledge, which involved telephone interviews with 610 randomly selected adults. The

as many college freshmen as thirty years ago describe themselves as keeping up to date with politics.<sup>160</sup>

While popular constitutionalists have remained largely silent on the minimum level of knowledge needed to meaningfully participate in constitutional culture, the bar must, by necessity, be quite low. While there is a lack of current data on basic constitutional literacy, Delli Carpini and Keeter culled data from a range of more general national surveys conducted between 1940 and 1994.

The results, limited as they are, vary based on the level of generality. On the positive side, a large majority of survey participants in the mid-1980s knew that the Constitution was subject to amendment, that it contained a right to a trial by jury, that states could institute the death penalty, and that the First Amendment protected rights related to free speech and the press.<sup>161</sup> Further, younger age cohorts appeared more knowledgeable about constitutional issues than older ones.<sup>162</sup>

But as the questions became more detailed, constitutional literacy predictably declined. Just over half were able to identify the number of women on the Supreme Court.<sup>163</sup> Between a quarter and a half of people asked could describe the decisions reached in three highly salient decisions: *Miranda v. Arizona*, *Roe v. Wade*, and *Webster v. Reproductive Health Services*.<sup>164</sup> Less than one-quarter were able to identify more than one right protected by the First or Fifth Amendments, could name all three branches of government, or knew that the Supreme Court did not automatically review all federal lower-court decisions.<sup>165</sup>

Even in moments when public attention is focused on interpretive developments, constitutional culture operates on the fringes of popular consciousness.<sup>166</sup> In a study conducted after the Court issued a major 1989 abortion decision, *Webster v. Reproductive Health Services*, only about 50% of the public knew anything about the decision, declining to 35% several weeks after the

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pollsters asked questions substantially similar to those asked during Gallup polls in the 1940s and 1950s. *Id.* at 163, 291–93.

160. PUTNAM, *supra* note 26, at 260.

161. The surveys revealed that 76% knew the constitution could be amended (1986), 83% knew the right to a jury trial was guaranteed (1986), 83% knew the states could institute the death penalty (1983), and 75% correctly identified the First Amendment rights. DELLI CARPINI & KEETER, *supra* note 95, at 70–71.

162. *Id.* at 203.

163. In 1988, 53% of survey participants answered this question correctly. *Id.* at 70.

164. Forty-five percent of survey participants identified the substance of the *Miranda* decision (1989), 30% identified *Roe* (1986), and 29% identified *Webster* (1989). *Id.* See *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Roe v. Wade*, 410 U.S. 113 (1973); *Miranda v. Arizona*, 384 U.S. 436 (1966).

165. Only 20% were able to name two First Amendment rights, and only 2% two Fifth Amendment rights (1989). *Id.* at 71. Only 12% knew that the Supreme Court did not review all federal cases (1986), and 19% were able to name the three branches of government (1952). *Id.* at 71.

166. See Friedman, *supra* note 95, at 2623 (“Only a small fraction of the Supreme Court’s work is likely to be salient with the public.”).



decision.<sup>167</sup> *Webster*, though, is aberrational in its ability to command comparatively high levels of public attention.<sup>168</sup> In general, large segments of the public are essentially ignorant about the Court and its work.<sup>169</sup> This is no surprise, given that the Court enjoys significantly less media coverage than other branches of government,<sup>170</sup> and what is reported omits much of what the Court does.<sup>171</sup>

In sum, current levels of knowledge and participation suggest, as Hibbing and Theiss-Morse put it, that “the people’s desire to avoid politics is widespread.”<sup>172</sup> Large numbers of Americans deliberately opt out of the process, choosing to spend their time on other pursuits. If popular constitutionalists intend to place increased civic responsibility in the hands of individual citizens—either to initiate a shift toward greater popular accountability or to actively integrate their preferences into the interpretive process—they must reckon with the fact that the People seem to want less, not more, involvement in civic life. These are sub-optimal conditions for juridominant scholars seeking to launch an interpretive revolution, particularly if the People are expected to play an active role in provoking a change in interpretive regimes.

Indeed, in such an environment, the People are likely to prefer interpretive processes that make minimal demands on their time and attention. Judicial supremacy, in turn, begins to look increasingly attractive to the average Joe. Under a juricentric regime, the People avoid the increased transaction costs that come with greater control over interpretive outcomes: obtaining and analyzing interpretive information, prioritizing and communicating preferences, monitor-

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167. ZALLER, *supra* note 150, at 17–18.

168. Charles H. Franklin & Liane C. Kosaki, *Media, Knowledge, and Public Evaluations of the Supreme Court*, in CONTEMPLATING COURTS 352, 364, 366 (Lee Epstein ed., 1995).

169. *See id.* at 369; *see also* Gregory A. Caldeira, *Neither the Purse nor the Sword: Dynamics of Public Confidence in the Supreme Court*, 80 AM. POL. SCI. REV. 1209, 1211 (1986) (“Few members of the public, regardless of the place or time of the sample, fulfill the most minimal prerequisites of the role of a knowledgeable and competent citizen vis-à-vis the Court.”). *But see* Valerie J. Hoekstra, *The Supreme Court and Local Public Opinion*, 94 AM. POL. SCI. REV. 89, 90, 97 (2000) (criticizing methodology of surveys examining public knowledge about the Court); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Public Knowledge of the Supreme Court*, 2001, at 4 (2001) (unpublished manuscript) available at <http://artsci.wustl.edu/~legit/Courtknowledge.pdf> (last visited Nov. 23, 2004) (concluding that Americans have a “surprisingly high” level of information about the Court, based on surveys conducted after the 2000 election controversy).

170. *See* Franklin & Kosaki, *supra* note 168, at 357 (finding that the President and Congress receive, respectively, 8.3 and 4.1 times as much coverage as the Court). *But see* Herbert M. Kritzer, *The Impact of Bush v. Gore on Public Perceptions and Knowledge of the Supreme Court*, 85 JUDICATURE 32, 38 (2001) (finding “clear” but “not dramatic” increases in knowledge about the Court due to heightened media coverage around *Bush v. Gore*).

Knowledge about the Court and its workings is, of course, distinct from knowledge about constitutional values, constitutional procedures, or other aspects of constitutional discourse. However, for the majority of Americans, who assume the Court’s interpretive supremacy, *see supra* note 95, knowledge of the Court and of the Constitution are often one and the same.

171. Jerome O’Callaghan & James O. Dukes, *Media Coverage of the Supreme Court’s Caseload*, 69 JOURNALISM Q. 195, 203 (1992) (concluding that “the media frequently neglect the Court’s contribution to the development of many diverse areas of American law”).

172. HIBBING & THEISS-MORSE, *supra* note 111, at 3.

ing political agents to ensure that their behavior complies with desired outcomes, and the psycho-emotional costs of bringing constitutional issues, previously addressed within the highly circumscribed rules of the courtroom, into a more overtly contentious political context.

Instead, unelected judges incur the costs of obtaining information, determining its relevance, analyzing it, developing a conclusion, and implementing an interpretive vision. Court hierarchies and the appointments process absorb the agency costs of monitoring interpretive developments. And, with limited opportunity for interpretive input, the People are free to allocate their time and energy to other pursuits.

#### IV. POPULAR PERCEPTIONS OF POLITICAL INSTITUTIONS AND PROCESSES

The Court's recent assertion of interpretive power has caused significant distress among popular constitutionalists; they have not been shy about calling on the People and other political institutions to take action.<sup>173</sup> Yet the Court's "grab for power"<sup>174</sup> may reflect a broader consensus about how our society should resolve interpretive problems. This consensus de-emphasizes the voice of ordinary people in favor of processes and institutional actors that maintain an appearance of neutrality and eschew overt conflict.

Policentrists posit an interpretive process where norms are reached through multiple actors and a mixture of political and legal procedures. The process results in interpretive outcomes that are "grounded in the constitutional culture of the nation," which is, in turn, "essential to constitutional legitimacy."<sup>175</sup> While policentrists avoid specifics about what their models demand from individual citizens, they implicitly address concerns about low levels of civic engagement through representative delegation, often treating Congress or interest groups as tantamount to "the People." Post and Siegel, for example, offer a "legislative constitutionalism" model, where Congress serves as the primary (but not exclusive) vehicle for communicating popular interpretive preferences, often acting through Section Five legislation in response to social movements or interest groups.<sup>176</sup> Democratic accountability thus allows Congress to "elicit and articulate the nation's evolving interpretive aspirations,"<sup>177</sup> which, in turn, legitimizes interpretive outputs.

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173. See KRAMER, *supra* note 13, at 247 ("[T]o control the Supreme Court, we must first lay claim to the Constitution ourselves."); Post & Siegel, *supra* note 43, at 45 (telling Congress it "must act to protect the Constitution for the people," which means publicly repudiating Justices who say that they possess exclusive authority to say what the Constitution means).

174. Kramer, *We the Court*, *supra* note 16, at 169.

175. Post & Siegel, *supra* note 28, at 2059. While Post and Siegel do not offer any definition of "legitimacy," I assume they are using the term in a positive sense, in which an interpretive regime "is legitimate if people comply with its laws and cooperate in social undertakings as a matter of acceptance rather than just of coerced obedience." RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 207 (2003).

176. Post & Siegel, *supra* note 28, at 2026–32.

177. *Id.* at 2031.

Yet there is little indication that the People have much faith in the ability of Congress or interest groups to serve as their interpretive agents. In a 1998 Gallup survey, 67% of respondents felt interest groups had “[t]oo much power,” outpolling even the federal government.<sup>178</sup> As for Congress, it consistently enjoys much lower levels of public confidence and approval than either the judiciary or the executive branch.<sup>179</sup> Large majorities perceive Congress as “too heavily influenced by interest groups in making decisions,” and “too far removed from ordinary people.”<sup>180</sup>

The Court, on the other hand, maintains comparatively high levels of public support.<sup>181</sup> The reasons for favorable attitudes toward the Court are somewhat unclear. Some legal scholars attribute it to the Court’s adaptability and responsiveness to political trends and social movements;<sup>182</sup> others explain it by pointing to the almost “mythic” qualities many Americans associate with the institution.<sup>183</sup>

Within political science, a recent and growing body of research points to process, rather than outcomes, as the driving force behind the Court’s relative popularity. As Tom Tyler notes, “procedural justice influences are strong when the focus of attention is citizen evaluations of national political and legal authorities.”<sup>184</sup>

Tyler’s research looked at the relative weight of different factors in assessing the fairness of the Court’s procedures. He concluded that assessments of neutrality and the trustworthiness of the Justices’ motives were major compo-

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178. HIBBING & THEISS-MORSE, *supra* note 111, at 102. The poll involved a sample of 1266 respondents. *Id.* at 246.

179. *Id.* at 99; *see also* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY 32 (1995) (documenting confidence levels from 1971–1994).

180. HIBBING & THEISS-MORSE, *supra* note 179, at 64.

181. *Id.* at 54; Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635 (1992) (“[T]he Supreme Court has traditionally fared well in the estimations of the public, especially in comparison with other political institutions.”); James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47 AM. J. POL. SCI. 354, 360 (2003); Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1118 (1997) (tracking support from 1972–1994); Lilliard E. Richardson, Jr., David J. Houston & Chris Sissie Hadjiharalambous, *Public Confidence in the Leaders of American Governmental Institutions*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 83, 83–84, 93–96 (John R. Hibbing & Elizabeth Theiss-Morse eds., 2001); John M. Scheb & William Lyons, *Public Perception of the Supreme Court in the 1990s*, 82 JUDICATURE 67 (1998) (finding respondents almost twice as likely to rate the Court “good” or “excellent” than to similarly rate Congress); Tom R. Tyler & Gregory Mitchell, *Legitimacy and the Empowerment of Discretionary Legal Authority: The United States Supreme Court and Abortion Rights*, 43 DUKE L.J. 703, 744 (1994).

182. *See supra* note 76.

183. *See, e.g.*, Dean Jaros & Robert Roper, *The U.S. Supreme Court: Myth, Diffuse Support, Specific Support, and Legitimacy*, 8 AM. POL. Q. 85, 95 (1980) (finding “high degree of mythical belief about the Supreme Court” among subjects attending state universities).

184. Tom R. Tyler, *The Psychology of Public Dissatisfaction with Government*, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?, *supra* note 181, at 227, 236.

nents of the public's comparatively favorable view of the Court.<sup>185</sup> More significantly for popular constitutionalists, he found that the public's inability to influence the Court's decisions—or lack of popular accountability—had “no influence upon procedural fairness judgments.”<sup>186</sup>

Tyler's findings reflect other studies that examine Americans' notions of procedural justice and how they affect perceptions of political institutions. Hibbing and Theiss-Morse argue that public distaste for the prolonged and often contentious deliberative processes that dominate legislative decisionmaking schemes is a major factor in Congress's low public opinion ratings compared with other political institutions.<sup>187</sup> This is consistent with social science research documenting the People's preference for avoiding conflict, and their perception that animosity and public conflict violate shared social norms.<sup>188</sup> Moreover, there is significant ambivalence about processes such as compromise and deliberation that are essential to the legislative process. Hibbing and Theiss-Morse note a 1998 Gallup survey where 86% of respondents agreed that “elected officials should stop talking and take action,” and 60% agreed that “compromise is selling out one's principles.”<sup>189</sup>

In such a context, it is no surprise that the Court enjoys enhanced popular legitimacy.<sup>190</sup> Compared with the heated and contentious rhetoric that often accompanies national elections and Congressional debate, it operates as a model of civility. Its decisionmaking procedures are highly circumscribed, with most debate and horse trading taking place behind closed doors. Norms of professional courtesy and decorum are well established.

There are at least four other reasons to doubt the policentrist assertion that “democratic accountability” necessarily produces more legitimate interpretive outcomes. First, a significant segment of the population is skeptical about the virtues of democratic accountability. In one recent survey, almost half of the respondents agreed that the political system would be better if “decision making were left to successful business people” or “non-elected experts.”<sup>191</sup> This reflects, in part, the People's ambivalence about their own trustworthiness and capacity for fairness,<sup>192</sup> as well as perceptions that elected officials use their office to advance their own self-interest.<sup>193</sup> Juricentric interpretation, by contrast, appeals to the sizeable portion of Americans that favors a more expert-

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185. *Id.* at 239.

186. *Id.*

187. HIBBING & THEISS-MORSE, *supra* note 179, at 147.

188. See Carolyn L. Funk, *Process Performance: Public Reaction to Legislative Policy Debate, in WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE?*, *supra* note 181, at 193, 195, 198–201.

189. HIBBING & THEISS-MORSE, *supra* note 111, at 136.

190. See Friedman, *supra* note 95, at 2616–17.

191. HIBBING & THEISS-MORSE, *supra* note 111, at 139.

192. *Id.* at 113 (summarizing a 1998 Gallup survey showing 60% of respondents agreeing with statement that “you can't be too careful in dealing with people” and 52% agreeing that “most people would take advantage of you if they had the chance”).

193. *Id.* at 122–24.

driven approach to governance. Moreover, despite sometimes vehement disagreement with interpretive outcomes, the Court's institutional support derives, in part, from a belief that the justices are not making decisions to advance their own well-being.<sup>194</sup>

Second, when it comes to constitutional interpretation, another body of data suggests that the People show strong preferences toward the interpretive methodologies associated with judicial practice. Scheb and Lyons conclude that the "myth of legality"—that judicial decisions are based upon neutral processes of legal reasoning—is alive and well today.<sup>195</sup> The myth is particularly strong among well-educated people—those most likely to participate in politics and constitutional culture.<sup>196</sup> Furthermore, the language of law carries significant symbolic weight. In examining popular expectations for the basis of Supreme Court decisions, Scheb and Lyons found that people think original intent and precedent should play prominent roles, while partisanship and ideology—on relatively high display in the legislative arena—should have the least effect on the Court's decisionmaking.<sup>197</sup>

Third, to the extent that popular constitutionalism relies upon the involvement of non-judicial political elites, contemporary political conditions suggest that their interpretive influence will move constitutional discourse in directions that are anything but "popular." The political opinions of elites, by and large, are significantly more polarized than the preferences of non-elite citizens.<sup>198</sup> If past practice is any indication, increased interpretive input by political elites will overrepresent the views of extreme ideologues,<sup>199</sup> and skew the interpretive agenda towards issues of limited significance to most Americans.<sup>200</sup>

Fourth, while popular constitutionalists often criticize other academics for their lack of faith in the interpretive and political abilities of ordinary citizens,<sup>201</sup> some of this skepticism is shared by the People themselves. Along with a lack of desire, there are also indications that Americans are increasingly skeptical of their own ability to participate in political life and effect political

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194. *Id.* at 158.

195. John M. Scheb & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 Soc. Sci. Q. 928, 928 (2000).

196. *Id.* at 938.

197. See John M. Scheb & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 184–86 (2001).

198. See MORRIS P. FIORINA, SAMUEL J. ABRAMS & JEREMY C. POPE, *CULTURE WAR? THE MYTH OF A POLARIZED AMERICA* 114–18 (2005).

199. *Id.* at 149–50.

200. *Id.* at 152–53.

201. See, e.g., KRAMER, *supra* note 13, at 244 ("Most contemporary commentators share a sensibility that takes for granted various unflattering stereotypes respecting the irrationality and manipulability of ordinary people . . ."); PARKER, *supra* note 12, at 73 ("The conventional discourse of constitutional law breathes in the warm air of the academy, rises over the heads of many to whom it is supposedly addressed, and then sends down a subtle message of inadequacy to everyone who is not 'in the know.'").

change. Political scientists measure an individual's sense of their own capacity for self-governance by assessing their political efficacy. Efficacy comes in two types: internal efficacy (a sense of one's personal ability to understand politics) and external efficacy (a belief that one's political activities can influence politics).<sup>202</sup> Efficacy is closely related to political participation, as individuals with higher levels of efficacy are more likely to engage in a range of participatory activities, from voting to donating money.<sup>203</sup>

Rosenstone and Hansen, examining data from 1952 to 1990, found that Americans' sense of internal efficacy is declining. Between 1960 and 1988, the percentage of the electorate who rejected the statement that "politics and government seem so complicated that a person like me can't really understand what's going on" fell from 41% to 22%.<sup>204</sup>

Their data reveal similar results for external efficacy. From 1960 to 1988, the number of Americans who disagreed with the idea that "people like me don't have any say in what the government does" fell from 73% to 55%. Over the same period, the number who rejected the notion that public officials "don't . . . care much about what people like me think" fell from 75% to 43%.<sup>205</sup>

These dynamics are only exacerbated when constitutional interpretation is the participatory act in question. While there is little empirical data about Americans' beliefs in their own ability to interpret the Constitution or to affect others' interpretations, we can guess that interpretive efficacy is in short supply. As Richard Parker points out, the specialized and elitist nature of constitutional discourse "has eroded the capacity of ordinary people to take part in . . . and even understand" constitutional arguments.<sup>206</sup>

The impact of this literature is twofold.

First, it adds to the body of data that portrays modern-day America as an inhospitable environment for popular constitutionalist schemes. Indeed, many citizens appear to prefer decisionmaking procedures that are relatively undemanding, minimize public deliberation, employ legal vocabulary and reasoning, and are relatively insulated from the whim of public opinion.

Second, there is reason to doubt whether "democratic accountability" actually enhances interpretive legitimacy. When asked to assess their own capacity to govern or Congress's institutional performance, the People respond with skepticism. In this light, interpretive outcomes produced by judicial "experts," particularly when combined with perceptions that the process is fair<sup>207</sup> and insulated

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202. ROSENSTONE & HANSEN, *supra* note 26, at 15.

203. *Id.* at 144–45.

204. *Id.* at 144.

205. *Id.* at 143–44.

206. PARKER, *supra* note 12, at 72–73.

207. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 104–08, 178 (1990) (establishing a connection between procedural justice, compliance, and legitimacy). *But see* James L. Gibson, *Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance*, 23 LAW & SOC'Y REV. 469, 487 (1989) (arguing that compliance is based on notions of diffuse and specific support rather than perceptions of fairness).

from self-interest, may achieve greater legitimacy than an interpretive process with greater popular accountability.

#### V. POPULISM, REPRESENTATION, AND ELITE CONSTITUTIONALISM

When constitutional theorists talk about assigning interpretive responsibility, they rely upon a distinction between two highly polarized “sensibilities.”<sup>208</sup> On one side is what Parker calls the Populist perspective, which embraces “energetic activity by ordinary people, and . . . engagement with ordinary people, on a common level.”<sup>209</sup> Populists share a faith in an average citizen’s ability to engage constitutional issues, and believe that popular involvement “is good for the vitality of all who take part in it, collectively as well as singly.”<sup>210</sup> On the other side is the “Anti-Populist” or “Progressive” perspective, which sees the People as too impulsive and ill-informed to engage in basic self-governance tasks. Anti-Populists prefer decisionmaking by calm, reasoned elites.<sup>211</sup>

Popular constitutionalists associate judicial supremacy with Anti-Populism, seeing it as driven by a fear of popular power and biased assumptions about the People’s capacity to govern.<sup>212</sup> They, in turn, assign themselves the Populist label, and their narratives show the energy of ordinary people engaging constitutional culture. Kramer, for example, cites popular protests and riots against the Jay Treaty, public meetings declaring the Alien and Sedition Acts null and void, and a constitutionally salient jury nullification as examples of popular constitutionalism at the Founding.<sup>213</sup>

Representative institutions are also filtered through the Populist lens. When Congress acts, it is in response to or in conjunction with popular activism, with legislators portrayed as agents of the People’s interpretive will rather than Burkean trustees who impose their own interpretive visions.<sup>214</sup> The People, in turn, do more than choose between competing leadership slates in periodic elections.<sup>215</sup> Through social movement activism, they serve as the point of origin for and assessment of competing interpretive claims. In Post and Siegel’s account of the women’s movement, for example, Congress acted to pass constitutionally relevant legislation in response to a grassroots movement driven by the conversations among and participation of ordinary women.<sup>216</sup>

These populist narratives serve to advance one of popular constitutionalism’s

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208. KRAMER, *supra* note 13, at 241.

209. PARKER, *supra* note 12, at 62.

210. *Id.*

211. KRAMER, *supra* note 13, at 242.

212. *Id.* at 241–44.

213. *Id.* at 3–5.

214. For a description of Burke’s theory of representation, see HIBBING & THEISS-MORSE, *supra* note 111, at 41.

215. This perspective on the People’s role in democratic politics is often associated with Joseph Schumpeter and his landmark work, *CAPITALISM, SOCIALISM, AND DEMOCRACY* (1942). See POSNER, *supra* note 175, at 178.

216. See Post & Siegel, *supra* note 28, at 1986–96.

primary normative goals: to transform the Constitution from “a lawyer’s contract” to “a layman’s instrument of government”<sup>217</sup> through an interpretive process where the People engage in a collective and ongoing redefinition of national values.<sup>218</sup> In today’s world, the People’s increasingly distant relationship with political life leads constitutional culture to operate in ways that are descriptively different from these moments of constitutional populism.

Consider, for example, how most Americans convey their interpretive preferences. Today, protesting is a comparatively rare event for most citizens. A 1990 survey of 2517 citizens found that only 6% had attended a protest within the past two years. By contrast, 71% of the survey participants reported voting in the previous presidential election, and 24% reported donating money to a campaign.<sup>219</sup>

Indeed, campaign contributions—a participatory act all but ignored by popular constitutionalists—appear to be the mechanism of choice for those who want to get their message heard. Today, a citizen who seeks to influence constitutional culture is far more likely to write a check than take to the streets.<sup>220</sup> While fewer and fewer Americans engage politics at a grassroots level (by attending political meetings or working for a political party), checkbook participation has exploded, growing from \$35 million in 1964 to over \$700 million in 1996.<sup>221</sup> Between 1967 and 1987, Verba, Scholzman and Brady found a 77% increase in the number of Americans who reported contributing money to a party or candidate.<sup>222</sup> Currently, somewhere between 4% and 12% of registered voters donate money to federal campaigns.<sup>223</sup> Total spending on a single campaign increased to an all-time high of \$717 million in the 2004 presidential election, more than ten times the \$67 million spent in 1976.<sup>224</sup>

Beyond the means of participation, limited participation and knowledge affect contemporary constitutional culture in at least two significant ways. First, low knowledge levels create an environment where the People’s interpretive

217. KRAMER, *supra* note 13, at 248 (quoting Franklin D. Roosevelt, The Constitution of the United States Was a Layman’s Document, Not a Lawyer’s Contract, Address on Constitution Day, Washington D.C. (Sept. 17, 1937), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 362–63 (Samuel I. Rosenman compiler and collator, 1941)); Post & Siegel, *supra* note 43, at 26 (same).

218. See Balkin, *supra* note 36, at 1945–46 (“[P]opulism is based on a particular conception of self-rule and self-determination, one in which the active participation of the citizenry—when they choose to participate—is encouraged and facilitated.”).

219. VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 50–51. Self-reporting of political activity is often exaggerated in surveys. For an explanation, see *id.* at 50 n.2 and Somin, *supra* note 153, at 1313 n.113.

220. PUTNAM, *supra* note 26, at 39–40 (“Financial capital . . . has steadily replaced social capital . . . as the coin of the realm.”).

221. *Id.* at 39.

222. VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 72.

223. BRUCE ACKERMAN & IAN AYERS, VOTING WITH DOLLARS: A NEW PARADIGM FOR CAMPAIGN FINANCE 31 (2002).

224. Center for Responsive Politics, 2004 Presidential Election, at <http://www.opensecrets.org/presidential/index.asp?graph=spending> (last visited Nov. 24, 2004). These figures are not adjusted for inflation.



input is often unstable and highly malleable. Second, participation in constitutional culture is concentrated in ways that mirror larger power disparities in American life.

The result is a constitutional conversation where the People's interpretive voice is left in the hands of an unrepresentative group of fairly well-off and well-educated citizens. This produces a constitutional culture that is highly susceptible to influence by political elites, with the political energy of ordinary people strategically channeled by elite opinion makers.<sup>225</sup>

#### A. KNOWLEDGE, PUBLIC OPINION, AND ELITE DOMINATION

In his recent book, Kramer dismisses the notion that there is some minimum level of moral or substantive expertise required for an individual citizen to contribute to constitutional culture. Constitutional law involves "hard questions, much too complicated to ever be solved or put to rest, regardless of the interpretive actor."<sup>226</sup> Therefore, for example, knowledge about undue burdens, pregnancy trimesters, or what the Court has said about privacy and substantive due process are not prerequisites for the People to contribute meaningful interpretive input on the constitutionality of abortion.

Regardless of the relative qualifications of judges and individual citizens, knowledge (or lack of it) plays a critical role in determining both the composition of and the outcomes produced by constitutional culture. Low knowledge levels leave many individuals excluded from the interpretive conversation, since the well-informed are more likely to engage in political participation.<sup>227</sup> Knowledgeable citizens are also more likely to have opinions, tend to be more stable in those opinions, and are better able to discount specific information that conflicts with larger values and belief systems.<sup>228</sup> Conversely, those with low levels of political knowledge are less likely to participate or to have discernable political opinions. Moreover, the opinions they have are often internally inconsistent and more easily subject to change.<sup>229</sup>

As a result, high levels of ignorance often act to destabilize popular input into constitutional culture. For the large number of Americans who operate under conditions of low political awareness, individual opinions tend to be quite malleable.<sup>230</sup> It is well known, for example, that responses to survey questions vary dramatically depending upon how a particular question is asked and the

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225. See FIORINA, ABRAMS & POPE, *supra* note 198, at 130.

226. KRAMER, *supra* note 13, at 236.

227. DELLI CARPINI & KEETER, *supra* note 95, at 186-87.

228. *Id.* at 230-35.

229. *Id.* at 265.

230. See HIBBING & THEISS-MORSE, *supra* note 111, at 30-32; Philip E. Converse, *The Nature of Belief Systems in Mass Publics*, in IDEOLOGY AND DISCONTENT 206, 240 (David E. Apter ed., 1964) (presenting data showing high instability in public opinion on a range of policy issues over a two-year period). *But see* Benjamin I. Page & Robert Y. Shapiro, *The Rational Public and Beyond*, in CITIZEN COMPETENCE AND DEMOCRATIC INSTITUTIONS, *supra* note 95, at 93, 93 (arguing that Americans' collective policy preferences are real, measurable, and stable).

nature of the information provided.<sup>231</sup> They are also affected by contextual factors like the perceived degree of social conflict involved<sup>232</sup> and the presentation of simple counterarguments.<sup>233</sup> Indeed, many Americans simply hold no opinion at all,<sup>234</sup> possess significant ambivalence about the opinions they have,<sup>235</sup> or form their preferences through a process in which contradictory information is converted into an opinion based upon how recently the information was acquired, rather than through employing a pre-existing set of values or deliberative reflection.<sup>236</sup>

To explain how public opinion operates in these conditions, political scientists place significant emphasis on the role of political elites—politicians, journalists, policy experts, certain activists—in opinion formation.<sup>237</sup> When individuals seek to learn about an area with which they have little familiarity, like the Constitution, they rely upon elites to provide relevant information, and to define salient issues and considerations.<sup>238</sup> Individuals also look to elites as signaling devices, since the source of the information, rather than the content, often serves as a cue to help a citizen determine where he or she stands on a particular issue.<sup>239</sup>

Lack of basic political knowledge creates a fertile opportunity for elites to manipulate public opinion or distort the interpretive messages sent through participatory acts. These conditions give rise to the potential for what Zaller calls “elite domination,” where “elites induce citizens to hold opinions that they

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231. See ZALLER, *supra* note 150, at 30, 33–34, 80–85.

232. Funk, *supra* note 188, at 198–203.

233. PAUL M. SNIDERMAN & THOMAS PIAZZA, *THE SCAR OF RACE* 144 (presenting survey data showing that “substantial numbers of white respondents will change positions on racial policy issues when confronted with counterarguments”); James L. Gibson, *A Sober Second Thought: An Experiment in Persuading Russians To Tolerate*, 42 AM. J. POL. SCI. 819–50 (1998) (concluding that presentation of counterarguments was “quite effective” at changing Russians’ initial responses to questions about political tolerance).

234. Converse, *supra* note 230, at 245. *But see* Christopher H. Achen, *Mass Political Attitudes and the Survey Response*, 69 AM. POL. SCI. REV. 1218 (1975) (using empirical data to attack Converse’s non-attitude thesis).

235. R. Michael Alvarez & John Brehm, *American Ambivalence Towards Abortion Policy: Development of a Heteroskedastic Probit Model of Competing Values*, 39 AM. J. POL. SCI. 1055, 1077 (1995) (presenting study showing deep ambivalence and internal conflict over abortion-related issues); Dennis Chong, *How People Think, Reason, and Feel About Rights and Liberties*, 37 AM. J. POL. SCI. 867, 897 (1993) (presenting study showing that “people experience considerable ambivalence over many civil liberties controversies”); Stanley Feldman & John Zaller, *The Political Culture of Ambivalence: Ideological Responses to the Welfare State*, 36 AM. J. POL. SCI. 268, 293 (1992) (calling ambivalence “a fundamental feature” of public opinion about the welfare system).

236. ZALLER, *supra* note 150, at 42–51.

237. *Id.* at 6; Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POL. SCI. REV. 619, 621–22 (2001).

238. See, e.g., LUPIA & McCUBBINS, *supra* note 149, at 64; ZALLER, *supra* note 150, at 6; Franklin & Kosaki, *supra* note 168, at 369 (“[M]edia coverage of the Supreme Court is a key determinant of what people know of its decisions.”).

239. ZALLER, *supra* note 150, at 14, 45.

would not hold if aware of the best available information and analysis.”<sup>240</sup> Several studies suggest that by “framing”<sup>241</sup> a salient constitutional issue in a particular way, elites can significantly affect public opinion about that issue, including the 2000 presidential election, abortion, affirmative action, and civil liberties.<sup>242</sup> Indeed, the potential for elite domination exists even during historical periods of high civic engagement and constitutional change.<sup>243</sup>

Under conditions of elite domination, the choice between juricentric and popular-constitutionalist models is less stark than it initially appears. Rather than a battle between the Court and the People for interpretive authority, the real power struggle is between a small number of competing (and often self-interested) elites—including the Court—that operate under a loose set of political constraints brought about in large part by low levels of political knowledge. The People operate primarily as passive spectators, occasionally weighing in through periodic elections but remaining largely disengaged.<sup>244</sup>

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240. *Id.* at 313; see also Thomas E. Nelson & Donald R. Kinder, *Issue Frames and Group-Centrism in American Public Opinion*, 58 J. POL. 1055 (1996) (arguing that citizens’ public policy preferences are dependent on how issues are framed by elites).

241. By framing, I refer to “the words, images, phrases, and presentation styles that a speaker uses when relaying information to another.” James N. Druckman, *The Implications of Framing Effects for Citizen Competence*, 23 POL. BEHAV. 225, 227 (2001); see also ZALLER, *supra* note 150, at 311–12 (discussing elite manipulation of public opinion); Donald P. Haider-Markel & Mark R. Joslyn, *Gun Policy, Opinion, Tragedy, and Blame Attribution: The Conditional Influence of Issue Frames*, 63 J. POL. 520, 529 (showing that less knowledgeable citizens are more susceptible to elite issue-framing on opinions about proposed law allowing carrying of concealed handguns). *But see* James N. Druckman & Kjersten R. Nelson, *Framing and Deliberation: How Citizens’ Conversations Limit Elite Influence*, 47 AM. J. POL. SCI. 729 (2003) (arguing that discussions with other citizens mediate the impact of elite influence).

242. See Chong, *supra* note 235, at 898 (showing susceptibility of study participants to framing of civil liberties issues); Donald R. Kinder & Lynn M. Sanders, *Mimicking Political Debate with Survey Questions: The Case of White Opinion on Affirmative Action for Blacks*, 8 SOC. COGNITION 73, 96 (1990) (showing effects of framing on opinion about affirmative action); Thomas E. Nelson, Rosalee A. Clawson & Zoe M. Oxley, *Media Framing of a Civil Liberties Conflict and Its Effect on Tolerance*, 91 AM. POL. SCI. REV. 567, 579 (1997) (showing how framing of a Ku Klux Klan march controversy as a “free speech” or “public safety” issue affects public opinion); Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of Bush v. Gore*, 65 J. POL. 676, 693 (2003) (showing how framing *Bush v. Gore* affected specific and diffuse support for the Court). *But see* James N. Druckman, *On the Limits of Framing Effects: Who Can Frame?*, 63 J. POL. 1041 (2001) (presenting two experiments suggesting that elite framing is constrained by the credibility of the frame’s source).

243. Ilya Somin, *Voter Knowledge and Constitutional Change: Assessing the New Deal Experience*, 495 WM. & MARY L. REV. 595, 662–63 (2003) (concluding that New Deal economic legislation was the result of efforts by elites to exploit voter ignorance).

244. Richard Posner calls this vision “Concept 2” democracy. Concept 2 democrats “see politics as a competition among self-interested politicians, constituting a ruling class, for the support of the people, also assumed to be self-interested, and to be none too interested in or well informed about politics. . . . It is rule by officials who are, however, chosen by the people and who if they don’t perform to expectations are fired by the people at the end of a short fixed or limited term of office.” POSNER, *supra* note 175, at 143–44.

## B. PARTICIPATORY DISTORTION

Even when the People speak, their input reflects the wide disparities in wealth and power that exist throughout American political life. As Christopher Eisgruber points out, “constitutional theorists . . . have not paid much attention to the possibility of a conceptual distinction between ‘the electorate’ and ‘the people.’”<sup>245</sup> For popular constitutionalists, the result of this oversight is a failure to acknowledge the distorted nature of the People’s interpretive voice.<sup>246</sup>

The process of citizen-interpreters opting in and out of constitutional culture creates the potential for “participatory distortion,” a condition where “political activists do not reflect accurately the larger population from which they come with respect to some politically relevant characteristic.”<sup>247</sup> This distortion can take place on a large scale; participants fail to represent the polity as a whole. It can also occur on a smaller scale; elites who represent a particular group’s interests fail to represent that group’s policy preferences,<sup>248</sup> or elected representatives fail to reflect the demography or ideological preferences of their constituencies.<sup>249</sup>

In the most comprehensive study of participatory distortion to date, Verba, Schlozman, and Brady concluded that political participants differ from the public at large in critical ways, particularly in demographic composition and political preferences. As a result, the political component of constitutional culture sends out distorted messages to political institutions about the People’s interests, preferences, and needs.<sup>250</sup>

Wealth and education are the strongest predictors of political participation.<sup>251</sup> The rich and well-educated are more likely to vote, sign petitions, attend rallies, contribute money, or work on campaigns.<sup>252</sup> According to Verba and his co-authors, with the exception of voting, the affluent are more than twice as likely

245. Christopher L. Eisgruber, *Constitutional Self-Government and Judicial Review: A Reply to Five Critics*, 37 U.S.F. L. REV. 115, 119 (2002).

246. This omission reflects the invisibility of class in American social and legal discourse. See Deborah C. Malamud, “*Who They Are—or Were*”: *Middle-Class Welfare in the Early New Deal*, 151 U. PA. L. REV. 2019, 2019–20 (2003).

247. VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 178.

248. *Id.* at 478–80 & n.14 (summarizing literature on participatory distortion among party elites and activists). For example, despite the general liberal bent among Latino elected officials, Latinos as a whole express significant skepticism about the merits of government assistance programs for the poor.

249. *Id.* at 165 nn.3–4 (summarizing literature showing that elected representatives do not reflect the demographics of their constituencies).

250. *Id.* at 464.

251. See, e.g., CONWAY, *supra* note 112, at 25–30; BENJAMIN GINSBERG & MARTIN SHEFTER, POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA 189–90 (1990); ROSENSTONE & HANSEN, *supra* note 26, at 236–38; E.E. SCHATTSCHNEIDER, THE SEMISOVEREIGN PEOPLE: A REALIST’S VIEW OF DEMOCRACY IN AMERICA 34–35 (2d ed. 1975) (“The flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent.”); VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 188; WOLFINGER & ROSENSTONE, *supra* note 126, at 13–36.

252. ROSENSTONE & HANSEN, *supra* note 26, at 236–38; VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 190.

to be active in every other form of political activity.<sup>253</sup> The close relationship between socioeconomic status and participation implicates race and sex as well. Demographic groups with comparatively lower levels of income and education, like African-Americans, Latinos, and women,<sup>254</sup> are underrepresented among participants.<sup>255</sup>

Echoing disparities in participation, "information about politics is as inequitably distributed as wealth in the mass public."<sup>256</sup> The most knowledgeable are disproportionately concentrated among the well educated,<sup>257</sup> while political ignorance is highest among women, racial minorities, and the poor.<sup>258</sup>

These inequities in political knowledge are mirrored in the realm of constitutional culture. Those with high levels of knowledge about the Court appear to share two characteristics: they are well educated, and they pay a lot of attention to politics outside the Court.<sup>259</sup> For example, among the most politically aware, over 95% knew about the *Webster* decision, while virtually no one at the lower end of the awareness continuum knew anything about the case.<sup>260</sup> In particular, post-secondary education is significant in determining institutional knowledge about the Court. Delli Carpini and Keeter found that while fewer than one-third of high school graduates were able to identify who nominates Supreme Court justices or which branch of government determines the constitutionality of laws, 80% of college graduates were able to correctly answer both questions.<sup>261</sup>

Citizens who possess traits associated with higher socioeconomic status are also the greatest beneficiaries of participatory distortion. Since citizens with education and money participate at higher rates than the rest of the population, they gain an overrepresentative voice in constitutional culture.<sup>262</sup>

This is particularly true for campaign contributions, which carry higher levels of distortion than any other participatory activity.<sup>263</sup> As one might expect, campaign contributions are drawn disproportionately from the very well-off.<sup>264</sup>

253. VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 189; *See also* Theda Skocpol, *Voice and Inequality: The Transformation of American Civic Democracy*, 2 PERSP. ON POL. 1, 12 (2004) ("Americans who are not wealthy or higher-educated now have fewer associations representing their values and interests, and enjoy dwindling opportunities for active participation.").

254. CONWAY, *supra* note 112, at 34 ("Latino citizens have lower rates of voter registration and turnout and of engagement in other forms of political participation than do either white citizens or black citizens."); VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 307-08.

255. Conway reports that while women are as likely as men to vote in presidential and midterm elections, significant but diminishing disparities continue to exist in participation in campaign activity. *See* CONWAY, *supra* note 112, at 36-39; VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 465.

256. *See* Philip E. Converse, *Information Flow and the Stability of Partisan Attitudes*, 26 PUB. OPINION Q. 578, 582 (1962).

257. DELLI CARPINI & KEETER, *supra* note 95, at 278.

258. *Id.* at 177; Somin, *supra* note 153, at 6.

259. Caldeira & Gibson, *supra* note 181, at 635, 653; Franklin & Kosaki, *supra* note 168, at 353.

260. ZALLER, *supra* note 150, at 17-18.

261. DELLI CARPINI & KEETER, *supra* note 95, at 191-92.

262. ROSENSTONE & HANSEN, *supra* note 26, at 236-38.

263. VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 516-17.

264. *Id.* at 361, 482.

According to one study, the wealthiest 5% of the population supply 17% of campaign donors, while the poorest 16% supply only 4%.<sup>265</sup> During the 2000 election, households that earned over \$100,000 were responsible for 85% of donations over \$200, even though they comprised only 13.4% of the population.<sup>266</sup> Similar distortion effects are seen in citizen interactions with legislators. According to survey data collected between 1976 and 1988, while college-educated people account for 35% of the population, they make up 56% of those who write letters to Congress.<sup>267</sup>

In and of itself, demographic distortion is not necessarily a problem, as long as those who participate do a reasonably good job of reflecting the views of nonparticipants. Voting, the most common form of political participation, contains far less ideological distortion than one might expect. Several studies confirm that voters, at least for now, do a reasonably good job of reflecting the policy (but not necessarily the interpretive) preferences of the country as a whole.<sup>268</sup>

But other forms of participation are far more susceptible to ideological distortion. For example, compared with the population as a whole, campaign contributors are significantly more tolerant of different political viewpoints and adopt more conservative attitudes on economic issues.<sup>269</sup> Not surprisingly, protesters—a critical group in many popular constitutionalist narratives—carry an ideologically liberal distortion.<sup>270</sup>

## VI. THE NATURE OF CONSTITUTIONAL CULTURE

In light of the political science literature, we can now draw a few preliminary descriptive conclusions about the People's role in contemporary constitutional culture.

265. ROSENSTONE & HANSEN, *supra* note 26, at 236–38.

266. Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 76 (2004).

267. ROSENSTONE & HANSEN, *supra* note 26, at 236. By contrast, those with the least education (10% of the population) make up 4% of those who write letters. *Id.*

268. See, e.g., VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 205 (“Voters and non-voters do not seem to differ substantially in their attitudes on public policy issues.”); Michael M. Gant & William Lyons, *Democratic Theory, Nonvoting, and Public Policy: The 1972–1988 Presidential Elections*, 21 AM. POL. Q. 185, 194 (1993) (finding “no strong patterns of significant differences between voters and nonvoters” in thirty-five policy positions over five elections); Stephen D. Shaffer, *Policy Differences Between Voters and Non-voters in American Elections*, 35 W. POL. Q. 496, 509 (1982) (presenting study showing “policy differences between voters and non-voters are presently neither large nor ideologically consistent”). *But see* PATTERSON, *supra* note 132, at 13 (citing polls suggesting that if all eligible adults had voted in the 2000 election, the Democrats would have won the Presidency and both houses of Congress); Jack Citrin, Eric Schickler & John Sides, *What If Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections*, 47 AM. J. POL. SCI. 75, 88 (2003) (concluding that there are “meaningful differences in the partisan leanings of voters and non-voters”).

269. VERBA, SCHLOZMAN & BRADY, *supra* note 26, at 482, 505. For the questions used to gauge tolerance or economic opinion, see *id.* at 552, 555.

270. *Id.* at 485. Verba et al. attribute this distortion to race and age: The protesting population contains more African-Americans and young people than the population as a whole. *Id.* at 485–87.

First, many Americans simply want nothing to do with constitutional culture. Moreover, to the extent the Court is engaging the People in a dialogue about constitutional aspirations, the People are not doing a particularly good job of holding up their end of the conversation. Apathy, disengagement, and low levels of political knowledge are enduring forces in modern political culture, and—if generational trends remain consistent—will continue to be for the foreseeable future. Their omission, particularly in policentrist narratives, creates an inaccurate picture of constitutional culture in practice, one that gerrymanders recent political history to highlight isolated moments of civic engagement while whitewashing the distant relationship between large segments of the polity and the interpretive process.

Second, the People do not serve as a particularly stable or reliable check on the Court's interpretive power. Popular interpretive preferences, where they exist, are often made without much awareness about politics generally, or the Constitution and the Court in particular. A public that is unaware of constitutional culture cannot engage in a conversation about shared constitutional values with the Court or any other interpretive actors. Further, once a preference is ascertained, it often proves unstable and easily susceptible to elite influence, lending a distinctly dubious quality to popular communications across the law-politics divide. Political institutions seeking to discern interpretive preferences are left with a *mélange* of conflicting information that is easily subject to manipulation.

Third, constitutional culture reflects the disparities of wealth and power that permeate our political culture. Popular input is derived primarily from an unrepresentative minority of Americans that, curiously enough, shares many demographic traits with constitutional theorists and Supreme Court judges. Knowledge of and participation in constitutional culture are disproportionately concentrated among well-educated, financially secure individuals who are highly attentive to political life. Moreover, the increased use of checkbook participation reinforces the upper-crust complexion of popular constitutionalism in practice. Hence, while the composition of the Court is far from representative—under virtually any demographic metric—granting the People heightened interpretive input presents its own set of problems.

Fourth, constitutional culture often acts to reinforce juricentric norms and legitimize judicial authority. As a forum for disagreement, many Americans see the courts as a preferable alternative to direct participation or a flawed political process. Even when the Court risks its political capital, as it did with *Bush v. Gore*, its public support remains solid.<sup>271</sup> Further, a declining sense of external and internal efficacy leaves the People predisposed to outsource constitutional disagreements to judicial fora.

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271. See Friedman, *supra* note 95, at 2627–29; James L. Gibson, Gregory A. Caldeira & Lester Kenyatta Spence, *The Supreme Court and the US Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise*, 33 *BRIT. J. POL. SCI.* 535, 555 (2003).

Finally, the contemporary political environment presents a number of serious operational challenges for increased popular constitutionalism in the foreseeable future. Younger generations disproportionately reflect overall declines in political interest, participation, and efficacy. A citizen-interpreter who lacks faith in her own ability to master the skills necessary to participate in constitutional dialogues, or believes that political institutions are unresponsive to popular input, is unlikely to participate in constitutional culture. Moreover, a political culture that doubts the People's capacity for self-governance is unlikely to respond well to heightened popular input in constitutional lawmaking outside Article V. In such a context, it is likely that Americans, who already make interpretive decisions based on limited information, will doubt their ability to fully understand basic constitutional issues and opt out of the interpretive process.

As realist democratic theorists have long held, declining levels of participation do not necessarily present an immediate threat to the People's ability to check institutional actors.<sup>272</sup> Indeed, a dramatic increase in political participation could present a potential threat to democratic stability.<sup>273</sup> Yet the decline is worrisome, if not for the present then for the future. As participation declines, it heightens the risk that constitutional meaning will reflect only the self-interest of a limited number of participants—primarily the rich and well-educated—while effectively silencing the constitutional perspectives of a large segment of the American population.<sup>274</sup> Decreased participation also means that constitutional culture will become increasingly dominated by a small number of intense issue activists whose views differ substantially from those of nonparticipants.<sup>275</sup>

Further, if one of popular constitutionalism's primary normative virtues is its ability to initiate a national conversation about constitutional values—to give the People a sense of ownership over the document and its meaning—this virtue is at risk when fewer people participate in constitutional culture. If the People are ill-equipped, unwilling, or unable to engage in a larger cultural dialogue about constitutional meaning, “constitutional culture” may amount to little more than an academic construction or a series of observations by pundits on a Sunday morning talk show.

Despite efforts by policentrists to highlight the role of popular input in the development of constitutional doctrine, the moments of constitutional empower-

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272. Griffin, *supra* note 21, at 526.

273. CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 14 (1970) (“The fact that non-democratic attitudes are relatively more common among the inactive means that any increase in participation by the apathetic would weaken the consensus on the norms of the democratic method.”).

274. The notion that our system of constitutional governance exists to promote the class-based interests of a political and economic elite has well-established theoretical roots. See CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

275. See Steven Earl Bennett & David Resnick, *The Implications of Nonvoting for Democracy in the United States*, 34 *AM. J. POL. SCI.* 771, 800 (1990). Indeed, Mark Tushnet argues that America is in the midst of a “new constitutional order” marked by “a public that does not participate in politics and weak parties but highly partisan institutions in a divided government.” TUSHNET, *supra* note 56, at 19.



ment they point to often bear a distant relationship to contemporary reality. Moreover, for juridominant critics, a population that avoids participation in civic life, doubts its capacity to understand political issues, expresses skepticism about its ability to influence political outcomes, and has little interest in civic life, is a poor subject for constitutional models that rely upon voluntary participation as a necessary component.

How can we explain the reluctance to acknowledge these trends—obvious to any political scientist—among popular constitutionalists? For one thing, constitutional theorists have steadily avoided empirical studies of any kind, preferring to use normative or historical lenses to explain or advocate for interpretive developments.<sup>276</sup> Moreover, as long as constitutional theorists remain committed to relitigating the countermajoritarian difficulty,<sup>277</sup> there will be a need to maintain democratic legitimacy within the political branches to counteract the antidemocratic features of judicial review.<sup>278</sup>

But something else is at work.

Contemporary constitutional theory is dominated by scholars who remain highly influenced by politically formative experiences from the civil rights era.<sup>279</sup> They (or their mentors) attended college during an era of heightened political efficacy, and found themselves among others who shared a belief in their ability to change the political system.<sup>280</sup> Protest was a primary means for accomplishing change,<sup>281</sup> and many within this age cohort were actively engaged in a popular constitutionalist discourse that centered around racial justice, women's rights, and class division. These experiences have brought historical instances of popular empowerment into sharp descriptive focus, while relegating much of contemporary political life into the background.<sup>282</sup> I mention this not to broadly pathologize a generation of scholars, but in an attempt to explain how constitutional theory, now decades into its development as a discipline,

276. See Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 41 (2004).

277. See Friedman, *History Part Five*, *supra* note 40, at 218–22 (describing the countermajoritarian difficulty as an “obsession” among academics).

278. As Barry Friedman notes, constitutional theorists also overlook the numerous political constraints on the Court's interpretive discretion, including its institutional wellspring of diffuse support, institutional composition, and independent sensitivity to political dynamics. See Friedman, *supra* note 95, at 2614–17.

279. See Balkin & Levinson, *supra* note 19, at 1090–92.

280. The period between ages eighteen and twenty-six is “the most crucial age range for the creation of a distinctive, self-conscious political generation.” M. KENT JENNINGS & RICHARD G. NIEMI, *GENERATIONS AND POLITICS: A PANEL STUDY OF YOUNG ADULTS AND THEIR PARENTS* 7 (1981).

281. *Id.* at 333 (“For those who lived through the protest period it may have seemed that nearly every young person was a protestor, in either incipient or manifest form.”); Jennings, *supra* note 103, at 369 (estimating that three in ten of all college graduates had taken part in a demonstration, protest march, or sit-in between 1965 and 1973, a level far higher than the rest of the population). See *supra* note 219 for contemporary data on protesting.

282. See DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 1–2 (2004) (describing “awe and respect” shown by educated elites to *Brown*, “a decision that promised so much and, by its terms, accomplished so little”).

continues to treat the People as a vague abstraction.<sup>283</sup>

If popular constitutionalists truly intend to view constitutional lawmaking as the product of a culture in which law and politics intersect, they can no longer treat politics and the People as interchangeable concepts. Indeed, if constitutional theory is evolving from the normative search for a dominant interpretive paradigm to a descriptive inquiry into the political and legal interactions that underlie judicial review,<sup>284</sup> it is no longer sufficient to rely upon abstractions like “the People.”

Instead, our theoretical inquiry must become more sophisticated about how political realities operate within constitutional culture. For example, does widespread political apathy offer an opportunity for an ambitious and confident Court to expand its interpretive authority? Do contemporary political conditions create incentives for interpretive restraint by other political institutions? Can a constitutional culture that operates under these conditions sustain its legitimacy? How prominent is the role of elite opinion and polarization? How do emotions operate within and influence constitutional culture? How exactly do courts internalize constitutional claims made outside the courtroom? How much legitimacy do extrajudicial constitutional norms have as law? Given relatively low levels of political knowledge, how credible are the conclusions we draw about popular interpretive preferences? How does the ebb and flow of participation affect constitutional interpretation and the behavior of courts? What levels of participation are necessary for a constitutional culture to sustain its democratic legitimacy? To what extent do the realities of participation and mobilization distort constitutional outcomes in favor of certain groups? How does constitutional culture manifest itself on the state level?<sup>285</sup>

More often than not, these questions have either gone unasked, or the answers lack empirical rigor. The result is constitutional theory that bears a skewed relationship to contemporary practice.

#### CONCLUSION

Our past informs our current perspective, bringing certain elements and structures into sharp focus while leaving others behind. This dynamic often plays itself out on a generational scale,<sup>286</sup> as particular age cohorts share a

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283. The notion that scholarship is influenced by historical paradigms that are often resistant to developing—and sometimes contradictory—facts is not new. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 62–65 (3d ed. 1996). For a description of how this dynamic has operated within constitutional theory, see Friedman, *History Part Five*, *supra* note 40, at 250 (describing mid-twentieth-century theorists as “stuck in the paradigm of ‘democratic faith’ that they had inherited”).

284. For an example of such an inquiry, see Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2005).

285. For example, the recent state-by-state skirmishes over same-sex marriage provide a comprehensive case study on the determination of constitutional meaning through complex interactions between the judiciary, the legislature, and the public.

286. For the classic statement on generational theory, see Karl Mannheim, *The Problem of Generations*, in *THE NEW PILGRIMS: YOUTH PROTEST IN TRANSITION* 101, 136 (Philip G. Altbach & Robert S.

common experiential point of reference that affects the style and content of their scholarship. It is no surprise, therefore, that scholars who formed their political consciousness during an era of heightened civic engagement would produce scholarship that seeks to integrate the role of social movements and politics into constitutional theory.

In building upon their work, the post-Watergate generation faces a similar challenge—to integrate our formative experience with the darker side of political life into the descriptive and normative course of constitutional theory. This will involve embracing empirical work that transcends barriers imposed by academic disciplines, and bringing greater sophistication to descriptive accounts of constitutional culture. All too often, generations of constitutional theorists have been seduced into the same modes of thinking as their predecessors.<sup>287</sup> We must do our best to avoid that trap.

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Laufer eds., 1972) (“The phenomenon of generations is one of the basic factors contributing to the genesis of the dynamic of historical development.”).

287. See Friedman, *History Part Five*, *supra* note 40, at 255 (describing how mid-century constitutional theorists “parroted their predecessors’ words”); Friedman, *supra* note 78, at 938–39.