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## POPULAR CONSTITUTIONALISM AND ITS ENEMIES

G. Alan Tarr\*

### INTRODUCTION

Chief Justice Robert Utter was acutely aware of the delicate place occupied by judges in the American system of government. Although their responsibilities of office obliged them to “say what the law is”<sup>1</sup> in resolving cases, even controversial cases, doing so often required them to address bodies of law, such as state constitutions, that were relatively unexplored and that might yield new principles and unexpected conclusions. Chief Justice Utter recognized that legal counsel could play an important part in assisting judges in this task, and so in advising attorneys how to frame state constitutional arguments, he admonished them to avoid a lazy reliance on federal interpretations of similar provisions and instead to be aware of “the historical mandates contained in their state bill[s] of rights.”<sup>2</sup> Such well-framed state constitutional arguments, he argued, could assist justices in developing “a principled, independent state jurisprudence,” which was essential because “state courts should be judged on whether they have created a principled body of state law based on their own independent analysis and interpretation.”<sup>3</sup>

Yet Chief Justice Utter also recognized that “the ultimate power of the courts comes not just from laws and the Constitution but from the expectation[s] of the public.”<sup>4</sup> These public expectations included, at a

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1. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

2. Robert F. Utter & Sanford E. Pitler, *Presenting a State Constitutional Argument: Comment on Theory and Technique*, 20 IND. L. REV. 635, 677 (1987) [hereinafter Utter & Pitler, *Comment on Theory and Technique*]; see also Robert F. Utter, *Practice of Principled Decision-Making in State Constitutionalism: Washington’s Experience, The Emerging Issues in State Constitutional Law*, 65 TEMP. L. REV. 1153 (1992).

3. Utter & Pitler, *Comment on Theory and Technique*, *supra* note 2, at 652, 676.

4. George Hodak, *Judges in the Culture Wars Crossfire*, A.B.A. J. (Oct. 29, 2005, 9:14 AM), [http://www.abajournal.com/magazine/article/judges\\_in\\_the\\_culture\\_wars\\_crossfire](http://www.abajournal.com/magazine/article/judges_in_the_culture_wars_crossfire)

minimum, judicial impartiality, resulting in decisions “without restriction, improper influence, inducements, pressures, threats or interference[—]direct or indirect.”<sup>5</sup> The people expected a judicial commitment to the rule of law, i.e. deciding cases based not on the judges’ personal views but on what the law requires. More generally, the people were concerned with the substance of the legal principles courts announced, as well as with the courts’ overall role in the political system. Chief Justice Utter acknowledged “the ideal of democratic accountability of the public servant no matter what the position of power” and the danger that “the more the judiciary is independent of popular pressures, the greater the risk of the judiciary straying from strongly-held popular values.”<sup>6</sup> However, he also cautioned that public expectations should not interfere with the rule of law: “the more the judiciary is accountable to popular pressures, the greater the risk it may lose its role of independent protector of nonmajoritarian interests and rights.”<sup>7</sup> Rather, what judicial accountability required was that “state judges [be] aware of the need to be sensitive to public concerns and to carefully explain [how the] value choices that must be made in decisions are chosen.”<sup>8</sup>

Such explanations were crucial because, as Chief Justice Utter noted, “state courts typically are democratically accountable” in ways that federal courts are not.<sup>9</sup> Most state judges serve limited terms of office rather than during good behavior, and roughly ninety percent of state judges stand for election at some point; therefore citizens can register their disapproval of judicial decisions by voting the offending judges out of office.<sup>10</sup> In addition, most state constitutions are relatively easy to amend, so voters may overturn disfavored rulings by constitutional amendment.<sup>11</sup> This of course cuts two ways. If decisions were relatively

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[<https://perma.cc/HFC2-VWGJ>].

5. *Id.*

6. Robert F. Utter, *State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub*, 64 WASH. L. REV. 19, 20 (1989).

7. *Id.*

8. *Id.* at 48.

9. *Id.* at 20.

10. On the selection and tenure of state court judges, see *Book of the States 2013: Chapter 5 State Judicial Branch*, COUNCIL ST. GOV'TS (July 1, 2013, 12:00 AM),

[http://knowledgecenter.csg.org/kc/system/files/5.7\\_2013.pdf](http://knowledgecenter.csg.org/kc/system/files/5.7_2013.pdf) [<https://perma.cc/BL4A-J5GQ>]. See generally G. ALAN TARR, WITHOUT FEAR OR FAVOR: JUDICIAL INDEPENDENCE AND JUDICIAL ACCOUNTABILITY IN THE STATES (2012) [hereinafter TARR, WITHOUT FEAR OR FAVOR].

11. See *Book of the States 2013: Chapter 1: State Constitutions*, COUNCIL ST. GOV'TS (July 1, 2013, 12:00 AM), <http://knowledgecenter.csg.org/kc/content/book-states-2013-chapter-1-state->

easy to overturn, then the failure to overturn them could be viewed as popular approval of those rulings. Thus Chief Justice Utter pointed to the failure of state voters to overturn most “new judicial federalism” rulings as evidence of “overall support of rights beyond those required by the federal constitution.”<sup>12</sup> In fact, the ready availability of mechanisms for overturning state court decisions may actually encourage judicial creativity. If democratic means exist for overturning judicial rulings and if judges themselves are electorally accountable, then the familiar arguments about the undemocratic character of judicial review and about the need for judicial restraint lose much of their force.<sup>13</sup>

Chief Justice Utter’s comments on the place of the judiciary in the American system of popular government give us much to ponder. In the pages that follow I continue the discussion that he started by looking at the debate over judicial review and popular constitutionalism. More specifically, I explore popular constitutionalism at both the federal and state levels. The decision to do so is rooted in part in the simple fact of dual constitutionalism. The decision is also rooted in the very different constitutional experience at the federal and state levels. The distinctiveness of the federal and state constitutional experiences is crucial for understanding popular constitutionalism in the United States.<sup>14</sup>

What role have the people played, and what role should they play, in American constitutionalism? That these questions are raised at all may seem odd. After all, the preambles of the United States Constitution and of American state constitutions confirm that “We the People” have the authority to establish the fundamental law under which we will live. These documents in turn draw upon the Declaration of Independence, which proclaims “the Right of the People to alter or to abolish [an existing government], and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.”<sup>15</sup>

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constitutions [https://perma.cc/KB2A-UL8W].

12. Robert F. Utter, *Don’t Make a Constitutional Case of It, Unless You Must*, 73 JUDICATURE 146, 149 (1989).

13. See Robert F. Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights*, 7 U. PUGET SOUND L. REV. 491, 495–96 (1984).

14. See generally JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* (2009); G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998) [hereinafter TARR, *UNDERSTANDING*].

15. See, e.g., N.Y. CONST. pmb. (“We The People of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS

Yet the founding documents do not conclude the matter, because more is involved in the constitutional enterprise than merely the creation of a government; and the popular role in that broader enterprise—both what the people have done and what they can and should do—has been debated throughout much of the nation’s history. Indeed, it remains controversial today.<sup>16</sup> For even if there is a consensus on the right of the people to create constitutions and replace existing constitutions, this does not resolve how frequently the people should do so and whether constitutional arrangements should encourage or discourage such recourse to the people. Nor does it address whether the people likewise have or should have a monopoly on instituting less fundamental constitutional changes or whether other institutions can and have initiated such changes. Nor does it clarify what role, if any, the people have played and should play—either directly or through institutions accountable to them—in interpreting or influencing the interpretation of their constitutions or in protecting the fundamental law against misinterpretation or evasion of its mandates. Yet these are crucial questions for American constitutionalism, as they are in any constitutional regime. Moreover, the answers to these questions may well vary both over time and depending on whether one is looking at the federal Constitution or at its state counterparts. To understand the role of the people in American constitutionalism, it is useful to begin with the current debate over popular constitutionalism.

## I. POPULAR CONSTITUTIONALISM

James Madison observed of the United States Constitution that “[a]s the instrument came from [the Convention] it . . . was nothing more than the draught of a plan, nothing but a dead letter, until life and validity

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CONSTITUTION.”). Similar language is found in the preambles of all state constitutions, and some—for example, the preamble to the Massachusetts Constitution—further specify that “the people have a right to alter the government” when it fails to serve the purposes for which it was created. MASS. CONST. pmbl. Several early state constitutions included portions of the Declaration of Independence in their lengthy preambles.

16. The most influential discussion—and endorsement—of popular constitutionalism is LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) [hereinafter KRAMER, *THE PEOPLE THEMSELVES*]. Other volumes sympathetic to popular constitutionalism and/or a reduced role for the judiciary in the constitutional realm include CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999) [hereinafter TUSHNET, *TAKING THE CONSTITUTION AWAY*]; JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999). For a magisterial account of the popular role in American constitutionalism during the antebellum era, see CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* (2008) [hereinafter FRITZ, *AMERICAN SOVEREIGNS*].

were breathed into it by the voice of the people, speaking through the several State Conventions.”<sup>17</sup> Few would quarrel with that. But proponents of popular constitutionalism maintain that the people are not merely constitutional legislators for a day. Even after a constitution’s adoption, the people exercise active and ongoing control over its revision, interpretation, and implementation—they are both the supreme creators and the supreme expositors of constitutions.<sup>18</sup> This is, for popular constitutionalists, simultaneously a proposition in political theory, a description of American political practice, and a normative claim. It is also highly controversial, with skeptics challenging whether popular constitutionalism was dominant at the American founding, whether it has continued throughout American constitutional history or has been replaced by judicial supremacy in the interpretation and implementation of American constitutions, whether popular constitutionalism remains viable today, and whether, even if it is viable, it is desirable. After all, as L.A. Powe has observed: “The fact that Americans used certain institutions and procedures before the Civil War is hardly an argument for using them today.”<sup>19</sup>

The preeminent contemporary exposition of popular constitutionalism is Larry Kramer’s *The People Themselves*. According to Kramer, prior to the Revolution, Americans “took for granted the people’s responsibility not only for making, but also for interpreting and enforcing their constitutions—a background norm so widely shared and deeply ingrained that specific expression in the constitution was unnecessary.”<sup>20</sup> Likewise well-established was the repertoire of mechanisms by which such unmediated popular intervention could occur. These included voting, petitioning public officials, public denunciation of unconstitutional acts in speeches and pamphlets, and various forms of quasi-legal or illegal direct action. Sometimes this

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17. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 78 (second alteration in original) (quoting James Madison, *Speech on the Jay Treaty in the Fourth Congress (April 6, 1796)*, in 6 *THE WRITINGS OF JAMES MADISON* 263 (Galliard Hunt ed., 1906)). Several other delegates to the Philadelphia Convention likewise stressed that popular ratification was crucial. For pertinent quotations, see FRITZ, *AMERICAN SOVEREIGNS*, *supra* note 16, at 139.

18. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 52–53. Kramer’s claim, like much of his theory, harkens back to Jean-Jacques Rousseau, who wrote in *The Social Contract*: “The people of England regards itself as free; but it is grossly mistaken; it is free only during the election of the members of parliament. As soon as they are elected, slavery overtakes it; and it is nothing.” JEAN JACQUES ROUSSEAU, 3 *THE SOCIAL CONTRACT* 83 (1762).

19. L.A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?: The People Themselves: Popular Constitutionalism and Judicial Review*, 83 *TEX. L. REV.* 855, 894–95 (2005).

20. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 53.

direct action took the form of a refusal of the *posse comitatus* to apprehend violators of unconstitutional laws, a refusal of grand juries to indict the violators, and a refusal of petit juries to convict them through jury nullification.<sup>21</sup> But, in the years preceding the Revolution, it increasingly included “mobbing” and other forms of resistance by “the crowd” against authority. As Gordon Wood observes: “Beginning with the revolutionary movement (but with roots deep in American history), the American people came to rely more and more on their ability to organize themselves and to act ‘out of doors,’ whether as ‘mobs,’ as political clubs, or as conventions.”<sup>22</sup> Yet whatever the means employed, the underlying assumption was that the people had the central responsibility for safeguarding the Constitution against its violation by governmental officials.

Formal opportunities for popular participation in constitutional affairs multiplied after independence with the establishment of governments responsive to the people and with the adoption of written constitutions that provided for constitutional change by the people. Early state constitutions, for example, institutionalized the people’s constitutional role through devices such as the extension of the right to vote, the power to instruct representatives, rotation in office, and procedures for constitutional amendment. In some constitutions, such as Maryland’s in 1776, the right to change the government was couched in language that seemed to countenance a constitutional right to revolution:

Whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought, to reform the old or establish a new government. The doctrine of non-resistance, against arbitrary power or oppression, is absurd, slavish, and destructive of the good and happiness of mankind.<sup>23</sup>

The shift to republican government, by making it easier for the people to enforce accountability and influence the choices of officials, made it less necessary to resort to extra-legal means to ensure that the public voice was heard and heeded. It also subtly changed the people’s relation to their constitutions. Whereas the people before 1776 could defend the customary constitution against violation, after 1776 they could in

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21. For a thorough discussion of the development of these techniques and their use prior to 1776, see GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 319–28 (1969).

22. *Id.* at 319.

23. M.D. CONST. of 1776 art. IV. A writer in the late nineteenth century counted twenty states with similar constitutional guarantees of the right to abolish the existing government. See JAMES ALEXANDER JAMESON, *A TREATISE ON CONSTITUTIONAL CONVENTIONS* 237 (1972).

addition change the written fundamental law through constitutional amendment and revision, becoming “an agent capable of ongoing, collective self-government and, when necessary, radical constitutional reform.”<sup>24</sup> But what did not change, Kramer insists, were the means available to the people for making effective their constitutional views.<sup>25</sup> Some High Federalists<sup>26</sup> may have contended that the creation of institutions answerable to the people delegitimized unmediated popular constitutionalism. Benjamin Rush, for example, argued that

[i]t is often said that “the sovereign and all other power is seated *in* the people.” This idea is unhappily expressed. It should be— ‘all power is derived from the people.’ They possess it only on the days of their elections. After that, it is the property of their rulers, nor can they exercise it or resume it, unless it is abused.<sup>27</sup>

But this was a minority sentiment. The creation of republican governments may have established channels for the operation of popular constitutionalism, but according to some popular constitutionalists these served to supplement, not displace, other forms of popular action.<sup>28</sup> Thus, amendment provisions might provide “an easier, more orderly mechanism for changing” constitutions, thereby reducing how frequently unmediated popular action might be needed, but they did not foreclose such action.<sup>29</sup> Popular constitutionalists contend that the sovereign people understood that they retained the authority to act directly to ensure constitutional fidelity and to resolve constitutional disputes.<sup>30</sup>

This aspect of popular constitutionalist thought deserves particular emphasis. Popular constitutionalists contend that the use of direct action, even against a popularly elected government, is not necessarily revolutionary or extra-constitutional. The people can legitimately act outside the rules that they themselves have established. They may have invested governing authority in their agents, but they did not thereby cede ultimate authority over the Constitution nor give up their power and responsibility to maintain and defend it against unconstitutional actions by those in government. Nor did they agree to use only government-sanctioned procedures in mounting the defense. Illustrative of popular

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24. JASON FRANK, *CONSTITUENT MOMENTS: ENACTING THE PEOPLE IN POSTREVOLUTIONARY AMERICA* 10 (2010) [hereinafter FRANK, *CONSTITUENT MOVEMENTS*].

25. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 110–18.

26. For a description of the High Federalist argument, see *id.* at 128–35.

27. *Id.* at 128–29 (emphasis in original).

28. *Id.* at 52–53.

29. *Id.* at 53.

30. *Id.* at 110–18.



constitutionalism's understanding of the continuing role of the people "out of doors" even after the adoption of written constitutions are the vignettes with which Kramer approvingly opens *The People Themselves*.<sup>31</sup> In the first, a jury exercises its power of nullification to acquit a defendant who had made a constitutional argument, even though the judges instructed the jury that his argument was legally frivolous.<sup>32</sup> In the second, a crowd hooted down Alexander Hamilton and other Federalist speakers defending the Jay Treaty, after they had argued that the treaty's constitutionality was a matter to be resolved by the President and the Senate rather than by the people.<sup>33</sup> In the third, he describes a series of public meetings denouncing the Alien and Sedition Acts as unconstitutional, with militia companies indicating that they would not enforce such laws.<sup>34</sup> What unites these events, at least in Kramer's mind, is a popular rejection of the proposition that government officials—whether the President, the Senate, or judges—have ultimate authority over the meaning of the Constitution and a popular assertiveness in proposing their own interpretations of the Constitution and acting upon them.<sup>35</sup> Yet these popular actions were not meant to overthrow government. Rather the people were voicing their constitutional complaints and rising up against official authority as a prelude to—or an impetus toward—institutional efforts to redress popular concerns. In fact, even popular actions that scared mightily many of the founding generation, such as Shays' Rebellion and the Whisky Rebellion, can on close inspection be understood as involving popular constitutionalism.<sup>36</sup>

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31. *Id.* at 3–5. A skeptical reader might question whether the twelve jurors or the crowd that booed Hamilton or those denouncing the Alien and Sedition Acts are really "the people" or can even claim to represent them. After all, the Jay Treaty and the Alien and Sedition Acts had supporters as well as opponents—indeed, several state legislatures rejected Virginia's call that they condemn the Alien and Sedition Acts. In such circumstances, how does one identify what the popular understanding is on a constitutional question? Kramer himself does not adequately answer that question. For a fuller attempt to grapple with how to identify when the people are acting, see FRANK, CONSTITUENT MOVEMENTS, *supra* note 24, at 67–101.

32. KRAMER, THE PEOPLE THEMSELVES, *supra* note 16, at 3.

33. *Id.* at 4.

34. *Id.* at 4–5.

35. *Id.* at 6.

36. Christian Fritz argues persuasively that separatist movements within the states in the 1780s, the Whiskey Rebellion, and Shays' Rebellion can all be understood as involving popular constitutionalism. See FRITZ, AMERICAN SOVEREIGNS, *supra* note 16, at 1–80. Regarding Shays' Rebellion, he notes:

For Regulators, court closings did not overthrow the Massachusetts government but legitimately interposed the authority of the people—as the ruler—to temporarily suspend policies that were inherently wrong if not unconstitutional. They sought a moratorium during which the legislature could finally grant needed relief. Such dramatic intervention would alert the legislature—which was not the sovereign—to the discontents of the people that could be

Kramer traces the operation of popular constitutionalism throughout American history, but his emphasis is on the founding and the antebellum era, given his concern to disprove that judicial supremacy is constitutionally inevitable and that it has been largely unchallenged from the very outset. He shows that figures as diverse as Thomas Jefferson, James Madison, James Wilson, and John Randolph all endorsed popular constitutionalism in the decades following independence, and he documents how political practice coincided with these pronouncements.<sup>37</sup> Even as judicial review gained acceptance, its exercise prompted popular threats to judicial independence and officially sanctioned defiance of judicial decrees.<sup>38</sup> During the first half of the nineteenth century, the rise of political parties created new vehicles by which the people could influence constitutional interpretation and implementation, and Kramer acknowledges that the rise of party politics in effect “swallowed up” popular politics, encouraging greater reliance on the newly established forms for popular participation and less on unmediated popular action.<sup>39</sup> Thus the impetus for constitutional defense and constitutional change would typically move from the people, from the political grassroots, to the party leadership and then to those holding political office. Insofar as the people had more opportunities to act through political institutions, this tended to efface—or at least narrow—the distinction between popular constitutionalism and departmentalism.

Kramer characterizes the years between Reconstruction and the New Deal as “a period of judicial expansion . . . [but] also a kind of golden age for popular constitutionalism: a time rife with popular movements mobilizing support for change by invoking constitutional arguments and traditions that neither depended upon nor recognized—and often denied—imperial judicial authority.”<sup>40</sup> Populists and Progressives proposed a variety of measures designed to check what they perceived as judicial domination of the political process on behalf of entrenched interests. These included the requirement of extraordinary majorities on courts to strike down laws, the recall of judges, and the recall of judicial decisions.<sup>41</sup> None of these proposals were endorsed nationally, but this

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redressed before the people—as the sovereign—took matters into their own hands.  
*Id.* at 101.

37. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 48–49.

38. TARR, *WITHOUT FEAR OR FAVOR*, *supra* note 10, at 8–67.

39. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 168, 192–96.

40. *Id.* at 215.

41. TARR, *WITHOUT FEAR OR FAVOR*, *supra* note 10, at 58–63.

did not prevent some states from adopting them.<sup>42</sup> The rather limited success of these proposals led Chief Justice Taft in 1923 to dismiss “the so-called radicals [as] vastly more noisy than they are important.”<sup>43</sup> But Taft was only partially correct. The political reformers’ “advocacy of various quixotic proposals to curtail judicial power often was intended merely to dramatize their grievances and remind the courts that an angry public possessed the means of curbing judicial power.”<sup>44</sup> Once the rulings of the courts shifted, once they ceased invalidating social and labor legislation, the reformers lost interest in the very reforms they had championed.<sup>45</sup> This underscores the political character of the conflict over popular constitutionalism and judicial supremacy. Those opposing the courts’ rulings are typically concerned about the substance of those rulings, what they see as judicial misinterpretations of the fundamental law, not the fact that the rulings emanated from the judiciary. Once the judicial obstacle to the action they favor has been removed, they no longer have any quarrel with the courts.

The New Deal precipitated a direct clash between President Franklin Roosevelt and a United States Supreme Court that adamantly opposed the expansion of national power that Roosevelt sought in order to deal with the Great Depression. Despite the strong personal mandate Roosevelt received in the 1936 presidential election, his proposal to reconstitute the United States Supreme Court aroused fierce opposition not only from Republicans but from many Democrats as well.<sup>46</sup> Proponents of popular constitutionalism have tended to view the outcome of the Court battle as a victory: The Supreme Court had been humbled, its constitutional rulings had changed, and a series of judicial retirements and Roosevelt appointees ensured a Court that shared the President’s—and the people’s—constitutional perspective.<sup>47</sup> But opponents of popular constitutionalism can celebrate the outcome as well. An institutional challenge to the judiciary had been defeated, and the Supreme Court’s authority to strike down laws had survived the

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42. *Id.* at 56.

43. KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 264 (2009) [hereinafter WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY].

44. WILLIAM G. ROSS, A MUTED FURY: POPULISTS, PROGRESSIVES, AND LABOR UNIONS CONFRONT THE COURTS, 1890–1937, at 20–21 (2014).

45. *Id.*

46. See JEFF SHESHOL, SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT (1st ed. 2010).

47. See, e.g., KRAMER, THE PEOPLE THEMSELVES, *supra* note 16, at 168, 219–20.

conflict, even if it would—at least for a while—no longer give serious scrutiny to economic regulations. As the jurisprudence of the Warren and Burger Courts showed, this left considerable opportunity for judicial activism in dealing with rights questions. Although some of the justices' rulings were unpopular in the states, their activism was largely unchallenged by the President and Congress because the Court was for the most part serving as a faithful member of the dominant Democratic coalition.<sup>48</sup>

Yet according to Kramer, the New Deal and the *Carolene Products*<sup>49</sup> settlement, under which courts subjected laws affecting individual rights to strict scrutiny but gave laws affecting congressional power and the structure of government a less exacting examination, ultimately led to judicial supremacy and a juricentric constitutionalism.<sup>50</sup> The Supreme Court carved out an ambitious role for itself as *the* constitutional expositor in rights cases, a position vigorously supported by opinion leaders and the legal profession, and the people and their representatives largely acquiesced in the transfer of interpretive authority to the judiciary.<sup>51</sup> Once this occurred, it eroded support for judicial restraint in dealing with other matters, such as the scope of congressional powers (the Rehnquist Court's New Federalism) or the outcome of presidential elections. Thus Kramer traces the origins of contemporary judicial activism and the accompanying rhetoric supporting judicial supremacy to recent developments rather than to something intrinsic to the Constitution itself.<sup>52</sup>

Having provided a historical account of popular constitutionalism, Kramer returns to advocacy. He suggests that in the present day popular constitutionalism involves not revolutionary acts or constitutional revision but “some idea that the people retain authority in the day-to-day administration of fundamental law.”<sup>53</sup> The people will play such a role, however, only if their understanding of what their role can be and should be changes. But this shift will only take place if the people have mechanisms through which they can act. Kramer thus concludes:

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48. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 17–103 (2004).

49. *United States v. Carolene Products Co.*, 304 U.S. 144 (1938).

50. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 220–26.

51. A similar development occurred in the states in the 1970s with the rediscovery of state bills of rights by state supreme courts, a phenomenon commonly known as the new judicial federalism. See TARR, *UNDERSTANDING*, *supra* note 14, at 161–70.

52. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 227–41.

53. Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959, 961 n.3 (2004).

If there is an agenda for constitutionalism today, its first concern is not substantive. It is institutional . . . . We should . . . be asking what kind of institutions we can construct to make popular constitutionalism work, because we need new ones. We need to start rethinking and building institutions that can make democratic constitutionalism possible. And we need to start doing so now.<sup>54</sup>

## II. ALTERNATIVES

### A. *Judicial Review*

Some proponents of popular constitutionalism reject judicial review altogether as incompatible with a robust popular constitutionalism. They deride those who want judges to decide fundamental political issues as “today’s aristocrats” and view their reliance on judicial authority as rooted in a “deep-rooted fear of voting” and a disdain for popular rule that is fundamentally anti-democratic.<sup>55</sup> They see this distrust of popular judgments on matters of political principle as particularly dominant in academia, but its deleterious effects have spread so widely that “already it is difficult for many, whether in or out of the academy, even to imagine any alternative.”<sup>56</sup> Instead, “Americans [have come] to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others.”<sup>57</sup> Kramer’s point is not a lack of popular engagement but rather the sense, encouraged by legal professionals, that the Constitution is a document only legal professionals can understand. This development is unfortunate, popular constitutionalists insist, because reliance on the judiciary hardly guarantees that constitutional issues will be correctly resolved. Judicial review furthers constitutional fidelity only if judges decide on the basis of law rather than their own predilections and do not err in their interpretation of that law. Yet intra-court divisions raise questions about

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54. Larry D. Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1182 (2006) [hereinafter Kramer, *Response*].

55. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 247; TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 16, at 177; *see also* Mark V. Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991 (2006).

56. ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 2 (1989). Thus, Roberto Unger observes that one of the “dirty little secrets of contemporary jurisprudence” is “its discomfort with democracy.” ROBERTO MANGABEIRA UNGER, *WHAT SHOULD LEGAL ANALYSIS BECOME?* 72 (1996).

57. *See* Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637, 1646 (2012).

whether judges' legal training really gives them a privileged insight into constitutions, and decades of research connecting judges' votes to their political ideologies further undermines the claim that their rulings are insulated from politics.<sup>58</sup> Popular constitutionalists insist that reliance on the people instead of on their elected executives and representatives is more compatible with the democratic character of the regime and just as likely, if not more likely, to yield correct constitutional interpretations.<sup>59</sup>

Yet the claim that there is a fundamental incompatibility in principle between popular constitutionalism and judicial review cannot withstand close analysis. A key element of popular constitutionalism is that the people have the right to choose the constitution under which they will live, and this includes the right to place constraints on what they and their representatives can do. The government thus created may be less simply democratic than it could be, but that does not render it less legitimate. So if the people have chosen to institute judicial review—admittedly, a contested question—then this exercise of popular constitutionalism is by definition compatible with popular constitutionalism. Any doubts on this point come from confusing who is choosing and the substance of what they are choosing. This, of course, does not prove that the American people have authorized judicial review or, more particularly, the form of judicial review that currently exists in the United States. Nor does it suggest that, if they have, they should not reconsider that choice. Nonetheless, this shifts the grounds of the debate from what historically the American people have chosen to whether their choice continues to be a wise one.

Furthermore, as is perhaps often the case, at least some critics of judicial review seem motivated less by principled opposition than by their disagreement with current rulings of the Supreme Court. Mark Tushnet is quite candid about this; one suspects he is not alone.<sup>60</sup> If this is true, then the current enthusiasm for popular constitutionalism may be merely the most recent manifestation of liberal distrust of judicial power, similar to what prevailed pre-1937 and remained a potent element in liberal thought until the rise of the Warren Court. So one may expect that should the orientation of the United States Supreme Court shift, some of the current support for popular constitutionalism would wane.

More importantly, Alexander Hamilton's classic defense of judicial review in *The Federalist No. 78* suggests a way to reconcile judicial

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58. See JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* (2003).

59. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 249–53.

60. See TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 16, at 129–53.

review with democracy and popular constitutionalism. Hamilton argues that judges are obliged to follow the will of the people that is expressed in the Constitution rather than the will of the people's representatives. In exercising judicial review, they are merely serving as an intermediary for the people, acting to prevent the people's representatives from exceeding their constitutional authority.<sup>61</sup> "Only the People can change the Constitution, and the judges must prevent Congress from making basic changes unilaterally."<sup>62</sup> Or, put differently, one set of the people's agents is helping ensure that another set of their agents is complying with the limits the people have set on them. Judges, therefore, have exactly the same authority as do the other branches of government: Namely, to make constitutional judgments when constitutional issues come before them. *The Federalist No. 78* argument thus affirms the authority of the people's will enshrined in the Constitution without claiming that the interpretation of that will is exclusively a judicial prerogative. It does not deny that the people should interpret the Constitution or use their authority to call their agents, including judges, to account should they misinterpret its provisions.

### B. *Judicial Supremacy*

Most contemporary proponents of popular constitutionalism frame their position as an alternative to judicial supremacy: The idea that the United States Supreme Court and its counterparts in the states are the *final* authority in matters of constitutional interpretation.<sup>63</sup> According to advocates of judicial supremacy, the Court's constitutional rulings are final not only in the sense that they resolve the particular dispute at issue and that there is no appeal from their rulings, but also in the sense that these rulings provide the authoritative interpretation of the Constitution: an interpretation binding on the federal government, the states, and the people. As Justice Joseph Story framed it in his famous *Commentaries on the Constitution of the United States*: "it is the proper function of the judicial department to interpret laws, and by the very terms of the

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61. THE FEDERALIST NO. 78 (Alexander Hamilton).

62. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 192 (1991).

63. For convenience, given the fact that most authors have addressed themselves exclusively to the United States Supreme Court and its claims of judicial supremacy, I will concentrate my analysis on that Court and its authority; but the same arguments apply to state supreme courts and the authority of their interpretations. However, at the state level there is more opportunity—and willingness—to overturn judicial rulings via constitutional amendment. See generally John J. Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007).

constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the department of the federal government, and upon the whole people.”<sup>64</sup> Indeed, this judicial preeminence requires the elected branches “not only to obey that ruling but to follow its reasoning in future deliberations,” and this deference is required “even when other governmental officials think that the Court is substantively wrong about the meaning of the Constitution and in circumstances that are not subject to judicial review.”<sup>65</sup> Thus political opposition to the Court’s rulings or its authority is interpreted as a challenge to the Constitution and to the judicial independence necessary to safeguard constitutional values.

In recent decades the United States Supreme Court has become increasingly outspoken in proclaiming its supremacy as constitutional interpreter. Thus in *Cooper v. Aaron*,<sup>66</sup> a unanimous Court asserted that “the federal judiciary is supreme in the exposition of the law of the Constitution . . . [A]nd Art. VI of the Constitution makes [its rulings] of binding effect on the States.”<sup>67</sup> In *Nevada Department of Human Resources v. Hibbs*,<sup>68</sup> the Court confirmed that “it falls to this Court, not Congress, to define the substance of constitutional guarantees,”<sup>69</sup> and in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>70</sup> the plurality opinion depicted the Supreme Court as leading a people “who aspire to live according to the rule of law” and as “invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals.”<sup>71</sup> It would not be hard, although perhaps tedious, to multiply the examples.

One can of course oppose judicial supremacy without rejecting judicial review—indeed, the Epilogue of *The People Themselves* is

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64. 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 357 (1833). Modern formulations are similar: “[T]he courts in general and the Supreme Court in the last analysis have the power to decide for the government as a whole what the Constitution means . . .” RONALD DWORKIN, LAW’S EMPIRE 356 (1986). Not every Supreme Court justice has shared Justice Story’s exalted understanding of the Court’s authority. Thus, Justice Robert Jackson wrote in *Brown v. Allen*, “[w]e are not final because we are infallible, but we are infallible only because we are final.” 344 U.S. 443, 540 (1953).

65. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 43, at 7; Walter F. Murphy, *Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter*, 48 REV. POL. 406–07 (1986).

66. 358 U.S. 1 (1958).

67. *Id.* at 18.

68. 538 U.S. 721 (2003).

69. *Id.* at 728.

70. 505 U.S. 833 (1992).

71. *Id.* at 868.



entitled “Judicial Review Without Judicial Supremacy.”<sup>72</sup> Yet, as the record of the United States Supreme Court and other courts over the last several decades reveals, the claim of judicial supremacy itself encourages judicial activism (and perhaps vice versa).<sup>73</sup> For if it is the responsibility of the judiciary “to speak before all others for [the nation’s] constitutional ideals,”<sup>74</sup> then it seems only appropriate that judges should put forth their own constitutional understanding rather than deferring to the constitutional understanding of the other branches of government. A presumption of constitutionality for congressional enactments or presidential actions makes no sense. Moreover, if “it falls to this Court, not Congress, to define the substance of constitutional guarantees,” then there is a temptation to embrace—or even to create—opportunities to proclaim what the Constitution means rather than seeking to avoid constitutional questions. Thus judicial supremacy encourages judges, whether state or federal, to interpret restrictions—such as the political question doctrine, mootness, and the requirement of standing to sue—narrowly, lest these restrictions prevent them from addressing constitutional issues. It may also lead judges to view disputes as raising constitutional questions, questions which they should decide, rather than as involving matters on which the Constitution is silent and which should therefore be resolved by the political process.

Some proponents of judicial supremacy trace its origins to the American founding, to *The Federalist No. 78* and to *Marbury v. Madison*,<sup>75</sup> highlighting in particular Chief Justice John Marshall’s statements in *Marbury* that the Constitution is “the fundamental and paramount law of the nation” and that “[i]t is emphatically the province and duty of the judicial department to say what the law is.”<sup>76</sup> However, as Justice Robert Jackson tartly notes: “The Constitution nowhere provides that it shall be what the judges say it is,” and in fact there is a “basic inconsistency between popular government and judicial

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72. KRAMER, THE PEOPLE THEMSELVES, *supra* note 16, at 249–53.

73. See THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION (Christopher Wolfe ed., 2004).

74. *Planned Parenthood*, 505 U.S. at 868.

75. 5 U.S. 137 (1803).

76. *Id.* at 177. Legal scholars arguing that judicial supremacy was part of the original constitutional design include SCOTT DOUGLAS GERBER, A DISTINCT JUDICIAL POWER: THE ORIGINS OF AN INDEPENDENT JUDICIARY: 1606-1787 (2011); H. Jefferson Powell, *Enslaved to Judicial Supremacy?*, 106 HARV. L. REV. 1197 (1993), and Kathleen M. Sullivan, *The Non-Supreme Court*, 91 MICH. L. REV. 1121 (1993). Larry Kramer rightly dismisses these claims as less constitutional history than “a story of judicial triumphalism.” KRAMER, THE PEOPLE THEMSELVES, *supra* note 16, at 229.

supremacy.”<sup>77</sup> It is true that “by the late 1790s the argument that courts were peculiarly responsible for constitutional interpretation, that their words ought indeed to be final, had become part of the Federalist canon.”<sup>78</sup> But this was a partisan position, put forth by a party that saw itself losing power in electoral politics, rather than a universally accepted view; and even Federalists did not consistently defend that position. Thus, in a letter to Samuel Chase composed a year after *Marbury*, Chief Justice Marshall himself contemplated allowing Congress to overturn the Court’s rulings by a two-thirds majority, fearful that an insistence by the United States Supreme Court on judicial supremacy would risk impeachment of the justices.<sup>79</sup>

The spread of judicial review in the nineteenth century encouraged claims of judicial supremacy, especially as judicial review became assimilated to legal interpretation more generally.<sup>80</sup> Such claims were most often advanced by the judges themselves and by their allies in the emerging legal profession.<sup>81</sup> But this took time, because judicial review itself advanced slowly: The United States Supreme Court struck down

77. ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* vii, 3 (1941) [hereinafter JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY*]. Larry Kramer insists that “when our Founding Fathers wrote no one had yet imagined anything even remotely like modern judicial supremacy,” and Keith Whittington concurs that “[j]udicial supremacy did not emerge as a fully formed and politically dominant constitutional theory at the time of the Founding or in the early years of the nation’s history.” KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 250; *see also* WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY*, *supra* note 43, at 10. Akhil Amar notes that claims that the Supreme Court was the ultimate constitutional interpreter “never appeared in the *United States Reports* until the second half of the twentieth century.” AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 237 (2012).

78. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 135.

79. Marshall’s proposal came in a letter to Samuel Chase in which he wrote: “I think the modern doctrine of impeachment should yield to an appellate jurisdiction in the legislature. A reversal of those legal opinions deemed unsound by the legislature would certainly better comport with the mildness of our character than [would] a removal of the Judge who has rendered them unknowing of his fault.” JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY*, *supra* note 77, at 28.

80. On the changing understanding of judicial review during the late eighteenth and early nineteenth centuries, *see generally* SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990).

81. Thus in his *Commentaries on the Constitution of the United States* Justice Joseph Story wrote:

[I]t is the proper function of the judicial department to interpret laws, and by the very terms of the constitution to interpret the supreme law. Its interpretation, then, becomes obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by, that constitution.

STORY, *supra* note 64, at 357.

only two congressional statutes prior to the Civil War, and state high courts likewise invalidated few statutes until the 1850s.<sup>82</sup> Chief Justice Marshall attempted to reinvigorate the idea of judicial supremacy in *McCulloch v. Maryland*,<sup>83</sup> claiming that “[o]n the Supreme Court of the United States has the constitution of our country devolved this important duty” to settle disputes over the “constitution of our country, in its most interesting and vital parts.”<sup>84</sup> His ruling provoked intense controversy, but not because of its insistence on judicial supremacy, which was largely ignored.<sup>85</sup>

This is not to deny that in practice a sort of pragmatic judicial supremacy may have operated, even if principled claims for judicial supremacy were rejected. Courts often made the final and determinative decision in constitutional disputes, operating in a zone of political indifference. They struck down politically inconsequential laws without incurring political repercussions, and some of their rulings enjoyed broad political support. Nonetheless, most scholars have concluded that until recent decades judicial claims of interpretive supremacy arose episodically rather than constantly, that those claims were almost always contentious, a matter of political dispute rather than unquestioning acceptance, and that particularly in the nineteenth century, both federal and state officials were willing to ignore rulings with which they disagreed or to deny their finality.<sup>86</sup>

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82. The two statutes invalidated by the United States Supreme Court were a section of the Judiciary Act of 1789, struck down in *Marbury v. Madison*, 5 U.S. 137 (1803), and the Missouri Compromise of 1820, struck down in *Scott v. Sandford*, 60 U.S. 393 (1857). The justices were somewhat more active in striking down state statutes—for data, see WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 43, at 107. For data on judicial review in the states during the antebellum period, see Jed Handelsman Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1115–42 (2010). The results of state-specific studies of judicial review during the antebellum period are summarized in TARR, WITHOUT FEAR OR FAVOR, *supra* note 10, at 26–30.

83. 17 U.S. 316 (1819).

84. *Id.* at 400–01.

85. On the debate engendered by *McCulloch*, in which Marshall himself participated, see JOHN MARSHALL’S DEFENSE OF MCCULLOCH V. MARYLAND (Gerald Gunther ed., 1969). Kramer notes that “[j]udicial supremacy was a small point even in the essays of Marshall and his adversaries” and that “[p]ublic inattentiveness to the issue was mirrored as well in the new treatises on constitutional law that seemed suddenly to be pouring from the presses.” KRAMER, THE PEOPLE THEMSELVES, *supra* note 16, at 156.

86. On the political controversy over the development of judicial supremacy, see Mark A. Graber, *The Problematic Establishment of Judicial Review*, in THE SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST PERSPECTIVES (Cornell Clayton & Howard Gillman eds., 1999); James Stoner, *Who Has Authority over the Constitution of the United States?*, in THE SUPREME COURT AND THE IDEA OF CONSTITUTIONALISM (Steven Kautz et al. eds., 2009); the essays collected in THAT EMINENT TRIBUNAL: JUDICIAL SUPREMACY AND THE CONSTITUTION (Christopher Wolfe

Some proponents of judicial supremacy justify it based on its substantive effects rather than its historical pedigree. They argue first of all that judicial supremacy fills a need for the authoritative resolution of constitutional disputes: Indeed, the decisional finality judicial supremacy provides is essential for maintaining the authority of the Constitution and the rule of law. As Justice William Johnson put it:

Once admit that the decisions of that tribunal which the Constitution has established to pronounce on the validity of Congressional enactments, is not to be regarded *as final*—is not to bind, definitively, the will of States, as well as of individuals, (and I understand you as going the full length of this,) and no barrier is left against mutual encroachments, mutual dissensions, and civil war. The very cement of the Union is gone.<sup>87</sup>

More recent commentators have echoed Johnson's sentiments. For example, Larry Alexander and Frederick Schauer insist that absent a "single authoritative interpreter," there would be "interpretive anarchy" and that the law can serve its settlement function only if other institutions defer to the judgments of the courts.<sup>88</sup>

Other judicial supremacists contend that judicial supremacy promotes more just, as well as more constitutionally correct, outcomes. They maintain that judicial review, enhanced by judicial supremacy, provides a valuable check on majoritarian tyranny and democratic excesses and that it protects the rights of minorities, citing judicial interventions on behalf of racial and religious minorities to bolster their case.<sup>89</sup> Although eschewing claims of judicial infallibility, these judicial supremacists argue that the judges' insulation from political influences, their training, and their insight into political principle enables them to better resolve contentious constitutional controversies. In making this argument, they

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ed., 2004); and WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY*, *supra* note 43.

87. DONALD G. MORGAN, *CONGRESS AND THE CONSTITUTION: A STUDY IN RESPONSIBILITY* 92 (1966).

88. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1379 (1997). As Mark Tushnet observes, their argument may establish that there is a need for a final authoritative decision-maker but not that the Supreme Court should perform that function. See TUSHNET, *TAKING THE CONSTITUTION AWAY*, *supra* note 16, at 27–31.

89. See, e.g., Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CALIF. L. REV. 1013, 1013 (2004) ("[A]s I read Professor Kramer's stunning new book about popular constitutionalism, I kept thinking about what his theory would mean for civil rights and civil liberties litigation. The answer is chilling. Popular constitutionalism would mean that courts would be far less available to protect fundamental rights. The rights of minorities would be largely left to the whims of the political majority with severe consequences for racial, ethnic, sexual orientation, and language minorities as well as criminal defendants, public benefits recipients, and others.").

typically portray the public as lacking an understanding of or attachment to constitutional principles or as ready to jettison those principles in the heat of the moment. “Popular constitutionalism,” they argue, “flirts with replacing the restraints of constitutionalism with a freewheeling reconsideration of all constitutional boundaries at the behest of popular majorities.”<sup>90</sup> Finally, proponents of judicial supremacy assert that judicial resolution of disputes over abortion and other contentious issues helps reduce divisions within the body politic and thereby contributes to the political health of the polity.<sup>91</sup>

Unsurprisingly, popular constitutionalists dispute these claims. They argue that the idea that there must be a final interpretive authority for constitutional disputes confuses constitutional law with the dispute resolution that occurs in ordinary law.<sup>92</sup> Constitutional rulings resolve disputes between the contending parties, just as non-constitutional rulings do, but they go much further. They establish the law that will govern the society, and in so doing they impinge on popular self-government. As Abraham Lincoln put it in his First Inaugural Address:

[T]he candid citizen must confess that if the policy of the Government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions the people will have ceased to be their own rulers, having to that extent practically resigned their Government into the hands of that eminent tribunal.<sup>93</sup>

Furthermore, popular constitutionalists deny that historically the judiciary has been particularly protective of rights or attentive to the just claims of racial or religious or political minorities. For every *Brown v. Board of Education*<sup>94</sup> that can be celebrated, they note, there is a *Dred*

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90. DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS: PRINCIPLES AND POLITICS IN CONSTITUTIONAL LAW 126 (2009).

91. See, e.g., LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).

92. KRAMER, THE PEOPLE THEMSELVES, *supra* note 16, at 234–36.

93. Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), [http://avalon.law.yale.edu/19th\\_century/lincoln1.asp](http://avalon.law.yale.edu/19th_century/lincoln1.asp) [<https://perma.cc/7QJS-GJW9>]. Yet Lincoln’s understanding of judicial authority was more nuanced than this frequently quoted statement seems to suggest. Thus in 1857, Lincoln stated: “We think [the Supreme Court’s] decisions on Constitutional questions, when fully settled, should control, not only the particular cases decided, but the general policy of the country, subject to be disturbed only by amendments of the Constitution as provided by that instrument itself.” BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 117 (2009) [hereinafter FRIEDMAN, THE WILL OF THE PEOPLE].

94. 347 U.S. 483 (1954).

*Scott v. Sandford*<sup>95</sup> and a *Plessy v. Ferguson*,<sup>96</sup> for every *New York Times v. Sullivan*,<sup>97</sup> a *Gitlow v. New York*<sup>98</sup> and a *Dennis v. United States*;<sup>99</sup> and it was the political branches that took the lead in safeguarding the rights of workers, women, and the disabled. In addition, they note that many judicial supremacists favor not merely judicial protection of rights but—flying under the banner of non-interpretivism, a “moral reading of the Constitution,” or other formulations—espouse judicial revision, adaptation, and expansion of rights, a quite different proposition.<sup>100</sup>

Popular constitutionalists also deny that courts are more competent to decide constitutional issues, insisting that it rests on a cynically stereotypical view of the people and their representatives and a romanticized view of judicial decision-making. Kramer puts the point starkly: “The modern Anti-Populist sensibility presumes that ordinary people are emotional, ignorant, fuzzy-headed, and simple-minded, in contrast to a thoughtful, informed, and clear-headed elite.”<sup>101</sup> Insofar as the people or their representatives are uninterested in constitutional matters, popular constitutionalists maintain, the blame may lie with judicial supremacy itself, because it curtails opportunities for popular involvement and thereby discourages popular interest.<sup>102</sup> In so arguing, they are consciously aligning themselves with Thomas Jefferson, who wrote:

I know of no safe depository of the ultimate powers of the society but the people themselves; and if we think them not enlightened enough to exercise their control with a wholesome discretion, the remedy is not to take it from them but to inform their discretion by education. This is the true corrective of abuses of constitutional power.<sup>103</sup>

Give the people the opportunity to make constitutional judgments, they

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95. 60 U.S. 393 (1857).

96. 163 U.S. 537 (1896).

97. 376 U.S. 254 (1964).

98. 268 U.S. 652 (1925).

99. 341 U.S. 494 (1951).

100. For examples of such approaches to constitutional interpretation, see RONALD DWORKIN, *FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996), and MICHAEL J. PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

101. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16, at 242.

102. *Id.* at 241–43.

103. Letter from Thomas Jefferson to William C. Jarvis (Sept. 28, 1820). For a parallel argument of how “judicial overhang” affects congressional interpretation and construction of the Constitution, see WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY*, *supra* note 43, at 237–39.

argue, and the people will be motivated by constitutional principles, although, as Mark Tushnet cautions, “[o]f course it is a fact that the people are not committed to the Constitution’s principles *as the courts have understood them*.”<sup>104</sup> Ultimately, though, “[t]he people’s claim to rule . . . is most persuasively put . . . not in terms of what the people know but in terms of who they are. They are the subjects of the law, and if the law is to bind them as free men and women, they must also be its makers.”<sup>105</sup>

These dueling quotations do not, of course, resolve the issue. For present purposes, it suffices to point out what is missing in the discussion of judicial supremacy. If during the eighteenth and early nineteenth centuries judicial supremacy was not widely accepted, how and why did that situation change? Keith Whittington’s *Political Foundations of Judicial Supremacy* masterfully traces the uneven advance of judicial supremacy, and I shall not attempt to summarize his analysis here, except to note that the judges lacked the power to impose judicial supremacy on a reluctant people and their representatives. As Whittington notes, “The American judiciary has been able to win the authority to independently interpret the Constitution because recognizing such an authority has been politically beneficial to others.”<sup>106</sup> Politicians—and the people they represent—are thus not simply the victims of judicial supremacy. They have helped create it to serve their own ends, with some presidents among the primary supporters of judicial supremacy.<sup>107</sup> Indeed, some popular constitutionalists acknowledge this. Larry Kramer observes that “[e]xcept in the most abstract sense, ‘We the People’ have—*apparently of our own volition*—handed over control of our fundamental law over to what Martin Van Buren in an earlier era condemned as ‘the selfish and contracted rule of a judicial oligarchy.’”<sup>108</sup>

### C. *Departmentalism*

In the message accompanying his veto of the bill establishing the Second National Bank, President Andrew Jackson provides the classic definition of departmentalism:

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104. TUSHNET, TAKING THE CONSTITUTION AWAY, *supra* note 16, at 70 (emphasis in original).

105. Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 383 (1981).

106. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY, *supra* note 43, at 27.

107. *Id.* at 292. For an analysis of the benefits that politicians in general and presidents in particular may derive from judicial supremacy, see *id.* at 82–229.

108. KRAMER, THE PEOPLE THEMSELVES, *supra* note 16, at 233–34 (emphasis added).

The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve.<sup>109</sup>

Under this theory, then, there is no single authoritative voice in interpreting the Constitution, for to elevate one branch above the others would destroy the balance among them. Each branch of the federal government can reach its own conclusions on constitutional matters and act on them, but those conclusions do not bind the other coequal branches—they are obliged to accept the conclusions only if they find the reasoning supporting them persuasive. In particular, departmentalism denies the judiciary a special institutional authority to say what the Constitution means, rejecting the claimed “transubstantiation whereby the Court’s opinion of the Constitution . . . becomes very body and blood of the Constitution.”<sup>110</sup> Thus for Andrew Jackson, the fact that a unanimous Supreme Court in *McCulloch v. Maryland* had upheld the constitutionality of the bank did not settle the question; nor did congressional authorization of the First Bank of the United States from 1791–1811 and of the Second Bank of the United States from 1816 onward. The constitutional positions taken by other branches and the arguments marshalled in support of them are entitled to respectful consideration, but that is all. If differing constitutional understandings develop, they might be resolved by dialogue between the branches or, ultimately, by the people, who directly or indirectly select the officials who serve in those branches.

It should be noted that departmentalism only pertains to the distribution of interpretive authority within a single government, whether federal or state. Because it is focused on separation-of-powers concerns, it does not address who should resolve constitutional conflicts between nation and state. The states have throughout American history disputed the correctness or authority of United States Supreme Court rulings, and in some instances they have successfully defied federal mandates. This happened most often when they were able to find political support in Congress or the President. Andrew Jackson’s oft-

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109. Andrew Jackson, Veto Message (July 10, 1832), [http://avalon.law.yale.edu/19th\\_century/ajveto01.asp](http://avalon.law.yale.edu/19th_century/ajveto01.asp) [<https://perma.cc/S62F-DBMD>].

110. EDWARD S. CORWIN, COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT 68 (1938).



reported comment—“Well, John Marshall has made his decision, now let him enforce it”—may be apocryphal, but the practice is not.<sup>111</sup> Nevertheless, the legitimacy of federal judicial review of state law is clear, rooted as it is in the supremacy of federal over state law, and thus state defiance is simply that, defiance. James Madison and Andrew Jackson, both of whom were departmentalists at the federal level, nonetheless rejected state nullification of federal constitutional pronouncements.<sup>112</sup> Although they acknowledged that states can mobilize public opinion or use other forms of political action to oppose perceived misinterpretations of the federal Constitution, they nevertheless maintained that, *pace* John C. Calhoun, individual states could not nullify federal action.<sup>113</sup>

Proponents of departmentalism believe that it encourages interbranch dialogue on constitutional questions, replacing destructive attacks on the judiciary by the President and Congress with constructive debate over the meaning of the Constitution. In making this argument, they assume that such virulent attacks on the judiciary arise from frustrations rooted in impotence: one complains loudly when, under a system of judicial supremacy, that is all one can do. In addition, departmentalists suggest that the fact that other departments may put forth competing constitutional arguments may serve to improve the judges’ constitutional rulings by requiring them to advance persuasive constitutional arguments in order to prevail. This more frequent interbranch dialogue on constitutional issues, in turn, can be expected to promote a heightened popular consciousness about and involvement with constitutional issues. Finally, departmentalists view their position as more democratic, in that it gives the power to make authoritative constitutional interpretations to branches more directly answerable to the people and more likely to act as the agents of the popular will.<sup>114</sup>

It is this potentially popular character of departmentalism that most

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111. HENRY J. ABRAHAM, *JUSTICES, PRESIDENTS, AND SENATORS: A HISTORY OF U.S. SUPREME COURT APPOINTMENTS FROM WASHINGTON TO BUSH II* 77 (5th ed. 2008).

112. For overviews of the nullification crisis, including Jackson’s and Madison’s positions and roles in its resolution, see generally WILLIAM W. FREEHLING, *PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY CRISES IN SOUTH CAROLINA* (1965) and THOMAS E. WOODS, JR., *NULLIFICATION: HOW TO RESIST FEDERAL TYRANNY* (2010).

113. See *THE MIND OF THE FOUNDER: SOURCES OF POLITICAL THOUGHT OF JAMES MADISON* 417–42 (Marvin Meyers ed., 1981) (reproducing James Madison’s Notes on Nullification, 1835–1836).

114. My account of the advantages and disadvantages of departmentalism draws on SUSAN R. BURGESS, *CONTEST FOR POLITICAL AUTHORITY: THE ABORTION AND WAR POWERS DEBATES* 1–27 (1992) [hereinafter BURGESS, *CONTEST FOR POLITICAL AUTHORITY*].

troubles its critics: they fear that the legislature and the executive will base their interpretations on what is politically popular rather than on what is constitutionally required and that this lack of commitment to the Constitution may jeopardize rights.<sup>115</sup> In addition, they point out that departmentalism removes a vital check on the legislature and the executive, allowing self-interested interpretations that undermine the rule of law and the interbranch distribution of power. Opponents of departmentalism further complain that conflicting constitutional understandings among the various branches promotes confusion about what legal standards apply and undermines the rule of law, which requires a final determiner of legal questions.<sup>116</sup>

Several of the arguments against departmentalism resemble those against popular constitutionalism. This is hardly surprising, for there are important connections between those two views. Indeed, some commentators have suggested that since the people usually cannot directly advance their constitutional views, they must rely on the other branches of the federal government to do so. Even Kramer, in responding to his critics, seems to endorse this understanding. He notes that “[m]jobs were fine in their context and in their time, but no one, least of all me, is suggesting that this is a good way to go about doing things today.”<sup>117</sup> Rather, he describes his “goal” as “restor[ing] a true departmental system” as proposed by Madison and Jefferson.<sup>118</sup>

Most proponents of departmentalism, however, situate their analysis in the context of the separation of powers, rather than popular constitutionalism, perhaps recognizing that there are problems viewing departmentalism as a form of domesticated popular constitutionalism. First, departmentalism places ultimate constitutional authority in the hands of the various branches of the government, whereas popular constitutionalism insists that the people have the final say over constitutional interpretation. As Saikrishna Prakash and John Yoo put it:

Kramer’s popular constitutionalism is a theory about the external relationship between the federal government and the polity; the people decide the Constitution’s meaning for all three branches. Departmentalism is a theory about the internal relationship between the three branches of the federal government in interpreting the Constitution. Departmentalism, whatever its merits, cannot have grand populist pretensions, for

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115. See, e.g., *supra* note 82 and accompanying text.

116. See BURGESS, CONTEST FOR POLITICAL AUTHORITY, *supra* note 114, at 1–27.

117. Kramer, *Response*, *supra* note 54, at 1175.

118. *Id.* at 1180.

it says absolutely nothing about the people's constitutional role.<sup>119</sup>

Second, in advancing their constitutional interpretations the legislative and executive branches may be acting independently of the people, in order to protect their institutional prerogatives or for other purposes. Departmentalism in such instances involves constitutional activity that is not opposed to popular constitutionalism but that occurs outside of, or in addition to, popular constitutionalism.

Third, the legislative and executive branches are, under this formulation, speaking for the people and acting as agents of the people. Although they may make such a claim, their faithfulness to the popular will cannot be presumed—the legislature and/or the executive may depart from the popular will to pursue corrupt or misguided policies. Indeed, lack of fidelity to the popular will may be consistent with representative government as understood by the founders—consider Madison's emphasis on the “cool and deliberate sense of the community”<sup>120</sup> and on the importance of a senate that could stand against popular whims or factions. Beyond that, a variety of institutions can make the claim to be speaking on behalf of the people, even as they express different perspectives. As Bruce Ackerman notes: “By multiplying perspectives, Publius deflates the claims of normal officials sitting either in Washington or in the states to speak for the People. Each official effort is just one of a number of competing representations.”<sup>121</sup>

Fourth, when combined with the development of political parties, the system may lead to popular subjection to the initiatives of the branches of government and of the political parties that organize and dominate the departments. At best, then, departmentalism may be a means—but only one of several—by which the people can exert their influence over the interpretation of their constitutions. In a federal system the people may use one level of government to organize and transmit popular opposition to constitutional initiatives at another level of government. The Virginia and Kentucky Resolutions of the late eighteenth century are a well-known example. And as an analysis of state constitutions will show, there are opportunities for unmediated popular influence on constitutions even in the twenty-first century.

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119. Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy: The People Themselves: Popular Constitutionalism and Judicial Review*, 103 MICH. L. REV. 1539, 1544–45 (2005).

120. THE FEDERALIST NO. 63 (James Madison).

121. ACKERMAN, *supra* note 62, at 185 (emphasis in original).

### III. POPULAR CONSTITUTIONALISM: MUCH ADO ABOUT NOTHING?

The debate over popular constitutionalism, like many scholarly debates, has been marked by hyperbolic claims and shrill denunciations. (My personal favorite comes from Larry Alexander and Lawrence Solum, who write: “*The People Themselves* is a book with the capacity to inspire dread and make the blood run cold.”<sup>122</sup>) Yet some scholars question what all the fuss is about. Popular constitutionalists and judicial supremacists may differ over who should interpret American constitutions, but the substantive law that results may not vary significantly regardless of who exercises ultimate interpretive authority. For even though judges proclaim judicial supremacy, judicial rulings tend to reflect popular constitutionalism. Thus Barry Friedman maintains:

Ultimately, it is the people (and the people alone) who must decide what the Constitution means. Judicial review provides a catalyst and method for them to do so. Over time, through a dialogue with the justices, the Constitution comes to reflect the considered judgment of the American people regarding their most fundamental values. It frequently is the case that when judges rely on the Constitution to invalidate the actions of the other branches of government, they are enforcing the will of the American people.<sup>123</sup>

The argument of Friedman and his compatriots is that on those issues on which the people are indifferent or on which they lack strong views, their diffuse support for the Supreme Court—or for courts in general—leads them to accept judicial rulings as final and authoritative. Indeed, absent extreme rulings that adversely affect large groups of people or

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122. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594 (2005) (emphasis in original) (reviewing KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 16).

123. FRIEDMAN, *THE WILL OF THE PEOPLE*, *supra* note 93, at 367–68; *see also* JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* xii (2006) (“[C]ourts have tended, over time, to reflect the will of majorities . . .”). The analyses of Friedman and Rosen are built on Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy Maker*, 50 EMORY L.J. 563, 570 (reprint 2001) (1957) (“[T]he policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States.”). Subsequent research has revealed some problems with Dahl’s analysis. *See* WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY*, *supra* note 43; Jonathan D. Casper, *The Supreme Court and National Policy Making*, 70 AM. POL. SCI. REV. 50, 50–63 (1976); Richard Funston, *The Supreme Court and Critical Elections*, 69 AM. POL. SCI. REV. 795, 795–811 (1975).

challenge their beliefs, the people are more likely to accept judicial interpretations than to rise up and challenge them, even if they are constitutionally suspect. Most court rulings do not so much reflect popular constitutional views as operate in the absence of such views. But on those high-salience issues on which the people have strong views, Friedman insists that “constitutional doctrine tends to track public opinion.”<sup>124</sup> Similarly, a standard history of the Supreme Court concludes: “In truth the Supreme Court has seldom, if ever, flatly and for very long resisted a really unmistakable wave of public sentiment.”<sup>125</sup> Or as a humorist put it long ago: “[T]h[e] Supreme Co[u]rt follows th[e] [e]l[e]ction returns,” typically issuing constitutional rulings that fall within the political mainstream.<sup>126</sup> Perhaps because of this, public opinion polls document a high level of support for the United States Supreme Court.<sup>127</sup> Similarly, in judicial elections in the states, where the people can directly register their satisfaction or dissatisfaction with judicial rulings, incumbents are regularly returned to office.<sup>128</sup> Thus, if one equates popular constitutionalism with popular outcomes, one could conclude that it is alive and well, notwithstanding the rise of judicial supremacy. As Larry Alexander and Lawrence Solum pointedly ask: “If

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124. Tom Donnelly, *Making Popular Constitutionalism Work*, 2012 WIS. L. REV. 159, 162. Another major study, in addition to those in the preceding note that minimizes the importance of the popular constitutionalism/judicial supremacy debate is: Powe, *supra* note 19.

125. ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 14 (4th ed. 2005).

126. FINLEY PETER DUNNE, MR. DOOLEY AT HIS BEST 77 (Elmer Ellis ed., 1938). This may coincide with popular expectations of the political process. Consider in this regard Franklin Roosevelt’s description of American government as:

a three horse team provided by the Constitution to the American people so that their field might be plowed . . . . Two of the horses [Congress and the executive] are pulling in unison today; the third is not. . . . It is the American people themselves who are in the driver’s seat. It is the American people themselves who want the furrow plowed. It is the American people themselves who expect the third horse to pull in unison with the other two.

FRIEDMAN, *THE WILL OF THE PEOPLE*, *supra* note 93, at 6.

127. On the idea of diffuse institutional support and its importance for public views of the United States Supreme Court, see Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 635–64 (1992). For analysis of data relating to support for the United States Supreme Court, including consideration of how it compares with public support for constitutional courts in other countries, see James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343, 343–58 (1998).

128. On the electoral success of incumbent state judges, see CHRIS W. BONNEAU & MELINDA GANN HALL, *IN DEFENSE OF JUDICIAL ELECTIONS* (2009). The success of incumbents is particularly marked in so-called retention elections, in which they run unopposed and voters are asked merely whether Judge X should be retained in office. See Larry T. Aspin, *Retention Elections and Judicial Behavior*, 77 JUDICATURE 306, 306–15 (1994); Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210, 210–33 (1980); William K. Hall & Larry T. Aspin, *What Twenty Years of Judicial Retention Elections Have Told Us*, 70 JUDICATURE 340, 340–47 (1987).

the people have, by fifty years of tacit endorsement, given the Supreme Court pride of place among the people's agents, who is Kramer to object?"<sup>129</sup>

The compatibility between public opinion and judicial rulings is hardly coincidental. In some instances it may reflect a conscious choice by justices to take account of public opinion in their rulings. Thus Barry Friedman depicts Justice Sandra Day O'Connor as "splitting the difference" between left and right and thereby arriving at solutions that aggrandized the Supreme Court while cutting off debate in the citizenry.<sup>130</sup> Other scholars have documented the justices using their discretion in reviewing cases to avoid unnecessarily inflaming public opinion.<sup>131</sup> In some instances, too, one can detect a popular feedback effect, with "the resolution [of crises involving popular dissatisfaction with judicial rulings] tend[ing] to restore a circumstance of equilibrium between judicial action and popular preferences."<sup>132</sup> Even more important, the U.S. Constitution creates a system of federal judicial selection that ensures that over time "judicial understandings of the Constitution are likely to be broadly convergent with political understandings" and no judicial interpretation can long survive the mobilized and protracted opposition of the people.<sup>133</sup>

Put differently, Article III ensures a certain form of popular constitutionalism. The President appoints federal judges, and so the

129. Alexander & Solum, *supra* note 122, at 1602. Barry Friedman concurs: "For positive scholars, the whole debate [over popular constitutionalism] is overplayed; they believe that constitutional law typically reflects popular values, albeit at some ill-understood remove." Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 322 (2005). Popular constitutionalists deny this equivalence and, in any event, are concerned with the manner in which constitutional law gets made as much as with its content.

130. FRIEDMAN, *THE WILL OF THE PEOPLE*, *supra* note 93, at 365.

131. Thus the Supreme Court avoided addressing the constitutionality of bans on interracial marriage in the years immediately following *Brown v. Board of Education* and waited for a case that did not provoke public outrage before extending the right to counsel to state criminal trials in *Gideon v. Wainwright*. See RALPH A. ROSSUM & G. ALAN TARR, *AMERICAN CONSTITUTIONAL LAW* 32–33 (9th ed. 2014).

132. See John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence*, 72 S. CAL. L. REV. 353, 384 (1999). The idea that the popular indifference toward most rulings does not preclude strong reactions to disapproved ones finds support in studies of voter scrutiny of political events more generally. Scholars have analogized voters as operating more like fire fighters than police officers, i.e., instead of exercising constant surveillance, they react only when an alarm indicates something is wrong. See PETER F. NARDULLI, *POPULAR EFFICACY IN THE DEMOCRATIC ERA: A REEXAMINATION OF ELECTORAL ACCOUNTABILITY IN THE UNITED STATES, 1828–2000*, AT 6–10 (2007).

133. WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY*, *supra* note 43, at 87; Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1030 (2004).

appointees are likely to reflect the political and constitutional views of the Oval Office, albeit discounted perhaps by the necessity of obtaining Senate approval of his choices. Indeed, some presidential candidates have made the selection of judges a major theme in their campaigns, pledging to appoint judges who better reflect popular views, and others have made ideological compatibility their highest priority, painstakingly seeking out the views of potential nominees.<sup>134</sup> Should presidents be perceived as having failed to ensure that their nominees hold the correct political and constitutional views, the presidents' own party may revolt, as occurred when political conservatives forced the withdrawal of Harriet Miers, whom President George W. Bush had nominated for the Supreme Court. The result of presidents' emphasis on the political and ideological compatibility of appointees, together with turnover on the Supreme Court, has meant that with only a short time lag, the Supreme Court has been allied with the popularly elected branches rather than a strong constraint upon them. From the President's point of view that, more than theoretical arguments about judicial supremacy, is what is important.

One can observe a similar dynamic in the states. In appointing justices to the state supreme court, either because the state has an appointive system or because they are filling mid-term vacancies, governors overwhelmingly appoint members of their own political party—more than ninety percent share the governor's political affiliation. This is true even under the system of so-called merit selection, in which nominating commissions provide governors with a list of qualified candidates from which they must appoint—more than seventy-five percent of appointees are of the governor's party.<sup>135</sup> In systems in which justices initially reach the bench via election, most justices share the party affiliation of the governor and/or the political majority in the state legislature. This is particularly true in states with partisan judicial elections, because partisan affiliation serves as an important voting cue in low-visibility races.<sup>136</sup> For example, as Alabama and Texas went from Democratic to

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134. See generally LEE EPSTEIN & JEFFREY A. SEGAL, *ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS* (2005); MICHAEL COMISKEY, *SEEKING JUSTICES: THE JUDGING OF SUPREME COURT NOMINEES* (2004).

135. Aman McLeod, *The Party on the Bench: Partisanship, Judicial Selection Commissions, and State High-Court Appointments*, 33 JUST. SYS. J. 262, 268, tbl.3 (2012).

136. Thus an early study found a 0.84 correlation between the percentage of the vote received by the gubernatorial candidate and by the supreme court candidate of the same party. See PHILLIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 74–75 (1980). Later studies have reported comparable results— see, for example, Lawrence Baum, *Judicial Elections and Judicial Independence: The Voter's Perspective*, 64 OHIO ST. L.J. 13, 26

Republican states in the last decades of the twentieth century, the partisan affiliation of their justices shifted accordingly. There may be some time lag in this, because elections for other offices occur more frequently than those for supreme court justices. But over time, if one party dominates state government, this tends to be reflected in the composition of the state bench as well, with predictable consequences for the substance of the courts' rulings.<sup>137</sup>

Although there is some truth to the idea of a judiciary conforming to the constitutional views of the prevailing political majority, ultimately this is too simple a picture. For one thing, the account rests on a problematic understanding of judicial decision-making. Judges are not simply the agents of those who elevate them to the bench, and their decisional independence, together with their developing understanding of the law, may frustrate the hopes of those who selected them. Among recent Supreme Court justices, Blackmun, Kennedy, O'Connor, and Souter might all have been judged "failures" on this basis.<sup>138</sup> For another thing, this switch in constitutional direction on the bench occurs only if there is a political coalition that remains in power over an extended period of time and can appoint several justices. Yet at the national level at least, this has not been the case in recent years. There has been no dominant political coalition for more than half a century, with divided government the rule rather than the exception. The presidency has alternated between political parties since 1952, with a party only once (1981–1993) controlling the presidency for more than two consecutive terms, and most presidents have confronted a Congress controlled in whole or in part by the opposing party for at least part of their tenure. This has led to situations in which the majority in one branch of government or one governmental institution disagrees with the majority in another branch or institution, with each having a plausible claim to speak for the people. When those majorities differ on constitutional matters, as they have with abortion and same-sex marriage among other matters, how can one say whether or not judicial rulings are following public opinion?

Even if one focuses exclusively on the presidency, recent history has involved an alternation of temporary political majorities, and this has affected judicial selection, with Democratic presidents appointing liberals to the Supreme Court, and Republican presidents appointing

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(2003).

137. See TARR, *WITHOUT FEAR OR FAVOR*, *supra* note 10, at 68–89.

138. See SEGAL & SPAETH, *supra* note 58.



conservatives. This in turn has led to sharp divisions on the Court, with justices seeking to steer the Court in different directions. Divided government has also made it difficult for the political branches to oppose judicial activism, because if judicial rulings are attacked by one of the political branches, they may find supporters in another. Whatever the reason, instead of aligning with and supporting the political branches, the Supreme Court under Chief Justices Rehnquist and Roberts has struck down more congressional enactments than did any preceding Supreme Court.<sup>139</sup>

Finally, the idea that judges reflect public opinion assumes a one-way relationship, with the courts responding to public opinion. But in actuality the relationship is far more complex.<sup>140</sup> In some instances, popular opposition to judicial rulings may induce judges to change course. For example, the United States Supreme Court backed away from earlier rulings dealing with congressional investigations of Communists and with busing to achieve school desegregation after the people's representatives made clear their displeasure with those rulings.<sup>141</sup> Similarly, the California Supreme Court reversed course and regularly upheld death sentences on appeal after three justices were defeated in retention elections because of rulings perceived as based on their personal opposition to the death penalty.<sup>142</sup> Yet in other instances, judges may refuse to reconsider unpopular positions they have taken, and public opposition may eventually recede or opinion may even shift toward the court's position. For example, the United States Supreme Court held firm on prayer in the schools and on most of its rulings extending the rights of defendants despite strong popular opposition, and

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139. KECK, *supra* note 48. Altogether forty-two of the 176 congressional statutes struck down by the United States Supreme Court by 2013 were invalidated by the Rehnquist or Roberts courts. For a listing of congressional statutes struck down by the Supreme Court, see Congressional Research Service, *The Constitution of the United States*, CONGRESS.GOV, <https://www.congress.gov/constitution-annotated> [<https://perma.cc/X8TG-GZK5>] (last visited Feb. 23, 2016).

140. For an excellent treatment of these complexities, see Michael McCann, *How the Supreme Court Matters in American Politics: New Institutional Perspectives*, in *SUPREME COURT IN AMERICAN POLITICS: NEW INSTITUTIONALIST INTERPRETATIONS* (Cornell Clayton & Howard Gillman, eds., 2007).

141. On congressional investigations of Communists, see WALTER F. MURPHY, *CONGRESS AND THE COURT: A CASE STUDY IN THE AMERICAN POLITICAL PROCESS* (1962); and on busing, see J. HARVIE WILKINSON, *FROM BROWN TO BAKKE: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978* (1981).

142. See Barry Latzer, *California's Constitutional Counterrevolution*, in *CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS* 149, 157–58 (G. Alan Tarr ed., 1996).

the Massachusetts Supreme Judicial Court did the same despite criticism of its ruling on same-sex marriage.<sup>143</sup> In still other instances, the public may accept judicial rulings as authoritative even on issues on which it has strong opinions—consider, for example, *Bush v. Gore*,<sup>144</sup> in which the Supreme Court decided the 2000 presidential election—perhaps because of popular respect for the Court as an institution or because of a perception that the Constitution assigns the Court the responsibility to decide the issue.<sup>145</sup> In addition, it is no more appropriate to equate popular quiescence with popular approval of judicial rulings than it would be to claim popular support for a political regime because the people are not in open revolt. The people may not be aware of some rulings, they may be indifferent to others, they may disagree with rulings but find the costs of opposition greater than the costs of acquiescence, or they may not perceive any way to oppose the Court and enforce popular constitutional understandings. Yet insofar as judicial interpretation of the Constitution does not simply lead to constitutional rulings reflecting public opinion, something remains at stake in the popular constitutionalism vs. judicial supremacy debate.

Finally, popular constitutionalists insist that it is not enough that the courts' high-salience rulings track popular views. Aggressive judicial review, combined with claims of judicial supremacy, tends to discourage popular interest in and involvement with constitutional matters, because they seem to suggest that the people have no role to play on such matters. In this, the popular constitutionalists echo the concern of James Brady Thayer, who complained more than a century ago that “[t]he tendency of a common and easy resort to this great function [of judicial review], now lamentably too common, is to dwarf the political capacity of the people, and to deaden its sense of moral responsibility.”<sup>146</sup> Popular constitutionalism is valuable, according to its advocates, because it

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143. On the aftermath of the Supreme Court's school prayer rulings, see STEVE K. GREEN, *THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE* (2013). On the Supreme Judicial Court's refusal to compromise on civil unions after criticism of its ruling on same-sex marriage, see *In re Opinions of the Justices to the Senate*, 802 N.E. 565 (Mass. 2004).

144. 531 U.S. 98 (2000).

145. *Bush v. Gore*, 531 U.S. 98 (2000). Of course, the popular perception that the Supreme Court was doing nothing extraordinary underscores the effect that experience with judicial activism and claims of judicial supremacy have on public understandings. For a popular constitutionalist like Larry Kramer, *Bush v. Gore* was a usurpation of popular authority. For a broader context, see RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (2004).

146. JAMES BRADLEY THAYER, *JOHN MARSHALL* 107 (1901).

involves citizens in the discussion and resolution of constitutional matters, because it encourages that “frequent recurrence to fundamental principles”<sup>147</sup> without which government by “We the People” cannot long survive. Insofar as judicial rulings dominate constitutional interpretation and thus short-circuit this popular participation, something valuable is lost.

## CONCLUSION

If the case of popular constitutionalism is persuasive—and I am inclined to think that it is—then an agenda suggests itself. This agenda is organized around the constitutional tasks or functions that are involved in the creation, maintenance, and operation of polity. These include: (1) the creation of the constitution; (2) the revision (replacement) of an existing constitution by a new constitution; (3) constitutional change that involves less than complete replacement, whether by constitutional amendment or other means; (4) the interpretation of the constitution; (5) the protection of the constitution against misinterpretation or evasion by governmental authorities; and (6) the implementation of the constitution in everyday political life. Thus, the first and second tasks are associated with the creation or re-creation of the constitutional order; the third, fourth, and fifth with constitutional maintenance and constitutional change; and the sixth (and to some extent the fourth) with making the constitution an effective instrument of governance. Scholars and political activists alike need to consider what opportunities exist for a robust popular constitutionalism in the performance of these tasks. Some scholars, such as Sanford Levinson and Steven Griffin, have already begun to explore these possibilities, but much more needs to be done to empower and energize “We the People.”<sup>148</sup>

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147. VA. DECLARATION OF RIGHTS § 15 (1776).

148. See STEVEN M. GRIFFIN, *BROKEN TRUST: DYSFUNCTIONAL GOVERNMENT AND CONSTITUTIONAL REFORM* (2015); SANFORD LEVINSON, *FRAMED: AMERICA’S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* (2012); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN FIX IT)* (2006). For a judicial contribution to this literature, see JOHN PAUL STEVENS, *SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION* (2014).