

BOOK REVIEW

BRINGING THE PEOPLE BACK IN

THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW. By Larry D. Kramer.* New York: Oxford University Press, 2004. Pp. 337. \$29.95.

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INTRODUCTION:

A POPULAR INTERPRETATION OF THE CONSTITUTION

Almost a century ago, Charles Beard's study of the American Founding, *An Economic Interpretation of the Constitution*,¹ set the terms of debate about constitutional history for the Progressive era and informed the way lawyers viewed the Constitution for even longer.² In *The People Themselves*, Larry Kramer has quite possibly done the same for a new generation of lawyers. Beard took an irreverent, tough-minded approach to the American Founding; Kramer is deeply skeptical of the conventional way that the Constitution is defined and offers an alternative that puts ordinary people, rather than judges, at the center of constitutional interpretation. If there is another Progressive era,³ it now has one of its foundational texts.

The key to Beard's influence was his arresting thesis: The revered Founding Fathers had conspired to draft the federal Constitution in order to protect their investments in the public debt,

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¹ CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913).

² On Beard's influence on history and politics, see RICHARD HOFSTADTER, *THE PROGRESSIVE HISTORIANS: TURNER, BEARD, PARRINGTON* 167–346 (1968). For his contribution to legal realism, see NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 114 (1995).

³ See generally PETER LEVINE, *THE NEW PROGRESSIVE ERA: TOWARD A FAIR AND DELIBERATIVE DEMOCRACY* (2000) (advocating more participatory democracy, using Progressive movement as model).

private commerce, and land.⁴ Consequently, he argued, the Constitution was not a miracle of political science; it resulted from the lobbying of commercial interests that overcame the resistance of agrarian interests. Beard later extended this economic interpretation to all of American history, from the colonial period to the twentieth century.⁵ His powerful thesis—that American history was the story of competition between commercial elites and agrarian masses—allowed him to reorganize every field he entered. For Beard, the tension between commercial and agrarian interests was a highly charged magnet that he used to arrange mounds of historical data into parallel and opposing lines. His approach was always controversial, and over time historians eroded Beard's specific argument about the Founding through painstaking analysis of the drafting of the Constitution—and of the drafters' investments.⁶ But Beard's fundamental point—that the Constitution was a political document serving economic interests—never faded entirely. The idea that the Constitution is enmeshed in politics remains commonplace. Few now believe that James Madison, Alexander Hamilton, and the rest of the Framers worked so hard in Philadelphia and afterward just to protect their government bonds. Probably no one, however, believes that they worked hard just to contribute to what they called "the science of politics."⁷

While the politics of the Founding remain fascinating, interest in the legal academy is shifting from the Constitution's framing and ratification to its implementation and enforcement, or from constitutional foundations to the processes of change. At present, American legal culture lacks a satisfying narrative for understanding how the founding generation made the new document work. The narrative that exists within the legal academy emphasizes the institution of judicial review and serves to justify the Supreme Court's power to strike down statutes that it believes violate the Constitution. That is the function of placing *Marbury v. Madison* at the front of most constitu-

⁴ BEARD, *supra* note 1, at 50–51, 63, 149–51, 183–88.

⁵ See generally CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION* (1927).

⁶ See, e.g., ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION: A CRITICAL ANALYSIS OF "AN ECONOMIC INTERPRETATION OF THE CONSTITUTION"* (1956); FORREST McDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958). But cf. GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787*, at 626 (1969) ("[T]he general interpretation of the Progressive generation of historians—that the Constitution was in some sense an aristocratic document designed to curb the democratic excesses of the Revolution—still seems to me to be the most helpful framework for understanding the politics and ideology surrounding the Constitution.").

⁷ THE FEDERALIST NO. 9, at 51 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

tional law casebooks.⁸ The narrative is one of constraint, and its premise is that democratic legislatures tend to violate the rule of law—which in the United States has come to mean constitutional limitations on legislative power—while courts are most competent to identify and enforce those limitations.

There are, however, other interpretations of the first generation of American constitutionalism that do not place democratic governance and the rule of law in tension. One way is to identify the people, rather than judges, as the primary guarantors of the rule of law—to emphasize popular experimentation rather than the naysaying function of judicial review. In other words, the American rule of law is not just, or even centrally, about judicial checks on legislation. It is also, perhaps mostly, about popular sovereignty.

Bringing the people back as the protagonists of American constitutional history is the burden Kramer seeks to carry in *The People Themselves*. He is largely successful. With remarkable energy and conviction, Kramer explores the early history of the federal Constitution and persuasively argues that early Americans believed that the people, using the mechanisms of popular constitutionalism, would play a central role in ensuring that the federal government adhered to the Constitution. They would make and enforce constitutional meaning themselves. Originally, few believed that judges had a special role in interpreting the Constitution, let alone possessed the final say about its meaning. But gradually some judges asserted this power, first to complement popular sovereignty and then to oppose it. That latter move is the one implicit in the editorial choice to begin a constitutional law casebook with *Marbury* while relegating the Constitution itself to an appendix and omitting the instruments of popular constitutionalism almost entirely.

As Kramer sees it, American constitutional history is riven by this conflict between the legal aristocracy and popular democracy. This central antagonism allows Kramer to reorganize the messy detail of American constitutionalism into a powerful story of a struggle between the nation's legal elite and ordinary people for control over the Constitution. The result is an interpretation that could well change the way lawyers and ordinary people conceive of their constitutions.

⁸ See, e.g., KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 3–10 (15th ed. 2004). Cf. Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553, 554 (2003) (arguing against teaching *Marbury*, or at least not teaching it at beginning of introductory courses).

With Kramer's dichotomy, however, as with Beard's, there are costs associated with the benefits of elegance and comprehensiveness. Along the way, some of the richness and texture of constitutional history is lost, and the argument's certitude comes at the expense of the moral ambiguity that distinguishes much good history. Kramer's book might galvanize a new generation of lawyers to find ways to reintegrate ordinary people into the process of constitutional interpretation. It might inspire those people to force the lawyers to let them back into that process. It will also send historians into the archives to test his interpretations. The book should, in short, rally all sorts of people to reexamine how American constitutions are made and enforced. It demands a constitutional accounting. It will not, however, raise much doubt about the whole project of American constitutionalism. The author of this book is angered rather than haunted by the course of history. The Constitution remains intact; the challenge is to restore the people's role in giving it meaning, and the premise is that popular constitutionalism once did, can again, and should work in practice.

In Part I of this review, I discuss the growing interest among legal scholars in the history of judicial review and popular constitutionalism. Kramer's contribution to this literature is his deep historical understanding of an old tradition of popular constitutionalism and his recovery of the more recent development of judicial review. In Part II, I explore Kramer's historical account of popular constitutionalism in early America. His book *is* a work of history, rather than "lawyer's history," and a valuable one. The focus on the career of the concept of judicial review does, however, distract from other important themes in that history, and the identification of popular constitutionalism with an undifferentiated "people" means that much of the cut and thrust of constitutional history is absent from Kramer's account. All exercises of popular constitutionalism—whether or not actually democratic or promoting justice—would seem to be equally good; at least, there is no principle here to help distinguish between exercises of popular constitutionalism that Kramer approves of and those he does not. Finally, the recovery of popular constitutionalism, and its contrast with judicial review, leads him to distinguish sharply—too sharply—between the legal aristocracy and the ordinary people. Finally, in Part III, I suggest ways in which the popular constitutionalism that Kramer describes could be reinvigorated today. Kramer's neo-Progressive constitutional history might contribute to the development of a more modest version of judicial review, which he calls (borrowing from Madison) "departmentalism": Each branch would be free to render its own judgment on the constitutionality of governmental activity, with no branch's judgment supreme or binding on the others. Our

jurisprudence already contains examples, or at least inchoate forms, of departmentalist judicial review. In addition, Kramer's account of constitutional history suggests the virtue and fairness of new constitutional amendments paralleling the democratic amendments of Beard's own Progressive era.

I

LAWYERS, THE PEOPLE, AND THE PROCESS OF CONSTITUTION-MAKING

Kramer's argument is that American constitutionalism has been reduced primarily to legal doctrine that is defined by courts. Judicial review is the primary expression of this legalist constitutionalism. His criticism of judicial review is also a criticism of the legal elite and a plea for ordinary people to reassert their control over constitutional interpretation. In short, Kramer raises the issue of constitutional process and asks whether the judiciary is especially competent to interpret the Constitution. His answer is that it is not. Because the Constitution was made by and for the people, they, rather than judges, are best placed to determine its meaning.

Judicial review is no mean target. It is a—perhaps *the*—central article of the modern American constitutional faith. For many citizens, the judicial power to nullify legislation symbolizes the rule of law. It is arguably one of the United States' most influential intellectual exports, too.⁹ But in civic faiths, as in all creeds, central tenets are often disputed, and the power of judges to set aside statutes has never been without controversy. In the second half of the twentieth century most academic debate about judicial review turned on how, not whether, to justify it.¹⁰ The consensus was that judges did have the power to strike down legislation on constitutional grounds; there was less agreement about the constitutional basis for this power and much debate about the content of the principles that a court could enforce against legislatures.¹¹ The only serious criticisms of judicial review came from the far right of the legal academy, a space that for much of

⁹ *But cf.* Mark Tushnet, *Marbury v. Madison Around the World*, 71 TENN. L. REV. 251, 251 (2004) (arguing that perception that other nations have emulated U.S. system of judicial review is inaccurate). For an exploration of constitutionalism as a civic faith, see SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988).

¹⁰ See Barry Friedman, *The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five*, 112 YALE L.J. 153, 157 (2002) (arguing that even though legal scholars struggled to reconcile popular democracy and judicial review by unelected judges, criticism of courts was distinct from problem of justifying judicial review).

¹¹ See, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 19 (1959) (arguing that courts should overturn decisions of other

the period was not large.¹² Even some of these dissenters viewed themselves as New Deal liberals who believed that a rejection of judicial review was part of the New Deal settlement in which courts stopped striking down progressive social and economic legislation. For them, logic demanded that courts extend great deference to all legislation, equally.¹³ But in the main, members of the legal culture in the late twentieth century saw judicial review as a way to protect civil liberties. From the Supreme Court in *United States v. Carolene Products Co.*¹⁴ and *Brown v. Board of Education*¹⁵ to Ronald Dworkin and his ideal of the judge as Hercules,¹⁶ the leaders of American legal culture defended the judicial power to prevent legislative majorities from infringing upon civil rights. With sometimes violent exceptions,¹⁷ ordinary citizens seemed to agree.

Recently, however, the legitimacy of judicial review has come under attack from what would have seemed unlikely places a generation ago: the academic center and left. From jurisprudential thinkers like Jeremy Waldron to constitutional law professors like Mark Tushnet, a founding member of Critical Legal Studies, scholars have asked whether our constitutional system pays too dearly for judicial review.¹⁸ The reliance on courts to improve society, they argue, has enervated politics. In short, the arguments imply, constitutional legalism and political culture exist in something like a zero-sum relationship: As the legalist approach to the Constitution has gained prominence, American political culture has atrophied.

Even a decade ago these arguments would have been surprising, as most law professors remained invested in the jurisprudence of the Warren Court—or at least what remained of it after twenty-five years

branches only for “reasons that in their generality and their neutrality transcend any immediate result that is involved”).

¹² See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 6 (1971) (criticizing Warren Court for choosing its own values rather than implementing values of society).

¹³ See, e.g., LEARNED HAND, *THE BILL OF RIGHTS* 56–77 (1958).

¹⁴ 304 U.S. 144, 152 n.4 (1938).

¹⁵ 347 U.S. 483 (1954).

¹⁶ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 105–30 (1977).

¹⁷ See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 314–20 (2004) (describing Supreme Court’s concerns with resistance to desegregation in southern states).

¹⁸ MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 154 (1999) (noting benefit of eliminating judicial review); Jeremy Waldron, *Judicial Power and Popular Sovereignty*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 181, 201 (Mark A. Graber & Michael Perhac eds., 2002) (criticizing Supreme Court for “putting itself in the special position that a constitutional convention would occupy” and “silenc[ing] other voices in the extraordinary decision making that it engages in”).

of conservative appointments to the Supreme Court.¹⁹ What has happened? Over the past ten terms, the Rehnquist Court has exercised judicial review aggressively, issuing decisions that have reinvigorated the doctrine of federalism and restored power to the states.²⁰ The Court also has rediscovered limits on congressional power to legislate both pursuant to Section 5 of the Fourteenth Amendment and the Commerce Clause.²¹ Just as important as this renascent judicial power is the Court's rhetorical style. It has assumed that judicial review is uncontroversial and that the Court is the supreme interpreter of constitutional meaning, citing as authority a line of canonical cases stretching from *Marbury v. Madison*²² and *McCulloch v. Maryland*²³ to *Brown v. Board of Education*²⁴ and *Cooper v. Aaron*.²⁵ These cases have anchored constitutional law casebooks for two generations. They operate as much as ritualistic signs to the initiate as arguments. Any lawyer knows immediately that these citations are supposed to be irrefutable, that they symbolize an irreducible core of judicial power and thus the dominant conception of the American rule of law. It is difficult for most lawyers to imagine a world in which these citations to leading Supreme Court cases from the Founding and Civil Rights eras signaled anything else—a world in which the judicial power was not supreme in the task of interpreting the Constitution.

With his historical exploration of the doctrine of judicial review, Kramer provides the raw material for reimagining American constitutionalism. He takes particular aim at the strong version of judicial review, or judicial supremacy, under which the judiciary's interpretations of the Constitution are final and trump those of other governmental branches as well as of the people.²⁶ His goal is to throw the consensus about judicial supremacy into historical relief, to rediscover

¹⁹ For example, another founder of Critical Legal Studies, Morton Horwitz, argued in his 1993 Foreword to the Harvard Law Review that the task of judges and constitutional theorists was to locate fundamental constitutional principles without lapsing into fundamentalism. Morton J. Horwitz, *The Supreme Court, 1992 Term—Foreword: The Constitution of Change: Legal Fundamentality Without Fundamentalism*, 107 HARV. L. REV. 30, 34 (1993).

²⁰ Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 14–15 (2001) (describing Court's newly aggressive approach to judicial review).

²¹ See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001).

²² 5 U.S. (1 Cranch) 137 (1803).

²³ 17 U.S. (4 Wheat.) 316 (1819).

²⁴ 347 U.S. 483 (1954).

²⁵ 358 U.S. 1 (1958).

²⁶ A weak version of judicial review would provide the courts with the power to refuse to apply statutes arising in cases before them. They would not proclaim legislation void across the board, for all branches. Those other branches would be free to make their own

the world we have lost: an American past in which the people governed themselves. Judicial review, let alone judicial supremacy, was not always the central tenet of American constitutional faith. Kramer argues that judicial review was not widely accepted in the early Republic, judicial supremacy not until much later, and neither without challenge. He also demonstrates that popular acceptance of judicial review came in cycles rather than a linear progression, though the gyrations got tighter, moving continually closer to judicial supremacy, as time went on. Yet even as the practice of judicial review became more routine, debates continued to rage over its legitimacy and scope during the nineteenth century and up through the New Deal. It was only after the Second World War that the specter of authoritarian government, skepticism toward mass rule, and "the historical anomaly of the liberal Warren Court" combined to generate broad acceptance of judicial review in American political culture (p. 232).²⁷

Kramer's historical insights into the origins of judicial review have sent other scholars hunting for evidence of controversy surrounding an institution that most lawyers accept as axiomatic after two weeks in a first-year constitutional law course.²⁸ Beyond recovering the originally contested, even marginal, nature of judicial review, Kramer hopes to reinvigorate the people's power to define their Constitution themselves. There used to be more constitutionalism outside the *U.S. Reports*—and, Kramer argues, there *should* be much more. His history makes his prescription credible.

It should be made clear at the outset that Kramer's normative argument is not originalist. He does not argue that we are compelled to return to an earlier version of constitutionalism. American constitutionalism always has been, and remains, a matter of popular choice. Indeed, his point is that there may be no single original understanding of the Constitution's meaning but rather evolving conventional understandings.²⁹ Given this premise of historical pragmatism, there can be no resort to originalism. The problem is not the exercise of choice,

determinations of a statute's constitutionality. For analysis of Kramer's departmentalist conception of judicial review, see *infra* notes 115–28 and accompanying text.

²⁷ See also Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Four: Law's Politics*, 148 U. PA. L. REV. 971, 1046–64 (2000) (arguing that after New Deal, popular acceptance of judicial review increased even as academic discomfort with practice grew).

²⁸ See, e.g., Theodore W. Ruger, "A Question Which Convulses a Nation": *The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004) (discussing Kentucky's brief rejection of judicial review in nineteenth century).

²⁹ For more elaboration of this point, see Larry Kramer, *Fidelity to History—And Through It*, 65 FORDHAM L. REV. 1627, 1627 (1997), who argues that "keeping faith with the Constitution means tracking its evolution over time."

but rather the specific choice that has been made. The lawyers' betrayal of the people, and the complicity of the people themselves, strikes Kramer as almost unforgivable, which might account for the book's passionate tone. "Perhaps," he writes, a country that entrusted a "lawyerly elite" with constitutional interpretation "could still be called democratic, but it would no longer be the kind of democracy Americans had fought and died and struggled to create" (p. 228). Instead of originalism, Kramer presents a constitutional morality tale, a kind of comparative constitutionalism in which the constitutional world of the present is held up against that of the past and found wanting. Rather than compare U.S. constitutionalism to that of, say, Britain or France today, he compares it to the constitutionalism of the first two generations of Americans. Their constitutionalism was different from ours, and the difference suggests, first, that our present constitutionalism was not an inevitable development and, second, that it can be changed. An alternative understanding of the past can offer leverage against the prevailing constitutional orthodoxy and help legitimate alternatives. His assumption is that lessons about the past can inspire more meaningful politics today. As he puts it, this history of early America might "reawaken our own seemingly deadened sensibilities" toward popular sovereignty (p. 8).

Two large themes emerge immediately. The first is that Kramer focuses on the process of constitutional change rather than on its substance. In this respect, his work is related to scholarship over the past decade or so that has renewed debate over the procedures of constitutional change.³⁰ The question for constitutional-process scholars is whether or not informal amendments wrought or confirmed in the courts are valid. They usually accept the division of power between judges, who make or at least articulate those informal amendments, and the people at large, who, through an elaborate process of signal and response, accept or reject those amendments. Kramer's critique is more thoroughgoing because he rejects the judiciary's claim to a monopoly over ratifying constitutional change. His subject is the *nature* of constitutionalism—how the Constitution gets its meanings—rather than the specific doctrines of constitutional law. He asks: Who defines the Constitution and who should? His answer is that the

³⁰ See, e.g., 1 BRUCE ACKERMAN, *WE, THE PEOPLE: FOUNDATIONS* 3–34 (1991) (discussing two-tiered system of normal and constitutional politics); AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 299–301 (1998) (addressing Ackerman's arguments); see also Daniel J. Hulsebosch, *Civics 2000: Process Constitutionalism at Yale*, 97 MICH. L. REV. 1520, 1521–22 (1999) (assessing work of constitutional scholars to locate legitimate mechanisms of constitutional change beyond amendment).

people should, and for a long time did, take the lead. Lately, however, the people have participated little in the process.

The people's counselors take a lot of the blame. This is the book's second major theme. Lawyers, especially judges, now dominate constitutional interpretation because they funnel most constitutional issues into constitutional law, a new genre of law created in the early republic.³¹ American constitutional history, Kramer argues, has been a struggle between the democracy of the people and an aristocracy of the bench and bar. Unlike Alexis de Tocqueville,³² Kramer does not celebrate this aristocracy as ballast against the tyranny of the majority. Instead, he celebrates politics, and he looks back nostalgically to a time when party politics, in particular, was robust. Only during the past two generations have lawyers and judges succeeded in placing judicial review at the center of American constitutional culture while marginalizing popular constitutionalism.

This review will examine Kramer's use of the dichotomy between aristocratic and democratic modes of constitutional interpretation later.³³ For now, it is enough to note that Kramer persuasively shows that progressive criticisms of judicial review are not new. They are also older than the Progressive era of Charles Beard and like-minded critics of Lochnerian judicial review.³⁴ Instead, it is the progressive embrace of judicial review, dating from approximately the Second World War, that is new. For generations before that time, Kramer argues, most on the left of the American political spectrum opposed judicial review; or at least they opposed the strong version known as judicial supremacy. Unlike some critics, Kramer does not advocate abolishing judicial review, and presumably he agrees that no amount of revisionism will erase the positive contribution that courts made to

³¹ See generally SYLVIA SNOWISS, *JUDICIAL REVIEW AND THE LAW OF THE CONSTITUTION* (1990) (describing legalization of constitutional law before and during Marshall Court); DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD 1664-1830*, at 391-490 (forthcoming 2005) (on file with the *New York University Law Review*) (describing formation of new genre of constitutional law during ratification debates).

³² See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 278 (Henry Reeve trans., Francis Bowen & Phillips Bradley eds., Alfred A. Knopf 1945) (1835) (observing that "lawyers . . . form the highest political class and the most cultivated portion of society" and thus were aristocracy in United States).

³³ See *infra* Part II.E.

³⁴ For a conventional account of Progressive-era criticism of the Court's *Lochner*-era jurisprudence, see HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* 147-58 (1993). See generally *Lochner v. New York*, 198 U.S. 45 (1905).

the postwar Civil Rights Movement.³⁵ He wants, however, to remind his readers that, for most of U.S. history, courts did not facilitate civil rights in the progressive sense. Instead, judicial review usually obstructed popular politics. In contrast, progressive politics meant *democratic* politics. And it meant *politics*.

The legal profession is not Kramer's only target audience. He also hopes to speak to the people themselves: non-lawyers today who have not thought deeply enough about their power, and duty, to interpret the Constitution. As such, this powerful book falls squarely in the tradition of the American jeremiads that for centuries have called on the American people to honor their original covenants.³⁶ The covenant breached here is the people's own agreement, at the Founding, to govern themselves. Thus, although Kramer is not an originalist, much of the moral force of his argument rests on his reading of how early Americans conceived of the customary constitution they inherited from the colonial period and the new ones they made during and after the Revolution. For Kramer, the past does not supply imperatives. It does, however, show that there has been more than one method of defining the Constitution and that, therefore, there are alternatives to judicial review.

II

POPULAR CONSTITUTIONALISM IN AMERICAN HISTORY

This Part examines Kramer's historiography through a discussion of his treatment of popular constitutionalism and concludes that *The People Themselves* is a work of history, and not merely the kind of "law office history" derided by historians. In his book, Kramer explores new and old evidence and offers fresh interpretation of primary sources. His interpretation of history does, however, lack some texture, as seen in his account of the colonial customary constitution. Kramer also pushes his arguments rather far, as in his interpretation of the state precursors to judicial review and of *Marbury v. Madison*. Finally, this Part concludes by exploring Kramer's guiding dichotomy, in which a constitutional history is a struggle between the legal aristocracy and popular democracy.

³⁵ Kathleen Sullivan, Kramer's predecessor as Dean of the Stanford Law School, has made this point in a review of the revisionist literature. Kathleen Sullivan, *What Happened to 'Brown'?*, N.Y. REV. BOOKS, Sept. 23, 2004, at 47, 52.

³⁶ For the tradition of the "American jeremiad," see SACVAN BERCOVITCH, *THE AMERICAN JEREMIAD* (1978); PERRY MILLER, *ERRAND INTO THE WILDERNESS* (1956).

A. *Forensic and Didactic History: A Practical Definition of History Worth Reading*

Because Kramer recovers much that historians have ignored and presents a persuasive account of the original understanding of judicial review in early America, his book is truly a work of history. Much law review ink has been spilled considering whether or not law professors are equipped to write good constitutional and legal history.³⁷ These analyses remind us that constitutional law studies and history are separate disciplines. Typically, historians and legal scholars are trained separately, publish in different journals, and contribute to distinct conversations. When they encounter each other in the same venue it becomes clear that they value different sources, ask different questions of those sources, and apply different measures of fitness to interpret them. Criticism usually comes from historians, who scoff at "law office history," which they see as instrumentalist and blinkered.

More searching critics of law review legal history—a variant of law office history abounding with footnotes—provide more helpful standards for assessment. Martin Flaherty, for example, asks whether a work of legal or constitutional history acknowledges the existing conversations about a given set of issues or instead relies on outdated interpretations and methods.³⁸ Does the author, in short, keep up with the literature? John Reid raises a similar question: Does a legal scholar obey the accepted canons of history at a given moment? Most do not because adherence to the evidentiary standards of the historical profession in pursuit of objective understanding is not their goal. Rather, they use history to support predetermined positions, a method Reid labels "forensic history."³⁹

³⁷ There is a sizeable law review literature exploring what counts as valid legal or, especially, constitutional history. See, e.g., Julius Goebel, Jr., *Ex Parte Clio*, 54 COLUM. L. REV. 450, 451, 483 (1954) (reviewing WILLIAM W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* (1953)) (arguing that constitutional history must be grounded in history of legal doctrine and contemporaneous precedents); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119, 122 & n.13 (challenging objectivity of historical accounts written to prove contested legal point); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1239–40 (1986) (responding to Critical Legal Studies scholars' criticisms of interpretive constitutional analysis).

³⁸ See Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 529 (1996) (criticizing historical scholarship of Richard Epstein and Cass Sunstein while praising that of Bruce Ackerman, who considers recent historiography in his scholarship).

³⁹ See John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 203 (1993). While criticizing such efforts, Reid recognizes the potential value of forensic history in constitutional law: It can function as a substitute for the lost common law notion of custom by tying the present to the past and generating a sense of duty to respect that past. Still,

Like all historiographical discussions, criticism of lawyers' legal history reaches a point of diminishing returns rather quickly. Blunt claims that some work is or is not history usually raise more questions than they resolve. Such criticism also takes us away from the sources and the questions those sources pose and answer, focusing instead on why scholars at one moment find some issues more interesting than others. This last question—why this project now?—is an intriguing one but not the most interesting to historians. Kramer's book seems to have begun as a criticism of the Rehnquist Court's use of judicial review to strike down congressional legislation.⁴⁰ In this sense, the orientation is presentist. That origin does not, however, exhaust the book's meaning and power. Many works of history originate in some immediate concern, and the distinction between those that are worth reading as histories and those that are mere polemics turns on the author's imaginative capacity to recall the foreign world of the past.⁴¹ The questions that historians ask are whether a scholar—regardless of training—selects primary sources sensibly, investigates them honestly, and presents a fresh argument about their meaning. For Kramer's book, the answer to these questions is "yes." He has examined many primary sources and fits his findings within existing historiographical frameworks while, at the same time, broadening our understanding of early American constitutional history and opening up new ways to look at what we thought we already knew. In short, Kramer has done the hard work of exploring the past and has struggled to make sense of it on its own terms. His objective is to prove that the conventional understanding of judicial review is ahistorical. But his book is not a lawyer's brief. If that had been the goal, a law review article or two would have sufficed. The book, instead, has a more complex argument, seeks a broader audience, and targets not a single court but rather the legal profession's self-ennobling mythology that justifies judicial review. Kramer opens the lens of history to capture other, nonlegal dimensions of American constitutional history, a history that so often reads like an authorized national biography. In doing so, he travels beyond the Whiggish orthodoxy that genuflects to the founders, celebrates John Marshall, moves uncomfortably over *Dred Scott*

the purpose would be to constrain politics through law rather than to understand history on its own terms. *Id.* at 222–23.

⁴⁰ This catalyst is apparent in the articles in which Kramer formulated the central arguments of his book. See Kramer, *supra* note 20, at 5–16; Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 219 (2000) ("[T]he current Supreme Court's aggressive encroachment on this system is as unnecessary as it is misguided.").

⁴¹ See DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* 4 (1985) (discussing imagination required to recover past worlds).

and *Lochner*-era obstructionism, and culminates in the heroic Warren Court.⁴² His story is not a story of inexorable progress—or regress. It is a story of an enduring struggle between competing modes of making constitutional meaning. As such, this is unquestionably a work of history.

Yet it is also what might be called *didactic history*. While Kramer does wish to recover early American understandings of constitutionalism—no one would spend that much time reading Madison, Jefferson, and Martin Van Buren just to write a lawyer's brief—he also presents a lesson in constitutional morality. There is a normative dimension here that is absent from most histories, or at least the normative dimension is more apparent in Kramer's book. Kramer asks whether the American people wish to live under a constitution defined by the legal elite or by themselves. He writes not only for historians and law professors, but also for judges, lawyers, students, and ordinary citizens. That Kramer has much to offer to more than one academic discipline, while also speaking to practitioners and laypersons, is a testament to the book's range and power. It is a work of history that also teaches a memorable civics lesson.

B. In the Beginning: The Customary Constitution and the Missing Empire

Every work of history must cut into the seamless web somewhere. Kramer does so in Chapter 1 by portraying a "customary constitution" shared on both sides of the Atlantic before the American Revolution (pp. 9–34). His analysis of this English customary constitution establishes three patterns that shape the rest of the book. First, Kramer argues persuasively that most of the instruments of popular constitutionalism were extra-legal. Second, Kramer appears to conflate popular constitutionalism with popular sovereignty and, along the way, seems to assume that colonial Americans had a unitary interest and can be treated coherently as "the people." Third, Kramer rarely refers to the governing scenery in which these people acted out the scripts of popular constitutionalism. In short, Kramer captures an extremely important and neglected dimension of Anglo-American constitutionalism but does not fully place it within its surrounding environment, namely the British Empire.

Kramer rightly identifies the sources of this customary constitution in canonical documents such as the Magna Carta and the English

⁴² The historical section of almost any constitutional law casebook serves as an example. For a valuable counterexample, see PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (3d ed. 1992).

Bill of Rights, as well as in common-law institutions like the jury. The precise content of the customary constitution was never certain, and this elasticity enabled the people to change it over time. For Kramer's purposes, the remarkable aspect of the customary constitution was its enforcement through the mechanisms of popular constitutionalism. Before constitutions were reduced to single documents, and before the establishment of orthodox legal modes of interpreting them, ordinary people influenced constitutional meaning in multifaceted ways. One instrument was "clear, convulsive expressions of popular will," such as the Glorious Revolution of 1689 that ousted James II and replaced him with a new King and Queen (p. 15). Another mode of change was prescription, or the weight of custom. Here, change was evolutionary rather than revolutionary. In practice, prescriptive arguments usually functioned as a defense against constitutional change. Typically, people raised a traditional way of doing governmental business to the level of constitutional right, while condemning the new way as unconstitutional. The principle of prescription, Kramer argues, helps explain "the extravagant reactions of American dissidents even to Parliament's most modest interventions" in the decade before the Revolution (p. 17).⁴³

Significantly, fundamental law was not law in the ordinary sense. Its definition did not take place primarily in the courts. Most important, judicial review was not a mode of constitutional enforcement in the British American world. Here Kramer argues that the much analyzed seventeenth-century decision known as *Bonham's Case* was only an instance of statutory interpretation that left no precedent for the claim that judges could strike down legislation. It was not a case about judicial review (pp. 18–24).⁴⁴ Dr. Bonham had practiced medicine in London in violation of the Royal College of Physicians's monopoly within the city. The statute granting the monopoly also gave the College the power to enforce it by trying alleged violators, like Bonham. The Court of Common Pleas refused to enforce the monopoly because the statute seemed to empower the College to act as judge in its own cause. Whether the court merely interpreted the statute as not permitting the College to enforce its monopoly, or

⁴³ This claim is supported by John Reid's multivolume *Constitutional History of the American Revolution*. JOHN PHILLIP REID, CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION (1986–91).

⁴⁴ Compare S.E. Thorne, *Dr. Bonham's Case*, 54 L. Q. REV. 543, 545–52 (1938) (arguing that Coke engaged only in statutory interpretation), with J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 241–42 (3d ed. 1990) (asserting that Coke's opinion invalidated statute that violated "natural justice"), and Charles M. Gray, *Bonham's Case Reviewed*, 116 PROC. AM. PHIL. SOC'Y 35, 36 (1972) (maintaining that Coke's contemporaries believed his opinion endorsed judicial review).

whether the court was actually nullifying that statute, has been much debated.⁴⁵ Kramer embraces the statutory interpretation model, which fits his thesis that people rather than courts made and enforced fundamental law.

Even if *Bonham's Case* represented some version of judicial review, it did not reflect the mainstream perception of judicial power in England or the new colonies. "Constitutional or fundamental law," Kramer writes, "subsisted as an independent modality, distinct from both politics and from the ordinary law interpreted and enforced by courts" (p. 24). Kramer borrows John Reid's characterization of early modern fundamental law as "political-legal" to characterize colonial constitutional discourse as neither a matter of ordinary law nor ordinary politics.⁴⁶ Some of the institutions of enforcement were political, such as elections and petitions. Some were legal, like the jury and its power to nullify law. And some, like protests, mobbing, and other forms of resistance, fitted into neither category. Fundamental law was, in short, "created by the people to regulate and restrain the government, as opposed to ordinary law, which is law enacted by the government to regulate and restrain the people" (p. 29). These legal, political, and extra-legal expressions of constitutionalism, rather than an ambiguous judicial opinion, are evidence of the customary constitution that the colonists believed they enjoyed and for which they rebelled in 1776.

Kramer's recovery of popular modes of enforcing fundamental law adds to our historical understanding of early modern Anglo-American constitutionalism. There are deep roots for popular participation in making a constitution. Still, the presentation may overcompensate for the prior neglect of popular constitutionalism. Important dimensions go unnoticed. A casual reader might conclude that Kramer has described the full range of constitutionalism in British America. In particular, Kramer seems to conflate popular constitutionalism with popular sovereignty, or at least he argues that popular constitutionalism was the enforcement mechanism for a constitution resting on popular sovereignty.⁴⁷ Popular sovereignty is the principle that all power derives from the people. This remained a controversial principle in the eighteenth century, and those who embraced it often disagreed with each other about what it meant in practice. Edmund S.

⁴⁵ See sources cited *supra* note 44.

⁴⁶ See 3 REID, *supra* note 43, at 28–29.

⁴⁷ Kramer states that, after the Revolution, "popular sovereignty emerged more clearly defined as the central principle of American constitutionalism" (p. 54), which is correct about the revolutionary period but also implies that popular sovereignty was already the central principle of American constitutionalism before that time.

Morgan calls it a contested fiction, a populist script originally used by relative elites to wrest authority from the Crown.⁴⁸ Most English thinkers were careful to locate popular sovereignty in Parliament, which was divided into three constituent parts: King, Lords, and Commons.⁴⁹ While just about everyone in the early modern British world believed that government required some degree of popular consent, not everyone agreed about how this consent was to be realized, whether consent implied popular sovereignty, and what the role of the Crown was after the Glorious Revolution of 1689.⁵⁰ One problem here is that the notion of "sovereignty" was undertheorized in the British world, which makes it difficult, if not anachronistic, to determine whether early modern Britons believed in popular sovereignty, royal sovereignty, parliamentary sovereignty, or some combination.

In the British Empire, at least outside England, popular constitutionalism should be contrasted with more conventional ways of defining the British and colonial constitutions, such as through Crown governance. In the colonies, the Crown was, in theory, the fount of political power. The King and his Privy Council drafted the colonial charters, appointed the colonial governors, reviewed colonial legislation, and heard appeals from colonial courts.⁵¹ Many practical obstacles lay between the theory of Crown power, which was extensive, and its practice, which was often obstructed.⁵² There was, for example, much more popular participation in colonial government than in England.⁵³ Many of these practical constraints can be placed under the heading of popular constitutionalism, which provided the colonists with strategies for asserting constitutional claims in a fluid imperial environment in which there was no clear, unitary sovereign.⁵⁴

The Crown's continued centrality in colonial government might be implicit in Kramer's discussion of the role of prescription in the

⁴⁸ See EDMUND S. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 94–121 (1988).

⁴⁹ WOOD, *supra* note 6, at 382–83.

⁵⁰ For a lucid discussion of these issues, see MORGAN, *supra* note 48, at 94–121.

⁵¹ See LEONARD WOODS LABAREE, *ROYAL GOVERNMENT IN AMERICA* 1–7 (1930) (outlining features of colonial government); JOSEPH HENRY SMITH, *APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS* 141–51, 637–53 (1950) (analyzing Privy Council review of colonial legislation and adjudications).

⁵² See BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 96 (1968) (referring to colonial governors' "swollen claims and shrunken powers").

⁵³ See MORGAN, *supra* note 48, at 122 (observing that colonies enjoyed "a degree of popular participation in government that would make the sovereignty of the people . . . a more plausible fiction . . . than in England").

⁵⁴ See Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750–1777*, 16 *LAW & HIST. REV.* 319, 326–54 (1998) (analyzing contested nature of imperial constitution).

enforcement of popular constitutionalism.⁵⁵ Colonists made customary or prescriptive arguments to *oppose* constitutional change that the Crown initiated, whether operating in Parliament, as with the Stamp Act, or outside Parliament, as with the Proclamation of 1763. The point is that popular constitutionalism emerged as a constraint on the Crown. It was not identical to popular sovereignty. In fact, it antedated popular sovereignty and emerged in a political culture that did *not* rest on popular sovereignty, which helps explain why it manifested itself in extra-political and extra-legal ways.

Even this picture of popular constitutionalism as a check on the Crown simplifies matters too much because it suggests that constitutions were arenas of conflict between only two contestants: the King and the people. Popular constitutionalism was a large arsenal with a variety of weapons that could be used by all sorts of people across the social spectrum and throughout the territories of the Empire: lords and commoners, courtiers and gentry, colonists and metropolitans, the many and the few. The targets of popular constitutionalism shifted and so did alliances among different groups of people. Perhaps one should qualify the term *popular* here. Procedurally, "popular" captures all sorts of constitutional activity outside official administration. In the colonies, the degree to which each of these arguments or actions were actually popular is an empirical question—a difficult one. Kramer does not state that every exercise of popular constitutionalism was popular in the democratic sense and, because his goal is to locate extra-legal procedures of constitutional change, it is not necessary for him to do so. This is, however, the impression that the book leaves on the reader.

In addition, the "people" rarely have a unitary interest. This was certainly true in colonial America. A petition from the provincial elite might have requested one policy, for example, while a mob demanded a different, conflicting one. Therefore, it is difficult to reduce colonial constitutionalism to a struggle between the government and the people. Instead, constitutions in the British Empire contained multiple levels of government harnessed by different, overlapping sectors of society.⁵⁶

⁵⁵ Kramer cites John Reid's work when distinguishing the persistence of customary constitutionalism in the colonies after it had started to give way to parliamentary sovereignty in England. This is not the same as saying that the colonists believed that their constitution rested on popular sovereignty, and Reid does not argue such. Instead, Reid argues that the colonists relied on custom more than popular sovereignty to defend their constitutional rights. See JOHN PHILLIP REID, *THE CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION: THE AUTHORITY OF RIGHTS* 72-73 (1986).

⁵⁶ See Hulsebosch, *supra* note 54, at 334 (discussing multiple levels of government).

Kramer is correct to emphasize the power of popular constitutionalism. But to what end was this power exercised? The treatment of fundamental law as a resource that the people used to restrain government, and contrasting it to ordinary law as something made by government to control the people (p. 29), risks flattening the complex political environment of the early modern world into the state-citizen model of modern liberalism. Much of popular resistance was aimed at imperial policy that had many goals, such as orderly settlement, British commercial development, defense, and fair treatment of allied Native American tribes.⁵⁷ Such policies created winners and losers. They did not pit an abstract people against an abstract government.

The land policy encapsulated in the Proclamation of 1763, for example, originated in reports from the Crown's agents on the frontier and had many goals.⁵⁸ An important one was to protect the Native Americans from Euro-American settlers. This and other measures to restrain migration met much opposition across the provincial institutional and social spectrum. Assemblies protested, juries resisted, and settlers moved where they pleased. All opposed the imperial version of their constitution in exactly the ways Kramer outlines. And in the long run they won. Indeed, Kramer might have placed more emphasis on the physical dimension of popular constitutionalism—the role of migration and violence, for example.

In sum, there were too many contestants for power *within* each Anglophone jurisdiction, as well as too many jurisdictions *across* the British Empire, to fit into a neat dichotomy between a fundamental law that the people wielded against government and an ordinary law that the government used to regulate the people. Different groups of people, in different places, exerted power through ordinary law or politics at one time, and at another time resisted such exercises through popular activity. This politically and jurisdictionally complex environment left the new American states a rich legacy that shaped their new state constitutions and the federal Constitution. When the people replaced the Crown as the source and symbol of authority, what forms would popular constitutionalism take?

⁵⁷ See *id.* at 355–77 (detailing imperial policies and provincial resistance to them).

⁵⁸ *Id.*

C. *After the Revolution: Popular Constitutionalism When the People Are Sovereign*

For two generations, historians have argued that the American Revolution represented the triumph of republicanism.⁵⁹ Republicanism was a much-contested concept in the eighteenth century and remains so now. Whatever else republicanism meant, it entailed eliminating monarchy and building representative government on the premise of popular sovereignty. Kramer adds to our understanding of revolutionary republicanism by putting the founding generation's expectations about constitutional enforcement against the background of popular sovereignty. In other words, not only did the Founders create republican governments resting on popular sovereignty; they also assumed that the people would continue to define and enforce their constitutions through the traditional mechanisms of popular constitutionalism such as electoral politics, petitions, juries, protests, and popular resistance. There was no great distinction between making and enforcing a constitution. The people invested constitutions with authority, and they would continue to give them meaning over time.

So it might seem strange that Kramer passes quickly over the Revolution and state constitution-making and concentrates instead on the origins of judicial review in the 1780s. The state constitutions support his thesis that the Revolution marked the apotheosis of popular constitutionalism. These early state constitutions would not strike us as especially democratic. Suffrage was widespread but hardly universal even among white males. Most of the original thirteen states retained property or taxpaying qualifications, many for at least another generation, and other exclusions—such as gender and racial restrictions—either continued in force or were added later.⁶⁰ From the perspective of the colonial period, though, the state constitutions reflected a new, radical commitment to popular sovereignty.⁶¹ Most of the state constitutions revolved around the legislature and safeguarded the traditional ways for the people to influence legislation. The drafters also increased the quality (if not the social depth) of rep-

⁵⁹ See BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* v-viii (enlarged ed. 1992); WOOD, *supra* note 6, at 118–23 (arguing that Revolutionaries viewed imperial regulation through lens of republican ideology and describing their struggle to create new republican governments).

⁶⁰ CHILTON WILLIAMSON, *AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY 1760–1860*, at 92–116 (1960); see also ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 5–25 (2000) (analyzing origin and development of voting laws in colonial America).

⁶¹ See WOOD, *supra* note 6, at 383–89.

resentation by making representatives more responsive to constituents while at the same time decreasing the power of the executive.⁶² The empire was gone; there were no instructions issuing from a distant central government. For many provincial leaders, it was a dream world of local republicanism.

For others, however, the new reality was not all that had been desired. To them, sovereignty realized primarily through legislative government created unbalanced constitutions and weakened the connections among the states that were needed to fend off surrounding empires and allow the American Union to reach its own imperial potential. Gordon Wood and Jack Rakove have documented how men like James Madison, Alexander Hamilton, George Washington and others soon known as Federalists became disillusioned with the state governments during and after the Revolutionary War.⁶³ Problems ranged from requisition and excise collection to violations of the peace treaty with Britain. To these Federalists, the states were violating the rule of law: They threatened property rights, literally alienated loyalist human and financial capital, and breached the law of nations. They feared the disintegration of the Union and disrespect among the European powers that still dominated the Atlantic world. The Federalists' most important response to these perceived abuses was to call the Philadelphia Convention.⁶⁴

Federalists never challenged the principle of popular sovereignty directly. They rarely challenged the state constitutions directly either. The Convention, for example, rejected Madison's proposed council of revision, which would have subjected state legislation to federal review.⁶⁵ Instead, the Federalists hoped to restrain the states by placing another level of government above them. Federalism was one way to exert some control over the states—an innovative political-

⁶² See WILLI PAUL ADAMS, *THE FIRST AMERICAN CONSTITUTIONS* 234–51 (Rita Kimber & Robert Kimber, trans., expanded ed. 2001) (1980) (describing apportionment of representatives, short terms of office, term limits, and transparency of legislative proceedings); DONALD S. LUTZ, *POPULAR CONSENT AND POPULAR CONTROL: WHIG POLITICAL THEORY IN THE EARLY STATE CONSTITUTIONS* 42–52 (1980) (describing use of words “consent,” “concur,” and “assent” in state constitutions and arguing that they reflected popular commitment to republicanism).

⁶³ JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 35–56 (1996) (detailing Madison's concerns about state governments); WOOD, *supra* note 6, at 393–96 (noting that “with the problems of war and reconstruction it is unquestionable that the period was unsettled”).

⁶⁴ RAKOVE, *supra* note 63, at 47 (“The proper task of the Convention was not merely to free the Union from its debilitating dependence on the states but also to seize the occasion of reforming the national government to treat the internal defects of the states.”).

⁶⁵ Charles F. Hobson, *The Negative on State Laws: James Madison, the Constitution, and the Crisis of Republican Government*, 36 WM. & MARY Q. 215, 216 (1979).

legal way that was in keeping with the tradition of popular constitutionalism because it involved participatory decision-making in representative bodies.

There were other responses. One was the form of judicial review that appeared in several state courts in the 1780s.⁶⁶ Kramer argues that these early opinions did not articulate a strong version of judicial review or judicial supremacy.⁶⁷ Instead, he finds that these state judges conceptualized their role in modest terms, so that most of the cases can be seen as instances of statutory interpretation rather than outright judicial review. In addition, these early judges defended their interpretive power by invoking popular sovereignty rather than opposing it: Judges were the people's agents, too, and they shared with the other branches the power to enforce the people's will (pp. 57–65).⁶⁸ Judges did not view themselves as experts entrusted with policing the political branches to ensure that they remained within the boundaries of the state constitutions. That, at least, is how they justified their scrutiny of legislation.

Kramer succeeds in showing that these early instances of judicial review were marginal, and that when the institution first appeared judges portrayed it as yet another mode of vindicating popular sovereignty. It is not difficult to imagine a world in which Americans experimented with judicial review and then rejected it. In fact, Kramer argues that this is what happened—almost. Nonetheless, he concludes, even these early, modest instances of judicial review marked a “radical departure from experience” and at root were attempts to subject popular politics to legal constraints (p. 65).

Kramer might underestimate the anti-populist animus behind the state cases in the 1780s. Contemporaries, at least, saw the decisions as attempts to place the courts atop legislatures. Perhaps, though, more was going on than aristocratic restraint of democracy. The law of nations, for example, played a large role in these cases, most of which raised the question of the Confederation's international legitimacy—

⁶⁶ For a survey of these state cases, see JULIUS GOEBEL, JR., 1 ANTECEDENTS AND BEGINNINGS TO 1801, at 125–42 (1971), who discusses *Commonwealth v. Caton*, 8 Va. (4 Call.) 5 (1782), *Rutgers v. Waddington* (N.Y. City Mayor's Ct. 1784) (unreported), *Trevett v. Weeden* (R.I. Super Ct. 1786) (unreported), and *Bayard v. Singleton*, 1 N.C. 5 (N.C. Super. L. & Equity 1787).

⁶⁷ See also SNOWISS, *supra* note 31, at 1–33 (arguing that judicial review did not gain acceptance in state courts during 1780s). But see William Michael Treanor, *The Case of the Prisoners and the Origins of Judicial Review*, 143 U. PA. L. REV. 491, 498 (1994) (asserting that arguments in this Virginia case demonstrate an “aggressive conception of judicial review”).

⁶⁸ See SNOWISS, *supra* note 31, at 2 (noting that “judicial authority to enforce the Constitution . . . [acted as] a judicial substitute for revolution”).

an issue by no means settled by the Declaration of Independence or the Articles of Confederation. Even the peace treaty with Britain in 1783 did not settle the question, especially as the states repeatedly breached that treaty.⁶⁹

In the New York case of *Rutgers v. Waddington*, for example, Alexander Hamilton relied heavily on the law of nations to defend his client in a trespass case (pp. 65–66). His client was a loyalist who occupied the New York City brewery of the plaintiff during the Revolution. In a draft of one brief, Hamilton invoked Sir Edward Coke's ambiguous opinion in *Bonham's Case*, but that case is not a strong precedent for judicial review, and Hamilton did not put much weight on it.⁷⁰ Instead, he argued that state law incorporated the law of nations by way of the common law, which the state constitution declared "shall be and continue the law of this state, subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same."⁷¹ Did the state legislature, he asked, intend to violate the law of nations or the 1783 treaty? "If it was intended the *act is void* [citing *Bonham's Case*].—But let us see whether there are not rules of construction which [render] this extremity unnecessary."⁷² Hamilton argued that when the state legislature drafted its Trespass Act, it could not have intended to eliminate justifications that derived from the laws of war, a branch of the law of nations.⁷³ Under the laws of war, a military order justified trespass during wartime, and his client claimed to occupy the brewery under a

⁶⁹ For discussion of international recognition and the role of the Declaration in gaining it, see David Armitage, *The Declaration of Independence and International Law*, 59 WM. & MARY Q. 39, 50–60 (2002), who argues that the Declaration of Independence initially provoked little response in Europe, but eventually shaped European "debates about the positive law of nations." For recent explorations of the influence of the law of nations on the Founders, see DAVID C. HENDRICKSON, *PEACE PACT: THE LOST WORLD OF THE AMERICAN FOUNDING 171–73* (2003), who argues that the Founders held the law of nations in high esteem, and Tara Helfman, *The Law of Nations in The Federalist Papers*, 23 J. LEGAL HIST. 107, 112–17 (2002), who discusses reliance on the law of nations in *The Federalist*.

⁷⁰ In the draft, Hamilton cited *Bonham's Case* for the proposition that "[a] statute against Law and reason especially if a private statute is void." A court had the power, Hamilton asserted in these notes, to "render [such an] act Nugatory." 1 THE LAW PRACTICE OF ALEXANDER HAMILTON 357–58 (Julius Goebel, Jr. ed., 1964) [hereinafter *LAW PRACTICE*].

⁷¹ N.Y. CONST. of 1777 art. XXXV, reprinted in 5 THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA, 2635–36 (Francis Newton Thorpe ed., 1909).

⁷² *LAW PRACTICE*, *supra* note 70, at 382. This last quotation comes from Hamilton's sixth brief; it may represent his most cautious line of argument, and it was the one used at trial. See GOEBEL, *supra* note 66, at 134 n.6.

⁷³ *LAW PRACTICE*, *supra* note 70, at 381–82.

military order. It could not, Hamilton supposed, have been the "intention of [the] wise honest and well informed men" in the legislature to violate the law of nations.⁷⁴ The Mayor's Court of New York City agreed with Hamilton's reasoning. It held that, because the law of nations was incorporated into state law, the defendant could plead military justification for the period of occupancy authorized by the Commander-in-Chief of the British military.⁷⁵

Kramer argues that the decision in *Rutgers* fit within the traditional power of common law courts to interpret statutes and thus was not an exercise of judicial review in any meaningful sense (pp. 65-66). But if the New York court engaged only in statutory interpretation, it was extremely strong interpretation. It is true that the court did not *assert* the power to set aside the statute because it conflicted with the state constitution. Still, the New York Trespass Act did not leave much room for judicial interpretation. According to the statute, defendants could not "plead, in Justification, any military Order or Command whatever, of the Enemy."⁷⁶ There was a direct conflict between the statute and the constitution, which the court claimed incorporated the law of nations. Although the law of nations was arguably part of the common law, and the state constitution adopted the common law, the constitution qualified the adoption of the common law by declaring that it was "subject to such alterations and provisions as the legislature of this state shall, from time to time, make concerning the same."⁷⁷ In essence, the Mayor's Court measured the statute against the state constitution, found in the latter a source of law not mentioned in its text, and refused to enforce the statute.⁷⁸ While the Mayor's Court did not actually claim the power to nullify the statute, that is what it did.

Members of the New York Assembly also saw it as judicial review rather than statutory construction. A group of them concluded that the court had "assumed and exercised a power to set aside an act of the state [and] permitted the *vague and doubtful* custom of nations to

⁷⁴ *Id.* at 357. Hamilton and several other New York lawyers first raised the Confederation's Peace Treaty as a defense in cases under New York's Confiscation Act. Letter from Alexander Hamilton et al., to the President of Congress (Dec. 10, 1783), in 3 THE PAPERS OF ALEXANDER HAMILTON 478-79 (Harold C. Syrett & Jacob E. Cooke eds., 1962); LAW PRACTICE, *supra* note 70, at 297 & n.42 (editor's comment) (citing 3 THE PAPERS OF ALEXANDER HAMILTON, *supra*, at 478-79).

⁷⁵ See LAW PRACTICE, *supra* note 70, at 411.

⁷⁶ *Id.*, at 200-01 (excerpting statute).

⁷⁷ N.Y. CONST. of 1777 art. XXXV, *supra* note 71.

⁷⁸ LAW PRACTICE, *supra* note 70, at 399-400. It also placed the United States within the pale of European civilization: "What more eminently distinguishes the refined and polished nations of Europe, from the piratical states of Barbary, than a *respect* or a *contempt* for [the law of nations]." *Id.* at 400.

be plead[ed] against, and to render abortive, a *clear and positive* statute.”⁷⁹ Several years later, leaders of the first federal administration interpreted *Rutgers* and other cases like it in the same way. When Britain complained that the states were not adhering to the peace treaty, Thomas Jefferson responded that the state courts had in fact been trying to hold the state legislatures to the treaty, citing *Rutgers* in particular.⁸⁰ In international diplomacy, cases like *Rutgers* became evidence that the United States adhered to the law of nations. In other words, this early form of judicial review functioned not only to restrain democracy or serve elite interests; it also demonstrated to the Atlantic empires that the United States was an equal, law-abiding member of the civilized world. Judicial review was wrapped up in many agendas from the beginning. Acceptance in the Atlantic world of commerce and legal ideas certainly served elite interests. It had advantages, however, for many people.

There were other expressions of caution about popular rule, not least from James Madison.⁸¹ Kramer treats Madison sympathetically. The Virginian appears here as a supporter of popular constitutionalism, but he also had deep reservations about the virtue of the people. Kramer takes the problem of Madison head on. As a Virginia legislator in the 1780s, Madison was so suspicious of popular politics that he drafted a memorandum to himself detailing “the [v]ices of the [p]olitical system of the United States” that set the tone for his participation in the Convention.⁸² Yet, Kramer argues, Madison never lost faith in popular constitutionalism. “Certainly the Father of the Constitution,” Kramer writes, “never wavered in his belief that final authority to resolve disagreements over its meaning must always rest with the people” (p. 47). Although Madison struggled to place structural barriers between government and popular factions, he always maintained that the people defined the Constitution, not just through the amendment process but also through political action like elections, petitions, and impeachments (p. 48). “A depen-

⁷⁹ MELANCTON SMITH ET AL., AN ADDRESS FROM THE COMMITTEE APPOINTED AT MRS. VANDEWATER’S ON THE 13TH DAY OF SEPTEMBER TO THE PEOPLE OF THE STATE OF NEW YORK, 1784, at 6 (1784).

⁸⁰ Letter from Thomas Jefferson, to George Hammond (May 29, 1792), in 23 THE PAPERS OF THOMAS JEFFERSON 580 (Charles T. Cullen et al. eds., 1990).

⁸¹ Lately, Madison has been credited with playing a crucial role at the Philadelphia Convention, so much so that Jack Rakove portrays the Convention as “the Madisonian moment.” RAKOVE, *supra* note 63, at 36.

⁸² JAMES MADISON, *Vices of the Political System of the United States*, in 2 THE WRITINGS OF JAMES MADISON 1783–1787, at 361–69 (Gaillard Hunt ed., 1901).

dence on the people," Madison wrote in *Federalist No. 51*, "is no doubt the primary controul on the government."⁸³

Kramer may underestimate the degree to which Madison feared "public passions" early in his career.⁸⁴ After stating that the people were "no doubt the primary controul on the government," Madison added this caveat: "but experience has taught mankind the necessity of auxiliary precautions."⁸⁵ In *Federalist 48* and *Federalist 50*, Madison presented alternatives to popular review of government action by recurring conventions, such as the "council of censors" provided in the Pennsylvania state constitution.⁸⁶ Simply put, his point was that the three branches of the new government would check and balance each other in the administration of their respective powers. He argued that the great "multiplicity of interests" in the large Union would prevent the creation of a "coalition of a majority of the whole society . . . on any other principles than those of justice and the general good."⁸⁷ There was, therefore, little need to refer disputed questions to the people. Indeed, a resort to the people, in a new convention for resolving disagreements, would only bolster the legislature, and at this point in his life, Madison maintained that "the tendency of republican governments is to an aggrandizement of the legislative, at the expence of the other departments."⁸⁸ If the three branches appealed to the people, the legislature—the people's most direct representative—would have a distinct advantage.

Madison's skepticism about popular oversight of government does not take away from Kramer's larger point that Madison did not nominate the judiciary as the supreme judge of constitutional meaning. Ultimately, Madison did accept a weak version of judicial review that has been called departmentalism and that fitted into his scheme of checks and balances. Kramer nicely recovers this more modest conception of the judiciary's power to interpret the Constitution. Madison believed each of the three departments of government had a concurrent power to define the Constitution as each carried out its constitutional role (pp. 146–47). No department's interpretation was binding on the others. Inevitably this would breed conflict between the branches. Who would resolve such conflict? The people, using the instruments of popular constitutionalism. They would reg-

⁸³ THE FEDERALIST NO. 51, at 349 (James Madison) (Jacob E. Cooke ed., 1961).

⁸⁴ THE FEDERALIST NO. 49, at 340 (James Madison) (Jacob E. Cooke ed., 1961).

⁸⁵ THE FEDERALIST NO. 51, *supra* note 83, at 349.

⁸⁶ THE FEDERALIST NOS. 48, 50, at 336, 344–45 (James Madison) (Jacob E. Cooke ed., 1961).

⁸⁷ THE FEDERALIST NO. 51, *supra* note 83, at 352–53.

⁸⁸ THE FEDERALIST NO. 49, *supra* note 84, at 341.

ister approval and disapproval through the ballot, petitions, protests, and so on. Madison realized that this would not be a smooth process, and so does Kramer. The key was intelligent public opinion. Departmentalism could only function within a robust political culture that placed a premium on education, accessible public information, and vigorous public discussion. In an effort to guide public opinion, Madison, Jefferson, and others created networks of information and persuasion—newspapers, political societies, public meetings—that, once institutionalized, became the Republican Party. Kramer concludes that these efforts to open channels of communication to and from the people marked the emergence of a “democratic public sphere” (p. 109).

It is against the backdrop of this emergence of party politics, and the arenas for public opinion that their founders thought necessary to make parties work, that Kramer presents *Marbury v. Madison*.⁸⁹ In his narrative, *Marbury* is neither new nor innovative. Federalists had already embraced judicial review; some even endorsed judicial supremacy. Popular feeling was against the institution, however, just as it was against the rest of the Federalists’ policies after 1800. So Chief Justice John Marshall decided to use *Marbury* as an occasion to inscribe judicial review in the federal reports “before more extreme sentiments against judicial review spread or grew into something more threatening” (p. 124). It was a last stand for the Federalist party, which was “reeling from the anti-court, pro-populist Republican onslaught” (p. 126).⁹⁰

Kramer’s discussion of *Marbury*’s political context is excellent. More debatable is his minimalist interpretation of Chief Justice Marshall’s opinion in the case. He concludes that the Court embraced a departmentalist version of judicial review, holding only that *the Court* would not recognize Congress’s grant to it of original jurisdiction to issue writs of mandamus (pp. 125–27). The more conventional interpretation—that when the Court declared it was “emphatically the province and duty of the judicial department to say what the law is,”⁹¹ it was articulating the doctrine of judicial supremacy—is also consistent with Kramer’s thesis that the decision marked a last stand for embittered Federalists (p. 126).⁹²

⁸⁹ 5 U.S. (1 Cranch) 137 (1803).

⁹⁰ Cf. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971) (emphasizing tension between moderates and extremists in both Federalist and Republican parties).

⁹¹ *Marbury*, 5 U.S. at 177.

⁹² For other interpretations of *Marbury*, see Noah Feldman, *The Voidness of Repugnant Statutes: Another Look at the Meaning of Marbury*, 148 PROC. AM. PHIL. SOC’Y 27 (2004)

It is not necessary, as a historical matter at least, to line up John Marshall behind Kramer's departmentalist theory of judicial review. With Kramer's recovery of the menu of options, one can see the Marshall Court as selecting an alternative to the departmentalist theory, one that reflected skepticism about the openness of the Jeffersonian public sphere and the ability of the people to make wise constitutional choices. Again, this judicial opposition to the Republican-dominated political branches might have been elitist. But Federalist elitism was at least not just an end in itself. From the 1780s onward, Federalists maintained an Atlanticist vision of the Union that conflicted with Jefferson's more westward-moving "empire for liberty" and his dislike of the British imperial regime.⁹³ Again, a focus on constitutional process, or the means of change alone, crops out other aspects of constitutional conflict.

D. *A Republic of Courts and, Especially, Parties*

Although he might overargue his interpretation of *Marbury*, Kramer is correct to interpret *Marbury* as a decision that participated in partisan politics. The election of 1800 was a decisive one in American political and constitutional history. There is a real question, though, about just how populist a victory it was. The Republicans won control of the Presidency and Congress because they swept the Southern states, where the three-fifths clause gave them an advantage in both the House of Representatives and the Electoral College.⁹⁴ Still, their dominance continued for another generation, a popularity that, because of successive and sweeping victories, cannot be attributed just to the Constitution's built-in inequalities. Throughout the early nineteenth century, Republicans emphasized political rather than legal constructions of the Constitution, criticized the Federalist-dominated judiciary, and, most importantly, built the first successful national party.

Kramer argues that party organization, not judicial review, was the most important institutional innovation during the early

(arguing that core pronouncement in *Marbury* is not establishment of judicial review, but rather invalidity of laws repugnant to Constitution); William E. Nelson, *Marbury v. Madison, Democracy, and the Rule of Law*, 71 TENN. L. REV. 217 (2004) (arguing that *Marbury* was about maintaining balance between democracy and rule of law).

⁹³ See PETER S. ONUF, *JEFFERSON'S EMPIRE* 2, 56–61 (2000) (describing Jefferson's expansionary vision of American empire and rejection of consolidation of authority). On the conflicting visions of Republicans and Federalists, see DREW R. MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 120–35 (1980).

⁹⁴ See GARY WILLS, "NEGRO PRESIDENT": JEFFERSON AND THE SLAVE POWER 62–72 (2003) (arguing that three-fifths clause along with Aaron Burr's New York campaign effort provided Jefferson with his margin of victory in 1800).

republic.⁹⁵ Party formation was both an example of popular constitutionalism in action and a vehicle for more effective popular participation in the future. Neither parties nor judicial review figured large in the vision of the Founders. Indeed, parties were anathema to any true republican. But the founding generation soon put aside its fear of parties and began practicing popular sovereignty in a way that several years earlier would have been unimaginable. The very creation of parties was the most important constitutional amendment of the early republic, and it was a *de facto* amendment made by the people to serve their interest in greater political participation (pp. 165–69).

The constitutional importance of parties as a second and third generation of American political leaders came of age is a subject that constitutional scholars are rediscovering. Kramer correctly points out that parties contributed much to constitutional construction, and they created a new avenue for popular participation as suffrage qualifications dropped. He proceeds to argue that parties “swallowed up” other forms of popular politics (p. 168). The only exception to this “party monopolization” was antebellum mobbing, and that had become “a virulent expression of racial, religious, and class-based resentments” and was thus “delegitimated” (p. 168). In sum, “[p]opular constitutionalism was rescued and revitalized as Democrat-dominated governments at both the state and national levels successfully marginalized the judiciary . . . and reasserted popular control over constitutional development” (p. 205).

Parties were not, however, an unqualified good, especially for those who were not the white males for whom parties functioned. Martin Van Buren, who is enjoying new respect among historians,⁹⁶ is the main protagonist in Kramer’s positive interpretation of parties, a story that Van Buren outlined in his *Inquiry into the Origin and Course of Political Parties in the United States*.⁹⁷ Van Buren was the nation’s eighth president, succeeding Andrew Jackson and carrying on his legacy. It was to a large degree Van Buren’s own legacy as well. As a New York state and federal politician in the 1820s, Van Buren helped construct the rapidly democratizing political order that text-

⁹⁵ Kramer, *supra* note 40, at 219. Kramer has written another book elaborating the place of parties in early American constitutional culture. See generally Larry D. Kramer, *After the Founding: Political Parties and the Constitution* (n.d.) (unpublished manuscript, on file with the *New York University Law Review*). For a good discussion of party development, see JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* 65–156 (1995).

⁹⁶ See, e.g., GERALD LEONARD, *THE INVENTION OF PARTY POLITICS* 35–47 (2002) (arguing that Van Buren and his party remained true to Republican principles).

⁹⁷ MARTIN VAN BUREN, *INQUIRY INTO THE ORIGIN AND COURSE OF POLITICAL PARTIES IN THE UNITED STATES* (Augustus M. Kelley Publishers 1967) (1867).

books refer to as "the Age of Jackson." Kramer takes the Democratic Party and its leader at their word and concludes that "the motivating principle behind the Democratic party really was democracy itself" (p. 196). Other historians argue that the point was to elect Democrats, though this is not incompatible with a desire to spread democracy.⁹⁸ But what was the content of this democracy? It is not that the reader wants to know the boundaries of that democratic debate (for example, why were some issues, like slavery, off the table for Van Buren?). This Kramer might criticize as the projection backward of modern theories of deliberative democracy, and he insists that the early party platforms supported little policy substance. Rather, what the reader wants to know is: What was the content of *democracy*? The untutored reader might assume that Van Buren supported universal suffrage and something like referenda. He did not. He was a master of the caucus, in which a small group of party leaders selected candidates, and at the 1821 New York Constitutional Convention, he objected to universal white male suffrage. Democratic opposition to extending suffrage to others was even stronger. While voting requirements continued to fall for white men, state conventions increased them for free African Americans, in part because Democrats feared that they would vote for the Federalists and their heirs, who numbered among the founders of abolitionism in the United States.⁹⁹ Perhaps there remains truth in the conventional wisdom that suffrage requirements became the tool of party politics in the simple sense that parties hoped to enfranchise those people who would support their election, while preventing the enfranchisement of others.

Kramer again might push a good argument too far when he writes that "[p]opular politics was . . . swallowed up by party politics" and that rioting was "delegitimated" because it often involved "racial, religious, and class-based resentments" (p. 168). Although the second-party system did legitimize official opposition,¹⁰⁰ it did not make partisan opposition the only kind of opposition. British America had been a violent and sometimes frightening place; the antebellum United States continued to be so. Part of the reason was that legal authority remained weak, and the argument that the

⁹⁸ ROBERT VINCENT REMINI, *MARTIN VAN BUREN AND THE MAKING OF THE DEMOCRATIC PARTY* 7-9 (1959) ("[A]ll men who would attain political prominence must do so within the framework of the organization With power thus derived, the state would be given an efficient, energetic, and forceful government.").

⁹⁹ See DIXON R. FOX, *The Negro Vote in Old New York*, 32 POL. SCI. Q. 252, 254, 256-57 (1917) (attributing increase in property qualifications for African American voters to prediction that blacks would support their Federalist emancipators).

¹⁰⁰ See RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM: THE RISE OF LEGITIMATE OPPOSITION IN THE UNITED STATES 1780-1840*, at ix-xii (1969).

Democracy absorbed all that unrestrained popular energy—or at least all of its legitimate expression—proves too much. Why write off mob violence as marginal bursts of racial, religious, and class resentments? It is not necessary in a work devoted to recovering the people's role in making and remaking the Constitution. Race, religion, and class were important axes of the people's many identities. Van Buren's Democratic Party could not contain the constitutional identities and aspirations of all the people; some popular constitutionalism remained untamed, out of doors, and in the streets. Abolitionists used the tools of popular constitutionalism during the antebellum period; the Ku Klux Klan did so a generation later; and so did Martin Luther King in the next century. It is no accident that so much of popular constitutionalism in America has involved racial slavery and its legacies: Slavery was one issue the Democratic Party refused to make a part of their platform in hopes of uniting north and south in one political organization.

We get little of this later history of popular constitutionalism. Kramer's goal is to establish the early tension between elite and popular forms of constitutionalism and then suggest that the pattern persisted. As the dates move beyond 1830, the narrative thins. The finely cut dance steps of the 1790s become long strides around the Civil War and then a gallop approaching the New Deal. Highlights in the later story include a brief treatment of *Dred Scott*, which "stuck out like a sore thumb partly because it was so unprecedented for the Supreme Court to assert its will over and against Congress" (p. 213), and effective use of Franklin Delano Roosevelt's assertion amidst the court-packing plan that the Constitution was "a layman's document, not a lawyer's contract" (p. 217). Even as the detail fades, Kramer keeps a firm grasp on his central theme: There has always been a struggle between aristocracy and democracy in American constitutional culture. That argument lends the book a convincing energy. It also makes for good reading. The reader wants to know how the story turns out and discover whether democracy triumphs in the end or not.

The story, of course, has not ended. "The point, finally," Kramer writes, "is this: to control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means." (p. 247). Furthermore, "[i]t means refusing to be deflected by arguments that constitutional law is too complex or difficult for ordinary citizens" (p. 248). It means that the people must confront the aristocracy. If this is the contest, it could be quite a struggle, for whether or not aristocrats enjoy uncontending

ease and the unbought grace of life,¹⁰¹ they rarely cede their privileges easily or gracefully.¹⁰²

E. Aristocracy v. Democracy: The Framework of Kramer's History

It has been quite a while since a historian has framed an interpretation of American history in terms of a continuous struggle between aristocracy and democracy. The most thorough attempt to fit all of American history into this scheme was Vernon Parrington's three-volume *Main Currents in American History*,¹⁰³ written in the 1920s and influenced by the populist politics of its author's youth in Kansas.¹⁰⁴ Even Charles Beard was skeptical of those terms, as he warned that history demonstrated that the people do not have a unitary interest.¹⁰⁵ Historians since the Second World War have been even more skeptical of attempts to squeeze even American political culture into this binary. Most famously, Louis Hartz argued that from the beginning of American history there has been an essential consensus about politics that he believed Thomas Jefferson captured in his first inaugural address when he proclaimed that "[w]e are all Federalists, we are all Republicans."¹⁰⁶

Postwar historians overstated that consensus, so it was revealing that Hartz, writing in the mid-fifties, remembered Jefferson's words as "[w]e are all Democrats, we are all Republicans," thus telescoping two centuries of political history into his own frustration with mid-twentieth-century America.¹⁰⁷ Since then, social historians have rediscovered lasting divisions among ordinary people—divisions along the lines of class, race, gender, religion, and ethnicity. Even here the categories of aristocracy and democracy have not made a comeback. Time will tell whether Kramer catalyzes a return to this more classical framework for analyzing American culture.

Kramer's aristocracy and democracy are more institutional than social. His aristocracy is rooted in the law schools and the judiciary.

¹⁰¹ See LEWIS B. NAMIER, *ENGLAND IN THE AGE OF THE AMERICAN REVOLUTION* 15 (1930) (discussing self-consciousness that defines what it means to be an aristocrat).

¹⁰² Cf. Laurence H. Tribe, *The People's Court*, N.Y. TIMES, Oct. 24, 2004, § 7 (Books), at 32 (criticizing Kramer for attacking orthodox view of judicial review without providing a stable alternative).

¹⁰³ VERNON LOUIS PARRINGTON, *MAIN CURRENTS IN AMERICAN THOUGHT: AN INTERPRETATION OF AMERICAN LITERATURE FROM THE BEGINNINGS TO 1920* (1927).

¹⁰⁴ See HOFSTADTER, *supra* note 2, at 349–436.

¹⁰⁵ See BEARD, *supra* note 1, at 17 (arguing that Constitution "was not the product of an abstraction known as 'the whole people,' but of a group of economic interests").

¹⁰⁶ Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), reprinted in *BASIC WRITINGS OF THOMAS JEFFERSON* 332 (Philip S. Foner ed., 1944); LOUIS HARTZ, *THE LIBERAL TRADITION IN AMERICA* 130 (1955).

¹⁰⁷ HARTZ, *supra* note 106, at 130.

In this sense, Kramer is a traitor to his class. His "aristocracy" is *his* aristocracy: a professional caste comprising the leaders of the legal profession who are elevated to the bench and the legal scholars who justify the judges' power to strike down legislation. By aristocracy, then, he has in mind a Paretan conception of a fluid elite who exercise disproportionate formal power and informal influence.¹⁰⁸ This aristocracy is based not on birthright but rather on institutional initiation. Because it permits circulation of new social types into its ranks, it is fairly immune to decadence.¹⁰⁹ No matter the social origin of the legal elite, the institutions that they control will retain power.

Kramer's democracy is also institutional. The power of the people operates through the institutions of representative government, especially legislatures and parties. Kramer dismisses critics on the left and the right who doubt that legislatures actually represent the people or engage in rational lawmaking. Drawing on the tradition of legal process, Kramer argues that the important comparison is between legislation and adjudication, not between legislation and some idealized form of adjudication. In this comparison of competence, legislatures do well. The image of the heroic judge does not match the reality of a bureaucratic court system. On the other hand, Kramer argues, legislators and their committees do genuinely seek to vindicate the public interest (pp. 237–39).

In his discussion of the judiciary's pretensions to power, Kramer does not mention the work of Ronald Dworkin. He might, however, be responding to Dworkin's image of the judge as Hercules, grappling with philosophical principles while applying the Constitution to concrete cases.¹¹⁰ In Kramer's history, the god is brought down to earth and revealed as the human he always has been: a political being. Judges have a role in the multi-polar conversation that makes up Kramer's ideal constitutional environment. They would retain the power of judicial review, albeit a weaker version. They would not, however, be gods or even aristocrats. They would be role players. Who would remind them of the boundaries of their roles? Those who teach them and those who run the institutions where lawyers learn their role in society.

¹⁰⁸ VILFREDO PARETO, *SOCIOLOGICAL WRITINGS* 130–38 (S.E. Finer ed., Derick Mirfin trans., 1966).

¹⁰⁹ *Id.* at 131–37, 155–60. Pareto describes the circulation of elites, whereby new elites "rise up from the lower strata of society, mount up to the higher strata, flourish there, and then fall into decadence," as "one of the motive forces of history" to which due weight must be given "if we are to understand great social movements." *Id.* at 134.

¹¹⁰ DWORKIN, *supra* note 16, at 105.

With the aristocracy identified as the legal elite and democracy as the people, represented mostly in legislative politics, Kramer has captured an enduring conflict between competing modes of constitutional change. The open question is whether he has described a persistent rhetorical dialectic—each side available to those with a variety of political commitments—or whether he has captured a crisis in the separation of powers that threatens democratic government. If it is the latter, the strong claim would be that the legal aristocracy has usurped the power of both of the other branches, as well as of the people.¹¹¹ Judicial supremacy is backed by powerful professional interests, complete with national organizations, an educational network, a professional literature impressive in its bulk and, finally, the social power that accompanies monopolistic privileges in the civil sphere. Against this there has been little popular outcry.

But do the people approach constitutional conflict in this disciplinary manner, clearly distinguishing popular from legal means of change? When Thurgood Marshall and the NAACP legal team litigated against Jim Crow in the courts, did they think that they were appealing to an aristocracy?¹¹² Did they eschew more popular modes of constitutional reform because they were not sympathetic to democracy? Or were their political commitments mapped on a more complicated field? Quite probably they chose the approach to constitutional reform that appeared to them, at that time, to be most promising, without regard for whether victories over segregationist legislation would call into question the vitality of popular constitutionalism. Ends mattered more than means. A historian interested in how people in the past lived, ruled, and were ruled will find the democracy-aristocracy model confining. As soon as one pulls back from a judicial decision, one finds real people with a variety of commitments, people who are conflicted about how democracy operates in practice, people whose attitudes about democracy change over time, and people who do not feel obligated to adhere to one conception of popular sovereignty. These people do not have to be *principled* in the legal sense of operating by coherent rules. The point is that judicial review always has been a more complicated practice than judges grabbing for power. Courts respond to arguments of counsel, who serve the interests of

¹¹¹ Kramer writes little about executive power. Presumably he believes that popular constitutionalism can be expressed through executive action and can also restrain executive power.

¹¹² For the litigation strategy, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education and Black America's Struggle for Equality* 552–63 (1975); MARK V. TUSHNET, *THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925–1950*, at 105–37 (1987).

their clients—the consumers of law who are also thus its original producers. One cannot explore all of these problems in a single book. A starting point would be detailed research about historical persons in concrete situations. This would help reveal whether constitutional history is about the development of the nature of constitutions or whether it is a story—hundreds of stories—about how the people have used the constitutional resources available to them under their historical circumstances, and how innovations in constitutional theory often emerge as byproducts of the jurisdictional conflicts that Kramer describes—byproducts of contests over freedom in which there are winners and losers.

Scholars can argue about the most interesting level of generality at which to write constitutional history. The bottom line is that we need more good constitutional histories of many sorts. This is an extremely good book that, because of its tight grasp on a powerful organizing theme, sheds much light on American history. What is missing in texture is offset by range and insight. Kramer's compelling interpretation of judicial review will quite possibly inspire ordinary people to reassert their power and, perhaps, persuade the legal elite to cede some of its privileges—or at least to engineer new forms of leadership.

III

POPULAR CONSTITUTIONALISM TODAY: DEPARTMENTALIST JUDICIAL REVIEW AND THE NEO-PROGRESSIVE CONSTITUTION

It becomes clear in his affecting last chapter, written “as an American,” that Kramer hopes to contribute to a Copernican Revolution in American constitutionalism that places the people back in the center of our constitutional legal universe. Constitutional law should be primarily a matter of politics, and if the people believe that their representatives behave unconstitutionally, they can respond through elections, petitions, protests, and resistance. Litigation also remains as an option, but only one among many. His standard of judicial review recalls that of James Bradley Thayer: Judges should only refuse to uphold a statute if they believe the legislature has made “a very clear [mistake].”¹¹³ For Kramer, the Constitution is an experiment to be worked out and reworked by the people through political means. Here he departs from Bruce Ackerman, who models American constitutional history around seismic “moments” of popular par-

¹¹³ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893).

ticipation.¹¹⁴ In Kramer's constitutional world, the people need not await signals from government before shifting into a higher constitutional gear. Instead, they must approach every issue seriously, realizing that small bits of legislation can add up over time to significant constitutional change.

What would popular constitutionalism look like in the twenty-first century? Judicial review would remain part of the mix. Kramer rejects only judicial supremacy and the prevalent belief that supremacy is necessary for its "settlement" function, by which the Court brings finality to contested questions (pp. 234–36). His alternative version of judicial review is Madison's: departmentalism.

Departmentalism, in which each branch would resolve constitutional questions that it encounters and bind only that branch, strikes some as a recipe for constitutional anarchy because there would be no final resolution of constitutional questions.¹¹⁵ Kramer disagrees. The people would resolve tough constitutional questions by signaling their answers through elections and party platforms. But he does not investigate what departmentalism would look like in action.

In practice, perhaps we already have a kind of departmentalism on the margins of constitutional law. Despite the ringing declarations of judicial supremacy, judicial review does not always result in clear definitions of the Constitution. Sometimes Congress and the Executive are able to work around, even ignore, a Supreme Court decision. Other times, all three branches participate in a conversation—albeit a highly stylized conversation—about the meaning of the Constitution. Rather than command or demand, these conversations involve negotiation, compromise, and accommodation.¹¹⁶ Quick reference to a few examples will suggest the outlines of a shadow version of judicial review that already exists and that provides a sense of how departmentalism might work.

The first example is *INS v. Chadha*, in which the Supreme Court held the legislative veto unconstitutional and called into question the

¹¹⁴ See generally 1 ACKERMAN, *supra* note 30.

¹¹⁵ See TUSHNET, *supra* note 18, at 26–30. There is another form of departmentalism that would allow the judiciary only the power to strike down legislation defining the judiciary's own power. *Id.* at 98 ("The Constitution created departments that were largely self-contained, and each had what Madison called 'the necessary constitutional means and personal motives to resist encroachments of the others.'").

¹¹⁶ See generally Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 Nw. U. L. REV. 1 (1990) (arguing that constitutional boundaries of federal jurisdiction emerge through dialogue between Supreme Court and Congress); Christine Bateup, *What Are They Talking About? A Critical Assessment of Theories of Constitutional Dialogue* (Sept. 28, 2004) (unpublished manuscript, on file with the *New York University Law Review*) (providing typology of theories of constitutional dialogue among branches of government).

way that the executive and legislature had accommodated each other in the administrative process.¹¹⁷ The political branches, however, have effectively evaded this ruling by creating informal substitutes that function much like legislative vetoes.¹¹⁸ This could be seen as evidence of the judiciary's limited power to enforce its judgments. It might also be evidence of creative adaptation to a questionable decision.

A second example is the give-and-take between the Court and Congress in the definition of Native American tribal sovereignty. Fifteen years ago, the Supreme Court held in *Duro v. Reina* that Congress had implicitly divested the tribes of criminal jurisdiction over Native Americans who were not tribal members.¹¹⁹ Congress responded by amending the Indian Civil Rights Act to declare that criminal jurisdiction "over all Indians" is part of the tribes' inherent sovereignty and was never ceded.¹²⁰ Last term, the Court interpreted this amendment as the restoration of preexisting tribal sovereignty, not a delegation of federal power.¹²¹ It is possible to reconcile these two decisions. The Court has long deferred to Congressional definitions of tribal power in the area of Federal Indian Law.¹²² As such, the Court retrospectively called its doctrine in *Duro* federal common law rather than constitutional law. Still, the interbranch negotiation here offers another example of the sort of give-and-take that might characterize judicial review of constitutional law questions under Kramer's departmentalist theory. And the Court's claim that *Duro* had announced only a rule of federal common law was not accepted by two dissenters, who saw instead a congressional attempt to "control the interpretation of the statute in a way that is at odds with the constitutional consequences of the tribes' continuing dependent status."¹²³ Federal Indian Law has always operated in an uncertain borderland between federal common law, statute law, and constitutional law, and offers an example of what Kramer's Madisonian departmentalism would look like.

¹¹⁷ 462 U.S. 919, 956, 958 (1983).

¹¹⁸ Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 273 (1993) ("[L]egislative vetoes of an informal and nonstatutory nature continue to define executive-legislative relations.").

¹¹⁹ 495 U.S. 676, 679 (1990).

¹²⁰ 25 U.S.C. § 1301(2) (2000).

¹²¹ *United States v. Lara*, 541 U.S. 193 (2004).

¹²² Indeed, the majority opinion referred to Congress's power in this area as "plenary." *Id.* at 200.

¹²³ *Id.* at 231 (Souter, J., dissenting).

A third example is the regulatory takings doctrine. Few areas of constitutional law are as unclear.¹²⁴ Rather than issuing bright-line rules distinguishing valid land-use regulations from takings that require compensation, the Court has usually sent signals that can be interpreted as encouraging compromises between regulatory authorities and landowners.¹²⁵ Although the Court has not disowned its power to define what is and is not a valid regulation, its restraint in doing so might be read as deliberately intended to discourage at least federal litigation and encourage settlement at the local level.¹²⁶ Here, again, there is accommodation and negotiation rather than bold statements of judicial supremacy.

A fourth example is the way that Congress has used its power under Section 5 of the Fourteenth Amendment, at least until the recent past. Reva Siegel and Robert Post have described how previous Supreme Courts, even during the supposed age of judicial supremacy in the latter half of the twentieth century, worked with the other branches and engaged in conversation with social movements to alter constitutional meaning.¹²⁷ Congress often took the lead in this conversation, operating pursuant to Section 5 of the Fourteenth Amendment. "The very Court that famously and vigorously defended judicial prerogatives in *Cooper* was also the Court that in *Katzenbach v. Morgan* confidently invited Congress to engage in processes of constitutional interpretation."¹²⁸ According to Siegel and Post, the "juricentric" constitutional law that Kramer laments might be even younger than he thinks.

Of course, such examples hardly demonstrate that we already have a form of departmentalism in constitutional law. They simply suggest different models of judicial review in which departmentalism is the rule and supremacy the exception. In a world of robust popular constitutionalism, interbranch negotiations would be recognized as such and occur more often and openly.

¹²⁴ The literature is enormous. See, e.g., Carol M. Rose, *Mahon Reconstructed: Why the Takings Issue Is Still Such a Muddle*, 57 S. CAL. L. REV. 561 (1984) (exploring reasons for vague legal definition of "taking").

¹²⁵ See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978).

¹²⁶ See Marc R. Poirier, *The Virtue of Vagueness in Takings Doctrine*, 24 CARDOZO L. REV. 93, 153 (2002).

¹²⁷ See Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 34 (2003) [hereinafter Post & Siegel, *Protecting the Constitution*]; see also Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441, 525-26 (2000).

¹²⁸ Post & Siegel, *Protecting the Constitution*, *supra* note 127.

Beyond departmentalism, what exactly would popular constitutionalism consist of in the twenty-first century? In his epilogue, Kramer reminds his readers that the traditional tools of popular constitutionalism remain available for disciplining federal judges. These tools are rarely discussed outside a Federal Courts class: judicial impeachment, budget reductions, jurisdiction stripping, and court-packing (p. 249). He calls for the reinvigoration of these and other means of expressing the popular will—along with voter education. With this last suggestion comes a gesture toward Jürgen Habermas's notion of a public sphere outside institutional politics and beyond the merely private communication of individuals as individuals (pp. 109–14).¹²⁹ Kramer locates American concern for this public sphere in the work of James Madison.¹³⁰ Jefferson might be a more obvious candidate. The founder of the public University of Virginia believed that education was a public trust because government depended on an independent electorate and, in the new republic, independence of the mind was being separated from economic independence.¹³¹ Cultural elites needed to build educational systems that would ensure that popular government would be enlightened government.

Kramer does not propose any constitutional amendments that would better institutionalize the people's constitutional power. A century ago, democratic constitutionalists of the Progressive era similarly criticized the judicial arrogation of the people's power to legislate and proposed state and federal constitutional amendments to increase governmental accountability.¹³² At the federal level, the Sixteenth Amendment gave the government the power to tax the people directly, without having to apportion those taxes equally among the states.¹³³ In other words, it facilitated the income tax. The Seventeenth Amendment made the Senate directly elected by the people rather than by the state legislatures.¹³⁴ The Nineteenth Amendment enfranchised women on the same basis as men.¹³⁵

¹²⁹ Kramer cites JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* (Thomas Burger & Frederick Lawrence trans., 1989) for this proposal (p. 296 n.98).

¹³⁰ See also Colleen A. Sheehan, *Madison and the French Enlightenment: The Authority of Public Opinion*, 59 WM. & MARY Q. 925, 927 (2002).

¹³¹ On Jefferson's role in founding the University of Virginia, see R.B. BERNSTEIN, *THOMAS JEFFERSON 172–77* (2003).

¹³² For a survey of the Progressive-era Amendments, see RICHARD B. BERNSTEIN & JEROME AGEL, *AMENDING AMERICA: IF WE LOVE THE CONSTITUTION SO MUCH, WHY DO WE KEEP TRYING TO CHANGE IT?* 117–34 (1993).

¹³³ U.S. CONST. amend. XVI.

¹³⁴ U.S. CONST. amend. XVII.

¹³⁵ U.S. CONST. amend. XIX.

What would analogous amendments be today? An amendment to abolish the Electoral College and make the president directly elected is one.¹³⁶ The undemocratic nature of the Senate might also be addressed. Any change would, of course, require the consent of all of the states.¹³⁷ Rather than abolish the Senate entirely, it could be made a smaller version of the House of Representatives. Senators might still serve longer terms, thus possibly allowing them greater perspective on national problems. No longer, though, would two senators represent 500,000 people in Wyoming while two others represented 35.5 million people in California. There may be no greater inconsistency with popular sovereignty and the one person, one vote principle than unequal senatorial representation, as the Supreme Court has held in regard to state senates.¹³⁸ Whatever the degree of state patriotism at the nation's Founding (an open question¹³⁹), it is unclear whether today the states *qua* states deserve direct representation in Congress.

The franchise also might be more widely distributed, including to legal aliens. Just as the term "persons" in the Fourteenth Amendment includes aliens, Kramer's ordinary people are not necessarily citizens. The political status of immigrants is one of the enduring problems of American constitutionalism, from the debate over the restrictive Federalist Alien and Naturalization Acts of the 1790s, which helped galvanize the Republicans and elect Thomas Jefferson in 1800, to local contests today over whether illegal aliens should be able to obtain drivers' licenses. We are living in one of the great periods of immigration. People from all over the globe have enriched American culture in many ways, and they form the backbone of more than a few economic sectors. Most arrive in the country legally. They must then wait years to obtain citizenship, if they choose to seek citizenship. In the meantime, they cannot vote in most elections.¹⁴⁰ Not least

¹³⁶ See Note, *Rethinking the Electoral College Debate: The Framers, Federalism, and One Person, One Vote*, 114 HARV. L. REV. 2526, 2549 (2001); Editorial, *Abolish the Electoral College*, N.Y. TIMES, Aug. 29, 2004, § 4 (Week in Review), at 10.

¹³⁷ U.S. CONST. art. V; see also ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 144–45 (2d ed. 2003) (criticizing "gross inequality of representation" in Senate).

¹³⁸ See *Reynolds v. Sims*, 377 U.S. 533 (1964) (requiring state senate apportionment to reflect principle of "one person, one vote").

¹³⁹ See J.R. Pole, *The Politics of the Word 'State' and Its Relation to American Sovereignty*, in 8 PARLIAMENTS, ESTATES AND REPRESENTATION 1–10 (John Rogister ed., 1988) (questioning whether early Americans attached much importance to states *qua* states).

¹⁴⁰ Some states and municipalities have long enfranchised legal aliens. See Virginia Harper-Ho, *Noncitizen Voting Rights: The History, the Law and Current Prospects for Change*, 18 LAW & INEQUALITY 271, 271 (2000) (noting that "the United States has a long

because of their lack of political voice, they are often subject to economic exploitation that provides a subsidy to all other Americans. They could petition or demonstrate. How many elected politicians, however, will heed aliens' protests if they have no power at the polls?

The point is that criticism of the courts was only one part of the Progressive legal movement a century ago. Legal Progressives also tried to reconceptualize the role of the judge, and Kramer has started to do likewise. They also supported a series of democratic constitutional amendments, but we have yet to see a similar effort today.

CONCLUSION

The People Themselves contains much strong analysis for historians and constitutional scholars. Kramer has a talent for bridging gaps between academic literatures while adding to each. In addition to contributing original insights, his book is a work of civics in the best sense of the word and deserves wide readership in law schools, undergraduate departments, and beyond. A reader gets the sense that the author will not be satisfied with positive reviews, awards, and course adoptions. This is ultimately a book about what it means to be an American citizen, about the right citizens have to define their constitutions and the correlative duty they owe each other to engage in politics every day.¹⁴¹ For all of its debunking—even scolding—this is a profoundly hopeful work. Kramer's premise is that the American people *can* exercise meaningful control over their constitutions. While this book does not contain prescriptions for twenty-first century democracy, Kramer makes clear that much depends on public conversation, and, in the Madisonian world, someone must start and lead that conversation. More social investment in education is necessary for the conversation to become more than a didactic exercise. In addition to writing this book, Kramer's recent assumption of a law school deanship may reflect a personal commitment to that educative mission. His message is that democracy can work and that this should be the central article of the constitutional faith. A sequel might be entitled "Taking Politics Seriously." For now, Kramer demonstrates that the American constitutional system was once a place of intense popular participation and can be again.

history of noncitizen voting"); GERALD L. NEUMAN, *STRANGERS TO THE CONSTITUTION: IMMIGRANTS, BORDERS, AND FUNDAMENTAL LAW* 3–15 (1996) (describing issues relating to aliens).

¹⁴¹ *The People Themselves* recalls the demanding civic involvement advocated by Hannah Arendt. See, e.g., HANNAH ARENDT, *ON REVOLUTION* 169 (1963) (distinguishing social contract among individuals, which "is based on reciprocity and presupposes equality," from consent to be governed by ruler).