

Book Review Essay

Are “the People” Missing in Action (and Should Anyone Care)?

THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW. By Larry D. Kramer.[†] New York: Oxford University Press, 2004. Pp. xii, 363. \$29.95.

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For almost a half century, the Supreme Court has claimed that it is the final authority on the meaning and interpretation of the Constitution.¹ This notion is most forcefully asserted in the O’Connor-Kennedy-Souter opinion in *Planned Parenthood v. Casey*, where the trio argued that when the Court decided a contentious constitutional issue, it was the duty of all Americans to put their differences aside and follow the Court’s lead.² Subsequently, in *Boerne*,³ *Dickerson*,⁴ and *Morrison*,⁵ a majority of the Court signaled their adherence to the belief that the Court is the sole authoritative expositor of the Constitution. This allegiance was subsequently validated when awestruck Democrats conceded that *Bush v. Gore*⁶ (while disagreeable and wrong) was within the Court’s province as “the ultimate interpretation of our

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1. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (asserting that the Court is “supreme in the exposition of the law of the Constitution” and that all public officials are bound by its decisions).

2. See 505 U.S. 833, 866–67 (plurality opinion). The plurality explained:

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court’s interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.

Id.

3. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (ruling that Congress lacks power under § 5 of the Fourteenth Amendment to expand free exercise rights beyond those found by the Court).

4. *Dickerson v. United States*, 530 U.S. 428 (2000) (holding that Congress may not limit due process rights found by the Court).

5. *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) (“[A] ‘permanent and indispensable feature of our constitutional system’ [is] that ‘the federal judiciary is supreme in the exposition of the law of the Constitution.’”).

6. 531 U.S. 98 (2000).

Constitution” and had to be accepted.⁷ If the ranking Democrat on the Senate Judiciary Committee believes this, it is no wonder that ordinary citizens do not “gainsay” the Court.⁸

It wasn’t always like this. Thomas Jefferson never believed that the judiciary had the last word.⁹ Andrew Jackson vetoed the rechartering of the Bank of the United States,¹⁰ showing his contempt for *McCulloch v. Maryland*.¹¹ Abraham Lincoln and the Republicans rejected *Dred Scott*¹² and refused to be bound by it (except in its exact holding that Scott was not free).¹³ Franklin D. Roosevelt had prepared a message announcing that he would ignore the Court’s decision in the *Gold Clause Cases*.¹⁴ And if the Court had intervened uninvited into the deadlocked presidential election of 1876,¹⁵ the losers would not have been resigned to claiming “we’ve been robbed.”¹⁶

Larry Kramer’s *The People Themselves* demonstrates that “[t]his modern understanding . . . reflects neither the original conception of constitutionalism nor its course over most of American history.”¹⁷ Thus until

7. LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 228 (2004) [hereinafter KRAMER, *THE PEOPLE THEMSELVES*] (quoting Senator Patrick Leahy).

8. *See id.* at 228, 232 (discussing the shift in the latter half of the twentieth century to broad-based public support for the Supreme Court’s authority to have the last say on constitutional issues).

9. *Id.* at 171.

10. President Andrew Jackson, Veto Message to the United States Senate (July 10, 1832), in 2 *A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS* 576–89 (James D. Richardson ed., 1897).

11. 17 U.S. (4 Wheat.) 316 (1819). President Jackson demonstrated his contempt for *McCulloch* and Supreme Court precedent by stating that “mere precedent is a dangerous source of authority, and should not be regarded as deciding questions of constitutional power except where the acquiescence of the people and the States can be considered as well settled.” Jackson, *supra* note 10, at 581–82.

12. 60 U.S. (19 How.) 393 (1857).

13. Abraham Lincoln, Sixth Debate with Stephen A. Douglas at Quincy, Illinois (Oct. 13, 1858), in 3 *THE COLLECTED WORKS OF ABRAHAM LINCOLN* 245, 255 (Roy P. Basler ed., 1953); President Abraham Lincoln, First Inaugural Address—First Edition and Revisions (Mar. 4, 1861), in 4 *THE COLLECTED WORKS OF ABRAHAM LINCOLN*, *supra*, at 262, 268.

14. WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN* 87–88 (1995). The message went undelivered because a majority found a way to sustain Roosevelt’s actions in taking the United States off the gold standard. *Id.* at 88. The *Gold Clause Cases* are *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240 (1935), and *Perry v. United States*, 294 U.S. 330 (1935).

15. Congress created an electoral commission that consisted of five members of the House, five members of the Senate, and five Supreme Court Justices. The politicians split five-five; the justices split three-two, all along party lines. The best legal account is Charles Fairman, *Five Justices and the Electoral Commission of 1877*, in 7 *THE OLIVER WENDELL HOLMES DEVISE: HISTORY OF THE SUPREME COURT OF THE UNITED STATES* (Paul A. Freund & Stanley N. Katz eds., Supp. 1988).

16. “[T]he half of the country that supported the loser would not have stood passively by.” KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 231.

17. *Id.* at 8. Kramer defines American history from the colonial foundings onward. *See id.* at 9 (referring to “Colonial Americans” who had an idea of what their constitution would look like long before the Revolution).

the modern era, “[P]roblems of fundamental law—what we would call questions of constitutional interpretation—were thought of as . . . problems that could be authoritatively settled only by ‘the people’ expressing themselves through”¹⁸ voting, petitioning, pamphletting, public meetings, as well as through intimidation of officials, and, if necessary, mob action.¹⁹ This was a world of popular constitutionalism where the people exercised “active and ongoing control over the interpretation and enforcement of constitutional law.”²⁰ The Court was one, but only one, player in identifying the meaning of the Constitution. Although Kramer is not an originalist,²¹ *The People Themselves* is a plea for the revival of the beliefs and actions of this earlier period.

While Kramer’s history through the Jacksonian Era is sound, his conclusions about the past fifty years are deeply flawed. First, he is oblivious to numerous modern movements that have vigorously opposed, in a variety of forms and fora, the Court’s interpretation of the Constitution. Second, a look at these movements raises serious questions regarding how normatively attractive popular constitutionalism is in our era. It may be, contrary to Kramer’s position, both that we still have popular constitutionalism and that we would be better off without it.

I see four possibilities that may explain why I can see popular constitutionalism where Kramer does not. First, Kramer’s interpretation of what constitutes popular constitutionalism may be so elusive that only he can apply it. Second, perhaps Kramer is indifferent to American constitutional development (outside the Court) after the Court-packing plan. Third, maybe Kramer sees popular constitutionalism only when he approves of the goals of the protestors. Finally, maybe deeds alone are insufficient for Kramer and without the requisite magic rhetoric they do not carry the appropriate meaning. I will return to these possibilities after first describing as best I can Kramer’s thesis, including its undoubted contributions, and then discussing the modern examples that he cannot see.

18. *Id.* at 31.

19. *Id.* at 25–28, 31. Kramer found that mobbing lost some legitimacy in the 1790s but that it made a comeback in Jacksonian America. *Id.* at 110–11, 168, 192.

20. Larry Kramer, *Popular Constitutionalism, circa 2004*, 92 CAL. L. REV. 959, 959 (2004) [hereinafter Kramer, *Popular Constitutionalism*] (presenting an overview of scholarly work about popular constitutionalism). This article was initially intended to be the concluding chapter of *The People Themselves*, and I will treat it as if it was part of the book.

21. Kramer writes:

The nation survived [the conflicts of the 1790s], barely, due in no small part to the pragmatism and flexibility of its Founding Fathers, who proved to be better politicians than political philosophers and who found ways to make the Constitution work even amidst their bitter conflicts and despite their earlier miscalculations. (A fact that ought to make one wonder why any sensible person, even a lawyer, would privilege the speculative writings of the 1780s over the hard-earned experience of subsequent decades.)

KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 94.

I. Larry Kramer Dissents²²

Kramer begins his discussion of popular sovereignty by introducing fundamental law in pre-Revolutionary America: practices worked out over time that marked boundaries between the authorities of those who ruled and the privileges of the people. These practices could be changed by consent; indeed the essential characteristic of fundamental law was “consent: the consent of the governed.”²³ Fundamental law differed from ordinary law, which regulated behavior in society, because the former aimed at restraining the government.²⁴ During the Revolutionary Era, popular sovereignty gained momentum from the necessity of constitution-making as the previously unwritten fundamental rules took written form.²⁵ In the process, Americans were infused with a sense of popular empowerment as they determined for themselves the varying shapes of their constitution.²⁶

Where did judicial review fit in this regime of popular sovereignty? It didn’t;²⁷ instead, “[T]he community itself had both a right and a responsibility to act when the ordinary legal process failed, and unconstitutional laws could be resisted by community members who continued to profess loyalty to the government and to follow its other laws.”²⁸ Correction and resistance were “well established and highly structured.”²⁹ Methods ran from voting to petitioning to intimidating local enforcement officials.³⁰ Furthermore, grand juries could fail to indict, and petit juries could choose not to convict lawbreakers.³¹ In criminal cases, lawyers would argue fundamental law to the juries, which could then “render[] verdicts based on their own interpretation and understanding of the constitution.”³²

The absence of judicial review is quite noticeable in the battles over Parliamentary rights to govern North America, especially in the areas of taxation and enforcement, prior to the Revolution. Americans perceived the mother country as engaged in “persistent and repeated efforts to deprive the [colonists] of what they viewed as their constitutional rights”³³ because the

22. With the exception of the final paragraph, everything in this Part describes Kramer’s thesis.

23. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 12.

24. *Id.* at 29.

25. *Id.* at 39–40, 55.

26. *Id.* at 55.

27. *Id.* at 19.

28. *Id.* at 25.

29. *Id.*

30. *Id.* at 25–26.

31. *Id.* at 26.

32. *Id.* at 28. John Peter Zenger’s acquittal on charges of seditious libel is an excellent example. *Id.* at 29; *see also* Stanley Nider Katz, *Introduction* to JAMES ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* 1–35 (Stanley Nider Katz ed., Harvard Univ. Press 1972) (1736).

33. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 36.

colonists had “never accepted the idea of Parliamentary sovereignty.”³⁴ Yet while the colonists presented extensive legal and constitutional arguments to back up their claims, no one suggested that the judiciary was the appropriate forum for their resolution.³⁵ Nevertheless, it was during this era leading up to the adoption of the Constitution that the first approximation of judicial review appeared in the claim that judges, no less than individual citizens, were bound by the Constitution and should resist unconstitutional infringements.³⁶ This assertion was not, as Kramer notes, a claim of special competence of judges; rather, it was an example of the general requirement that everyone must refuse to obey an obviously unconstitutional law.³⁷

“The status of judicial review on the eve of the Federal Convention was . . . uncertain at best.”³⁸ There are just a handful of statements about judicial review at the Constitutional Convention and the subsequent ratifying state conventions.³⁹ “It was not even clear just what the argument [about judicial review] was.”⁴⁰ While the argument would eventually clear up, uncertainty about “the propriety and justifications” for judicial review would last for decades.⁴¹ For the most part, a judicial declaration that a statute was void would be deemed an invasion of either the legislative province or the people’s prerogatives.⁴² Nevertheless, a smaller group of men concluded that constitutional limits could become a judicial matter when a litigant relied upon an unconstitutional statute and that judges might not exceed the boundaries of their decisionmaking authority in striking down such statutes.⁴³ Furthermore, these thinkers endorsed some form of judicial review because judicial invalidation of an unconstitutional law held the prospect of offering a peaceful alternative to popular resistance to the law’s enforcement.⁴⁴

The Antifederalists believed that the Constitution placed too few limits on the new government and that those limits were sure to be exceeded.⁴⁵ The Federalists responded that the people would ensure that the limits were respected.⁴⁶ “Let Congress try to misuse its powers, they said time and again, and federal lawmakers would find themselves facing formidable

34. *Id.* at 35.

35. To Kramer, this is “a point so obvious one would be embarrassed to mention it, but for the need to underscore the absence of anything resembling modern judicial review before the Declaration of Independence.” *Id.* at 38.

36. *Id.* at 38–39.

37. *Id.* at 39.

38. *Id.* at 69.

39. *Id.* at 78–83.

40. *Id.* at 69.

41. *Id.* at 62.

42. *Id.* at 59.

43. *Id.* at 71.

44. *Id.* at 63.

45. *Id.* at 83.

46. THE FEDERALIST NOS. 45, 46, at 291, 300 (James Madison) (Clinton Rossiter ed., 1961).

popular resistance—via elections, juries, popular outcries, or, in the unlikely event that all these failed, by more violent forms of opposition.”⁴⁷

In the 1790s, a few courts began to exercise judicial review,⁴⁸ although not on the assumption and funding of the debts from the War for Independence and the creation of a central bank, the role of the House in funding a treaty, and execution privilege, which were the major constitutional battles of the decade (with the exception of the Sedition Act,⁴⁹ which all the Federalist judges found constitutional⁵⁰). The judiciary’s claim, typified by *Marbury v. Madison*,⁵¹ was for coequal status with the legislature and the executive in interpreting and expounding the Constitution.⁵² Its decisions did not bind the other branches of government (nor did the others’ decisions bind the judiciary). That is what checks and balances and separation of powers meant. Each branch of government had an independent right to interpret the Constitution, and disputes over ultimate authority would be resolved by, in James Madison’s words, “the will of the community, to be collected in some mode to be provided by the constitution, or one dictated by the necessity of the case.”⁵³

In the 1790s, the people also gained new methods for expressing their will. Democratic-Republican societies sprung up, and it became clear that the nation had two political parties with differing constitutional visions.⁵⁴ The Democratic-Republican societies proved transitory,⁵⁵ and while the Federalists died in the wake of the War of 1812,⁵⁶ political parties again institutionalized themselves as mechanisms of constitutional interpretation in the 1830s.⁵⁷

47. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 83–84.

48. *Id.* at 135 (“These precocious judicial gestures toward the court’s supremacy were sporadic, highly localized, and obviously wrapped up in Federal anxieties over America’s quasi-war with France.”).

49. Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

50. LUCAS A. POWE, JR., *THE FOURTH ESTATE AND THE CONSTITUTION* 60–61 (1991).

51. 5 U.S. (1 Cranch) 137 (1803).

52. See KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 109 (stating that judicial review in this period consisted of the judiciary’s achievement of a status equal to that of the legislative and executive branches, with each branch “capable of making and acting upon independent judgments about the meaning of the Constitution”).

53. *Id.* at 48.

54. RICHARD BUEL, JR., *SECURING THE REVOLUTION: IDEOLOGY IN AMERICAN POLITICS, 1791–1815*, at 97–105 (1972).

55. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* 487 (1993).

56. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 138, 144.

57. Gerald Leonard, *Party as a “Political Safeguard of Federalism”*: *Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221, 225 (2001). Leonard states: [P]olitical parties . . . since the 1830s, had a central place in the constitutional system . . . quickly [becoming] institutions of governance every bit as important as the institutions formally provided for in the Constitution, and . . . quickly claim[ing] a central place in giving content to and enforcing the constitutional doctrine of federalism.

The target of Kramer’s ire is judicial supremacy, and for all the pedigree Kramer ascribes to popular constitutionalism, he acknowledges that by the end of the 1790s some Federalists were thinking in terms of judicial supremacy.⁵⁸ Jefferson’s Republicans disagreed with this view; they did not reject judicial review, just judicial supremacy.⁵⁹ These positions were articulated before *Marbury* in the charged debates over the repeal of the Judiciary Act of 1801.⁶⁰

The idea of judicial supremacy did not die with the Federalist Party. As judicial review became more common, the belief that courts were the arbiters of the Constitution likewise became more common. John Marshall hinted at it in *McCulloch* when he stated that “by this tribunal alone can the decision be made. On the supreme court of the United States has the constitution of our country devolved this important duty.”⁶¹ A chapter in Joseph Story’s *Commentaries on the Constitution of the United States* asked “Who is Final Judge or Interpreter in Constitution Controversies?”⁶² Story bluntly answered that it was the Court. “Its interpretation, then, becomes obligatory and conclusive upon all the departments of the federal government, and upon the whole people, so far as their rights and duties are derived from, or affected by, that constitution.”⁶³

Even Madison, who had initially placed the Court last in the pecking order of constitutional interpretation before moving to the Republicans’ departmentalism which granted the Court coequal status, wrote in 1834 that the judiciary will “most engage the respect and reliance of the public as the surest expositor of the Constitution.”⁶⁴ The Court had gone from last to first in four decades. Experience mattered. The country in 1834 was much larger than the one Madison helped father, and it was far more diverse. Madison wrote those words in the wake of the Nullification Crisis and the battle over extending the charter of the National Bank. Having a single authoritative interpreter of the Constitution was a pragmatic adjustment to the American political system.

Despite Madison’s shift, Kramer disputes Ted White’s claim that the Court “had by the 1830s cemented its place as the final interpreter of the Constitution.”⁶⁵ Jackson’s veto message resounded in departmental theory, and he garnered support from both the Democratic press and the nation as a

58. KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 104, 134.

59. *Id.* at 135–40.

60. *Id.* at 119, 138–44.

61. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819).

62. KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 147 (citing 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 123 (Ronald D. Rotunda & John E. Nowak eds., Carolina Academic Press 1987) (1833)).

63. *Id.*

64. *Id.* at 146.

65. *Id.* at 189.

whole when he turned the 1832 election into a referendum on the National Bank.⁶⁶

Jackson's chosen successor, Martin Van Buren, was the founding father of the Democratic Party. According to Kramer, Van Buren "and his followers directed their labors toward restoring and preserving what we have been calling popular constitutionalism."⁶⁷ The Democrats embraced Jackson's departmentalism and believed, in the words of Senator Hugh Lawson White, that "[i]f different interpretations are put upon the Constitution by the different departments, . . . the people themselves, through the ballot-boxes, must settle it."⁶⁸ The people did, overwhelmingly preferring the Democrats to the Whigs. Judges appointed or elected by Democrats did not echo the claims of judicial supremacy sounded by their predecessors. Claims of judicial supremacy did not vanish, but they did not prevail either. "It was the views of Jefferson, Jackson, and Van Buren that carried the day and that reflected how most Americans apparently understood their Constitution."⁶⁹

Kramer then races from the Jacksonian victory to his lament about the modern era. Three-quarters of the book has taken the story to Justice Story's retirement in 1845.⁷⁰ For the next century during times of political and constitutional quiescence, no one questioned the Court's rulings, but when an issue captured the public's attention the people returned to popular constitutionalism. Thus, *Dred Scott* (especially when seen through the prism of Kansas)⁷¹ was denounced by Northerners, and Abraham Lincoln, both in his debates with Stephen Douglas and in his Inaugural Address, articulated departmentalism just as the Democrats had.⁷²

66. Kramer is so anti-Court that he claims the "Jacksonians made challenging judicial authority a centerpiece of their 1832 presidential campaign." Kramer, *Popular Constitutionalism*, *supra* note 20, at 962.

67. KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 195.

68. *Id.* at 201 (quoting MARTIN VAN BUREN, INQUIRY INTO THE ORIGINS AND COURTS OF POLITICAL PARTIES IN THE UNITED STATES 329–30 (1867) (relating Senator Hugh Lawson White's words)).

69. *Id.* at 208.

70. Kramer quotes Story telling a correspondent that "[b]y remaining on the Bench I could accomplish no good, either for myself or my country." *Id.* at 206 (quoting Letter from Joseph Story to Ezekiel Bacon (Apr. 12, 1845), in 2 LIFE AND LETTERS OF JOSEPH STORY, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 528 (William W. Story ed., 1851)). Kramer follows the quote with his own conclusion: "In this, at least, Story seems to have understood both his time and his place in it better than many of the historians who followed." KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 206.

71. See KENNETH M. STAMPP, AMERICA IN 1857, at 108 (1990) (noting that Northerners' expectation of increased support for the antislavery movement resulted from their view of "the Supreme Court's *Dred Scott* decision, together with recent events in the territory of Kansas"); see also *id.* at 144–81, 266–94 (describing Kansas politics and events, leading to and focusing on the debate over whether Kansas's admission would be as a free or pro-slave state).

72. KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 212.

Kramer notes an increasing move toward judicial supremacy during the decades between Lincoln and Franklin Roosevelt, but he also claims it was “a golden age for popular constitutionalism: a time rife with popular movements mobilizing support for change by invoking constitutional arguments and traditions that neither depended upon nor recognized—and often denied—imperial judicial authority.”⁷³ Not surprisingly, the twentieth century hero is Roosevelt, especially with his post-Court-packing statement that the United States Constitution is “a layman’s document, not a lawyer’s contract Whenever legalistic interpretation has clashed with contemporary sense on great questions of broad national policy, ultimately the people and the Congress have had their way.”⁷⁴

When the Justices yielded to the New Deal, a new constitutional settlement was achieved whereby the Court agreed not to interfere with economic adjustments but instead to police civil liberties and minority rights.⁷⁵ What was a minor sphere in the late 1930s emerged under the Warren Court as one affecting virtually all aspects of society, and with it came the claim of supremacy in constitutional interpretation articulated in *Cooper v. Aaron*.⁷⁶

Kramer notes that judicial supremacy did not sweep the entire field and that in the 1968 presidential race Richard Nixon mounted a frontal attack on the Warren Court.⁷⁷ But something was changing; the attack was “directed *at* rather than against the Court.”⁷⁸ Republicans did not assert that judicial supremacy was wrong; they just claimed that the substantive interpretations of the Warren Court liberals were wrong.⁷⁹ Republicans could believe in judicial supremacy while simultaneously rejecting judicial outcomes. Meanwhile, liberals had—for the first time in American history—dropped their unease with judicial supremacy and concluded that a Great Society needed a Great Court (and that the country had just that in the Warren Court).⁸⁰ With liberals and conservatives agreeing on judicial supremacy (but not specific outcomes), “[P]opular constitutionalism faded from view.”⁸¹ Its unfortunate demise is supposedly seen in Chief Justice Rehnquist’s claims

73. *Id.* at 215.

74. *Id.* at 217 (quoting Franklin D. Roosevelt, Address on Constitution Day in Washington D.C. (Sept. 17, 1937), in 6 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 359, 362–63, 365 (Samuel I. Rosenman ed., 1941)).

75. KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 219–20.

76. *Id.* at 220–21.

77. *Id.* at 221.

78. *Id.*

79. *Id.* at 222.

80. Mark V. Tushnet, *The Politics of Constitutional Law*, 79 TEXAS L. REV. 163, 186–87 (2000) (book review).

81. KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 223.

in *United States v. Morrison*⁸² equating constitutional limitations with judicial enforcement of all constitutional limitations.⁸³

Kramer's final chapter notes that the Court will someday overreach and be reminded of its proper place. The transformation will come when the people disagree with the Court's decisions and feel free to act on that disagreement.⁸⁴ The book ends with re quoting Roosevelt and calling on the people to "insist[] that the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse. The Supreme Court is not the highest authority in the land on constitutional law. We are."⁸⁵ That conclusion represents the shift over the last quarter of the book as Kramer moves from an eighteenth and nineteenth century history to a Message for Our Times.

Kramer's history to 1845 is impressive indeed. But if someone as astute as James Madison could change his views on the role of the judiciary, then a natural question arises: Why can't the people themselves change with experience too? This leads to further questions. Are things all that different from the era to which Kramer hopes we will return? Even if so, does it really matter? Has Kramer offered a persuasive call to our times to return to a better era of interpretation?

II. Have We Lost It?

The People Themselves is ripe with quotations embracing popular sovereignty but very thin with examples of it in operation. The book opens with three incidents: (1) widespread celebrations in 1793 over the jury acquittal of Gideon Henfield on charges that he violated the law of nations by serving on a French privateer;⁸⁶ (2) a large protest of Jay's Treaty in New York City where the crowd shouted down Alexander Hamilton and someone threw a rock that grazed his head;⁸⁷ and (3) public meetings in Virginia, Kentucky, and throughout the Middle Atlantic states protesting the Alien Act of 1798.⁸⁸ In addition, Kramer later mentions the Whiskey Rebellion in western Pennsylvania, Fries's Rebellion in southeastern Pennsylvania, and the Baltimore riots of 1812;⁸⁹ eventually, he gets to Franklin Roosevelt's Court-packing plan.⁹⁰ In between there is lots of talk, but no action. Interestingly, the only example Kramer offers of popular constitutionalism

82. 529 U.S. 598 (2000).

83. *Id.* at 225.

84. *Id.* at 230.

85. *Id.* at 248.

86. *Id.* at 3.

87. *Id.* at 4.

88. *Id.* at 4–5.

89. *Id.* at 110.

90. *Id.* at 217, 231.

involving the Supreme Court prior to 1845 is Jackson’s veto of the bill rechartering the National Bank.⁹¹ Thus, a stunning omission from Kramer’s historical review is the public reaction to Marshall’s decisions favoring the Cherokees⁹² and their subsequent forced exile from Georgia.⁹³

Although Kramer does not flesh out his examples, let me take an obscure one, Fries’s Rebellion, and do that for him. The rebellion was led by a former militia captain, John Fries, in three southeastern Pennsylvania counties with dense concentrations of uneducated “church” German (Lutheran or Reformed) immigrants.⁹⁴ It was triggered by the new property taxes made necessary by the military buildup during the Quasi-War with France from 1798 to 1799.⁹⁵ The locals did not like the tax increases or the army, and they were beset with rumors. One was that John Adams planned to marry one of his sons to a daughter of George III.⁹⁶ Another was that the “tories” (by which they meant Federalists) planned to increase taxes in order to confiscate their lands and turn them into serfs.⁹⁷ To make matters worse, the tax assessors were minority Moravians and Quakers.⁹⁸ First, there were noisy public meetings.⁹⁹ Second, armed bands intimidated the assessors and halted collections.¹⁰⁰ Then, a U.S. Marshall arrested a number of suspects and prepared to escort them to Philadelphia for trial.¹⁰¹ At this point Fries and an armed band forced their release.¹⁰² President Adams ordered the army in and went off to his Quincy home.¹⁰³ Some weeks later, sixty of Fries’s band were taken prisoner, and the leaders were charged with and convicted of treason.¹⁰⁴ Adams had second thoughts and pardoned them, announcing

91. *Id.* at 183, 189–90.

92. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832) (striking down a Georgia law that required all white persons residing in the Cherokee nation to have a permit from the state and holding that all regulation of relations between the United States and the Cherokee nation were reserved to the federal government); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 20 (1831) (ruling that the Court lacked original jurisdiction because the Cherokees were not a foreign nation, yet recognizing “the Cherokees as a state, as a distinct political society” and implying that their claims had merit). Charles Warren wrote that *Cherokee Nation* “was destined now to bring about the most serious crisis in the history of the Court.” 1 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 729 (rev. ed. 1926); see also Joseph C. Burke, *The Cherokee Cases: A Study in Law, Politics, and Morality*, 21 *STAN. L. REV.* 500 (1969).

93. Kramer does mention Georgia’s battles with the Cherokees as one of a number of state challenges to national authority in the 1830s, but he never labels it popular constitutionalism. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 182–83.

94. ELKINS & MCKITRICK, *supra* note 55, at 696.

95. WILLIAM W. H. DAVIS, *THE FRIES REBELLION, 1798–99*, at 3 (1969).

96. RON CHERNOW, *ALEXANDER HAMILTON* 578 (2004).

97. ELKINS & MCKITRICK, *supra* note 55, at 696.

98. *Id.*

99. *Id.*

100. *Id.* at 696–97.

101. *Id.* at 697.

102. *Id.*

103. *Id.*

104. *Id.* at 698.

that they were “obscure, miserable Germans, as ignorant of our language as they were of our laws.”¹⁰⁵

Popular constitutionalism would seem to consist of an energized community opposing the actions of government, not to overthrow the government, but to change its course of action. Except for the talk, it is not clear that our era differs from any since the Civil War. Thus, more than sporadically, there are strong public actions expressing the people’s views on what the Constitution means, even during the times Kramer sees popular constitutionalism as invisible.¹⁰⁶ Perhaps the talk matters. Kramer stresses that opposition is directed at particular decisions, not against the Court’s right to make them.¹⁰⁷ But if there is judicial review, then a Court does have the right, in some sense, to make any decision in a case. Forcing the Court to change its mind, either by convincing the Justices they erred or, more likely, by new appointments, would seem to be the most likely mechanism through which the people could control constitutional law. If this is the case, then Kramer’s distinction between being mad at a decision and mad at the Court collapses. The people would still demand control, but they would have no need to assert it when they agreed with the Court’s decisions.

What follows are seven examples of modern popular constitutionalism. The first three deal with a wide constitutional vision on issues of race, domestic security, and the role of the courts generally. The next three deal with efforts to undo a specific decision of the Court: *Engel v. Vitale*,¹⁰⁸ *Roe v. Wade*,¹⁰⁹ and *Swann v. Charlotte-Mecklenburg*.¹¹⁰ The final one does not involve courts at all; it is about globalization. Two are contemporaneous with *Cooper v. Aaron*¹¹¹ although continue past it; the other five occur later. All are discussed in more detail than Kramer offers in any of the incidents he describes in *The People Themselves*.

A. *Massive Resistance (1955–64)*

Brown found no friends among Southern politicians, and criticism was swift. Senator Harry Flood Byrd offered an alternative constitutional vision in his condemnation of the decision as “the most serious blow” leveled

105. RICHARD BROOKHISER, *AMERICA’S FIRST DYNASTY* 197 (2002).

106. Kramer mentions *Brown v. Board of Education*, 347 U.S. 483 (1954), *Engel v. Vitale*, 370 U.S. 421 (1962), *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Roe v. Wade*, 410 U.S. 113 (1973), as cases that “were not likely to pass unnoticed” and that “embroiled [the Court] in controversy.” KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 220. But he does not cite any of the controversies as examples of popular constitutionalism because, as previously noted, popular constitutionalism had “faded from view.” *Id.* at 223.

107. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 222.

108. 370 U.S. 421 (1962).

109. 410 U.S. 113 (1973).

110. 402 U.S. 1 (1971).

111. 358 U.S. 1 (1958).

against the states.¹¹² Senator James Eastland announced that the South would not abide by or obey this legislative decision by a political court “indoctrinated and brainwashed by left-wing pressure groups.”¹¹³

Georgia, in the midst of its Democratic primary, became the first state to validate Eastland’s prediction when its outgoing Governor (and soon-to-be Senator) Herman Talmadge announced that the state would not comply with the Court’s ruling and that even with several divisions of federal troops invading the state, “[T]hey wouldn’t be able to enforce it.”¹¹⁴ Those running for office scrambled mightily to occupy the most extreme segregationist position.¹¹⁵

Louisiana was the only Southern state whose legislature was meeting when *Brown* was handed down. It promptly censured the Court.¹¹⁶ The lead then shifted to Virginia where the editor of the *Richmond Union Leader*, James Jackson Kilpatrick, had prepared the way with a long-running series of editorials on nullification and interposition wherein he claimed that states retained the ultimate decision as to whether they agreed with (and would comply with) Supreme Court decisions.¹¹⁷ Were it otherwise, the people of every state would be “compelled to lie down like sheep and be sheared by any court.”¹¹⁸ Kilpatrick’s goals were to provide a constitutional theory that would justify maintaining segregation and to spur the Virginia legislature into action.¹¹⁹ He succeeded. On February 1, 1956, a joint resolution was overwhelmingly passed announcing that the state would use all “honorable, legal, and constitutional” means to “resist this illegal encroachment on our sovereign powers.”¹²⁰ Massive Resistance was now the state’s official policy.

The next step was to make Massive Resistance the official policy of the entire South. Senators Harry Flood Byrd, Richard Russell, and Strom

112. LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 38 (2000) [hereinafter POWE, *THE WARREN COURT*].

113. 100 CONG. REC. 7254 (1954).

114. *Talmadge Defies High Court Ruling: Governor Says Georgia Will Keep Schools Segregated Even if Troops are Sent*, N.Y. TIMES, May 24, 1954, at 19.

115. NUMAN V. BARTLEY, *THE RISE OF MASSIVE RESISTANCE* 68 (1969) (noting that politicians in Georgia and South Carolina pushed the segregationist position “to its outer limits of hyperbole”).

116. POWE, *THE WARREN COURT*, *supra* note 112, at 39.

117. *Id.* at 58.

118. *Id.* (quoting James Jackson Kilpatrick, RICHMOND NEWS LEADER, Dec. 30, 1955, reprinted in RICHMOND NEWS LEADER, INTERPOSITION: EDITORIALS AND EDITORIAL PAGE PRESENTATIONS, THE RICHMOND NEWS LEADER, 1955–1956, at 35 (James Jackson Kilpatrick ed., n.d.) [hereinafter RICHMOND NEWS LEADER, INTERPOSITION]).

119. *Id.* at 58–59 (discussing Kilpatrick’s embrace of interposition and his push to force the Virginia legislature to act).

120. *Id.* at 59–60 (quoting S.J. Res. 3, 1956 Gen. Assem., Reg. Sess. (Va. 1956) and James Jackson Kilpatrick, RICHMOND NEWS LEADER, Feb. 1, 1956, both reprinted in RICHMOND NEWS LEADER, INTERPOSITION, *supra* note 118, at 51–54).

Thurmond drafted a "Declaration of Constitutional Principles," which they asked all Southern senators and congressmen (save the Speaker of the House and Majority Leader of the Senate) to sign.¹²¹ Eighty percent of the Southern delegation did sign.¹²² Those who did not sign were from Texas, Tennessee, and, surprisingly, three congressmen from North Carolina.¹²³ Two of the latter were immediately defeated in the Democratic primaries.¹²⁴

The Declaration, quickly dubbed the "Southern Manifesto," was a frontal attack on *Brown* as "a clear abuse of judicial power."¹²⁵ No one should be surprised by the Southern opposition because *Brown* was "now bearing the fruit always produced when men substitute naked power for established law."¹²⁶ The signers "commend[ed] the motives" of the states that were engaged in Massive Resistance and "pledg[ed] . . . to use all lawful means to bring about a reversal of this decision which is contrary to the Constitution."¹²⁷

With the blessings of its political leadership, the South (Texas and Tennessee excluded) began passing an avalanche of laws designed to undo *Brown* and further entrench segregation. South Carolina barred NAACP members from government employment; Mississippi required school teachers to list all organizations to which they belonged; and Arkansas did both.¹²⁸ Mississippi and Louisiana made it a crime to attend a desegregated school.¹²⁹ Some states offered private school tuition, denied state funds to desegregated schools, and authorized the closing of any school that was desegregated.¹³⁰ All the Southern states passed pupil placement laws that in operation ensured that all white students would be assigned to white schools where no African American students could get in.¹³¹

Where laws would not do the trick, other means were available. Acting on the request of the Alabama attorney general, a trial judge enjoined the NAACP from doing business in the state and demanded that it turn over its membership list.¹³² Heavy fines were levied to enforce the order, but the

121. *Id.* at 61.

122. *Id.*

123. *Id.*

124. See JACK BASS & WALTER DEVRIES, *THE TRANSFORMATION OF SOUTHERN POLITICS* 221 (1976) (observing that since the defeat of two of the three congressman, "the North Carolina congressional delegation's voting record . . . has been one of the most conservative in the South").

125. 102 CONG. REC. 4515 (1956).

126. *Id.*

127. *Id.* at 4516.

128. POWE, *THE WARREN COURT*, *supra* note 112, at 167–68.

129. *Id.* at 67.

130. *Id.* at 66–67.

131. See *id.* at 66 (noting that "most southern states were not content to rely solely on pupil-placement laws, and therefore they adopted a variety of backup measures just in case pupil placement did not work as intended").

132. *Id.* at 157, 165–66.

NAACP refused because had it complied, its members would have faced a variety of consequences from loss of employment and credit to perhaps physical violence.¹³³ That was because a new movement, the (white) Citizen’s Councils, sprung up quite spontaneously as yet another method of enforcing segregation.¹³⁴ The Citizen’s Councils were more law-abiding than the Ku Klux Klan, but the two shared similar goals of maintaining complete conformity to the norms of the Southern way of life.¹³⁵

With the 1957–58 school year about to open and nine African American students about to enter the formerly all-white Central High School in Little Rock under a court order, Governor Orval Faubus called out the National Guard to prevent this token desegregation.¹³⁶ This ploy initiated the Little Rock Crisis, where President Eisenhower negotiated unsuccessfully with Faubus for three weeks before sending in the 101st Airborne Division to enforce the federal court order.¹³⁷ This produced *Cooper v. Aaron* and the Court’s statement that it was “supreme in the exposition of the law of the Constitution” and that all public officials were bound by its conclusions.¹³⁸

Cooper did not, as Kramer mistakenly asserts,¹³⁹ cause Eisenhower to send in the troops; Eisenhower sent the troops in 1957, a year before *Cooper* was decided.¹⁴⁰ If Eisenhower could send in troops to back up a decision he believed wrong, then the least the Court could do was back him up with the best rhetoric it could offer. That was exactly what the Court did. *Cooper* was the “boasting of the weak.”¹⁴¹ Faubus ordered the Little Rock schools closed, and they were.¹⁴² The Justices then sustained Alabama’s unconstitutional pupil placement act¹⁴³ because no matter what they said or did, their decision was not going to be enforced by either Alabama or Eisenhower. Faubus was handily re-elected and Brooks Hays, a Little Rock congressman who signed the Southern Manifesto but had worked for calm in the Little Rock Crisis, was defeated by the write-in campaign of an ardent

133. *Id.*

134. *See id.* (noting that the NAACP could not produce its membership list “without subjecting its members to the mercies of Citizen’s Councils”).

135. *See* NEIL R. McMILLEN, *THE CITIZEN’S COUNCIL* 360, 362 (1971) (comparing the Ku Klux Klan and the Citizen’s Council and finding that the “Council demonstrated a marked preference for the subtler forms of intimidation” while “enforc[ing] a rigid conformity to racial orthodoxy among whites”).

136. *Cooper v. Aaron*, 358 U.S. 1, 9–11 (1958).

137. POWE, *THE WARREN COURT*, *supra* note 112, at 157–58.

138. *Cooper*, 358 U.S. at 18.

139. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 221.

140. MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 326 (2004).

141. L. A. Powe, Jr., *The Politics of American Judicial Review*, 38 *WAKE FOREST L. REV.* 697, 713 (2003).

142. POWE, *THE WARREN COURT*, *supra* note 112, at 160.

143. *Shuttlesworth v. Birmingham Bd. of Educ.*, 358 U.S. 101 (1958) (per curiam) (affirming *Shuttlesworth v. Birmingham Bd. of Educ.*, 162 F. Supp. 372 (N.D. Ala. 1958)).

segregationist.¹⁴⁴ The Court abandoned school cases for five years and then intervened only to reverse a Tennessee decision.¹⁴⁵ The Deep South was left untouched.

That suited Alabama just fine. The Supreme Court in 1958 had reversed Alabama's order that the NAACP turn over its membership lists.¹⁴⁶ But Alabama would not take no for an answer and kept the organization enjoined. It took three more trips to the Court and six more years with a reversal defeat for Alabama each time before the Alabama Supreme Court accepted the result.¹⁴⁷ In the interim, the Alabama Supreme Court had affirmed a libel judgment against *The New York Times* that was ten times greater than any previously sustained.¹⁴⁸ Inflation, the court noted, had driven the dollar down to "50 cents or less of its former value."¹⁴⁹ An Alabama trial judge had also issued an ex parte injunction using an unconstitutional statute against Martin Luther King, Jr. to (unsuccessfully) prevent his marching on Good Friday in Birmingham.¹⁵⁰

After the Good Friday march and facing defeat, King decided to use children as marchers, and Police Commissioner Bull Conner's use in turn of electric cattle prods, German shepherds, and high-velocity fire hoses sickened the American public who watched on network television.¹⁵¹ Birmingham, coupled with the ascendancy of Lyndon Johnson to the presidency, brought a different "people" into the equation of the segregated South. Now, instead of Southern whites, the "relevant people" were Americans in the North. When they spoke decisively in the Civil Rights Act of 1964 and the November elections, Massive Resistance was at an end.¹⁵² Massive Resistance had forced the Court into a retreat of several years, and it produced the assertion of judicial supremacy that so infuriates Kramer. Yet he never even mentions it.

144. POWE, THE WARREN COURT, *supra* note 112, at 160.

145. *See Goss v. Bd. of Educ.*, 373 U.S. 683, 685 (1963) (reversing a Sixth Circuit decision that had upheld a school transfer plan where students in a racial minority could transfer to a school where they would be in the majority).

146. *NAACP v. Alabama*, 357 U.S. 449, 466 (1958) (holding that Alabama's compelled disclosure of NAACP membership lists abridged the group's freedom to associate freely, thereby violating the Fourteenth Amendment).

147. POWE, THE WARREN COURT, *supra* note 112, at 166–67.

148. *New York Times v. Sullivan*, 144 So. 2d 25, 52 (Ala. 1962) (upholding a \$500,000 verdict against *The New York Times* for a libelous advertisement), *rev'd*, 376 U.S. 254 (1964) (reversing the verdict for the failure to show actual malice on the part of *The New York Times*).

149. *Id.* at 51.

150. POWE, THE WARREN COURT, *supra* note 112, at 224.

151. *Id.* at 224–25.

152. Richard Russell acknowledged that "as long as [the Civil Rights Act] is there it must be obeyed." *Rights Obedience Urged by Russell: He Tells Georgians Violence Will Only Add to Woes*, N.Y. TIMES, July 16, 1964, at J13.

B. Domestic Communism (1956–64)

Another possible reason for *Cooper*'s adamancy that the Court was supreme in constitutional interpretation was that the Court was smarting from being badly bruised by the just-ended 85th Congress. Congress had been angered by the Court's liberal drift on domestic security beginning in 1956 and came very close to stripping the Court of jurisdiction to hear certain types of cases involving domestic security.

The drift accelerated with *Pennsylvania v. Nelson*¹⁵³ and *Slochower v. Board of Higher Education*.¹⁵⁴ Nelson was the head of the Communist Party in western Pennsylvania,¹⁵⁵ and the state had convicted him of sedition against the United States.¹⁵⁶ Thereafter, the federal government convicted him under the Smith Act.¹⁵⁷ In the Pennsylvania case, the Court held that the state's Sedition Act was preempted by the Smith Act¹⁵⁸ despite arguments from the federal government that there was no tension between the two statutes.¹⁵⁹ Slochower was a tenured teacher who took the Fifth Amendment about prior Communist Party membership.¹⁶⁰ Under New York law, a municipal employee who refused to answer questions relating to his official conduct was deemed to have quit his job and therefore was automatically terminated.¹⁶¹ The Court held that New York's action had unconstitutionally penalized the assertion of a constitutional privilege.¹⁶²

These holdings provoked attacks on the Court both on the floors of Congress and in committee hearings. National security conservatives now added their voices to those of Southerners already angry over *Brown*. In the House, hearings were held on H.R. 3, an already-existing proposal to limit preemption to situations where Congress expressly declares its intent to preempt state law.¹⁶³ The Judiciary Committee amended H.R. 3 to simply overrule *Nelson*, but its supporters wanted wholesale changes in the law and so decided to wait until the 85th Congress convened in January of 1957.¹⁶⁴ That Congress witnessed stunning judicial setbacks to the domestic security agenda. Nelson's Smith Act conviction was reversed because of potentially

153. 350 U.S. 497 (1956).

154. 350 U.S. 551 (1956).

155. *Nelson*, 350 U.S. at 498.

156. *Id.*

157. STEVE NELSON ET AL., STEVE NELSON: AMERICAN RADICAL 324, 339 (1981).

158. *See Nelson*, 350 U.S. at 509–10 (finding that Congress had occupied the field to the exclusion of state legislation).

159. *See id.* at 518–19 (Reed, J., dissenting) (quoting the Department of Justice's brief, which argued that the federal and state sedition laws did not conflict).

160. *Slochower v. Bd. of Higher Educ.*, 350 U.S. 551, 522–53 (1956).

161. *Id.* at 552.

162. *Id.* at 558–59.

163. POWE, THE WARREN COURT, *supra* note 112, at 87–88, 128–29.

164. *Id.* at 88.

perjured testimony of a paid government informant.¹⁶⁵ Clinton Jencks's conviction for lying on filing a noncommunist affidavit required by the Taft-Hartley Act was also reversed, and the Court held that before a government witness takes the stand, defense counsel could see the witness's prior statements to the FBI.¹⁶⁶ In a pair of cases, the Court ruled that state bar associations could not deny admission merely because someone had once been a communist.¹⁶⁷ Finally, on "Red Monday," the Court reversed a Smith Act conviction and seemingly gutted the statute,¹⁶⁸ overturned the firing of Old China Hand John Stewart Service,¹⁶⁹ and in a pair of cases, seemingly limited the investigative powers of both the House Un-American Activities Committee¹⁷⁰ and one of its state counterparts.¹⁷¹

In addition to being attacked by national security conservatives in Congress, the Court was now criticized formally by the state attorneys general as well as the American Bar Association.¹⁷² A number of bills were quickly introduced to curb the Court, including eleven to change the ways justices were selected.¹⁷³ But in the summer of 1957, little could be done because Congress was focused almost entirely on what would become the Civil Rights Act of 1957.¹⁷⁴ Thus, while Congress was not in a position to do much more than verbally trounce the Court, it nevertheless hurriedly passed the Jencks Act at the demand of FBI director J. Edgar Hoover.¹⁷⁵ Although the Act basically codified *Jencks*, it was opposed by the Court's defenders and seen by all as a slap at the Court.¹⁷⁶

The second session of the 85th Congress had time to consider Court-curbing bills. Indeed, the House passed H.R. 3 in its full antipreemption mode, rewrote the Smith Act provisions on "organizing," and authorized summary discharges of nonsensitive government personnel for security reasons.¹⁷⁷ Senate action focused on William Jenner's proposal to strip the Court of jurisdiction in all the areas where it had interfered with the anticommunist programs.¹⁷⁸ There was too much opposition, and Senator

165. *Mesarosh v. United States*, 352 U.S. 1, 14 (1956).

166. *Jencks v. United States*, 353 U.S. 657, 672 (1957).

167. *Schwartz v. State Bar*, 353 U.S. 232, 247 (1957); *Konigsburg v. State Bar*, 353 U.S. 252, 274 (1957).

168. *Yates v. United States*, 354 U.S. 298, 338 (1957).

169. *Service v. Dulles*, 354 U.S. 363, 389 (1957).

170. *Watkins v. United States*, 354 U.S. 178, 216 (1957).

171. *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957).

172. *POWE, THE WARREN COURT*, *supra* note 112, at 99–100.

173. *WALTER F. MURPHY, CONGRESS AND THE COURT* 116 (1962) (providing an excellent analysis of the relations between the 85th Congress and the Court).

174. *Id.* at 84.

175. *Id.* at 121, 139–91.

176. *Id.* at 101–02.

177. *Id.* at 181–82.

178. *Id.* at 154–67.

John Marshall Butler offered an amendment to Jenner’s bill that would limit jurisdiction-stripping to admissions to the legal profession, while also undoing the HUAC holding, rewriting the Smith Act on organizing, and changing the preemption doctrine.¹⁷⁹ As modified, Jenner-Butler was voted out of the Judiciary Committee by a 10–5 vote.¹⁸⁰

Senate majority leader Lyndon Johnson tried to prevent any votes on anti-Court measures and was successful until the end of the session neared.¹⁸¹ Jenner-Butler was ultimately tabled by a 49–41 vote, but that was accompanied by a tremendous outpouring of anti-Court sentiment.¹⁸² Immediately on the heels of that vote, a motion to table H.R. 3 failed 45–39.¹⁸³ There was pandemonium in the Senate, but Johnson secured a recess until the next day, and between his arm-twisting and that of organized labor, enough votes were changed for the motion to recommit to pass 41–40.¹⁸⁴ Even though no anti-Court measure had passed, a clear message had been sent.¹⁸⁵ And the Court, or at least a five-man bloc of the Court, got it.¹⁸⁶

A year later, in *Barenblatt v. United States*,¹⁸⁷ the Court offered HUAC carte blanche and, in 1961, affirmed the convictions of two uncooperative witnesses who were called to testify solely because of their opposition to HUAC.¹⁸⁸ The state counterparts to HUAC, too, were freed from their earlier boundaries.¹⁸⁹ The prior bar admission cases were gutted when the Court ruled that someone who thought that “whenever the particular government in power becomes destructive of these [constitutional] ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government” could justifiably be asked if he were a Communist and be denied admission if he refused to answer.¹⁹⁰ A Smith Act conviction using the membership provisions of the law was affirmed,¹⁹¹ as was the order of the Subversive

179. *Id.* at 168–69.

180. *Id.* at 169; POWE, THE WARREN COURT, *supra* note 112, at 131.

181. MURPHY, *supra* note 173, at 171.

182. *Id.* at 208.

183. POWE, THE WARREN COURT, *supra* note 112, at 132.

184. MURPHY, *supra* note 173, at 217.

185. EARL WARREN, THE MEMOIRS OF EARL WARREN 313 (1977) (“[L]egislation, evoking as it did the atmosphere of the Cold War hysteria, came dangerously close to passing.”).

186. POWE, THE WARREN COURT, *supra* note 112, at 132–33.

187. 360 U.S. 109 (1959) (explaining that the Court must strike a balance between “individual and government interests” while discussing only the interests of the government).

188. *Wilkinson v. United States*, 365 U.S. 399 (1961); *Braden v. United States*, 365 U.S. 431 (1961).

189. *See Uphaus v. Wyman*, 360 U.S. 72, 81–82 (1959) (upholding petitioner’s conviction for refusing to cooperate with a state attorney general’s investigation of un-American activities).

190. *In re Anastaplo*, 366 U.S. 82, 99 (1961); *see also Konigsburg v. State Bar*, 366 U.S. 36, 56 (1961) (affirming a decision against an attorney who was denied admission to the State Bar of California for refusing to answer questions about prior party membership supposedly relevant to the issue of “moral character”).

191. *Scales v. United States*, 367 U.S. 203, 209 (1961).

Activities Control Board to the Communist party requiring it to register and list its members.¹⁹² The Court also upheld a summary discharge of a short-order cook at the Naval Gun Factory.¹⁹³ Finally, in 1962 the Court voted to allow Florida to use HUAC hunting practices against the NAACP, a result changed only by Charles Whittaker's timely retirement.¹⁹⁴

The attacks on the Court by the 85th Congress were successful in changing the Court's direction for four years. Congressman Wint Smith had stated that "[t]he Court is simply blind to the reality of our times."¹⁹⁵ When the Court ultimately returned to striking down aspects of the domestic security program, the issue had lost all of its political salience, and only members of the John Birch Society were likely to think in the terms Smith had used.¹⁹⁶

C. *Nixon and Wallace v. the Warren Court (1968)*

As Kramer acknowledges in passing,¹⁹⁷ the 1968 presidential campaign, which was heightened by Chief Justice Warren's decision (following the assassination of Robert Kennedy) to retire, is a useful example of popular constitutionalism. Even before Warren's decision, Congressional debate on the Omnibus Crime Control and Safe Streets Act echoed North Carolina Senator Sam Ervin's attack on the Court: "Enough has been done for those who murder and rape and rob! It is time to do something for those who do not wish to be murdered or raped or robbed."¹⁹⁸ Senator John McClellan placed a large graph in the Senate chamber showing the escalating crime rate accompanied by the names and dates of relevant Court decisions. "Look at that chart! Look at it and weep for your country—crime spiraling upward and upward. Apparently nobody is willing to put on the brakes."¹⁹⁹ The Act expressly repealed both *Miranda v. Arizona*²⁰⁰ and *United States v. Wade*,²⁰¹ and it was overwhelmingly passed.²⁰²

Also in the spring, Richard Nixon issued a position paper outlining his views on crime, its causes, and its cures, entitled *Toward Freedom from Fear*, which stated that "the cumulative impact of these decisions has been to

192. *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 114–15 (1961).

193. *Cafeteria & Rest. Workers Union Local 473 v. McElroy*, 367 U.S. 886, 887–99 (1961).

194. POWE, *THE WARREN COURT*, *supra* note 112, at 155–56, 220.

195. 104 CONG. REC. 2011 (1958).

196. POWE, *THE WARREN COURT*, *supra* note 112, at 213.

197. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 221.

198. Nan Robertson, *Ervin Protests Curbs on Police: Proposes an Amendment to Upset High Court Decision*, N.Y. TIMES, July 23, 1966, at L54.

199. 114 CONG. REC. 14, 146 (1968).

200. 384 U.S. 436 (1966).

201. 388 U.S. 218, 241 (1967) (holding that identification in a line-up without defense counsel present is unconstitutional under the Sixth Amendment).

202. 72–4 in the Senate; 369–17 in the House. POWE, *THE WARREN COURT*, *supra* note 112, at 408.

set free patently guilty individuals on the basis of legal technicalities.”²⁰³ In his standard speech, Nixon asserted to applause that “some of our courts have gone too far in weakening the peace forces as against the criminal forces.”²⁰⁴ George Wallace, who was also running against the Court, was far harsher; in his view, the Court was “destroy[ing] constitutional government in the country.”²⁰⁵

The Senate Hearings on Warren’s successor, Abe Fortas, were nothing short of a broadside against the Court. As Fortas noted in a letter to Warren, “The common element is bitter, corrosive opposition to all that has been happening in the court and the country: the racial progress, and the insistence upon increased regard for human rights and dignity in the field of criminal law.”²⁰⁶ Fortas’s nomination died by filibuster with his opponents claiming that choosing a new Chief Justice should be done by a new President.²⁰⁷ His supporters could not even get a majority of Senators to vote in favor of invoking cloture.²⁰⁸ House Republican leader Gerald R. Ford had stated two years earlier that he “refuse[d] to concede that the elected representatives of the American people cannot be the winner in a confrontation with the Supreme Court.”²⁰⁹ The people spoke decisively; Nixon and Wallace carried 56.9% of the popular vote in November 1968.²¹⁰

D. School Prayer (1962–present)

Prior to *Roe v. Wade*,²¹¹ no case generated more hostile mail for the Court than *Engel v. Vitale*, striking down New York’s Regent’s Prayer that was uttered at the beginning of each school day.²¹² Chief Justice Warren recalled seeing a newspaper headline: “Court outlaws God.”²¹³ The Reverend Billy Graham announced: “God pity our country when we can no longer appeal to God for help.”²¹⁴ Spokesmen for the Roman Catholic Church were equally concerned for the nation. New York’s Francis Cardinal Spellman asserted that the decision “strikes at the heart of the Godly tradition in which America’s children have for so long been raised.”²¹⁵ Southern

203. LIVA BAKER, *MIRANDA: CRIME, LAW AND POLITICS* 211 (1983).

204. 2 STEPHEN E. AMBROSE, *NIXON* 154 (1989).

205. DAN T. CARTER, *THE POLITICS OF RAGE* 339 (1995) (quoting *Meet the Press* (NBC television broadcast, June 30, 1968)).

206. BRUCE ALLEN MURPHY, *FORTAS* 450 (1988) (quoting Letter from Abe Fortas to Earl Warren (July 25, 1968) (on file with the Earl Warren Papers, Box 352, Library of Congress)).

207. POWE, *THE WARREN COURT*, *supra* note 112, at 474.

208. The cloture vote failed 45–43. *Id.*

209. PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS* TIMES 440 (1972).

210. POWE, *THE WARREN COURT*, *supra* note 112, at 475.

211. 410 U.S. 113 (1973).

212. 370 U.S. 421, 436 (1962).

213. WARREN, *supra* note 185, at 316.

214. POWE, *THE WARREN COURT*, *supra* note 112, at 188.

215. *Id.*

politicians naturally piled on the Court. South Carolina's Mendel Rivers concluded that nothing in his lifetime had given "more aid and comfort to Moscow than this bold, malicious, atheistic, and sacrilegious twist by an unpredictable group of uncontrollable despots."²¹⁶

At the National Governors' Conference, a resolution in support of amending the Constitution to restore prayer in the schools passed unanimously.²¹⁷ After the Court added *Schempp*²¹⁸ to *Engel*, House Judiciary Committee Chairman Emanuel Celler was forced to hold hearings on an amendment. To the surprise of many, the representatives of a veritable who's who of Protestant religions supported the Court, and even the Catholic Church switched to a neutral stance.²¹⁹ Supporters of the amendment knew it was dead. All they wound up with was a House Resolution to place the motto "In God We Trust" behind the Speaker's desk.²²⁰

Although prayer ceased being a political issue, it did not vanish from the public schools. In both the South and the Midwest, the Court's rulings were largely nullities. Two-thirds of all Southern schools continued exactly as before.²²¹ Either no one cared or no one would risk the opprobrium of becoming a plaintiff. Years after the law was clear, it was widely and publicly ignored.²²²

Prayer reappeared as a political issue when the evangelicals came out of their self-imposed exile and into electoral politics in the 1970s. They were disgusted by the moral decline of the country—i.e., the sexual revolution—on the one hand and politically attracted to the presidential campaign of one of their own, Jimmy Carter, on the other.²²³ But the catalyst came when Carter's Internal Revenue Service switched enforcement policy on the tax-exempt status of their all-white Christian schools.²²⁴ In 1980, they flocked to Ronald Reagan's banner.²²⁵

Using rights-based language usually associated with Democrats, Republicans called on "Congress to restore the right of individuals to participate in voluntary non-denominational prayer in schools and other

216. *Id.*

217. *Id.* at 189.

218. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963) (holding that state laws which require the school day to begin with readings from the Bible are unconstitutional under the Establishment Clause).

219. In the short interim, the Catholic Church set its sights on public funding for parochial schools. POWE, *THE WARREN COURT*, *supra* note 112, at 365–66.

220. *Id.* at 189.

221. KENNETH M. DOLBEARE & PHILLIP E. HAMMOND, *THE SCHOOL PRAYER DECISIONS* 32 (1971).

222. *See infra* text accompanying notes 228–31.

223. A. JAMES REICHLEY, *RELIGION IN AMERICAN PUBLIC LIFE* 316–18 (1985).

224. The Reverend Jerry Falwell stated that "[i]t was the IRS trying to take away our tax exemptions that made us realize that we had to fight for our lives." MATTHEW C. MOEN, *THE CHRISTIAN RIGHT AND CONGRESS* 27 (1989).

225. REICHLEY, *supra* note 223, at 318–27.

public facilities.”²²⁶ They were unsuccessful in amending the Constitution but did achieve a notable victory with the Equal Access Act of 1984,²²⁷ which held that secondary schools must treat student religious groups who wished to use meeting rooms equally with nonreligious groups.

The Court sustained the Equal Access Act²²⁸ but remained adamant about school-sponsored organized prayer, as both *Lee v. Weisman*²²⁹ and *Santa Fe Independent School District v. Doe*²³⁰ demonstrated. Nevertheless, as the record in *Santa Fe* (as well as numerous anecdotes that students have shared with me about their high school experiences) shows, organized prayer remains a constant fact within a number of Southern schools. Perhaps the best explanation was offered by a resident of Indianapolis in the wake of *Engel* and *Schempp*: “No Supreme Court decision handed down to us because of a disgruntled atheist mother who doesn’t want her child to know there is a God should influence our school board.”²³¹

E. Busing (1971–90s)

Beginning in the South in 1970 and moving North shortly thereafter, district courts began to issue decrees ordering busing to desegregate (and therefore to integrate)²³² local schools. Almost all Southern urban areas were affected, but it was more haphazard in the North—Boston, Detroit, Cleveland, Denver, and Seattle were major cities affected. Busing was hugely unpopular in virtually every urban community in which it was ordered.²³³ Affected whites deemed themselves conscripted into a gigantic social experiment without the approval of any democratically accountable body.²³⁴ Protests, however, remained local because different courts issued their orders at different times.²³⁵

226. *Republican Party Platform*, 36 CONG. Q. ALMANAC 63B (1980).

227. 98 Stat. 1302–03 (codified at 20 U.S.C. § 4071 (1984)).

228. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 247 (1990) (holding that a secondary school’s denial of students’ requests to form an extracurricular Christian club violated the Equal Access Act).

229. 505 U.S. 577, 599 (1992) (holding that the Establishment Clause forbids the inclusion of clergy who offer prayers at public school graduation ceremonies).

230. 530 U.S. 290, 301 (2000) (holding that student-initiated and student-led prayer before football games violates the Establishment Clause).

231. William M. Beaney & Edward N. Beiser, *Prayer and Politics*, 13 J. PUB. L. 475, 491 (1964) (quoting a comment in the INDIANAPOLIS STAR, Nov. 25, 1963).

232. As early as *Cooper v. Aaron*, the Justices made a conscious decision to use the word “desegregated” when they meant integrated. POWE, THE WARREN COURT, *supra* note 112, at 294–95.

233. THE SCHOOL BUSING CONTROVERSY: 1970–75, at 207, 231 (Judith F. Buncher ed., 1975) (showing results from two Gallup Polls that indicate that busing was very unpopular).

234. “Of utmost importance to many parents is the ‘strongly felt’ need, referred to in [*Wright v. Council of the City of Emporia*, 407 U.S. 451, 469 (1972)], for ‘direct control over decisions vitally affecting the education of one’s children.’” LINO A. GRAGLIA, DISASTER BY DECREE: THE SUPREME COURT DECISIONS ON RACE AND THE SCHOOLS 265 (1976).

235. One commentator has noted:

Busing rarely had high approval from the black community and never enjoyed majority approval from whites. It was ordered by judges and supported by the NAACP²³⁶ and white liberals (whose children were unaffected).²³⁷ No court decision affected American families so directly, and only forbidding school prayer was anywhere near as unpopular.

There were always politicians happily siding with their unhappy, white constituents. The Nixon Administration opposed busing as a desegregation tool, and Nixon publicly vowed to “hold busing to the minimum required by law.”²³⁸ Then he led an unsuccessful Republican effort to undo the major busing decision, *Swann v. Charlotte-Mecklenburg Board of Education*, legislatively.²³⁹ Nixon’s stand against busing was the key aspect of his strategy to move conservative white Southern Democrats into their natural ideological home, the Republican Party.²⁴⁰ Therefore, busing was an issue on which the Republicans never varied their stance, only the tone of their rhetoric, and they certainly liked the phrase “forced busing.”²⁴¹

[T]he ultimate question is how a policy so consistently opposed by great majorities of Americans, including many blacks, ever came to be the law. The answer lies partly in the unevenness of the litigation process, in the staggered sequence by which lawsuits are pursued and resolved. Thus, busing struck Richmond and Charlotte very early in the decade; Boston and Louisville in the middle, and Los Angeles and Wilmington only of late. Cities were often isolated in opposition; a concerted national fury never entirely took hold.

J. HARVIE WILKINSON III, *FROM BROWN TO BAKKE* 249 (1979).

236. When the Atlanta chapter of the NAACP approved a minimal busing plan for Atlanta in 1973, the national office suspended it for disobeying a directive not to compromise. *Id.* at 233. The school district was already 78% black, and the local NAACP believed that white flight from the city had to be halted. *Id.* At the end of the decade, I was retained by a tri-ethnic group to file an amicus brief at the Supreme Court. At one point I raised the question of why the case had not settled and was told that the local NAACP lawyer had informed my clients that the NAACP national office forbade compromises that eschewed maximum busing.

237. See GRAGLIA, *supra* note 234, at 269–70 (pointing out that the leading advocates of busing as a means of integrating public schools sent their children to private schools to avoid the consequences of the policies they supported).

238. President Richard M. Nixon, Statement on the Busing of Schoolchildren (Aug. 3, 1971), in AMBROSE, *supra* note 204, at 460. When Elliot Richardson, Secretary of Health, Education, and Welfare, seemed too supportive of busing decrees, Nixon informed aide John Ehrlichman “to jump Richardson and Justice and tell them to *Knock off this Crap*. I hold them personally accountable to keep their leftwingers in step with my express policy—Do what the law requires and not *one bit more*.” *Id.*

239. JAMES T. PATTERSON, *GRAND EXPECTATIONS* 732–33 (1996) (discussing Nixon’s public comments that Congress should not provide funds for busing for school desegregation).

240. *Id.* at 730–32.

241. “We believe that segregated schools are morally wrong and unconstitutional. However, we oppose forced busing to achieve racial balances in our schools If Congress continues to fail to act, we would favor consideration of an amendment to the Constitution forbidding the assignment of children to schools on the basis of race.” *Republican Party Platform*, 32 CONG. Q. ALMANAC 907 (1976). “We must halt forced busing and get on with the education of all our children” *Republican Party Platform*, 36 CONG. Q. ALMANAC 63B (1980). “We are committed to guaranteeing equality of educational opportunity and to completing the process of ending *de jure* school segregation. At the same time, we are irrevocably opposed to busing for racial balance.” *Republican Party Platform*, 30 CONG. Q. WEEKLY RPT. 2159 (1972).

Democrats found themselves in a bind. They would not go against the Court, and they could not turn their backs on their most loyal constituency. Whereas the Republicans condemned busing, the Democrats deemed it essential, but given its unpopularity, their chosen language muted their support.²⁴²

At the local level there were protests against the court orders,²⁴³ but naturally they failed. The editor of the *Richmond News Leader* delivered 29,122 letters (containing 37,438 signatures) to the Court petitioning against the end of freedom of choice.²⁴⁴ An attorney in a community that a judge had merged with Richmond told a huge crowd that federal courts only listened to a mob, “so if we have to get a mob, let’s get a mob.”²⁴⁵ Others went further, and in some communities buses were bombed.²⁴⁶

Eventually Boston became synonymous with white racism that opposed busing.²⁴⁷ Buses with black children were stoned, and one day an angry white mob trapped over a hundred black students inside a school for hours.²⁴⁸ Reminiscent of Little Rock, 1,600 police had to be stationed in the schools.²⁴⁹ But local protests could not dissuade federal judges, however reluctant they might be to order busing.

Many whites took advantage of *Pierce v. Society of Sisters*²⁵⁰ and *Milliken v. Bradley*,²⁵¹ voting with their pocketbooks by placing their children in private schools or with their feet by moving to the suburbs. Nothing could block white flight, and it always accompanied a busing

242. Busing is “another tool.” *Democratic Party Platform*, 28 CONG. Q. ALMANAC 1051 (1972). “It is clearly our responsibility as a party and as citizens to support the principles of our Constitution.” *Democratic Party Platform*, 36 CONG. Q. ALMANAC 100B (1980).

243. In 1970, an antibusing rally in Charlotte drew over 10,000 protesters. WILKINSON, *supra* note 235, at 138.

244. *Id.* at 151.

245. *Id.*

246. THE SCHOOL BUSING CONTROVERSY, *supra* note 233, at 207, 210 (reporting that school buses were dynamited and firebombed in Colorado and Michigan by busing opponents).

247. Bruce Schulman writes:

Armed riot police patrolled South Boston and Charlestown, white neighborhoods that greeted black children with derisive signs taunting, “We don’t want any niggers in our school” and “Monkeys get out of our neighborhood.” The nation’s cradle of liberty, the city that begot the abolitionists and helped educate Martin Luther King, became the home of “the bean, the cod, and the bigot.” In April 1976, as Boston prepared to celebrate the nation’s bicentennial, antibusing protesters attacked Ted Landsmark, a Yale-educated black lawyer and architect, as he rushed across City Hall Plaza to a meeting. A stunning Boston Herald photograph broadcast the grisly scene to a horrified world: white boys trying to impale a black man with the American flag.

BRUCE J. SCHULMAN, *THE SEVENTIES* 57 (2001).

248. THE SCHOOL BUSING CONTROVERSY, *supra* note 233, at 247–48.

249. *Id.*

250. 268 U.S. 510, 535 (1925) (holding that Oregon’s Compulsory Education Act, which required attendance at public schools, violated the Fourteenth Amendment).

251. 418 U.S. 717, 752–53 (1974) (holding that district courts could not enforce a multidistrict remedy for single-district *de jure* segregation).

order.²⁵² For example, in the six years prior to busing in Boston, white enrollment in public schools dropped by an average of 3.7% per year; the two years following the order saw 16.2% and then 7.9% drops in white enrollment.²⁵³ Richmond went from being 35% white to less than 20% after six years of busing.²⁵⁴ For those without the necessary resources, anger, resignation, and perhaps the faint hope that a political solution would arrive were the likely choices.²⁵⁵

Eventually the people prevailed, and the Court yielded not to the constitutional claims but rather to the political claims when the Justices were faced with extraordinary judicial overreaching in Kansas City. It had been matched only by the district judge in *Milliken* who combined school districts to create a new one the size of Delaware to obtain the requisite number of whites.²⁵⁶ In *Missouri v. Jenkins*,²⁵⁷ the district judge, barred by *Milliken* from going after whites in the suburbs of Kansas City, was determined to lure them into the city. First, he wiped out constitutional limitations on property taxation in order to build gold-plated schools.²⁵⁸ Then, faced with evidence that the costly plan was not working as hoped, he determined that his orders would nevertheless go on until the Kansas City students reached the national average in academic achievement—perhaps forever.²⁵⁹ The Court signaled that the quarter-century experiment with busing should come to a close,²⁶⁰ and within a matter of years it did.²⁶¹

252. Doctrine held that district judges could not consider either the negative or positive effects on integration that implementation of their busing orders might cause. See *United States v. Scotland Neck Bd. of Educ.*, 407 U.S. 484, 491 (1972) (stating that fear of “white flight” to private schools is not sufficient to compromise legal desegregation efforts); *Monroe County v. Bd. of Comm’rs*, 391 U.S. 450, 459 (1968) (holding that constitutional principles cannot be allowed to yield even if the result might be that white students flee the school system altogether).

253. WILKINSON, *supra* note 235, at 208.

254. *Id.* at 151–52.

255. “[A]fter several years of busing, Charlotte’s problems began to recede. Not that everyone was happy, rather, mainly resigned or fussed out.” *Id.* at 156.

256. *Milliken v. Bradley*, 418 U.S. 717, 729 n.10, 729–30 (1974). The 43 suburban districts that were merged with Detroit had not been parties to the litigation until the judge issued his remedy. GRAGLIA, *supra* note 234, at 216.

257. 672 F. Supp. 400 (W.D. Mo. 1987).

258. *Missouri v. Jenkins* [I], 495 U.S. 33, 37 (1990) (stating that the judge imposed an increased tax to ensure funding for the desegregation of local schools).

259. *Missouri v. Jenkins* [II], 515 U.S. 70, 81–82 (1995) (discussing the district court’s determination that the school district had yet to achieve national norms at many grade levels and therefore required further supervision).

260. Echoing the Court’s demand in *Green v. New Kent County*, 391 U.S. 430, 439 (1968), that the time for unitary schools was *now*, Wendy Parker found that the court in Kansas City “evidenced its desire that school desegregation orders end *now*.” Wendy Parker, *The Decline of Judicial Decisionmaking*, 81 N.C. L. REV. 1623, 1645 (2003).

261. *Jenkins* was not a true busing case, but two other cases had pointed to the end of the era. *Freeman v. Pitts*, 503 U.S. 467, 471 (1992) (holding that “a district court is permitted to withdraw judicial supervision with respect to discrete categories in which the school district has achieved compliance with a court-ordered desegregation plan” and need not retain active control until the district has demonstrated unitary status throughout the school system); *Bd. of Educ. v. Dowell*, 498

F. *Anti-Abortion (1973–present)*

*Roe v. Wade*²⁶² was a shot out of the dark and created its own opposition immediately as groups quickly formed to attempt to undo the decision. For those wishing to reverse the decision, the rest of the 1970s was spent organizing, voting, using direct mail, and scoring an occasional legislative victory like the Hyde Amendment in Congress and notification laws in the states.²⁶³ While the Court backed down a little, it stood fast on the underlying principle.²⁶⁴

The evangelical Christians who ended their self-imposed political exile and moved into the Republican Party of Ronald Reagan cared passionately about *Roe*.²⁶⁵ As a result, from then onward the Republicans, at least rhetorically, held steadfastly to the principle that *Roe* must go. This in turn, pushed the Democrats into all-out support for freedom of choice, which meant that so long as Democrats could control either the presidency or one house of Congress, *Roe* could not be touched legislatively. As a result, abortion foes in the 1980s redirected their efforts into securing judges and then justices who would overrule *Roe*. So long as Republicans controlled the White House and the Senate, the strategy seemed possible. Although there was the huge set-back with the defeat of Robert Bork, adding Anthony Kennedy and then David Souter and Clarence Thomas seemed to vindicate the strategy of demonstrating, voting, winning elections, and confirming justices. Then *Planned Parenthood v. Casey*²⁶⁶ showed it had been all for naught, and the Democrats retook the White House.

The two years after *Casey* witnessed a violent shift in the anti-abortion movement. Operation Rescue “established virtual boot camps to train (paying) volunteers how to stalk and otherwise harass and intimidate

U.S. 237, 249–50 (1991) (holding that desegregation decrees can be dissolved so long as there was good faith compliance with the decree and discrimination had been eliminated to the extent practicable). *Jenkins* formalized the end. Mark Tushnet links *Jenkins* to the *Civil Rights Cases*, 109 U.S. 3 (1883), under the happy title *The “We’ve Done Enough” Theory of School Desegregation*, 39 HOW. L. REV. 767, 767 (1996).

262. 410 U.S. 113 (1973).

263. The Hyde Amendment denied federal funding for abortions except for those “where the life of the mother would be endangered if the fetus were carried to term.” Act of Sept. 30, 1976, Pub. L. No. 94-439, § 209, 90 Stat. 1418, 1434 (1976). Various state legislatures enacted laws during the 1970s requiring parental notification. *See, e.g.*, Act of June 18, 1973, No. 72, § 1, 1973 La. Acts 157 (codified at LA. REV. STAT. ANN. § 40:1299.33 (West 2001)); Act of Sept. 14, 1979, ch. 413, 1979 Me. Laws 519 (codified at ME. REV. STAT. ANN. tit. 22, § 1597 (West 2004) (repealed 1993)); Montana Abortion Control Act, ch. 284, § 4, 1974 Mont. Laws 703, 704 (codified at MONT. CODE ANN. § 50-20-107 (2003) (repealed 1995)).

264. *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 419–20 (1983) (reaffirming the underlying principle stated in *Roe* that a woman has a fundamental right to decide whether or not to terminate her pregnancy).

265. H. W. Perry & L. A. Powe, Jr., *The Political Battle for the Constitution*, 22 CONST. COMMENT. (forthcoming 2005).

266. 505 U.S. 833, 845–46 (1992) (reaffirming the essential holding of *Roe v. Wade*).

abortion providers and patients.”²⁶⁷ Two abortion providers were murdered, and other attempts took place at clinics.²⁶⁸ Perhaps if *Roe* could not be overruled, abortion could be ended by terrorist violence.²⁶⁹

Criminal and civil suits cut the violence, and voting gave the Republicans control of both Houses of Congress for the first time during the era. At first there was no attempted roll-back of pro-life gains because of the changed composition of the Court and the certainty of presidential vetoes.²⁷⁰ But with the Lewinsky scandal weakening the Clinton administration, anti-abortion efforts then refocused legislatively—first on banning partial birth abortions and then on protecting the fetus from violence (and labeling the fetus “a member of the species homo sapiens, at any stage of development, who is carried in the womb”)—as a means of chipping at *Roe* until a more favorable Court could be constituted.²⁷¹ These efforts have been intensified during the George W. Bush Administration. It has been a thirty-year fight for control of the Constitution, and it will continue until one side gives up and realizes that the people have spoken authoritatively.

I am far less sure that the next event is an example of popular sovereignty—especially because of its violence. In part this stems from the ambiguity of Kramer’s thesis. I have read *The People Themselves* four times, and I must confess I still feel uneasy in describing Kramer’s version of popular constitutionalism because I do not believe that Kramer gives the reader a firm handle in his book. Indeed, in his subsequent article, he acknowledged the “very diffuseness and decentralization of popular constitutionalism, combined with uncertainty over the means through which it was expressed.”²⁷² I concur with Dale Carpenter’s observation on Kramer’s *Foreword* in the *Harvard Law Review*:²⁷³ “After reading 169 pages of densely-footnoted text, I am unclear precisely what it means, how it is supposed to operate in practice, or what constitutional significance we should attach to it.”²⁷⁴ I am not sure Kramer has the answers either.²⁷⁵ At some point he should have stated just how “The People Themselves” were

267. Carol J. C. Maxwell, *Introduction: Beyond Polemics and Toward Healing*, in PERSPECTIVES ON THE POLITICS OF ABORTION 8 (Ted G. Jelen ed., 1995).

268. *Id.* at 9.

269. *Id.* at 12–13.

270. L. A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 668 (2003) [hereinafter Powe, *The Not-So-Brave New Constitutional Order*].

271. Perry & Powe, *supra* note 265.

272. Kramer, *Popular Constitutionalism*, *supra* note 20, at 963.

273. Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 4 (2001).

274. Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 432 (2003).

275. As Erwin Chemerinsky notes, Kramer “never offers a clear definition of what he means” by popular constitutionalism. Erwin Chemerinsky, *In Defense of Judicial Review*, 92 CAL. L. REV. 1013, 1014 (2004).

going to “control” constitutional interpretation.²⁷⁶ If it is not clear to him, it is a lot to expect for it to be clear to others. I include the following example because it asserted constitutional claims and succeeded, at least momentarily, in forcing its claim on a larger body. Furthermore, it seems difficult to distinguish it from Kramer’s own example of Fries’s Rebellion.

G. The WTO Riots in Seattle (1999)

The World Trade Organization (WTO) scheduled a meeting in Seattle in December 1999 to work for more liberalized trade. President Bill Clinton flew to Seattle to speak to the organization even though he knew that thousands of protestors, both American and foreign, were also coming.²⁷⁷ Peaceful protests were, he properly asserted, in the best traditions of the country, and he “welcomed them as an exercise in democracy and a demonstration of the need for greater openness in the trade body’s deliberations.”²⁷⁸ Unfortunately, a small percentage of the WTO protestors were intent on shutting the meetings down by whatever means were available, including riot.²⁷⁹ Thus while the overwhelming majority of protestors were peaceful—indeed festive—the demonstrations turned violent when a small number of youths wearing ski masks went on a rampage: breaking windows in shops, restaurants, and banks; overturning trash bins; setting garbage on fire; and vandalizing police cars and city buses.²⁸⁰ Rioters using clubs and hammers also demolished a Starbuck’s coffee house, a symbol of “the faceless force of global capitalism.”²⁸¹

Protestors, overwhelmingly white, chanted that “the whole world is watching.”²⁸² They claimed “this is democracy in action” and demanded that “the WTO must go.”²⁸³ Their specific complaints were that the WTO acts undemocratically, deliberates secretly, “tolerates sweatshops, strips forests and benefits only international corporations and the rich.”²⁸⁴

276. Kramer, *Popular Constitutionalism*, *supra* note 20, at 959.

277. Brian Knowlton, *Riots Cast Cloud Over WTO Talks; Clinton Arrives; Seattle Restricts Further Protests*, INT’L HERALD TRIB., Dec. 2, 1999, at 1.

278. *Id.*

279. *Id.*

280. *Id.*

281. Hugh Davies, *Riots in Seattle: The Last Wisps of Misty Romance Are Blown Away*, DAILY TELEGRAPH (London), Dec. 2, 1999.

282. Merrill Goozner & Monica Davey, *Seattle Cops Retake Streets; Clinton: WTO Must Address Issues Raised; Police: Reverse Tactics, Arrest Hundreds*, CHI. TRIB., Dec. 2, 1999, at 1. See Bronwen Maddox, *Seattle’s Riots May Have Saved the Negotiations from Looming Failure*, TIMES (London), Dec. 2, 1999, at 26 (describing the protestors as almost all white).

283. John Burgess & Steven Pearlstein, *Riot Over Trade Talks Shuts Down Seattle; Overnight Curfew Imposed; Washington Governor Calls in the National Guard*, AUSTIN AM.-STATESMAN, Dec. 1, 1999, at A1.

284. John Burgess & Steven Pearlstein, *Protests Delay WTO Opening*, WASH. POST, Dec. 1, 1999, at A1.

The lack of democratic accountability and the ceding of some sovereignty to the WTO are fundamental constitutional issues, and prior to the Seattle riots, few people knew about them. One astute protestor noted that “[n]inety-nine percent of people didn’t know what the WTO was before this. Now they do.”²⁸⁵ The WTO has remained on the agenda since then, and in the Democratic primaries of 2004 the candidates ranged from outright protectionists to being decidedly cool to the idea of free trade.²⁸⁶ The exception was Senator Joseph Lieberman, Al Gore’s running mate in 2000, who in ten primaries broke single digits only in Delaware.²⁸⁷

Popular constitutionalism thus appears to be alive and well. Its attractiveness is a different issue.²⁸⁸

* * *

Just as I concluded that Kramer has overlooked too many modern examples of popular constitutionalism in action, I also believe he has overlooked an institutional mechanism for keeping the Constitution abreast of majority will. As H. W. Perry and I detail elsewhere, for well over the last three decades, the political needs of the Republicans and the Democrats have caused the two parties to develop and articulate separate visions of the Constitution.²⁸⁹ Richard Nixon’s 1968 campaign was an attack on the Warren Court’s criminal procedure decisions.²⁹⁰ Once in the White House, he used race and supported quotas to pit Democratic constituencies—African Americans and labor unions—against each other.²⁹¹ Nevertheless, because of opposition to busing, Republicans began their drift toward viewing the Constitution as color-blind. During the Reagan Administration, this became Republican policy, as did an effort to lower the metaphorical wall between

285. Knowlton, *supra* note 277, at 1.

286. Elizabeth Becker, *Globalism Minus Jobs Equals Campaign Issue*, N.Y. TIMES, Jan. 31, 2004, at A12 (detailing all of the candidates’ positions); Elizabeth Becker, *Congressional Memo: A Senator Once Isolated on Trade Now Finds a Chorus*, N.Y. TIMES, June 1, 2004, at A12 (detailing the similarities between arch-protectionist Ernest Hollings and John Kerry).

287. There he hit 11% of the vote. Democratic Presidential Primary Election, Feb. 3, 2004, Official Results for the State of Delaware, at <http://www.state.de.us/election/archive/elect04/Pres%20Primary/PP-office.html> (last modified Feb. 6, 2004).

288. In choosing my examples, I selected cases where those protesting had or gained some support from elected representatives. Thus, I excluded the Militia Movement, which has an entire structure of “law” tied into a 1790s Republican view of the Constitution and an Ackermanian-like belief that it has been modified outside the framework of Article V. It is well described in Susan P. Koniak, *When Law Risks Madness*, 8 CARDOZO STUD. IN L. & LITERATURE 65 (1996).

289. Perry & Powe, *supra* note 265.

290. POWE, THE WARREN COURT, *supra* note 112, at 474–75.

291. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470, 1521–23 (2004) (explaining how Richard Nixon’s policies on race and quotas, among other issues, were taken to “split traditionally Democratic coalitions”).

church and state.²⁹² Democrats, at least until the Clinton presidency, hated to talk about crime, and when they did so they focused on gun control, white-collar crime, and violence against women and abortion providers, but never on violent crime generally.²⁹³ They also wanted none of the criminal procedure decisions weakened.²⁹⁴ With African Americans as a prime constituency, Democrats embraced as much affirmative action as possible.²⁹⁵ Similarly, as Reagan moved Republicans to an anti-*Roe* position, the Democrats solidified as the party for abortion rights and for maintaining a strong separation between church and state.²⁹⁶

Kramer recognizes how the party system that Martin Van Buren forged operated to enhance popular constitutionalism before the Civil War.²⁹⁷ Similarly, the party system of the past several decades has found its own method of embracing its adherents’ views of the Constitution. By voting for Republicans, a person can expect certain legislative efforts as well as judicial appointments that reflect the Republican constitution. By voting for Democrats, individuals will know that judicial appointments and legislation will back a different set of constitutional principles. It is not perfect—as Republicans will note in discussions of O’Connor, Kennedy, and Souter²⁹⁸—but it does offer a current and reasonably effective means of translating votes into constitutional doctrine.

Kramer wants “The People Themselves” to translate their vision of the Constitution into reality (seemingly without the aid of judges).²⁹⁹ The two political parties also wish to translate their vision of the Constitution into reality. The difference is that the parties see an instrument to do so—judges. At one level, Kramer has offered a distinction without a difference because in each situation “The People Themselves” want their desired outcomes. At another level, there is a difference. Kramer offers an ambiguous theory; the

292. Perry & Powe, *supra* note 265.

293. *Id.*; see also Text of 1984 Democratic Party Platform, 40 CONG. Q. ALMANAC 73-B, 91-B, 97-B (1984) (detailing the party’s positions on gun control, violence against women, and white collar crime).

294. Perry & Powe, *supra* note 265.

295. *Id.*; see also Text of 1988 Democratic Party Platform, *The Restoration of Competence and the Revival of Hope*, 44 CONG. Q. ALMANAC 87-A, 88-A (1988) (stating that the party wanted to see “the lingering effects of past discrimination eliminated by affirmative action, including goals, timetables, and procurement set-asides”).

296. Perry & Powe, *supra* note 265; see also Text of 1988 Democratic Party Platform, *supra* note 295, at 88-A (noting that the party advocated that “the fundamental right of reproductive choice should be guaranteed regardless of ability to pay”); Text of 1984 Democratic Party Platform, *supra* note 293, at 92-B (stating that “[t]he Democratic Platform affirms its support of the principle of religious liberty, religious tolerance and church/state separation”).

297. KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 195; Kramer, *Popular Constitutionalism*, *supra* note 20, at 1007.

298. Powe, *The Not-So-Brave New Constitutional Order*, *supra* note 270, at 667.

299. “[T]he role of the people . . . includes active and ongoing control over the interpretation and enforcement of constitutional law.” Kramer, *Popular Constitutionalism*, *supra* note 20, at 959 (emphasis added).

parties offer a practical means of achieving their ends. It is not merely vulgar realism to note that carefully selected justices can translate constitutional vision into constitutional law.

It is time to return to the four possibilities that may explain why I can see popular constitutionalism where Kramer does not: (1) Kramer's ambiguity on what counts as popular sovereignty; (2) Kramer's indifference to the past fifty years of American constitutional development outside the Court; (3) Kramer's recognition of popular constitutionalism only when he approves of the goals of the protestors and his inattentiveness toward the popular constitutionalism of others; (4) Kramer's view that deeds unaccompanied by the magic rhetoric are insufficient to constitute popular constitutionalism.

For me, people having a constitutional vision and trying to see it implemented sure sounds like the people Kramer describes. I think all of the possibilities may be accurate (and Kramer has acknowledged the first),³⁰⁰ but for purposes of this Review, I have concentrated on the second.

III. Does It Matter?

Popular constitutionalism served as a means of attempting to check royal authority prior to the Revolution. It then carried over as a potential check on the newly created independent governments. Would they exceed their boundaries and attempt to usurp the people's rights? With Antifederalist fears about the powers granted the federal government, popular constitutionalism had a bright future, as Kramer detailed.

The Sedition Act trials showed emphatically that the judiciary was part of the national government and that judges could be willing to assist in the stamping out of a popular opposition. This did not change with the Revolution of 1800 (as Jefferson called it).³⁰¹ While the elected government could then be trusted (except in New England during the embargo and the War of 1812), the federal judiciary, led by John Marshall, remained a Federalist stronghold. Thus, Virginia Congressman William Branch Giles stated that "the revolution is incomplete so long as the judiciary is in possession of the enemy."³⁰² At the conclusion of his unsuccessful effort to convict Aaron Burr of treason, Jefferson bemoaned the "original error of establishing a judiciary independent of the nation."³⁰³ Life tenure and class differences delayed the Republican takeover and then left the Jacksonian Democrats, with their egalitarian streak, profoundly wary.³⁰⁴ That version of history constitutes the bulk of *The People Themselves*.

300. Kramer, *Popular Constitutionalism*, *supra* note 20, at 963.

301. JOHN ELLIS, *AMERICAN SPHINX* 201 (2002).

302. JEAN EDWARD SMITH, *JOHN MARSHALL* 302 (1996).

303. *Id.* at 362.

304. Steven P. Croley, *The Majoritarian Difficulty*, 62 U. CHI. L. REV. 689, 716–18 (1995).

By jumping ninety years from Jackson to FDR, Kramer omits and ignores the most stunningly successful example of popular constitutionalism in American history.³⁰⁵ That, of course, is the white South’s combined use of terrorism and the ballot, first to overthrow the Reconstruction governments and then to nullify the Fourteenth and Fifteenth Amendments for generations.³⁰⁶ In one of the most egregious historical errors I have seen in law reviews, Kramer (without citations) places the blame for the end of Reconstruction at the feet of the Court.³⁰⁷ Seldom does a theory—in this case, people good, Court bad—beget such a wrong-headed factual conclusion.

Omitting Reconstruction and the Trail of Tears, plus all of the modern examples, offers evidence that Kramer sees popular constitutionalism only when he approves of the cause. Or else it reinforces the view that popular constitutionalism in Kramer’s hands is so slippery that only he can successfully apply it.

305. Kramer writes:

Indeed, if the years between Reconstruction and the New Deal were a period of judicial expansion, they were also a kind of golden age for popular constitutionalism: a time rife with popular movements mobilizing support for change by invoking constitutional arguments and traditions that neither depended upon nor recognized—and often denied—imperial judicial authority.

KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 215. While this might be a hint that he saw Redemption as an example of popular constitutionalism, the reference would be stunningly oblique, and the sentence was footnoted to secondary literature discussing women’s rights, labor, and Progressivism.

306. As Willy Forbath writes:

[The] constitutional order of the late nineteenth- and early twentieth-century . . . was twice transformed, first by Reconstruction and, then again, . . . by Reconstruction’s foes . . . [wielding] a reign of terror and [statutory and state constitutional] disenfranchising measures [to secure] . . . a closed one-party system. This New South and its racial apartheid won a special constitutional status, becoming a distinct society within the Union’s new constitutional order).

William E. Forbath, *Constitutional Change and the Politics of History*, 108 *YALE L.J.* 1917, 1922–24 (1999).

307. “More distant evils, like the 150 or so laws struck down during the *Lochner* era . . . tend to lose their salience over time. This is even more true of still older judicial misadventures like the dismantling of Reconstruction . . .” Kramer, *Popular Constitutionalism*, *supra* note 20, at 997. Reconstruction, as everyone but Kramer knows, died because the North tired of providing the support necessary to sustain Republican governments in the South. ERIC FONER, *RECONSTRUCTION* 524–601 (1988) (chronicling a variety of factors that led to the end of Reconstruction and asserting that the Court’s decisions during this time were in response to waning Northern support for Reconstruction). If Kramer thinks that the Court brought it down, it would be nice to know which cases did it. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), a case on court martials for civilians, was early enough to matter. See FONER, *supra*, at 272 (stating that *Milligan*, which was a blow to Republicans, was handed down at a time when Republicans were experiencing many successes). *United States v. Cruikshank*, 92 U.S. 542 (1876), a case on prosecuting whites for violence against blacks, was decided on March 27, 1876, by which time most of the Southern governments had been redeemed. See FONER, *supra*, at 569 (describing *Cruikshank* as one of many setbacks for Republicans and noting that the case was decided at a time when only four Southern states were “unredeemed”).

The era between Reconstruction and the New Deal was one of Republican national political dominance punctuated by occasional periods when the parties were in equipoise. The Court made some stunning decisions—Kramer fumes at *Lochner*,³⁰⁸ but *Pollock*³⁰⁹ was more important—and *Pollock*'s invalidation of the income tax came just a year before William McKinley swept William Jennings Bryan for the first time. It is little wonder that Mr. Dooley offered his famous observation about the Court following the election returns at this time.³¹⁰

Franklin Roosevelt's first term placed the judiciary fundamentally at odds with the electorate, and it is no wonder that, looking for a needed check on the judiciary, popular constitutionalism reemerges in both Roosevelt's rhetoric and the Court-packing plan. The Court wisely yielded to save itself.

It is through the lens of *Carolene Products*³¹¹ and footnote four that Kramer sees the Court operating for the next fifty years. Thus, Kramer believes that the Court offers governments carte blanche on economic matters while protecting civil liberties and discrete and insular minorities. While this postulation holds a kernel of truth, it obscures a more fundamental one. After the Court-packing plan, the Court reverted to being a majoritarian institution; it is just during what Mark Tushnet aptly calls the New Deal-Great Society Constitutional Order³¹² that the majorities were profoundly different from previous ones.

The much-admired Warren Court was not protecting discrete and insular minorities; those minorities were now part of the governing coalition, and the Court itself was a functioning partner in Kennedy-Johnson liberalism.³¹³ The Warren Court was routing outliers—first and foremost the segregated South, but also rural America and pockets of urban pre-Vatican II Catholic dominance—and bringing national values to bear on all of them. The sole time the Warren Court challenged the Federal Government was over domestic security, and as recounted earlier, it retreated immediately when Congress barked back. Only after the issue lost salience did the Court return. The Court overruled lots of cases, but it did not strike down many federal statutes, and the ones that it did were of no significance whatsoever.³¹⁴ When it came to important federal statutes, the Court stood shoulder to shoulder with Congress. The partnership becomes abundantly clear when one

308. *Lochner v. New York*, 198 U.S. 45 (1905); KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 213–14.

309. *Pollock v. Farmers Loan & Trust*, 157 U.S. 429 (1895).

310. FINLEY PETER DUNNE, *MR. DOOLEY AT HIS BEST* 77 (Elmer Ellis ed., Charles Scribner's Sons 1938) (1901) (“[T]h’ Supreme Coort follows th’ iliction returns.”).

311. *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938).

312. MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 1 (2003).

313. POWE, *THE WARREN COURT*, *supra* note 112, at 494.

314. Powe, *The Not-So Brave New Constitutional Order*, *supra* note 270, at 716–19.

compares the declaration of judicial supremacy in *Cooper v. Aaron*³¹⁵ with the conclusion in *Katzenbach v. Morgan* that Congress could independently interpret the Fourteenth Amendment and have that different interpretation control outcomes.³¹⁶ No wonder Archibald Cox believed that result was as profound as 1937.³¹⁷

The Rehnquist Court obviously differs from the Warren Court, but it, too, has followed the election returns. The prominent federal statutes that it dispatched were, with a couple of exceptions, all passed prior to the Republican takeover of Congress in 1994, and all were invalidated after that date.³¹⁸ Kramer’s complaints about the Rehnquist Court are better directed toward the electorate that keeps returning Republicans to Congress. Popular constitutionalism is not needed as a check on the Rehnquist Court because it is either reflecting majority will or operating in an area where both the populace and Congress are evenly split so that whatever the Court does will have supporters who will check its opponents.³¹⁹ The popular constitutionalism that Kramer seems to want is that of electoral losers rising to challenge the Court. Why they should prevail over the judiciary is unclear except on the belief that those who lose elections should be protected from their folly.

When the Court is behaving in a way that the majority of the people find acceptable, there is no need for popular constitutionalism to check it. Only a minority, trying either to change the majority’s minds or undermine its policy, would revert to popular constitutionalism. Most of my examples in the previous Part are of this nature.

I can think of three justifications for embracing popular constitutionalism: originalism, functionalism, or its normative attractiveness. Surprisingly, Kramer never specifies why anyone, himself included, should endorse popular sovereignty. I have already noted Kramer’s crediting of the Founders for their pragmatic use of experience, and I think this precludes his being an originalist. In any event, he makes no originalist claims for the continuation of popular constitutionalism. I will not reopen the debate about originalism. Those who are originalists can determine for themselves whether Kramer’s evidence is sufficient. For nonoriginalists, the desire to

315. 358 U.S. 1, 18 (1958).

316. 384 U.S. 641, 651 (1966) (declaring that Congress is authorized “to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment”).

317. Archibald Cox, *The Supreme Court 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966) (arguing that the Court’s “strong declaration of congressional power under § 5 of the fourteenth amendment” could “prove as important in bespeaking national legislative authority to promote human rights as the Labor Board decisions of 1937 were in providing national authority to regulate the economy”).

318. Powe, *The Not-So Brave New Constitutional Order*, *supra* note 270, at 668.

319. TUSHNET, *supra* note 312, at 31–32.

revive popular constitutionalism will have to rest on something it brings to the table in the present.

Popular constitutionalism could offer a useful check on a government that lacks popular support. Our frequent elections suggest that this is unlikely to occur in the House of Representatives, although it could encompass the presidency and definitely could include the Court. There is no time since the Civil War when a party won three consecutive presidential elections and failed to gain a majority on the Court.³²⁰ Thus any time the presidency switches parties, there is the chance that the Court will represent the recently defeated party, and this will always be true when one party has previously had a lock on the presidency. This phenomenon opens the possibility of that Court rejecting the initiatives of the new administration, just as the Court did in 1935 and 1936. But we also know the outcome from 1937, and a Court would do well to think twice before blocking a very popular political movement. The fact that this has not happened in almost 70 years is some evidence that the risks of such a confrontation are not high. This is further buttressed by the majoritarian nature of judicial review³²¹—striking down statutes that no longer have their electoral majority rather than thwarting majority will. If the Court were countermajoritarian, then popular constitutionalism would offer a functional solution, but given the realities of modern judicial review, that solution does not seem necessary.

Even busing is not much of an example of countermajoritarian judicial decisionmaking. This is not to dismiss its lack of popular support but instead to note the enthusiastic support of liberal elites at a time when liberalism still reigned supreme combined with the tacit backing of the Democratic Party when it, too, reigned supreme in the House of Representatives. This also suggests a further obstacle in figuring out who “the people” are. Elites may have a disproportionate impact on policy decisions and may see themselves as speaking for the people.

I think Kramer would assert that popular constitutionalism is normatively attractive (although at best he implies this).³²² Popular

320. Powe, *The Not-So Brave New Constitutional Order*, *supra* note 270, at 679.

321. Robert Dahl, *Decision-Making in a Democracy*, 6 J. PUB. L. 279, 293–95 (1957) (analyzing an empirical study of Supreme Court decisions and arguing that the Supreme Court decisions overwhelmingly support majoritarian policies).

322. Kramer states:

“Public opinion,” wrote Madison in an essay of that title, which he published in December 1791, “sets bounds to every government, and is the real sovereign in every free one.” This was more than a paraphrase of Hume’s point about ultimate authority resting with the people because “FORCE is always on the[ir] side.” It was a normative and not just descriptive claim. Public opinion should be sovereign because republicanism meant, first and foremost, that “after establishing a government [the people] should watch over it as well as obey it.”

KRAMER, *THE PEOPLE THEMSELVES*, *supra* note 7, at 112 (footnotes omitted).

constitutionalism embraces our modern notions of civic republicanism and the romantic ideal of an engaged citizenry. That vision has been deemed for years to constitute a very attractive society. In addition to involving increased citizen participation, popular constitutionalism is populist in that it takes experts—judges—off the hierarchy and holds them coequal with ordinary citizens.

Civic republicanism was premised on the absence of political parties and the belief in a unitary “people.” We have not had the former for two centuries, and the latter has been long gone as well. If those living in the 1830s could wonder at the new diversity of the American people, imagine what they would think of today’s America. Thus, Jed Rubenfeld explains:

[E]veryone knows that “the People,” understood as an entity transcending particular individuals alive at any one moment, died long ago, just a little after God did. The benighted enlightenment, which brought God low, raised the People to His majuscular place, only to suffer his fate. Who today speaks of ‘We the People’ other than demagogues, originalists, and Yale law professors?³²³

Now the Dean of Stanford Law School does, but he is maddeningly ambiguous as to who are the people.

It is perhaps easier to figure out who are not the people. Loyalists weren’t during the Revolution. The Bank and its supporters weren’t during Jacksonian Democracy. The South wasn’t during Reconstruction, and economic royalists weren’t during the New Deal. In my seven examples, African Americans, Communists, criminals, ACLU supporters and atheists, federal judges, abortion providers and women desiring abortions, and finally multinational corporations were not “the people.” None of that is particularly helpful in determining who are the people.

For a thesis depending on the people, it is surprising that Kramer never tells us who they (or we) are and how to know whether those claiming to speak in the people’s name—Huey Long,³²⁴ Richard Nixon,³²⁵ and Al

323. Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1146–47 (1995).

324. “Every Man a King, But No One Wears a Crown.” ALAN BRINKLEY, *VOICES OF PROTEST* 20 (1982). “Share Our Wealth.” WILLIAM IVY HAIR, *THE KINGFISH AND HIS REALM* 269–76 (1991). The Kingfish explained America’s abundance and problems using the analogy of God inviting everyone to a great barbecue:

“God invited us all to come and eat and drink all we wanted. He smiled on our land and we grew crops of plenty to eat and wear. He showed us in the earth the iron and other things to make everything we wanted. He unfolded to us the secrets of science so that our work might be easy. God called: ‘Come to my feast.’” But what had happened? “Rockefeller, Morgan, and their crowd stepped up and took enough for 120,000,000 people and left only enough for 5,000,000 for all the other 125,000,000 to eat. And so many millions must go hungry and without these good things God gave us unless we call on them to put some of it back.”

BRINKLEY, *supra*, at 71–72 (quoting Huey Long, Radio Address (Jan. 14, 1935), in 79 Cong. Rec. 410, 412 (1935)).

Gore,³²⁶ to offer three disparate examples—really are doing that. The contrast with Bruce Ackerman’s work is stunning.³²⁷ When Ackerman has the people awakening to create a constitutional moment, there must be several elections with similar outcomes and ultimately the losers giving up on their claims.³²⁸ There may be problems with Ackerman’s thesis, but those do not go to whether there is any doubt that the people are expressing a preference on the issue of the time. Kramer, by contrast, offers no guide to tell us whether Strom Thurmond, Harry Flood Byrd, and Richard Russell in the Southern Manifesto were speaking for the people or whether Earl Warren and the Court were in *Brown*. Perhaps they all were; perhaps none of them were. But it would be nice to have a marker to know.³²⁹

Especially from Kramer’s perspective that the Court functions as a “footnote four” Court,³³⁰ popular constitutionalism does not seem that attractive. Could he wish to see judicial protections of minorities wiped out by an aroused majority?³³¹ What if popular constitutionalism reappears to force the Court to retreat from *Lawrence*?³³² When is it appropriate in Kramer’s world for the people to force their contrary constitutional vision on

325. “[T]o you, the great Silent Majority of my fellow Americans, I ask for your support.” TOM WICKER, *ONE OF US* 457 (1991).

326. “Gore . . . says he wants to ‘fight,’ ‘every day,’ for ‘the people’ versus ‘the powerful.’” John Podhoretz, *Gore Has a Hidden Agenda and It Should Not Secure Him the White House*, *TIMES* (London), Aug. 24, 2000, at 18.

327. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

328. 2 BRUCE ACKERMAN, *supra* note 327, at 177–84, 211, 234–47.

329. Kramer recognizes that “[w]e are not one community, but many. We may all be ‘Americans’ but we are also Jews or Christians or Mennonites or Muslims. We are laborers or managers, farmers or cops, Californians or Texans. We are rich or poor, black or white, male or female.” Kramer, *Popular Constitutionalism*, *supra* note 20, at 975. One might have thought that someone who could recognize our diversity might also recognize that summoning up “the people” might not be the easiest task. Unless, of course, fifty percent plus one equals the people. When Kramer talks of skepticism about democracy, he leaves the impression that simple majoritarianism is the people. *Id.* at 1004.

330. *See* *United States v. Carolene Products*, 304 U.S. 144, 152 n.4 (1938); *see also supra* text accompanying note 311.

331. Because the Court only protects minorities that majoritarian elites want protected, it doesn’t work this way. Thus when the Court handed down *Minersville School District v. Gobitis*, it tragically signaled an open season on Jehovah’s Witnesses. *See* *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (upholding a Pennsylvania law requiring flag salutes in public schools, despite the Jehovah’s Witnesses’ claim that saluting violated their religious beliefs). For example,

In Litchfield, Connecticut, virtually the entire adult population assaulted a group of sixty Witnesses. An American Legion mob in Louisiana attacked Witnesses gathering for a regional convention and drove them into Texas. A Nebraska mob castrated a Witness. An ACLU report documented violent incidents in over 355 local communities in forty-four states.

SAMUEL WALKER, *IN DEFENSE OF AMERICAN LIBERTIES* 109 (1990).

332. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding that a Texas statute criminalizing consensual sexual intercourse between persons of the same sex violates the Due Process Clause of the Fourteenth Amendment).

the Court? How should believers in popular constitutionalism feel about the proposed amendment banning same sex marriage?

Kramer recognizes that elites have been uneasy about popular participation since the aftermath of World War II. That fascism and communism gained power by invoking the people seems aberrational to him. But not to me. Like many others, I am concerned that mass meetings with an agenda of complaint can—and have—lead to violence. The mass movements of the twentieth century that have set themselves out to overturn an existing legal order have sometimes been wonderful—the Civil Rights Movement jumps first to mind³³³—but equally as often they have been horrible. Given that the Supreme Court has been reasonably good on the upside and nowhere near as bad on the downside, I’ll take the Court and the consequences. Kramer acknowledges that the founding generation learned from experience. Ours has too.

In addition to the three justifications, I can think of a further reason why someone might desire popular constitutionalism: an unhappiness with current judicial outcomes.³³⁴ Like virtually all law professors, Kramer believes that *Bush v. Gore* should have been seen as judicial usurpation, and he claims that had the Court broken the 1876 Hayes-Tilden deadlock, the supporters of the loser would not have stood by. They might have tried impeachment or ignored the Court’s judgment or slashed its budget or limited its jurisdiction, “[b]ut they surely would have done something.”³³⁵

The implications of bringing up unwanted Court settlement in the Hayes-Tilden deadlock in the context of *Bush v. Gore*³³⁶ seem clear. Kramer believes that “the people” should have done something. But what? The chance to vote again would first occur two years later (when, in fact, the people returned Republicans to control in both Houses). Voting George W. Bush out of office could not be done until 2004. Petition Congress to do something? Both Houses in the outgoing and incoming Congress were in Republican control, and Republicans were as satisfied with the outcome of *Bush v. Gore* as they were concerned about the Florida Supreme Court stealing the election for Al Gore. Hold public hearings? Perhaps, but to what avail if they could not affect the outcome (because it is the result of *Bush v. Gore*, not the announced doctrine, that was the outrage).

The danger in the Hayes-Tilden deadlock was that the Civil War might be restarted.³³⁷ People were armed and willing to use force to settle the dispute if necessary. I cannot believe that Kramer would want to see if

333. Which is not to slight the Women’s Rights, Gay Rights, and Disability Rights movements.

334. *Lawrence*, 539 U.S. 558 (2003), *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *United States v. Virginia*, 518 U.S. 515 (1996), are excepted, of course.

335. KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 231.

336. 531 U.S. 98 (2000).

337. C. VANN WOODWARD, REUNION AND REACTION 13 (1951).

intimidation of public officials or mob action aimed at preventing George W. Bush from taking office might have worked. Had that occurred, violence would have been met with violence.

The one remedy omitted thus far is pamphletting, and in one form it has prospered. Law review pages have been filled with denunciations of the Court, and for the most part, defenders of *Bush v. Gore* have been silent.³³⁸ On the merits, the intellectual battle has been won: The Professoriate Ourselves. “In this democracy of 200 million citizens, the people have spoken: all five of them.”³³⁹

Even if judicial exclusivity seems unattractive, it does have its moments. Justices who believe that only they can interpret the Constitution will instinctively reject claims that they have no business interfering with the Executive Branch. Thus, they could remind a president that even though the nation is engaged in a war on terrorism, courts have an important role to play in enforcing the Constitution.³⁴⁰

In sum, popular constitutionalism provides a useful mechanism for dealing with a usurping government, but we have passed that stage in our history and hopefully will not see it again. The time when popular constitutionalism played an important institutional function has thus passed. Therefore, the only modern rationale for popular sovereignty is the normative attractiveness of those claiming to represent the people when they attempt to overturn judicial policies. Before embracing that vision, we should see substantial evidence that this would make the country better because, in fact, the evidence seems quite the contrary.

IV. Conclusion

I respect the history in *The People Themselves*. Kramer has written a rich narrative of popular constitutionalism up through the Jacksonian era and given historians and constitutional law scholars much to assimilate. But assimilating history is not an order to adopt its practices. The fact that

338. Powe, *The Not-So Brave New Constitutional Order*, *supra* note 270, at 673 n.209.

339. PAUL F. BOLLER, JR., PRESIDENTIAL CAMPAIGNS 411 (2004) (quoting Mark Russell).

340. *See, e.g.*, Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004). In a world where a John Ashcroft can be Attorney General, does anyone still think it wise to take the Constitution from the courts? For that argument in a pre-Ashcroft world, see MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 6–71 (1999) (arguing against judicial supremacy in constitutional law, and describing how a “populist constitutionalism” could preserve constitutional values outside of the courts); JEREMY WALDRON, LAW AND DISAGREEMENT 15–16 (1999) (defending the historical strength of electoral institutions, as opposed to courts, on the grounds that “controversies about the fundamental ordering of their society . . . were controversies for them to sort out, respectfully and on a basis of equality, because *they* were the people who would be affected by the outcome”); JEREMY WALDRON, THE DIGNITY OF LEGISLATION 5 (1999) (criticizing the idea that “the courts, with their wigs and ceremonies, their leather-bound volumes, and their relative insulation from party politics, are a more appropriate place for resolving [matters of right and principle in a society]”).

Americans used certain institutions and procedures before the Civil War is hardly an argument for using them today. Neither the times nor the Constitution is static.

Popular constitutionalism’s core idea—that all citizens have the right to interpret the Constitution for themselves—was explicitly reborn a quarter century ago in Sandy Levinson’s seminal article, “*The Constitution*” in *American Civil Religion*.³⁴¹ Using a divide in Christianity, Levinson offered two ways of seeing the Constitution.³⁴² One, always favored by the justices, is a Catholic Constitution with an official authoritative interpreter, the Pope, being replaced by the Court. The other is a Protestant Constitution where each believer could individually interpret the Constitution. Levinson favored the latter and so does Kramer, who takes it to its logical conclusion that those successfully claiming to speak for the people have the right to control constitutional interpretation.

Law professors have been drawn to both the civic republican ideal and a belief that they could produce better constitutional law than the Rehnquist Court. Thus when Larry Alexander and Fred Schauer defended the alternative of adhering to a Court-centered hierarchy, they noted that theirs was a minority view.³⁴³ They claimed, nevertheless, that a democracy must have an authoritative determination of constitutional claims and that this was best done by the Court. Alexander and Schauer admitted that they did not argue from “empirical []or historical” evidence.³⁴⁴ But they could have, as the prior pages of this Review have shown. Seeing modern constitutional history for the first time through the lens of popular constitutionalism gives me pause. For all the Court’s faults—and they are real—the Court has been right more often than it has been wrong, and the consequences of mass movements to overturn the Court seem more profound than Levinson and Kramer have perceived (or let on).

Even assuming that in the future Kramer could tell us who “the people” are and then how they would translate their constitutional vision into reality,

341. Sanford Levinson, “*The Constitution*” in *American Civil Religion*, 1979 SUP. CT. REV. 123 (1980) [hereinafter Levinson, *The Constitution*]. I am surprised that this article is not cited by Kramer. He does, however, offer a single citation to SANFORD LEVINSON, CONSTITUTIONAL FAITH (1988). KRAMER, THE PEOPLE THEMSELVES, *supra* note 7, at 247. The latter receives added mention in Kramer, *Popular Constitutionalism*, *supra* note 20, at 985, 1011.

342. In addition to the discussion in the text over who is authoritative in interpretation, Levinson also noted that there were Protestant and Catholic views on what “the Constitution” consists of. Levinson, *The Constitution*, *supra* note 341, at 132–36. For Constitutional Protestants, like Hugo Black and Antonin Scalia, the Constitution is the text of the document alone. *Id.* at 133. For Constitutional Catholics, like William O. Douglas and John Marshall Harlan, the Constitution is the text as amplified through the traditions of the American people throughout the nation’s history. *Id.* at 135.

343. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1362 n.12 (1997).

344. *Id.* at 1369.

we should nevertheless ask whether “the people” are missing in action (and should anyone care)? Kramer would give an emphatic affirmative to both questions. After my second reading of *The People Themselves*, I would have answered “maybe” and “no.” After reflecting on the past fifty years as I wrote this Review, I see that the correct answers are “no” and “perhaps.”