POPULAR CONSTITUTIONALISM IN THE TWENTIETH CENTURY: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule

WILLIAM E. FORBATH*

In the acknowledgements of *The People Themselves*, Larry Kramer thanks me as his chief "compatriot in crime."[1] I could not be prouder. *The People Themselves* is a brilliant book, filled with superb history and provocative theory. As a compatriot in this largely unexplored land, I will offer some historical reflections that aim to revise and strengthen Kramer's pioneering account. In some important ways, I think Kramer is wrong about the character and significance of popular constitutionalism in America, particularly during the last century. The book focuses on the early republic, leaving it to others to dwell on the more recent past. Revising these features of Kramer's narrative, my reflections also complicate its normative path.

First, I turn to the role of racism and slavery in shaping American popular constitutionalism and its rivals. *The People Themselves* has been assailed for glossing over this and other dark chapters in popular constitutionalism's history. I sketch how and why Kramer's narrative should take these dark chapters squarely on board. Next, I turn to the Progressive Era. This was the first and last time Americans seriously considered profound institutional changes aimed at enlarging ordinary citizens' role in determining the meaning of the Constitution and the course of its development. Mainstream Progressive attacks on judicial finality were at least as thoroughgoing as Kramer's. And their efforts to rethink popular self-rule under modern conditions and to make American constitutionalism more democratic were deep and systematic. What can we learn from them? And what should we infer from the important occasions in which "the people themselves" seem to have rejected the Progressives' rejection of judicial authority?

* Lloyd M. Bentsen Chair in Law & Professor of History, UT Austin. Thanks to Sandy Levinson, Robert Post, Scott Powe, David Rabban, and Reva Siegel for thoughtful comments and criticisms.

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

This latter question opens on to the New Deal. There, again, I suggest, Kramer is off the mark when he claims that Americans "consistently chose popular constitutionalism over the view that the Constitution was subject to authoritative control by the judiciary."[2] Rather, as near as one can gauge such things, Americans preferred to have it both ways. When matters came to a head, they embraced only halfway the counsel and vision of Progressives like Theodore Roosevelt who looked to undo judicial finality, dethrone the courts, and institute a new democratic allocation of interpretive authority. They even frowned on the ill-starred Court-packing plan, put forward by Theodore's younger cousin, FDR. Thus, while Americans lent overwhelming support to FDR's vigorous attacks on the conservative Justices' constitutional doctrines and decisions, most refused to forsake the ideal or myth of judicially enforceable constitutional commitments standing obdurately above and beyond the sway of non-judicial political actors. Popular sway over constitutional questions in both eras stood in tension with a deeply conservative current of popular skepticism about the people's collective enthusiasms about the uses of state power, a current that ran in favor of judicial finality.

There is a puzzle at the heart of *The People Themselves*. Kramer champions the principle of popular (a broad notion in his book, encompassing public, political, and legislative) control over constitutional law for its own sake. He knows full well that the politicians, lawmakers, and social movements best positioned to seize on the principle just now are ones whose substantive constitutional values he largely deplores. But he thinks popular constitutionalism is dying; and he believes the republic will be well-served by whomever helps revive it. Jackson, Lincoln, and Theodore and Franklin Roosevelt, the heroes of Kramer's narrative, all attacked judicial supremacy. But none of them did so simply or chiefly because he favored other constitutional interpreters over against the courts. They all did so because they thought the republic was imperiled by the constitutional interpretations and paths of constitutional development laid down by the courts. In contrast to Kramer, their attacks on the courts and their accounts of popular, state-legislative, or congressional interpretive authority were wedded to substantive diagnoses of what was amiss with the republic and its institutions.

Popular constitutional politics has never been motivated by the principle of popular control over constitutional law and constitutional development. It has been driven by substantive principles—about the rights of

2. *Id.* at 209.

citizens and the duties of government, about the constitution of American society and political economy, about the conditions of popular self-rule at a given moment in national history. Often, such substantive visions laid new obligations on lawmakers, but not necessarily in ways that clashed with judge-made law. Often, the substantive popular constitutional visions drove movements to amend the existing Constitution. Often, the courts changed doctrine to accommodate these reform impulses and initiatives arising from popular movements. Thus, much of the history and work of popular constitutionalism has unfolded at some distance from the space where judicial authority clashed with the powers of other branches. Where substantive visions clashed head-on with the courts, leaders and movements rolled out the weaponry on which Kramer focuses. But Americans' views on judicial supremacy have not been matters of abstract or general first principle, and this makes Kramer's hermeneutics—his reading of our constitutional history and traditions for normative authority—somewhat wrong-headed.

On Kramer's account, today's America is impoverished because popular constitutionalism has faded away. The proof lies in the trajectory of both popular and elite opinion over the course of the twentieth century. Only in the final decades of the century, according to Kramer, did Americans, left and right, liberal and conservative, come to agree on the courts' final say on our important constitutional conflicts. Judicial finality, he contends, is inconsistent with popular constitutionalism. Where the one holds sway, the other expires. What follows challenges Kramer's account of twentieth-century American views on judicial finality and his report of popular constitutionalism's demise.

Throughout most of the twentieth century, I suggest, even in the thick of popular constitutional battles against the courts, Americans associated judicial finality with the stability of firm, unduckable, law-like constitutional guarantees. Liberals and conservatives disagreed with one another both about what rights the Constitution vouchsafed and about what rights were properly safeguarded by courts. But on all sides, they were believers in the indispensability of judicial finality in respect of some important set of rights, which they deemed essential to their rival conceptions of popular self-rule or constitutional democracy.

This basic agreement on the virtues of judicial finality across the liberal-conservative divide, which Kramer bemoans as a late twentieth century development, arose many decades earlier. But contrary to Kramer, I do not find that this agreement has spelled the demise of popular constitutionalism. From the New Deal right down to the present, party politics and social movements, including movements to amend the Constitution, have

been lively sites of popular involvement in—and popular influence over—the nation's constitutional development.

Kramer envisions social and cultural life as a process in which we strive "to make [our] web of beliefs and practices as coherent as we can."[3] In the annals of constitutional culture and the clash between judicial supremacy and popular political sway over constitutional law, I think instead we have preferred to keep our options open, to line up with the great bard of American democracy: "Do I contradict myself? Very well then I contradict myself, (I am large, I contain multitudes)."[4]

I. THE DARK SIDE

As Kramer chronicles it, popular constitutionalism underwent a sea change during the early nineteenth century. During the eighteenth century, popular involvement in the interpretation and enforcement of constitutional norms rested with "the people out of doors." The great sea change of the early nineteenth century was the transformation of "the people out of doors" into the Jacksonian Democracy. As Kramer puts it, "'the people' became 'the democracy,'" and voting and mass participation in the deliberations and rituals of party politics replaced petitioning, remonstrating, and mobbing as the vehicles of "popular control over the Constitution and constitutional law."[5]

During this period, the United States pioneered democratic electoral politics as the world's first nation to institute universal white male suffrage. But the United States also proved to be the last of the nations of the "free world" in the mid-twentieth century to achieve universal adult suffrage, when African-Americans finally gained the vote. If universal adult suffrage is a minimum condition of constitutional democracy, then the United States did not become a constitutional democracy until the mid-'60s. The "Democracy" launched by Andrew Jackson and theorized by Martin Van Buren was founded on race. Jacksonians called it a "white man's republic."[6] Drawing on the historiography of nationalism, George Fredrickson has called the Antebellum republic a *Herrenvolk* democracy.[7] The Democratic

3. *Id.* at 34 (quoting DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 23 (1989)).

4. WALT WHITMAN, *Song of Myself*, *in* POETRY AND PROSE 188, 246 (1982).

5. KRAMER, *supra* note 1, at 190, 192.

6. *See, e.g.*, ALEXANDER SAXTON, THE RISE AND FALL OF THE WHITE REPUBLIC: CLASS POLITICS AND MASS CULTURE IN NINETEENTH-CENTURY AMERICA (1990); SEAN WILENTZ, THE RISE OF AMERICAN DEMOCRACY: JEFFERSON TO LINCOLN (2005).

7. *See* GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY xi–xii (1981).

Party, which, in Kramer's nice phrase, "brought the people indoors" and became the bearer of popular constitutionalism, was built largely on this precept: Join Democratic voters North and South on the common ground of whiteness, and put the slavery issue off the table and out of contention, as a matter of inviolable states' rights.

Kramer is scrupulous to note that when *Dred Scott*[8] came down, Van Buren, popular constitutionalism notwithstanding, "was willing to support the Court's jurisdictional holding."[9] Kramer primly does not mention—he may assume all readers know—that the jurisdictional holding was that the black man, free or slave, had no rights in the white man's nation, not even the right to claim a right in the nation's courts. This was the judicial Constitution's affirmation and adoption of a key precept of the popular constitutionalism of Mr. Van Buren, delivered by another architect of Jacksonian popular constitutionalism, Jackson's Attorney General and drafter of the Bank Veto, Roger Taney.

During the decades preceding *Dred Scott*, remember, abolitionist attorneys constantly had been arguing the contrary position, or, rather, a variety of contrary positions. In the recesses of Article IV, in the Due Process Clause, and elsewhere in the Bill of Rights, the abolitionist attorneys were seeking intimations of a constitutional democracy.[10] This framed a battle between the popular constitutional ideal of the white man's republic, on one hand, and the liberal ideal of an inclusive constitutional democracy, someday to be vindicated by a justice-seeking court, on the other. This battle is not concluded by the Fourteenth and Fifteenth Amendments. Instead, it continues for another century, and one cannot understand the deep ambivalence that serious liberal thinkers in America have displayed toward popular constitutionalism apart from this battle; nor can one understand the appeal of judicial supremacy apart from it.

Yet missing from Kramer's account is not only the Antebellum story, but also the century-long, post-bellum saga of states' rights/white *Herrenvolk* popular constitutionalism. In passing, Kramer blames "the dismantling of Reconstruction" on the Supreme Court.[11] Critics have blasted him for this passing remark.[12] I do not think Kramer would dispute that the disman-

8. Dred Scott v. Sandford, 60 U.S.(19 How.) 393 (1857).

9. KRAMER, *supra* note 1, at 211.

10. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 161, 269 (1998); ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 154–58 (1975).

11. KRAMER, *supra* note 1, at 229.

12. *See, e.g.*, L. A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care?)*, 83 TEX. L. REV. 855, 887 (2005) (book review).

tling of Reconstruction and the betrayal of the Reconstruction Amendments was an inter-branch enterprise. Nor would he disagree that the enterprise was propelled by white Southern violence in the name of the "original Constitution" of "states' rights" and "home rule," as the Ku Klux Klan often put it. What is also lacking in Kramer's story, however, is mention of the role of popular constitutionalism in thwarting any and all legislative efforts to make good on the Amendments' promise of racial equality for generations to follow.

Thus, throughout the first half of the twentieth century, the halls of Congress rang with constitutional attacks on anti-lynching bills, anti-poll tax bills, bills to bring black occupations under New Deal federal labor standards, fair employment bills to outlaw race discrimination in private employment, and so on. But the Court's Constitution did not serve as a friend or guardian of white supremacy. To the contrary, by attacking "lynching's close cousin," the racist-mob-dominated criminal trial, the Court, from the '20s onward, gave every sign to Congress that it would uphold federal action against lynching. But anti-lynching bills were "filibustered to death" by Southern Senators, assailing the Court's intrusions into Southern justice and invoking the popular Constitution of states' rights.[13]

Likewise, right on the heels of *Jones & Laughlin*[14] and *Darby*,[15] liberal Congressmen began to invoke the Court's new commerce power jurisprudence as a ground on which to outlaw private employment discrimination. Champions of anti-discrimination measures highlighted the then-recent rulings of "the Supreme Court, in upholding the provisions of the Wagner Act."[16] These rulings meant that under its commerce power, just as Congress could outlaw employers' discrimination against union members, so too did it have "constitutional authority" to protect the "right to work at gainful employment" free from discrimination based on race.[17] Conservative lawmakers responded, wielding the tools of departmentalism and popular constitutionalism to keep alive the old Constitution that the Court had abandoned, the Constitution of "States' rights, local self-government, [and] local self-determination of our own sociological and

13. *See* Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 60–61 (2000). *See also* Avis Thomas-Lester, *A Senate Apology for History on Lynching: Vote Condemns Past Failure to Act*, WASH. POST, June 14, 2005, at A12 ("There may be no other injustice in American history for which the Senate so uniquely bears responsibility [by repeatedly knocking down anti-lynching bills]." (quoting Sen. Landrieu)).

14. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

15. United States v. Darby, 312 U.S. 100 (1941).

16. 90 CONG. REC. A3032 (1944) (extension of remarks of Rep. LaFollette).

17. *Id.*; 91 CONG. REC. 3673–74 (1945) (extension of remarks of Rep. LaFollette).

economic problems."[18] Whatever the Court might hold, in the halls of Congress, the Commerce Clause did not authorize interference with "free choice in hiring" whites over blacks;[19] for that reached into the realm of "private life" violating the constitutional rights of contract and property and reaching beyond where "even the States operating in the vast realm of their reserved sovereignty" could properly venture.[20]

Kramer's celebration of departmentalism and of Congress's and the White House's healthful rejection of judicial supremacy during the New Deal would carry more conviction if it reckoned with this more complex history. As it is, *The People Themselves* recounts the first act of the New Deal drama, wherein FDR and the New Dealers in Congress spurn the Court's Constitution in favor of their own—but not the second act, wherein the reactionary players are no longer on the Court, and the language and tools of popular constitutionalism are wielded by Dixiecrats and conservative Republicans in Congress to thwart both racial progress and FDR's efforts to complete the New Deal.[21] It was this same Southern Democratic hammerlock on the Senate and key House committees that Justice Jackson had in mind during oral argument in *Brown v. Board of Education*,[22] when he observed that "realistically the reason this case is here was that action couldn't be obtained from Congress."[23] The black citizens of the South were disenfranchised, and the Dixiecrats had the power and will to keep it that way. Lacking the vote, plaintiffs belonged to the quintessential "discrete and insular minority" for whom recourse to "those political processes ordinarily to be relied upon to protect minorities"[24] was bootless.

That is why, throughout the early twentieth century, even when federal courts' interventions against Jim Crow were extremely modest, and their interventions against redistribution quite bold, African-Americans never supported white reformers' attacks on judicial supremacy. That's also one reason—but not the only one, as we will soon see—why, during the New Deal era, as mainstream Northern white liberals and progressives began to champion racial equality, they also abandoned the blunter

18. 82 CONG. REC. A441 (1937) (extension of remarks of Rep. Cox).

19. 94 CONG. REC. A4282 (1948) (extension of remarks of Rep. Williams).

20. 91 CONG. REC. 3680 (1945) (statement of Rep. Hays).

21. *See generally* William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165 (2001).

22. 347 U.S. 483 (1954).

23. ARGUMENT: THE ORAL ARGUMENT BEFORE THE SUPREME COURT IN BROWN V. BOARD OF EDUCATION OF TOPEKA, 1952–55, at 244 (Leon Friedman ed., 1969).

24. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

schemes for curtailing judicial authority favored by earlier generations of social reformers.

I have said that taking on board this darker and more complex history of popular constitutionalism and judicial review could strengthen, rather than unravel, Kramer's argument, and the reason by now may be apparent. In the 1960s, Congress enacted civil rights and voting rights legislation. The universe of discrete and insular minorities narrowed, as more and more minorities, as well as women, became active players in electoral politics. Racial and other prejudices hardly vanished, nor did the legacies of disenfranchisement and legal subordination, but minorities, and women, increasingly found their most robust safeguards in legislation and not judge-made constitutional law. For them, the road to equal citizenship no longer ran through judicial supremacy. Indeed, judicial supremacy and the Court's attacks on many legislative anti-discrimination measures came to seem obstacles on that road in the eyes of many minority advocates.

Thus, for Kramer's interpretive account of popular constitutionalism versus judicial supremacy, the belated dismantling of the White Man's Republic supplies a narrative underpinning for the proposition that the moral warrant for judicial supremacy largely ran out, as America finally became a constitutional democracy.[25] Thereafter, Kramer may argue, courts deserved no pride of place in deciding the nation's hard constitutional questions.

II. POPULAR CONSTITUTIONALISM IN THE PROGRESSIVE ERA

I now turn from what *The People Themselves* omits to say about the twentieth century to what it does say. "[E]ach time matters came to a head," writes Kramer, and "circumstances impelled Americans to . . . choose sides—they consistently chose popular constitutionalism over the view that the Constitution was subject to authoritative control by the judiciary."[26] I think not.

I start with the Progressive Era. There are two lessons here. One concerns the People's institutional conservatism to which I already have alluded. The other is that assailing judicial supremacy in the name of popular constitutionalism may entail more than dethroning the courts. The Progressives took popular constitutionalism more seriously than any other generation of thinkers and reformers. Kramer's notion—that shifting

25. Stephen Griffin sets out just such an argument in fine detail. *See* Stephen M. Griffin, *The Age of* Marbury*: Judicial Review in a Democracy of Rights*, *in* ARGUING *MARBURY V. MADISON* 104 (Mark Tushnet ed., 2005).

26. KRAMER, *supra* note 1, at 207, 209.

constitutional interpretive and enforcement authority to Congress and the political and electoral process will necessarily make the enterprise substantially more democratic—would have seemed dubious, even laughable, to the Progressives who thought and did most about it. Their conception of popular constitutionalism entailed myriad institutional reforms and innovations, which seemed, in their time and place, to offer plausible new ways of going about the business of constitutional interpretation, decision-making, and development more democratically.

A. The Progressive Constitutional Imagination

Urbanism, advanced capitalism, and an acknowledged plurality of value orientations or conceptions of the common good—on most accounts, these are the key hallmarks of the "modern" condition. It was in the Progressive Era, the pre-World War I years of the twentieth century, that American political and constitutional thought first fully reckoned with these developments. What did democratic citizenship and self-government mean under these "modern" conditions? The federal Constitution fell far short of the forms of popular self-rule as well as those of modern lawmaking and administration; it was advertently "aristocratic" and "unwieldy," Progressives thought. But how could it be remade and how could new institutions of self-rule be fashioned?

How could "We the People" rule in the face of the rise of the large-scale corporation and the asymmetries of wealth, power, and organization it produced? How could it contend with corporate domination of the nation's political parties and legislatures? And how could it cope with the seemingly irremediable and fundamental differences amongst the People—with cultural gulfs newly visible between secular and fundamentalist Americans, between native-born WASP elites and the masses of new immigrants from the pre-modern peripheries of Asia, Europe, and the American South? What would it mean to make good on the "modern" insight that the perspective of the WASP elites was but one particular view of the common good? "Public opinion" must govern, but what did "public opinion" mean in modern, mass society? What institutions might lend themselves to the formation of democratic publics and popular political will in the modern city? And what forms would political participation and representation take in a world of openly contending definitions of the good society? Would republican values of citizenly participation and deliberation about the common good find a purchase in "modern" democratic institutions? Or would a liberal marketplace model of democratic politics prevail?

These were the challenges that "modern America" posed for democratic political and constitutional thought. We have a standard account of the Progressives' response to these challenges: supplanting the "state of courts and parties" with a modern regulatory and administrative state dominated by the executive branch; securing political and constitutional legitimacy for the new state's managerial and bureaucratic forms of governance—forms designed to ameliorate the social world of corporate capitalism and also to wrest power from boss- and immigrant machine-ridden party politics; forging "direct democracy" measures like the direct primary, the initiative, referendum, and recall—again, to thwart the corruption of party politics and party bosses; creating powerful national interest group associations as vehicles of political representation; and relying on the newly emergent national media to define and publicize social problems and shape public opinion. With the exception of the "direct democracy" reforms, these endeavors have seemed aimed at empowering experts and elite professionals, rather more than the citizenry. And the direct democracy reforms have seemed a distinctly hollow achievement, helping to erode political parties as vehicles of popular participation in democratic politics, in favor of a politics of advertising and mass manipulation.

Indeed, law-making by initiative and referendum has been assailed by many leading liberal constitutional law scholars as irrational (and, usually, right-wing) populism, driven by money and the manipulation of popular fears—the antithesis of the kind of "deliberative democracy" the Constitution prescribes. Likewise, we condemn the Progressives for their complicity in the disenfranchisement of the blacks of the South; but we take this as being of a piece with a reform agenda that meant to supplant popular patronage politics with expert administration and elite policy-making, and we have no brief against the thinning of democracy such an agenda implies. Modern society is too complex, mass politics too irrational and dangerous, to take thicker conceptions of democracy seriously. That is our view; but in important respects, it was not theirs.

Progressives set out to rethink and remake the Constitution, root and branch—not only to legitimate the modern administrative, regulatory, and redistributive state, but also to make law- and policy-makers more accountable by reconstructing the relations among the branches and the role of the political party, to make the constitution itself more changeable, and to create a modern democracy that was more, not less, rooted in popular participation and decision-making, more, not less, open to initiative and change from below, one that was deliberative in a more popular and plebian fashion than liberal constitutionalists today generally think possible.

B. Roosevelt, the Progressive Party, and the Imperative of Constitutional Change

Theodore Roosevelt laid down the gauntlet. The Progressive Party was born of Roosevelt's ambitions to return to the White House in 1912, and of the aspirations of a broad range of reformers—insurgent Republicans; disaffected Democrats; crusading journalists, academics, social workers, and others—who saw in the new party a way to press economic, social, and political reform upon the federal government and to hasten a transformation of the party system into one pitting progressives against conservatives. The party platform was a radical one calling for national social insurance, national regulation of industry, national corporation law, and for "pure democracy" and dramatic constitutional change to make "the people . . . the masters of their Constitution," the national government adequate to securing "equal opportunity and industrial justice," and the political parties adequate to providing "responsible government and executing the will of the people."[27] Roosevelt's vision of constitutional reform and "pure democracy" became the centerpiece of his 1912 run for the White House. To create a "modern state" with programmatic parties and "responsible government" meant undermining the separation of powers, the federalism, and the world of party politics that had grown up around them. As it became an ideology of constitutional change, Roosevelt's "New Nationalism" inveighed against "the utter confusion that results from local legislatures attempting to treat national issues as local issues . . . [and] still more [against] the overdivision of governmental powers . . . which makes it possible for local selfishness or for legal cunning . . . to bring national activities to deadlock."[28]

Thus did the New Nationalism threaten to create the kind of centralized state that Americans had been taught to shun, and many Progressives, like Louis Brandeis and Robert LaFollette, rejected it. LaFollette and his supporters had created the National Progressive Republican League early in 1911 to carry LaFollette and his neo-Jeffersonian form of progressive politics to the White House. Roosevelt spurned as unrealistic LaFollette's Anti-Monopoly outlook with its dedication to competition and decentralization. But he made his own the Wisconsin senator's (and the broader Anti-Monopoly movement's) program of political reform—the direct primary, the initiative, referendum and recall, and revising Article V to make the

27. Platform of the Progressive Party (Aug. 7, 1912), *available at* http://www.pbs.org/wgbh/amex/presidents/26_t_roosevelt/psources/ps_trprogress.html.

28. Theodore Roosevelt, The New Nationalism (Aug. 31, 1910), *in* 17 THE WORKS OF THEODORE ROOSEVELT 5, 19 (Hermann Hagedorn ed., 1926).

Constitution more changeable. This last idea, amending the amendment rules, was one embraced by Progressives of all stripes, including figures far more moderate than Roosevelt, like Brandeis and Woodrow Wilson.

C. "The American people, . . . the final interpreters of the Constitution":[29] *"Direct Democracy," the Problem of Creating Democratic Publics, and Progressive Visions of Institutional and Cultural Change*

That Roosevelt and his party would meld national social reform with a remarkable array of politico-constitutional reforms—both centralizing and democratizing—became apparent the day he finally threw his hat in the ring as a candidate in the 1912 race. Addressing the Ohio Constitutional Convention in February, Roosevelt offered his counsel to the state constitution-makers about what precepts and institutions were essential to a progressive Constitution.[30] Roosevelt was steeped in American political thought—he knew the traditions from which he was departing. He knew that he was distancing himself from much that every school of republican constitutionalism held dear, even as he invoked the authority of Lincoln's Constitution. With the Lincoln of the Douglas debates and the First Inaugural, Roosevelt embraced the view that the judiciary should not enjoy the final word on "vital questions" of policy and constitutional principle.[31] But Lincoln's brand of departmentalism took as given that conflicts over constitutional meaning like the one the Court presumed to decide in *Dred Scott* would unfold among the branches of the federal government; the people might be the ultimate authority, but the people's role was mediated by party councils and all the inherited ways the federal Constitution filtered popular input. Roosevelt's "pure democracy" would undo these mediating institutions in order to "make popular feeling effective" in deciding our constitutional conflicts and interpreting and altering our constitutional commitments. Nothing short of this would enable the people to wrest government and party from the grip of the money power and corporate malefactors; nothing less than "genuine popular self-government" was adequate "to establish justice" or secure "the common welfare."[32] Not only must constitutions state and federal be made readily amendable, but if "the American people are fit for complete self-government," then they must be able not only to amend but also "to apply and interpret the Constitution."

29. Theodore Roosevelt, A Charter of Democracy: Address Before the Ohio Constitutional Convention, *in* 100 OUTLOOK 390, 399 (1912).

30. *See generally id.*

31. *Id.* at 398.

32. *Id.* at 390–91.

They must be "the masters and not the servants of even the highest court in the land, and . . . the final interpreters of the Constitution."[33] "I do not say the people are infallible," Roosevelt declared,

> [b]ut I do say that our whole history shows that the American people are more often sound in their decisions than is the case with any of the governmental bodies to whom, for their convenience, they have delegated portions of their power. If this is not so, then there is no justification for the existence of our Government; and if it is so, then there is no justification for refusing to give the people the real, and not merely the nominal, ultimate decision on questions of constitutional law. Just as the people and not the Supreme Court under Chief Justice Taney, were wise in their decisions of the vital questions of their day, so I hold that now the American people as a whole have shown themselves wiser than the courts in the way they have approached and dealt with such vital questions of our day as those concerning the proper control of big corporations and of securing their rights to industrial workers.[34]

So, Roosevelt counseled the Ohio Convention, high court decisions ought to be subject to review by the people through referendum. "If any considerable number of the people feel" that a constitutional decision "is in defiance of justice" or misjudges the proper bounds of the state's police power, "they should be given the right by petition to bring [that decision] before the voters"; a progressive state constitution must "permit the people themselves by popular vote, after due deliberation and discussion, but finally and without appeal, to settle what the proper construction of any Constitutional point is."[35]

The idea of popular "recall" of judicial decisions was one Roosevelt borrowed from William Draper Lewis, dean of the University of Pennsylvania Law School.[36] For both of them, the idea was a moderate alternative to judicial recall, which Roosevelt largely abjured,[37] and to abolishing judicial review, which he also opposed.[38] But of all the innovations in "the machinery of government" that Roosevelt championed, the "recall of state judicial decisions" proved most controversial. His bold statement of the people's interpretive authority hobbled Roosevelt's chance of securing the Republican nomination. Attacking the courts, Roosevelt "alienated the conservative wing of his party, which might have supported him for the

33. *Id.* at 399.

34. *Id.* at 399–400.

35. *Id.* at 391, 399.

36. *See* Theodore Roosevelt, *Introduction* to WILLIAM L. RANSOM, MAJORITY RULE AND THE JUDICIARY: AN EXAMINATION OF CURRENT PROPOSALS FOR CONSTITUTIONAL CHANGE AFFECTING THE RELATION OF COURTS TO LEGISLATION 3 (1912).

37. *See* Roosevelt, *supra* note 29, at 398.

38. *See* Roosevelt, *supra* note 36, at 13.

sake of a possible victory."[39] Mainstream Republicans and industrialists had long appreciated Roosevelt's disdain for vigorous antitrust policy; but confronted with his constitutional radicalism, they abandoned the former president. Even Henry Cabot Lodge, who owed Roosevelt his reelection to the Senate in 1911, now wrote his lifelong friend that he could not support his quest for the White House:

> I found myself confronted with the fact that I was opposed to your policies declared at Columbus [at the Ohio Constitutional Convention] with great force in regard to changes in our Constitution and principles of government . . . I knew of course that you and I differed on some of these points but I had not realized that the difference was so wide.[40]

For his part, the former federal circuit court judge and future Chief Justice William Howard Taft—in many respects a moderate Progressive himself—was glad to take the part of conservatism in the face of Roosevelt's constitutional heresy, and run as the Republican presidential candidate. But, of course, Roosevelt was hardly alone in believing that radical constitutional reform and "direct democracy" were essential to making modern, industrial America a genuine constitutional democracy.

Reformers as diverse as Jane Addams, the great settlement house pioneer, and Herbert Croly, founder of the *New Republic* and the leading public intellectual of the Progressive movement, shared Roosevelt's outlook on the links between constitutional and political, social, and economic reform. All three believed that a European path to social democracy was a nonstarter in the United States. Class-based socialist politics rubbed too abrasively against the American grain, as did strongly centralized, class-based party organizations. If commitments to substantial redistribution, central state regulation, and the like were to be forthcoming, they would come from a more middle-class movement that appealed to individual voters, one-by-one (rather than as members of an oppressed class), to embrace the higher calling of national community and a national social ethic.[41] Figures like Addams and Croly hoped to see these commitments emerge from the direct democratic constitutional reforms they and Roosevelt championed and from the active, popular democratic deliberation they fostered. Nor was

39. GEORGE E. MOWRY, THEODORE ROOSEVELT AND THE PROGRESSIVE MOVEMENT 217 (1946).

40. Letter from Henry Cabot Lodge to Theodore Roosevelt (Feb. 28, 1912), *in* 2 SELECTIONS FROM THE CORRESPONDENCE OF THEODORE ROOSEVELT AND HENRY CABOT LODGE, 1884–1918, at 423, 423–24 (1925).

41. *See generally* JANE ADDAMS, DEMOCRACY AND SOCIAL ETHICS (1905); HERBERT CROLY, PROGRESSIVE DEMOCRACY (1914) [hereinafter CROLY, PROGRESSIVE DEMOCRACY]; HERBERT CROLY, THE PROMISE OF AMERICAN LIFE (Belknap Press 1965) (1909). Illuminating historical treatments are found in PROGRESSIVISM AND THE NEW DEMOCRACY (Sidney M. Milkis & Jerome M. Mileur eds., 1999).

theirs such a foolish hope. Legions of city- and state-level Progressive reformers were succeeding in melding new managerial forms of administrative governance (for which the Progressives are remembered) with vibrant democratic associations and polities (which we tend to forget). They worked hard with unions, academics, and all kinds of reform organizations to create myriad forums and arenas for public political deliberation in cities like Portland, Cleveland, and Rochester, fashioning a circuitry of democratic publics, direct democracy, and strong executives.[42] We think of direct and deliberative democracy as foes; for them, they were bound up with one another.[43] Other Progressives put less emphasis on direct democracy and more on reconstructing the parties themselves. Thus, Progressive constitutional reformers also looked to create a more programmatic and responsible party system, shifting to administrative agencies the parties' coordination, patronage, and welfare functions, and making the parties accountable for hammering out policy.[44] All these innovations seemed better vehicles for popular self-rule, as well as radical social reform, than the inherited party machinery, which seemed unaccountable, boss-ridden and dominated by corporate elites.

And all of them were radical in their attacks on the Constitution's traditional guardians, which returns us to Kramer and his assault on judicial supremacy. The tenor of Kramer's attack is strikingly similar to that of Croly's, whose popular books and articles offered the most sustained and widely read Progressive constitutional briefs for dethroning what he called the "monarchy of the Law and the aristocracy of the robe."[45] Croly's central trope was the same as Kramer's: the Court was an authoritarian parent. A mature democracy must topple this parental authority and the very idea that judge-made constitutional law was the "fixed and stable element of government."

42. Reflecting on the nation's experiences between 1890s and 1914, the Ohio-based Progressive Frederick Howe wrote, "The initiative, . . . referendum, and recall have carried democracy still further and made the city the most democratic instrument in America and in many ways the most democratic agency in the world." Referenda "lead to constant discussion, to a deeper interest in government, and to a psychological conviction that a government is in effect the people themselves." KEVIN MATTSON, CREATING A DEMOCRATIC PUBLIC: THE STRUGGLE FOR URBAN PARTICIPATORY DEMOCRACY DURING THE PROGRESSIVE ERA 40 (1998) (quoting FREDERIC HOWE, THE CONFESSIONS OF A REFORMER 181 (Quadrangle Books 1967) (1925)).

43. Today one has to look at the work of high theorists like Jurgen Habermas to find thinkers still engaged with the problem of democratic opinion- and will-formation. *See* William E. Forbath, *Habermas's Constitution*: *A History, Guide, and Critique*, 23 LAW & SOC. INQUIRY 969 (1998) (reviewing JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (1996)). But in the Progressive era, the problem was the stuff of mainstream politics and popular thinkers.

44. *See, e.g.*, FRANK J. GOODNOW, POLITICS AND ADMINISTRATION (1900).

45. CROLY, PROGRESSIVE DEMOCRACY, *supra* note 41, at 215.

The Framers, Croly readily acknowledged, "were not seeking to establish a system of popular political education."[46] But the "monarchy of the Constitution" proved "educational in spite of itself."[47] With its assistance the "American people were learning quite as much from their own unofficial experiments in democracy as they were from instruction in the Word" of the law.[48] Broader literacy, participation in party politics, and local self-government suggested an "increasing political maturity."[49] Now, the People must assume for themselves "the duty of thinking over their political system," their basic principles, and their "fundamental political problems."[50] "Progressive democracy must reject the finality of [the] . . . formulations" of "states rights" and "individual rights" offered up by the courts.[51] The practice of applying the ideals of constitutional liberty and equality to challenged laws and institutional arrangements "would always be binding and liberating."[52] The problem was bowing to the "monarchy of the Law," rather than relying strictly on citizens' own self-reflective deliberations and self-imposed constraints.

In contrast to a Herbert Croly's, however, Kramer's brand of popular constitutionalism is notably insouciant about the democratic bona fides of the "democratic branches" and "electoral process" to which he entrusts the tasks of popular constitutionalism. Yet, arguably, the problem of creating democratic publics and democratic vehicles for public opinion- and will-formation—of anchoring what we now call "deliberative democracy" in institutions and practices of popular rule and participation—is as acute as it was when Croly and his generation of Progressive popular constitutionalists addressed it so arduously. Or more so, for as World War I brought the Progressive Era to an end, it also destroyed the intellectual climate that helped sustain and guide all the vibrant Progressive experiments in creating democratic publics—the cultural undergirding of the Progressive's "direct democracy" reforms. The war saw the creation of massive propaganda machinery by the federal government in collaboration with the emerging advertising industry. In the '20s both experiences—war-time propaganda and burgeoning "modern" advertising—inspired thinkers like Walter Lippman to forge a new conception of modern, urban publics—as manipulable, irrational, "emotional" vessels for opinions "manufactured" for them

46. *Id.* at 145.
47. *Id.* at 146.
48. *Id.* at 146–47.
49. *Id.* at 144.
50. *Id.* at 150.
51. *Id.* at 240.
52. *Id.* at 209.

by media and political technicians.[53] Thus, the idea of "public opinion" underwent a sea change. From meaning the considered views of the citizenry, which must guide and constrain state policy and constitutional development, and from being a project of progressive reformers, intellectuals and activists, "public opinion" became the product of new professionals and new techniques: advertising, polling, mass media. And the pre-war Progressive ideas about democratic citizenship and popular rule came to seem hopelessly naïve.

D. "The American people, . . . the final interpreters of the Constitution": What Did the People Decide?

So, to judge by the standards and experience of his chosen twentieth-century forebears,[54] there may remain much in the way of democratic-constitutional renovation that is left unaddressed and even unnoticed in Kramer's historical account and prescriptive offerings. But what about the historical claim with which we began? When matters came to a head did the People choose popular constitutionalism? As I have noted, the Progressives' brand of popular constitutionalism won many important local, city, and state-wide battles. But the quintessential national expression of this vision was Roosevelt's 1912 run for the presidency, and while Roosevelt did spectacularly well in comparison to most third-party presidential campaigns, Wilson won. And Wilsonian democracy, as Croly rightly observed, promised to accommodate and work inside the "existing constitutional system" and the "aristocracy of the robe," rather than, like Roosevelt and his new party, "to eradicate or seriously to alter" it.[55]

Like Roosevelt, both Wilson and Taft were fluent in American constitutional thought in ways unmatched by any other twentieth-century presidents. When the three of them contended for the White House in 1912, the issues were squarely on the table. And the voters did not choose the champion of popular constitutionalism. One cannot reduce all the complex and contingent, small and large popular constitutional choices of the era to one election. But I do think the 1912 election roughly encapsulates what happened. A thoroughgoing, programmatic vision of reforming modern America along popular constitutionalist lines was on the table. It won many local and state contests, but it lost in the national arena. Voters (overwhelmingly white males, to be sure) embraced it, but only up to a certain point. The

53. *See* WALTER LIPPMANN, PUBLIC OPINION (Transaction Publishers 1991) (1922).

54. *See* KRAMER, *supra* note 1, at 215–18.

55. CROLY, PROGRESSIVE DEMOCRACY, *supra* note 41, at 15, 22, 215.

(enfranchised) People (at least) do not seem to have shared the Progressives' faith in "popular [constitutional] reasonableness" so far as to endorse a program bluntly aimed against "judicial finality." When matters came to a head, at the national level, the voters chose reform but also continuity with the "existing constitutional system." For its part, the Court took careful note of the constitutional controversies of the election of 1912, and drew back from many of the most aggressive forms of Lochnerism. Judicial supremacy took on a Progressive tinge in this era, and not only endured but prospered.[56]

The choice of Wilson's reformed brand of constitutional conservatism over against Roosevelt's radical outlook can be seen as part of a longer pattern of conservative collective constitutional choices.[57] The critical presidential election of 1896 saw William Jennings Bryan rail at length against the Court's asserted usurpations of popular and legislative authority, and William McKinley, the overwhelming victor, stand up for the Court. In 1908, Bryan continued to rail against the Court, and the victorious Taft stoutly defended it. Thus, arguably, the popular discomfort with full-throated popular constitutionalism in 1912 was not a one-off affair.

III. POPULAR CONSTITUTIONALISM AND THE NEW DEAL

How, then, should we understand the New Deal? Surely, Kramer is right. When matters came to a head during the New Deal, didn't the People "[choose] popular constitutionalism over the view that the Constitution was subject to authoritative control by the judiciary"?[58] Not exactly. American voters in the thick of the Great Depression certainly chose Roosevelt's substantive views about the reach of Congress's powers as well as his recasting of basic rights to include decent wages and working conditions and social provision against the hazards of illness, unemployment, and old age. But about the Court-packing plan and a head-on confrontation with the Court's final authority over the Constitution, short of Article V amendment, Americans were decidedly ambivalent.

The New Deal Congresses saw bold proposals to undo judicial review, and these went nowhere. Nor did other popular-constitutional reforms of Progressive vintage—amending Article V, popular "recall" or revision of judicial decisions outside the rigors of Article V, congressional authority to reenact judicially voided legislation—find anything like the traction they

56. *See generally* William E. Forbath, *The White Court (1910–1921): A Progressive Court?*, *in* THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 172 (Christopher Tomlins ed., 2005).

57. I am indebted here to conversations with Keith Whittington.

58. KRAMER, *supra* note 1, at 209.

enjoyed a generation earlier. Leading Progressives declared that the road to an adequately powerful and competent and sufficiently democratic national government demanded serious constitutional reforms, including a structurally constrained judiciary. Leading New Dealers did not. Instead, their watchword was that the inherited constitutional order was fully adequate and amply democratic. The problem lay not in outmoded constitutional machinery but in the outmoded doctrines of a handful—a "one-man majority"—of conservative judges. Topple the doctrines and you will save the Constitution from the Court and the Court from itself. This formulation allowed for a continued commitment to judicial finality. It avoided any Progressive heresies like the notion that "permanent expert administration" should replace "[a] permanent body of constitutional law" as the fixed and stable element of government.[59]

Roosevelt's famously experimental mindset extended to matters of constitutional design—not only in respect of judicial review, but regarding other inter-branch relations as well. But like the Court-packing plan, FDR's proposal for bold executive branch reorganization foundered in Congress. Likewise, Congress rejected the administration's vision of an autonomous administrative state apparatus, set free from legalistic decision-making and heavy-handed judicial oversight. In both instances, I think, Congress's (self-regarding) constitutional conservatism was probably a better barometer of popular sentiment. The New Dealers, after all, were building the nation's first European-looking national bureaucracies at a time when several of Europe's great national bureaucracies had become instruments of fascism and Stalin's bureaucrats reigned in Russia. Not surprisingly, the conservative counter-reformation in Congress—waged in the name of judicial authority and the "rule of Law"—enjoyed much popular support.[60] As always, Progressive-minded reformers and state-builders lamented: Americans are great believers in tinkering, natural experimentalists; yet, they seem resistant to large-scale experiments in the machinery of government and mistrustful of their own collective enthusiasms when it comes to bold new designs for the uses of central state power. The People's yen for tinkering so often has stopped at the Constitution, even when Progress demanded otherwise.

Consider also the changed status of rights in New Deal versus Progressive era reform discourse. For Progressives, rights seemed destined to

59. CROLY, PROGRESSIVE DEMOCRACY, *supra* note 41, at 358.

60. *See* MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 230–33 (1992); WILLIAM E. FORBATH, *The Long Life of Liberal America: Law and State-Building in the U.S. and the U.K.*, LAW & HIST. REV. (forthcoming 2006), *available at* http://ssrn.com/abstract=738564.

ossify into impediments to practical change. Constitutional rights talk was exactly what the laissez-faire jurists insisted: a limit on the democracy's capacity to reconstruct its social environment by redistributive means. Only after witnessing war-time and post-war repression of radicals at the hands of the newly expanded federal government did the great Progressive public philosopher John Dewey have a good word to say for rights.[61] Rights were not only impediments to democracy; they also were a necessary condition of it. And courts—and unduckable judicial authority—sometimes were essential for vindicating democratic rights. It all depended. But the growing prominence of liberal and progressive rights-based organizations like the ACLU and NAACP combined with the rise of fascism and Stalinism and their loud scorn for rights talk to confirm both popular and elite reform opinion in the view that there was a baby in the bathwater of a "permanent body of constitutional law."

Southern white Progressives, like Wilson, were entirely comfortable with Jim Crow and black disenfranchisement. Indeed, they saw these developments as a necessary basis for social reform because they deprived Southern conservatives and reactionaries of the race card. For their part, the majority of Northern white Progressives concurred, nursing a callous and bigoted notion of evolutionary "racial progress" that deferred equal citizenship for blacks to an indefinite future. Indifference to the claims of racial equality helped cement white Progressives' indifference to the "democratic resources of rights, 'higher law,' and judicial authority."[62] This too had substantially changed by the New Deal.

Many factors—the struggle against Nazism abroad; the growing importance of the Northern black vote at home; the compelling vision of an enfranchised Southern black citizenry to oust the conservative Southern Dixiecrats, who stood in the way of completing New Deal reforms in Congress; and the centrality of black workers in the new industrial unions that were the organizational backbone of countless New Deal election campaigns—combined to make local, state, and national reform opinion, leadership, and organizations vastly more attuned to the claims of racial equality and other minority rights in the '30s and '40s. In sharp contrast to the Progressive Era, African-Americans no longer were alone among reformist voices in congressional hearings and public debate when they stood against broad jurisdiction-stripping and other court-curbing measures in Congress and state legislatures.

61. *See* William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1, 53 (1999).
62. *Id.* at 55–56.

To the contrary, even as they called for an end to judicial supremacy in the sphere of economic regulation and redistribution, key New Dealers in Congress were reaffirming judicial supremacy in the domain of free speech, free press, criminal justice, and other non-economic rights inscribed in the Bill of Rights, as well as in the safeguarding of constitutional equality and voting rights on behalf of racial, ethnic, and religious minorities. The allocation of interpretive and enforcement authority sketched in *Carolene Products* footnote four,[63] in other words, did not spring forth from a Court intent on reinventing its supremacist mantle. Instead, among the branches of government, the idea first arose in Congress, Kramer's key organ of popular constitutionalism. Take the congressional New Deal constitutionalists who insisted most eloquently that the Constitution was a "statesman's document," whose general "abstract phrases" were best "interpreted in the legislative laboratory where and when the statute [was] being made," when it came to legislation securing Americans' economic well-being.[64] These same New Dealers also insisted that courts should continue to enjoy final authority over "the validity of acts relating to . . . the [Bill of Rights'] prohibitions" respecting the non-economic areas just mentioned. Likewise, many observed that "[t]he great and serious objection to any change in [judicially defined] 'due process' is that it has been a bulwark against the infringement of civil liberties by both Congress and the State legislatures"; the Fourteenth Amendment too, "in judicial hands," has proved "useful in stemming the tides of prejudice manifested in . . . legislation."[65]

Now set this judicial-finality-protecting liberal New Dealer outlook alongside that of the conservative and reactionary popular constitutionalists in the New Deal Congresses, whom we glimpsed in Part I, those who lamented the demise of judicial enforcement of *Lochner*-era property and contract and states' rights. And you will be hard-pressed to find many voices of popular constitutionalism who were not simultaneously firm believers in the indispensability of judicial finality in respect of some important set of rights, which they deemed essential preconditions to their conception of popular self-rule or constitutional democracy. The basic agreement on some version of judicial finality across the liberal-conservative divide, which Kramer bemoans as a late twentieth century development, arose many decades earlier. On both sides, I think, the popu-

63. United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938).

64. 79 CONG. REC. 13,910 (1935) (statement of Rep. Lewis). For more extensive congressional constitutional language, see Forbath, *supra* note 21.

65. Forbath, *supra* note 21, at 180 (citations omitted).

lar association between firm, unduckable, law-like constitutional guarantees and judicial finality was too strong and too durable for a full-bore theory of popular constitutionalism like Kramer's to find cultural traction.

CONCLUSION: POPULAR CONSTITUTIONALISM TODAY

Popular constitutionalism has all but expired, according to Kramer. Post-New Deal America, he writes, saw the beginning of its demise, as liberals applauded the increasingly imperial claims of interpretive authority by the Warren and Burger Courts; and by the 1980s, conservatives and liberals alike were kowtowing to judicial supremacy. In fact, I think, popular constitutionalism continued to flourish during the second half of the twentieth century. Social movements, lawmakers, and party pols continued to make claims on the Constitution and to press those claims in many arenas outside the courts: on the streets, in public discourse and debate, in the halls of Congress, in the making of new civil rights laws, and in fights over judicial appointments. For their part, the courts often accommodated these claims, even when they clashed sharply with received doctrine.

The Progressive Era, we have seen, witnessed the last serious efforts to reallocate interpretive authority root and branch, and to give institutional form and substance to the principle of popular, democratic control over constitutional law. These efforts fell short. Progressive democracy, as Croly and Roosevelt envisioned it, proved less popular than what Croly described as Wilson's half-way Progressivism "pos[ing] as a higher conservatism" on behalf of "the traditional constitutional system."[66] When social and economic reform returned to the national agenda during the New Deal, reformers no longer demanded an end to judicial finality but only to judicial overreaching. World War I experience under Wilson had shown how far existing constitutional arrangements could be made to accommodate a vast expansion of national regulation and administrative state building. And the very rise of a big national administrative state combined with the deep-grained anti-statism of much of America to make it a bad moment to renew Progressive calls for wholesale abolition of the "legal Constitution" and of judicial review.

Instead, New Dealers declared, what demanded change was the conservative majority's doctrines and its brand of constitutional review—whether through amendment, Court-packing, or, in the event, the appointment of a sequence of staunchly New Deal Justices. This marked the beginnings of the melding of appointment politics with popular

66. CROLY, PROGRESSIVE DEMOCRACY, *supra* note 41, at 15, 20.

constitutionalism—a meld Kramer identifies with our present parlous state. And on his account, post-New Deal America sees the decline of popular constitutionalism and the beginnings of a half-century of mounting judicial supremacy. But here his elegant narrative narrows to an intellectual history of how popular constitutionalism fared in Ivy League law schools. As it hurtles toward the present, it leaves out what was happening in the polity, the Congress, the state houses, and the streets.

Thus, Kramer highlights liberals' conversion to judicial supremacy with *Brown v. Board* but largely leaves out the reactions to *Brown* in Congress and in Southern polities.[67] There, of course, "massive resistance" took the form of burgeoning popular constitutionalism in the name of white supremacy and states' rights, articulated by Senators and Congressmen, as well as governors and state legislators. This brought on an era of clashing constitutional visions in the streets, churches, lunch counters, and state houses of the South, and of vigorous constitutional debate and liberal constitutional innovation in Congress, as Congress enacted the great civil rights statutes of the '60s.[68] Liberal popular constitutional ferment in the '60s and '70s also found expression in the women's rights movement, which, once more, shaped popular, public, and congressional constitutional interpretation in ways that departed from received doctrine. Both as regards the scope of Congress's power to reach private discrimination and as regards the reach of the 14th Amendment in respect of sex discrimination on the part of government, it is impossible to understand the evolution of constitutional law in the courts apart from the development of new liberal constitutional understandings and commitments in the culture at large: the fruits of popular constitutionalism.[69] The fact that the Court chose to accommodate rather than stoutly resist these developments does not alter their origins. Had the matter been left to the courts and the pathway of litigation, in the absence of popular constitutional ferment on behalf of a new (re)vision of the nation that the Constitution exists to promote and redeem, the outcomes would have been dramatically different.

Meanwhile, conservatives took a leaf from FDR: they made judicial appointments a critical arena for pressing their vision of constitutional law.

67. *See generally* KRAMER, *supra* note 1, at 220–26.

68. *See generally* LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS (2000); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

69. *See* Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J.1943 (2003); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimel, 110 YALE L.J. 441 (2000).

Richard Nixon made his 1968 presidential campaign a battle against the Warren Court's criminal procedure and school prayer decisions. Later Republican hopefuls ran against bussing and abortion decisions; and the Democrats, of course, followed suit on behalf of abortion rights. And so on, and so on. In the process, party politics and electoral campaigns have become much like what they were for Kramer's hero, Martin Van Buren: vehicles for translating votes and vision into law. Yet, somewhat formalistically, Kramer overlooks this parallel. Instead, all he sees in the tumultuous politics of judicial appointments is the final triumph of judicial supremacy. We fight about appointments, he claims, because we no longer think we have the power or authority to fight about anything else. We think appointments are "all there is" to popular involvement in constitutional law. This seems to me a wildly truncated picture of the constitutional beliefs and practices of right-wing America today. Direct action; civil disobedience; popular education and agitation on the campaign trail and in the pulpits, the airwaves, the internet, the schools, and universities; jurisdiction-stripping initiatives; legislative measures openly flouting judge-made law—all of these old and new modes of popular constitutionalism and dozens more thrive and mingle with the conservative constitutional politics of judicial appointments. In none of them do right-wing lawmakers and citizens seem to believe what Kramer ascribes to them: that the judiciary has final authority to tell ordinary Americans what the Constitution means.

Liberals are more subdued. They defend the threatened legacies of constitutional politics past, embodied in statute and doctrine. Liberal and left constitutional politics these days are defensive, however, not because they are in thrall to judicial supremacy, but because left and liberal Americans are without a substantive politics that inspires citizens to action on behalf of a left-liberal vision of the rights of citizens and the duties of government, and of the nation the Constitution exists to promote and redeem in the twenty-first century. Those of us who hope to see such a politics emerge may do well to emulate the Progressives: not in any of their particular reform pursuits, nor in their calls for wholesale abolition of the "legal Constitution," but in their efforts to wed popular involvement in constitutional development to new forms of political and economic association and accountability in which new democratic publics may prosper, and progressive popular constitutionalism finds a voice. I do not think Kramer would demur. When such a politics arrives, I would wager that the deep and fruitful tension between popular constitutionalism and judicial finality will remain. The People Themselves will continue to keep their options open.