

## POPULAR CONSTITUTIONALISM AS PRESIDENTIAL CONSTITUTIONALISM?

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In this essay I would like to make three points. First, although Larry Kramer makes “popular constitutionalism” the conceptual centerpiece of the book that occasioned this symposium,<sup>1</sup> it is not at all clear what popular constitutionalism is. I am going to suggest that Kramer’s work, both in *The People Themselves* and in his other writings, can be read to embody two very different versions of popular constitutionalism, which I will call the *populist sensibility model* and the *departmentalist model*. Second, no matter which of these two models Kramer has in mind, he has made a valuable contribution by reminding us from a historical perspective that the meaning of the Constitution is not now, and has never been, identical to the doctrines the Supreme Court uses to implement that meaning. Third, and most troubling, those who march under the loose banner of popular constitutionalism have said very little about the particular institutional mechanisms that would make their vision a reality in today’s world. In particular, I suggest, popular constitutionalism in 2006 may in practice mean presidential constitutionalism—an outcome that should give us cause for concern.

Before continuing, I must issue a disclaimer: I am not a legal historian. Because this symposium features contributions from Morton Horowitz, Jack Rakove, and many other preeminent legal historians, I will largely leave it to others to comment on Kramer’s historical claims and methods.

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

Instead, I want to discuss what his core idea of popular constitutionalism might mean for us today, as law professors, as lawyers, and as citizens.

Having made that disclaimer, let me say that even a careful reader can come away from *The People Themselves* without a firm idea of what its author means by the concept that forms his central theme. Popular constitutionalism, as Kramer describes it in the historical section that occupies most of the book, is a moving target.<sup>2</sup> In the eighteenth century, he says, it was characterized by direct and often spontaneous popular action such as mobbing, civil disobedience, and jury nullification.<sup>3</sup> By 1803, when Chief Justice John Marshall decided *Marbury v. Madison*, popular constitutionalism had morphed into what we could call interpretive departmentalism, a system in which “courts had the same duty and the same obligation to enforce the Constitution as everyone else, both in and out of government.”<sup>4</sup> By around 1830, Kramer concedes, interpretive departmentalism had largely given way to judicial supremacy—so much so that even a formerly staunch departmentalist like James Madison was willing to state publicly that the federal courts should enjoy the last word on constitutional questions, at least on questions of federalism.<sup>5</sup> In short, Kramer’s story—which essentially ends in the 1840s if we put to one side the final chapter’s dizzying time-lapse sequence that covers the past century and a half of constitutional development in less than twenty pages<sup>6</sup>—is the story of the rise of judicial review and, eventually, judicial supremacy. Yet, puzzlingly, Kramer insists that in the battle between popular constitutionalism and judicial supremacy, “[w]hat is certain is that popular constitutionalism was the clear victor each time matters came to a head.”<sup>7</sup>

What, then, is the present-day content of this “popular constitutionalism” that emerges, constantly embattled yet ultimately triumphant, from Kramer’s narrative? This turns out to be a surprisingly difficult question to answer.

Some of Kramer’s writings, both in *The People Themselves* and elsewhere, suggest that he has in mind a rather modest form of present-day

2. Some of the book’s reviewers have expressed the same concern, so I will not dwell for too long on it here. See, e.g., Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (book review).

3. KRAMER, *supra* note 1, at 3–5 (offering “snapshot” examples from the 1790s of each of these phenomena).

4. *Id.* at 127.

5. *Id.* at 187 (“[I]n both rhetoric and emphasis, Madison had elevated the courts’ role considerably above what he had been prepared to concede in 1800.”).

6. *Id.* at 207–26.

7. *Id.* at 207.

popular constitutionalism—a populist sensibility model.<sup>8</sup> The populist sensibility model is willing to accommodate judicial supremacy, at least on certain issues, but refuses to tolerate what Kramer calls “judicial sovereignty.”<sup>9</sup> A commitment to popular constitutionalism under this view entails primarily a change in attitude. Lawyers, politicians, and, above all, engaged citizens ought to stop viewing “democratic politics as scary and threatening.”<sup>10</sup> They should stop interpreting “the Constitution in exclusively counter-majoritarian terms.”<sup>11</sup> And, most of all, they should stop thinking of the Court as their infallible constitutional taskmaster.<sup>12</sup> Reciprocally, Supreme Court Justices should pay greater attention to the people’s judgments and show more modesty about their own interpretive role.<sup>13</sup> On this model, popular constitutionalism is not a specific program or institutional arrangement. It is, rather, a tonic: a much-needed reminder for people to quit acting as if the Court had a monopoly on constitutional meaning.

Even if this unassuming model of popular constitutionalism is all Kramer has in mind, he has performed a valuable service by providing a historical narrative to reinforce the critique that is increasingly, and rightly, leveled at the current Supreme Court—namely, that the Court too often conflates the Constitution’s actual meaning with the lawyers’ doctrines that the Court uses to decide constitutional cases. This is a category mistake, one that the Rehnquist Court committed in a particularly troubling way in cases involving Section 5 of the Fourteenth Amendment and the Interstate Commerce Clause<sup>14</sup>—although the Court seemed to recognize the error of its ways in Chief Justice Rehnquist’s final few terms.<sup>15</sup> For example, the

8. I have adapted the name for this model from one of the subchapter headings in Kramer’s final chapter: “A Matter of Sensibility.” *Id.* at 241 (quoting RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 4 (1994)).

9. See Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 163 (2001) [hereinafter Kramer, *We the Court*] (“There is a place for judicial supremacy, but it has bounds. There is no place for the totalizing claims of judicial sovereignty.”). Kramer’s Foreword sets forth an earlier version of the argument made at greater length in *The People Themselves*.

10. KRAMER, *supra* note 1, at 242.

11. *Id.*

12. In this regard, Kramer quotes a revealing comment from a New York Times article describing the results of a recently completed Supreme Court Term as “a report card on the elected branches.” *Id.* at 244 (quoting *Supreme Court Term: Beyond Bush v. Gore*, N.Y. TIMES, July 2, 2001, at A1).

13. See *id.* at 253 (arguing that Supreme Court Justices should adjust their “attitudes and self-conception” so as to recognize that the people are “a higher authority out there with power to overturn their decisions”).

14. See *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *United States v. Lopez*, 514 U.S. 549 (1995).

15. See *Gonzales v. Raich*, 125 S. Ct. 2195 (2005); *Tenn. v. Lane*, 541 U.S. 509 (2004); *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003).

Court sometimes forgets that rational basis review is a lens through which the judiciary, for reasons of institutional capacity, views the work of the political branches, rather than a statement of what the Constitution actually means.<sup>16</sup> To be sure, this is not an earthshaking insight—in his Harvard Law Review Foreword from a few years ago, Kramer calls it “freshman stuff”<sup>17</sup>—and plenty of scholars from James Bradley Thayer to Lawrence Sager to Kermit Roosevelt have fleshed out this critique in useful ways.<sup>18</sup> What Kramer gives us is a historical narrative to help explain how the general public has come to buy into this category mistake.

Building on this critique of the current Court, two further observations should be made that are of special interest for the would-be popular constitutionalist. First, it is important not to oversell the specter of judicial sovereignty. Although the Court has claimed interpretive exclusivity over a few important domains of constitutional law,<sup>19</sup> most areas of public decision-making remain almost wholly within the control of the politically accountable branches. Thanks to doctrines of deference, judicially under-enforced constitutional norms,<sup>20</sup> and self-imposed limits on justiciability, we can be reasonably certain that even our imperial Court will not second-guess any of the following:

16. Kramer accurately describes the constitutional settlement that lasted from 1937 until around 1995 and that subjected most legislation to minimal judicial scrutiny:

The critical thing to understand about rational basis scrutiny is that it was a rule of judicial restraint, not substantive constitutional law. It did not mean that laws were constitutional if they were rational. Rather, the decision whether a particular law was constitutional was made by the legislature, with the Court’s power of review limited to questioning the legislature’s determination only in the rare case where Congress could not be said to have had a “rational basis” for what it did. By using this device, the Court ceded a quite substantial area of constitutional authority to political officials.

KRAMER, *supra* note 1, at 219.

17. Kramer, *We the Court*, *supra* note 9, at 146–47.

18. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 190 (1988); Richard H. Fallon, Jr., *The Supreme Court, 1996 Term—Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857 (1999); 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); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

19. See *Garrett*, 531 U.S. 356; *Morrison*, 529 U.S. 598; *Kimel*, 528 U.S. 62; *Fla. Prepaid*, 527 U.S. 627; *Flores*, 521 U.S. 507; *Lopez*, 514 U.S. 549.

20. See Sager, *supra* note 18, at 1213.

- the invidiousness *vel non* of the huge majority of statutes that classify people other than by race, gender, or a few other suspect criteria;<sup>21</sup>
- the public-regardingness *vel non* of the huge category of statutes that regulate the economy and social welfare;<sup>22</sup>
- the scope and application of the Necessary and Proper Clause in most contexts;<sup>23</sup>
- the scope of the “General Welfare Clause” that authorizes federal taxing and spending laws;<sup>24</sup>
- the tightness of the fit between conditional exercises of the federal spending power and the conditions imposed;<sup>25</sup>
- Congress’s power to delegate broad lawmaking authority to others outside the legislative branch;<sup>26</sup>
- most issues concerning the allocation of war-making,<sup>27</sup> foreign affairs,<sup>28</sup> and treaty-making<sup>29</sup> powers;
- the exercise of the pardon power, the veto power, and prosecutorial discretion;<sup>30</sup>
- the conduct of the impeachment process.<sup>31</sup>

And obviously the list could go on from there. Kramer is right to be concerned about judicial self-aggrandizement, but as the foregoing list suggests, the sky is not falling yet.

A second cautionary observation follows from the first. Once we accept, with Kramer and others, that the Constitution’s own requirements are

21. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 314–15 (1993) (“On rational-basis review, a classification in a statute . . . comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden to negate every conceivable basis which might support it. . . . [L]egislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.”) (citations omitted).

22. See, e.g., *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (“It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.”).

23. See, e.g., *Gonzales v. Raich*, 125 S. Ct. 2195, 2115–20 (2005) (Scalia, J., concurring).

24. See, e.g., *South Dakota v. Dole*, 483 U.S. 203, 208 (1987) (“[T]he concept of welfare or the opposite is shaped by Congress.”) (citation omitted).

25. See, e.g., *Sabri v. United States*, 541 U.S. 600 (2004).

26. See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474–75 (2001) (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’”) (citation omitted).

27. See, e.g., *Doe v. Bush*, 323 F.3d 133 (1st Cir. 2003) (dismissing constitutional challenge to war in Iraq).

28. See, e.g., *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103 (1948).

29. See, e.g., *Goldwater v. Carter*, 444 U.S. 996 (1979) (plurality opinion).

30. See, e.g., *Linda R. S. v. Richard D.*, 410 U.S. 614 (1973).

31. See, e.g., *Nixon v. United States*, 506 U.S. 224 (1993).

different from and broader than the doctrinal tests the Court uses to decide constitutional cases, we must also accept that there are *a lot more constitutional questions out there* than we as lawyers are accustomed to thinking about. To return to our earlier example, the best understanding of the actual meaning of the Due Process Clause—and, for that matter, the General Welfare Clause—may well be that legislation must pursue public rather than merely private interests.<sup>32</sup> This is true notwithstanding the fact that, since 1937, the Supreme Court has chosen as a matter of judicial doctrine to defer to legislatures regarding most social and economic legislation, reviewing it only for minimal rationality. In a world of popular constitutionalism, whenever Congress regulates or appropriates—and, by extension, in many instances in which the Executive Branch enforces federal statutes or spends public money—those public actors are called upon to make *constitutional* judgments: Does this legislation serve the public interest? Does it promote the general welfare? Does it classify people for good enough reasons?

Kramer insists that the Constitution is not ordinary law, that constitutional questions should not be reduced to mere exercises in lawyers' reasoning.<sup>33</sup> My point here is that the converse is also true—on the popular constitutionalist understanding, many things we are used to thinking of as questions of ordinary law or policy turn out to be constitutional questions. This means that popular constitutionalism, even within the relatively modest populist sensibility model, places a heavy responsibility on the people and the popular branches of government to develop, articulate, and carry out their own constitutional visions. Moreover, this responsibility rests on the people all the time: in Kramer's account, unlike Bruce Ackerman's,<sup>34</sup> there is no "dualist" separation between ordinary politics and constitutional politics.<sup>35</sup> In my view, Kramer is too quick to reject Ackerman-style dualism, for there are advantages to marking out the realm of constitutional decision-making as something distinct from the background noise of political bargaining. We should require the people to speak loud and long before

32. Cf. CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* (1993).

33. Kramer, *We the Court*, *supra* note 9, at 14 ("The last, faint traces of popular constitutionalism are fading, threatened by a Court that truly sees the Constitution as nothing more than ordinary law.").

34. 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

35. KRAMER, *supra* note 1, at 197 (seemingly rejecting Ackerman's dualist approach by remarking that his "distinction between 'normal' and 'higher' politics would have struck a Jacksonian as bizarre and anti-republican: exactly the sort of ploy aristocrats were always inventing to divest the people themselves of authority").

we deem them to have spoken with a constitutional voice.<sup>36</sup> After all, if everything is constitutional politics, then everything is ordinary politics.<sup>37</sup>

I suspect, moreover, that Kramer is aiming for more than the populist sensibility model. At the end of the day, he rejects the notion of giving the Supreme Court the final word in constitutional interpretation. The Epilogue to *The People Themselves* is entitled “Judicial Review Without Judicial Supremacy.”<sup>38</sup> Kramer wants the people to do more than simply adjust their attitudes or feel more entitled to critique the Court. He wants them—us—to be in charge of what the Constitution means. “The Supreme Court is not the highest authority in the land on constitutional law,” he writes. “We are.”<sup>39</sup>

How, exactly, are we supposed to exercise this authority? It can't be through direct action such as mobbing or jury nullification. The eighteenth-century manifestations of popular constitutionalism that seem so dear to Kramer, however crucial they may have been in framing the Framing, no longer have the central role they once had. To be sure, “the people” still get mobilized to some degree on Election Day, periodically in demonstrations about controversial issues, and even occasionally in violent protests.<sup>40</sup> And perhaps modern technologies such as the Internet promise a new era of direct, decentralized popular mobilization around political (and, by extension, constitutional) issues. But it is safe to say that popular constitutionalism in 2006 cannot be primarily driven by what Kramer likes to call “the people out-of-doors.”<sup>41</sup> Politics, including constitutional politics, has become thoroughly domesticated, mediated, and institutionalized, so that the role once played directly by the people is now played by elected representatives, national political parties, interest groups, and the media. In short, the people ain't what they used to be.

36. I ACKERMAN, *supra* note 34, at 6 (describing preconditions, including supermajorities and repeated electoral victories, for “higher lawmaking”).

37. I am grateful to Richard Primus for this formulation of the point.

38. KRAMER, *supra* note 1, at 249.

39. *Id.* at 248.

40. It would be interesting to know whether Kramer believes setting a car on fire in a Paris *banlieue* to express frustration at one's lack of full participation in the social and economic life of France counts as an act of popular constitutionalism. See, e.g., Craig S. Smith, *Angry Immigrants Embroil France in Wider Riots*, N.Y. TIMES, Nov. 5, 2005, at A1. Why shouldn't it?

41. See, e.g., KRAMER, *supra* note 1, at 35 (“[B]y the middle of the eighteenth century the orthodox view in England located sovereignty in Parliament rather than in the people out-of-doors.”); *id.* at 47 (“The men who led the campaign for a new Constitution were not fans of the people out-of-doors; they preferred a more sedate style of politics, safely controlled by gentlemen like themselves.”).

Kramer is fully aware of this.<sup>42</sup> That is why, rather than settling for the populist sensibility model or dreaming about a return to eighteenth-century direct action, he tends instead to advocate a *departmentalist model* of popular constitutionalism. We have already encountered the idea of departmentalism, an arrangement whereby each branch of the federal government enjoys not only independent interpretive authority but also independent power to transform its constitutional visions into reality.<sup>43</sup> This model is suggested by Kramer's rather ominous statement toward the end of the book:

The Constitution leaves room for countless political responses to an overly assertive Court: Justices can be impeached, the Court's budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures.<sup>44</sup>

(This observation has the tone of a mafia henchman's knuckle-cracking threat: *That's a nice Supreme Court you got there. It would be a shame if anything were to, you know . . . happen to it.*)

Departmentalism is subject to many objections, which have been amply registered in other places.<sup>45</sup> My purpose here, as someone who is broadly sympathetic to the departmentalist project, is to pose a simple question: Whom do we trust to speak for the people in constitutional matters?

Any attempt to assess the capacity of any person or institution to speak for "the people" in constitutional matters is plagued by both an evidentiary problem and a baseline problem. The evidentiary problem is that in order to judge how accurately an institution conveys the constitutional views of "the people," it is necessary first to measure those views in their "raw" form, and this is quite difficult to do.<sup>46</sup> The baseline problem is that

42. See, e.g., *id.* at 167–68 (documenting the rise of the party system in the 1840s and 1850s and concluding that, "[i]n short, politics moved indoors").

43. See, e.g., *id.* at 109 ("Within this new political culture [of the 1790s], the departmental theory made perfect sense. Each branch could express its views as issues came before it in the ordinary course of business: the legislature by enacting laws, the executive by vetoing them, the judiciary by reviewing them. But none of the branches' views were final or authoritative. They were the actions of regulated entities striving to follow the law that governed them, subject to ongoing supervision by their common superior, the people themselves.").

44. *Id.* at 249. See also *id.* at 252 (describing the book's project as posing "the choice between a system of judicial supremacy and one based on departmental or coordinate construction").

45. See, e.g., Alexander & Solum, *supra* note 2, at 1609–15 (critiquing as unworkable both "divided" and "overlapping" departmentalism); Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 (1997) (defending judicial supremacy largely on the basis of the Court's superior ability to bring final settlement to issues on which various government actors may disagree).

46. Some would argue that "the people" are too ignorant about our Constitution to have well-considered views concerning its meaning. An oft-cited 1997 survey, for example, indicated that only



nonjudicial actors almost certainly perform quite differently under our present regime of judicial supremacy than they would in a system that lacked what Mark Tushnet has called the “judicial overhang.”<sup>47</sup> But even acknowledging these difficulties, it seems possible to reach tentative conclusions about an institution’s capacity for engaging in popular constitutionalism by examining the deliberativeness and transparency with which it approaches constitutional issues and the reasonableness of its resultant positions on those issues.<sup>48</sup>

*The People Themselves*, somewhat surprisingly, does not answer—or even pose—the question of which institutions are well-equipped to speak for the people today.<sup>49</sup> We can get some hints, however, by looking at Kramer’s other writings. For instance, he has forcefully argued that when it comes to questions of constitutional federalism, the national political parties have taken over the equilibrating function once played, in Herbert Wechsler’s famous account, by structural mechanisms like the Electoral College and the pre-17th Amendment Senate.<sup>50</sup> Perhaps, then, we can trust the parties to speak for the people more generally on constitutional questions.

I am skeptical about this proposition for several reasons, including the simple fact that party leaders and elected representatives do not get much attention or credit for addressing constitutional issues as such, and thus do

19% of Americans know when the Constitution was drafted; 85% believe the Constitution states that “all men are equal”; 42% do not know that the federal government has three branches; a majority thinks the President is directly elected; a majority does not know that there are 100 Senators; and 42% believe the Constitution establishes English as the official language. National Constitution Center, Startling Lack of Constitutional Knowledge Revealed in First-Ever National Poll, <http://www.constitutioncenter.org/CitizenAction/CivicResearchResults/NCCNationalPoll/index.shtml> (last visited Mar. 16, 2006). Although survey results like these do suggest the need for constitutional education of the kind proposed by Sheldon Nahmod in this volume, I do not think the popular constitutionalist has to view them as cause for despair. On a wide range of basic constitutional questions—Should Congress have the power to protect endangered species? Should individuals have a right to possess assault weapons? Should affirmative action, or abortion, or dog sniffs at checkpoints, be lawful?—the general populace does have opinions, even if they are difficult to measure.

47. See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 58–60 (1999).

48. Cf. Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, in *CONGRESS AND THE CONSTITUTION* 269, 269–92 (Neal Devins & Keith E. Whittington eds., 2005).

49. The book’s failure to address this question has not gone unnoticed. See L. A. Powe, Jr., *Are “the People” Missing in Action (and Should Anyone Care)?*, 83 *TEX. L. REV.* 855, 891–92 (2005) (book review) (“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, Richard Nixon, and Al Gore, to offer three disparate examples—really are doing that.”) (footnotes omitted).

50. See Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 *COLUM. L. REV.* 215 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954).

not have much of an incentive to spend time and resources doing so. Another reason is ideological polarization, exacerbated by an increasingly aggressive and fine-tuned practice of drawing electoral districts for partisan advantage.<sup>51</sup> As more and more representatives are remapped into “safe seats,” the locus of political competition shifts from the general election to the primary, reinforcing the power of ideologically extreme players in both parties and leaving the median voter increasingly out in the cold.<sup>52</sup> While novel and interesting constitutional understandings might well emerge from a system in which representatives choose their constituents rather than vice versa,<sup>53</sup> those understandings seem unlikely to be truly “popular” in the sense of representing the broad swath of public opinion.

Partisan gerrymandering is itself unconstitutional, on any sensible popular constitutionalist understanding.<sup>54</sup> Can we expect a popular constitutionalist solution to the problem? The conventional, and probably correct, answer is, Don’t hold your breath. As several observers have pointed out, this is one area in which the political system is not likely to be self-correcting, suggesting the need for judicial intervention.<sup>55</sup> Indeed, partisan gerrymandering would seem to be the paradigmatic example of a problem that the popular branches of government cannot be trusted to solve because they benefit from the very system they would be called upon to reform. Tellingly, when California governor Arnold Schwarzenegger attempted in 2005 to shift redistricting authority from legislators to a panel of retired judges, his proposal was soundly defeated by the voters in a popular initiative.<sup>56</sup> If Schwarzenegger, who is viewed as relatively independent of the

51. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 570 (2004) (describing partisan gerrymandering as “a mechanism to frustrate the popular electoral will by rendering elected officials a self-perpetuating caste”).

52. See generally Samuel Issacharoff, *Collateral Damage: The Endangered Center in American Politics*, 46 WM. & MARY L. REV 415, 427–31 (2004).

53. Ironically, the Framers’ vision of bicameralism has now been turned on its head: where once Senators were chosen by state legislatures and members of the House of Representatives were chosen by the people, today Senators are chosen by the people while members of the House, thanks to partisan control over redistricting, are in effect chosen by state legislatures. See Issacharoff & Karlan, *supra* note 51, at 574.

54. Cf. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Despite a fragmented Court that produced five separate opinions and no majority opinion, all nine Justices agreed that excessive partisanship in redistricting is unconstitutional.

55. See, e.g., Issacharoff & Karlan, *supra* note 51, at 570–77; *id.* at 570 n.135 (citing numerous sources for the proposition that partisan redistricting has rendered many elections for legislative office noncompetitive); cf. *Davis v. Bandemer*, 478 U.S. 109, 126 (1986) (plurality opinion) (“It is not clear that political gerrymandering is a self-limiting enterprise . . .”).

56. See Elizabeth Mehren, *Ballot Measures Mostly Draw Scowls from Voters*, L.A. TIMES, Nov. 10, 2005, at A12. A similar ballot measure was defeated by voters in Ohio. See Sandy Theis, *Job Issue OK’d; Reform Measures Fail*, CLEVELAND PLAIN DEALER, Nov. 9, 2005, at A1. But see Sam Hirsch & Thomas E. Mann, *For Election Reform, a Heartening Defeat*, N.Y. TIMES, Nov. 11, 2005, at A23

two major parties,<sup>57</sup> is unable to push through such a proposal in the teeth of major-party opposition, it is highly unlikely that the ordinary political process will produce the needed reforms.<sup>58</sup> Unfortunately, the fractured opinions in the Supreme Court's recent partisan gerrymandering cases imply that judicial intervention won't be forthcoming anytime soon.<sup>59</sup>

The political parties as such are, in any event, not the most natural candidates for the role of tribune of popular constitutionalism in the twenty-first century. That distinction must surely belong to the President of the United States. The President is our only nationally elected official;<sup>60</sup> he enjoys unparalleled public attention and access to the media; and he has been, at least since the New Deal, the leader of his national political party, which during that time has usually been the dominant party in the country.<sup>61</sup> In short, the President is the closest thing we have to an embodiment of the national popular will.<sup>62</sup>

(applauding the defeat of the California and Ohio proposals on the grounds that they would have required mid-decade redistricting and did not contain fair and enforceable standards).

57. Cf. Elizabeth Garrett, *Democracy in the Wake of the California Recall*, 153 U. PA. L. REV. 239, 282 (2004) ("Schwarzenegger's personal fortune, his ability to raise money, and the tremendous amount of publicity that surrounds his every move provide credibility to his threat to go over the heads of state lawmakers.").

58. *But see* Richard L. Hasen, *Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After Vieth*, 3 ELECTION L.J. 626, 640–41 (2004) (arguing that the issue of partisan redistricting should be left to the political process).

59. In *Vieth v. Jubelirer*, 541 U.S. 267, 292, 316 (2004), a divided Court let stand an egregiously partisan redistricting plan in Pennsylvania, with three Justices (including the late Chief Justice Rehnquist and the now-retired Justice O'Connor) joining an opinion by Justice Scalia declaring partisan gerrymandering claims nonjusticiable under the political question doctrine, and Justice Kennedy writing a pivotal yet cryptic concurring opinion declaring such claims justiciable (though only barely) but effectively unwinable. "When all was said and done, the result of *Vieth* was that a majority of the Court had expressed unwillingness to entertain challenges to political gerrymanders under any as-yet articulated standard." Issacharoff & Karlan, *supra* note 51, at 564. This pattern persisted in *League of United Latin American Citizens v. Perry (LULAC)*, No. 05-204 (U.S. June 28, 2006), which involved a challenge to Texas's mid-decade partisan redistricting plan. *See id.*, slip op. at 7 (opinion of the Court) (declining to revisit the *Vieth* majority's justiciability holding); *id.*, slip op. at 7–14 (opinion of Kennedy, J.) (concluding once again that no workable test for unconstitutional partisan gerrymandering had been articulated). In *LULAC*, the two newest members of the Court, Chief Justice Roberts and Justice Alito, declined to reach the question of justiciability. *See id.*, slip op. at 1–2 (opinion of Roberts, C.J.).

60. Though, admittedly, not popularly elected.

61. *See* Mark Tushnet, *Controlling Executive Power in the War on Terrorism*, 118 HARV. L. REV. 2673, 2678–79 (2005). Cf. Powe, *supra* note 49, at 884–85 (giving examples showing how Republican and Democratic presidents and presidential candidates from Nixon onward have articulated competing constitutional visions for the country).

62. The idea that the President embodies the popular will—indeed, the entire notion that there exists an ascertainable "popular will"—has been powerfully criticized, particularly in the context of the debate in administrative law over the "unitary presidency." *See, e.g.,* Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI-KENT L. REV. 987 (1997) (arguing that the notion of a popular will, as advanced by advocates of strong presidentialism in administrative law, is neither descriptively useful nor normatively attractive); *see also* Jide Nzelibe, *The Fable of the Nationalist President and Parochial Congress*, 53 UCLA L. REV. (forthcoming June 2006) (showing that the President's constituency is more parochial than is widely believed). I take no position here on

Indeed, all of the heroes of popular constitutionalism in Kramer's historical narrative—with the lone exception of the Reconstruction Congresses—are Presidents: Jefferson, Jackson, Lincoln, Franklin D. Roosevelt. Kramer could have added Theodore Roosevelt, who famously claimed to act as “a steward of the people bound actively and affirmatively to do all he [can] for the people.”<sup>63</sup> Yet *The People Themselves* offers surprisingly few examples of actual constitutional interpretation undertaken by Presidents.<sup>64</sup> Likewise, most scholars who write about extrajudicial constitutional interpretation seem to focus their attention on the legislative branch.<sup>65</sup> The relative lack of attention to executive constitutionalism is especially surprising given that the Executive Branch, much more than Congress, contains institutional vehicles for careful and deliberative treatment of constitutional questions. To be sure, legislative committees, particularly the House and Senate Judiciary Committees, hold hearings on constitutional issues and stay abreast of the latest constitutional developments in the courts,<sup>66</sup> and staff agencies help members of Congress develop

whether the President in fact embodies a national “popular will”; for present purposes it is enough that no other person or institution is in a better position to claim to do so.

63. THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 389 (1913).

64. Most of these occur in the context of the veto power, a context that does not provide the best test of the executive role in a system of departmentalism for two reasons. First, the President in exercising the veto power acts not as an executive but as a *de facto* third branch of the legislature. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 76 (2005) (referring to the federal legislature as “tricameral because of the President’s veto power”). Second, and more important, the veto power, like the pardon power, has long been understood to lie within the sole and unreviewable discretion of the President. As such, a presidential veto—even if predicated on expressly constitutional grounds, as was Jackson’s bank veto in 1832—represents neither a distinctively executive nor a particularly daring challenge to judicial supremacy.

65. For examples, see the excellent contributions compiled in CONGRESS AND THE CONSTITUTION, *supra* note 48. There are, of course, exceptions to this generalization. For examples of thoughtful analyses of constitutional interpretation within the executive branch, see David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, L. & CONTEMP. PROBS., Winter/Spring 2000, at 61; Christopher L. Eisgruber, *The Most Competent Branches: A Response to Professor Paulsen*, 83 GEO. L.J. 347 (1994); Dawn E. Johnsen, *Functional Departmentalism and Nonjudicial Interpretation: Who Determines Constitutional Meaning?*, L. & CONTEMP. PROBS., Summer 2004, at 105; Gary Lawson & Christopher D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267 (1996); Sanford Levinson, *Constitutional Protestantism in Theory and Practice: Two Questions for Michael Stokes Paulsen and One for His Critics*, 83 GEO. L.J. 373 (1994); Geoffrey P. Miller, *The President’s Power of Interpretation: Implications of a Unified Theory of Constitutional Law*, L. & CONTEMP. PROBS., Autumn 1993, at 35; Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L.J. 217 (1994); Cornelia T.L. Pillard, *The Unfulfilled Promise of the Constitution in Executive Hands*, 103 MICH. L. REV. 676 (2005); H. Jefferson Powell, *The President’s Authority over Foreign Affairs: An Executive Branch Perspective*, 67 GEO. WASH. L. REV. 527 (1999); and Symposium, *Executive Branch Interpretation of the Law*, 15 CARDOZO L. REV. 21 (1993).

66. See Keith E. Whittington, *Hearing About the Constitution in Congressional Committees*, in CONGRESS AND THE CONSTITUTION, *supra* note 48, at 87.

and articulate constitutional views,<sup>67</sup> particularly on those matters, such as impeachment, over which Congress has unreviewable discretion. But none of these legislative resources is as consistently focused on constitutional issues, or as self-consciously structured for impartial deliberation, as the Department of Justice's Office of Legal Counsel ("OLC").<sup>68</sup>

As John McGinnis has observed, since its creation in 1932, OLC has engaged in various different modes of constitutional interpretation, sometimes taking its lead from the Supreme Court's opinions and at other times advancing the Executive Branch's independent interpretive views.<sup>69</sup> McGinnis describes several procedural norms that OLC observes in order to ensure deliberativeness and a proper degree of objectivity: it generally publishes its opinions; it has a policy of not giving opinions on issues currently in litigation; and it does not give opinions on the legality of executive agency action without first soliciting a legal opinion from the relevant agency.<sup>70</sup> These procedures and practices demonstrate that the President, through OLC and other institutions, is well-positioned to articulate independent, extrajudicial, and popularly-informed constitutional understandings.

Can we trust the President, using institutional resources such as OLC, to perform well as a popular constitutionalist? This essay does not purport to answer this question, but only to underline its centrality to any contemporary theory of popular constitutionalism. To further clarify the issues at stake, I offer two brief illustrative case studies. Though these case studies may seem at first to be worlds apart, both raise questions about the President's capacity to develop independent, reasonable constitutional understandings in a deliberative and transparent way.

*Assisted suicide and federalism.* The case of *Gonzales v. Oregon*, recently decided by the Supreme Court, grew out of Oregon's enactment of

67. See Louis Fisher, *Constitutional Analysis by Congressional Staff Agencies*, in CONGRESS AND THE CONSTITUTION, *supra* note 48, at 64.

68. The Attorney General is obligated by statute to "give his advice and opinion on questions of law when required by the President," as well as to provide advice, upon request, to the heads of the executive departments "on questions of law arising in the administration of [their] department[s]." 28 U.S.C. §§ 511–512 (2000). The Attorney General has delegated this opinion function to OLC. See 28 C.F.R. § 0.25(b) (2005). There are other venues for constitutional interpretation within the Executive Branch as well, such as the White House Counsel's office and, to some extent, the Office of the Solicitor General.

69. John O. McGinnis, *Models of the Opinion Function of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon*, 15 CARDOZO L. REV. 375 (1993).

70. *Id.* at 425–28. As Harold Koh has pointed out, OLC has not always adhered to these policies, particularly in politically controversial matters. Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 CARDOZO L. REV. 513, 514–15 (1993).

the Death with Dignity Act by popular initiative in 1994.<sup>71</sup> This state law permits doctors, under certain conditions, to prescribe drugs to enable competent, terminally ill patients to commit suicide.<sup>72</sup> The federal Controlled Substances Act (“CSA”)<sup>73</sup> extensively regulates the prescription and distribution of several such drugs. A regulation promulgated by the Drug Enforcement Administration (“DEA”) pursuant to the CSA provides that “[a] prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.”<sup>74</sup>

In 1998, Attorney General Janet Reno concluded that “the CSA does not authorize DEA to prosecute, or to revoke the DEA registration of, a physician who has assisted in a suicide in compliance with Oregon law.”<sup>75</sup> In particular, Attorney General Reno stated, “There is no evidence that Congress, in the CSA, intended to displace the states as the primary regulators of the medical profession, or to override a state’s determination as to what constitutes legitimate medical practice in the absence of a federal law prohibiting that practice.”<sup>76</sup> Bills were introduced in Congress that would have granted the federal government express authority to regulate physician-assisted suicide, but they were not enacted.<sup>77</sup>

In 2001, however, Attorney General John Ashcroft revisited the question after soliciting a memorandum from OLC but without consulting Oregon or any federal agency outside the Justice Department.<sup>78</sup> OLC’s

71. 126 S. Ct. 904, 911 (2006).

72. OR. REV. STAT. §§ 127.800–127.995 (2003). The patient must make an oral request to his or her attending physician and a written request attested by two witnesses, and must reiterate the oral request at least fifteen days after the initial oral request. §§ 127.810(1), 127.840. Two doctors must determine that the patient is mentally capable, is “suffering from a terminal disease,” and has voluntarily expressed a wish to accelerate the dying process. §§ 127.805(1), 127.815(1), 127.820. The statute contains elaborate provisions designed to ensure that the patient makes an informed, voluntary, and independent choice. *See* §§ 127.815(1), 127.820, 127.825. The attending physician may prescribe and dispense the lethal drugs, but may not terminate a patient’s life by active euthanasia or administering a lethal injection. § 127.880.

73. 21 U.S.C. § 801 (2000).

74. 21 C.F.R. § 1306.04(a) (2005).

75. Memorandum from Sheldon Bradshaw, Deputy Assistant Attorney Gen., & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to the Attorney Gen. of the U.S., *Whether Physician-Assisted Suicide Serves a “Legitimate Medical Purpose” Under the Drug Enforcement Administration’s Regulations Implementing the Controlled Substances Act 109a* (June 27, 2001), available at <http://www.usdoj.gov/osg/briefs/2004/2pet/7pet/2004-0623.pet.app.pdf> [hereinafter OLC Memo] (quoting Letter from Janet Reno, Attorney Gen. of the U.S., to Henry J. Hyde, Chairman, Comm. on the Judiciary, U.S. House of Representatives I (June 5, 1998), available at <http://www.usdoj.gov/opa/pr/1998/June/259ag.htm.html>).

76. *Id.*

77. *See* *Gonzales v. Oregon*, 126 S. Ct. 904, 913 (citing H.R. 4006, 105th Cong. (2d Sess. 1998); H.R. 2260, 106th Cong. (1st Sess. 1999)).

78. *Id.* at 913–14.

memorandum concluded that “assisting in suicide is not a ‘legitimate medical purpose’ that would justify a physician’s dispensing controlled substances consistent with the CSA.”<sup>79</sup> Acting on this advice, the Attorney General published an “interpretative rule” in the Federal Register adopting the OLC position.<sup>80</sup> The question formally presented to the Supreme Court in *Gonzales v. Oregon* was whether the CSA and its implementing regulations were permissibly construed by the Attorney General to prohibit doctors in Oregon (or elsewhere in the United States) from prescribing and distributing federally controlled drugs for the purpose of assisting a suicide.<sup>81</sup>

The Supreme Court’s decision in the case was not particularly surprising. Writing for a six-justice majority, Justice Kennedy began by noting that, although the case touched on sensitive matters of morality and politics, “its resolution requires an inquiry familiar to the courts: interpreting a federal statute to determine whether Executive action is authorized by, or otherwise consistent with, the enactment.”<sup>82</sup> The majority opinion proceeded to reject the government’s arguments that the Attorney General deserved interpretive deference, either on the ground that he was construing one of his own regulations or on the ground that he was construing an ambiguous statute that Congress had charged him with administering.<sup>83</sup> “The statutory terms ‘public interest’ and ‘public health’ [in the CSA] do not call on the Attorney General, or any other Executive official, to make an independent assessment of the meaning of federal law.”<sup>84</sup> Construing the statute for itself, the Court held that the CSA was intended to regulate medical practice only insofar as was necessary to prevent doctors from using their drug-prescribing licenses as a cover for pushing, or trafficking in, illicit drugs.<sup>85</sup> The Court accordingly invalidated the Attorney General’s interpretative rule.<sup>86</sup>

From a traditional lawyer’s perspective, there was no colorable constitutional issue in *Gonzales v. Oregon*. The Court’s recent decision in *Gonzales v. Raich*, upholding the constitutionality of the CSA as applied to local,

79. OLC Memo, *supra* note 75, at 130a.

80. Dispensing of Controlled Substances to Assist Suicide, 66 Fed. Reg. 56,607, 56,607–08 (Nov. 9, 2001) (to be codified at 21 C.F.R. pt. 1306).

81. Brief for Petitioners at (I), *Oregon*, 126 S. Ct. 904 (No. 04-623).

82. *Oregon*, 126 S. Ct. at 911.

83. *Id.* at 915–22.

84. *Id.* at 919. *See also id.* at 922 (“The deference here is tempered by the Attorney General’s lack of expertise in this area and the apparent absence of any consultation with anyone outside the Department of Justice who might aid in a reasoned judgment.”).

85. *Id.* at 922–25.

86. *Id.* at 925.

noncommercial, medical use of marijuana,<sup>87</sup> and its 1997 decision in *Washington v. Glucksberg*, refusing to recognize a fundamental right to assisted suicide,<sup>88</sup> together foreclosed any constitutional challenge to the Attorney General's action. And, indeed, the Court's decision in *Oregon* did not address constitutional issues at all.<sup>89</sup> The majority even disavowed any reliance on constitutionally motivated canons of statutory construction such as "clear statement" rules.<sup>90</sup>

Yet from a popular constitutionalist's perspective, the case was replete with constitutional questions. After all, the popular constitutionalist does not read *Raich* to say that every activity that falls within the literal terms of the CSA may constitutionally be regulated—only that the Court, for reasons of institutional capacity, has left that question to the other branches.<sup>91</sup> Now that the Supreme Court has put the brakes on as-applied challenges to congressional exercises of the commerce power,<sup>92</sup> it will often be up to the Executive Branch, and the Attorney General in particular, to determine whether to enforce a Commerce Clause statute "to the hilt" or to carve out particular applications for non-enforcement in light of constitutional con-

87. 125 S. Ct. 2195, 2198–2201 (2005).

88. 521 U.S. 702, 728 (1997).

89. By the same token, the briefing and argument in the Supreme Court focused entirely on matters of statutory and regulatory construction. To be sure, Oregon urged the Court to adopt a constitutionally informed "clear statement" rule or to interpret the statute narrowly to avoid constitutional doubts, but it did not press a constitutional claim directly. Brief for Respondent State of Oregon at 27–47, *Oregon*, 126 S. Ct. 904 (No. 04-623); see also Transcript of Oral Argument at 43–44, 56, *Oregon*, 126 S. Ct. 904 (No. 04-623) (counsel for Oregon attempting to argue that the Attorney General's construction of the Controlled Substances Act implicates clear-statement and avoidance doctrines). For his part, the Solicitor General essentially denied that the Attorney General's action raised any constitutional concerns at all. Brief for the Petitioners at 37–42, *Oregon*, 126 S. Ct. 904 (No. 04-623); see also Transcript of Oral Argument at 59, *Oregon*, 126 S. Ct. 904 (No. 04-623) (argument by Solicitor General that there is no Commerce Clause issue in the case).

90. *Oregon*, 126 S. Ct. at 925 ("It is unnecessary even to consider the application of clear statement requirements . . ."). On the other hand, the Court's interpretation of the CSA did appear to be motivated by an awareness that a contrary reading could alter the traditional federal-state balance. See *id.* ("[T]he background principles of our federal system also belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power. . . . The text and structure of the CSA show that Congress did not have this far-reaching intent to alter the federal-state balance and the congressional role in maintaining it.").

91. See *Raich*, 125 S. Ct. at 2208 ("In assessing the scope of Congress' authority under the Commerce Clause, we stress that the task before us is a modest one. We need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding."). Cf. *Oregon*, 126 S. Ct. at 939 (Scalia, J., dissenting) ("Unless we are to repudiate a long and well-established principle of our jurisprudence, using the federal commerce power to prevent assisted suicide is unquestionably permissible. The question before us is not whether Congress *can* do this, or even whether Congress *should* do this; but simply whether Congress *has* done this in the CSA.") (emphases in original).

92. See David L. Franklin, *Facial Challenges, Legislative Purpose, and the Commerce Clause*, 92 IOWA L. REV. (forthcoming 2006) (on file with author); Glenn H. Reynolds & Brannon P. Denning, *What Hath Raich Wrought? Five Takes*, 9 LEWIS & CLARK L. REV. 915, 916–18 (2005) (concluding that *Raich* put an end to as-applied Commerce Clause challenges).



cerns about federalism. Likewise, the popular constitutionalist does not read *Glucksberg* to say that the Court has resolved the question of the right to assisted suicide or the power to prohibit it. Indeed, the Court in *Glucksberg* was careful to point out that “[t]hroughout the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.”<sup>93</sup>

In short, the fact that the Court in *Gonzales v. Oregon* held the Executive Branch to have strayed beyond the limits of its *statutory* authority does not mean that the Executive was not faced with *constitutional* questions in the case. Presidential popular constitutionalism could have expressed itself here in two ways. On the one hand, a robust commitment to federalism on the part of the Executive Branch would have resulted in a decision to allow the national debate over assisted suicide to continue by declining to enforce the CSA against doctors in Oregon. On the other hand, a robust commitment to a constitutional “culture of life” would have reinforced the stance actually taken by the Attorney General.<sup>94</sup> In either event, on a popular constitutionalist view, the Executive Branch was obligated to wrestle with questions of constitutional and not merely statutory dimension in deciding whether to issue its directive concerning assisted suicide.

The OLC memorandum on which the Attorney General’s action was based shows little evidence of such wrestling. In particular, the memorandum pays scant attention to the interest in allowing states in a federal system to experiment with diverse solutions to a controversial social and ethical problem. Instead, OLC appeared to view the Supreme Court as the appropriate institution to vindicate those federalism interests at a constitutional level<sup>95</sup> and Congress as the appropriate body to vindicate them at a political level.<sup>96</sup> To use McGinnis’s typology, OLC’s constitutional analysis in this instance was “court-centered.”<sup>97</sup> And even within this court-centered context, it is surprising how little attention OLC paid to federalism concerns, especially given that its opinion in the assisted suicide matter was issued *before* the Court upheld the CSA against a federalism-based chal-

93. 521 U.S. at 735.

94. See, e.g., Michael A. Fletcher, *Bush Hails Progress Toward ‘Culture of Life’: Limits on Abortion, Stem Cell Use Cited*, WASH. POST, Jan. 25, 2005, at A3.

95. See OLC Memo, *supra* note 75, at 134a–135a (“[W]e think it shows no disrespect for the principles of federalism to conclude that the States cannot, by their unilateral actions, shelter their physicians from the Federal narcotics code.”).

96. See *id.* at 145a (“Congress remains free to alter the terms on which the DEA acts: it could, e.g., carve out an exception for the use of controlled substances by physicians to assist suicide.”).

97. McGinnis, *supra* note 69, at 382–89 (describing court-centered mode of Executive Branch reasoning).

lence in *Raich*. It is perhaps too much to expect that the Executive Branch would respond to judicial underenforcement of federalism norms by undertaking a completely independent constitutional analysis. Still, the apparent absence of constitutional deliberation by the Executive Branch in this case should be enough to give the would-be popular constitutionalist some pause.

*NSA Surveillance.* President Bush recently sparked controversy by admitting that he secretly authorized the National Security Agency to eavesdrop on the international telephone conversations and emails of United States citizens without seeking court approval.<sup>98</sup> The President authorized this surveillance in the face of a federal statute that provides that the Foreign Intelligence Surveillance Act of 1978 (“FISA”)<sup>99</sup> and other specified statutory provisions concerning investigative wiretaps constitute the “exclusive means by which electronic surveillance . . . may be conducted.”<sup>100</sup> FISA requires the government to obtain a warrant from a special secret court within seventy-two hours of initiating electronic surveillance, and provides that a warrant shall issue if “there is probable cause to believe that . . . the target of the electronic surveillance is a foreign power or an agent of a foreign power . . . .”<sup>101</sup> Moreover, FISA states that it is a criminal offense to “engage[] in electronic surveillance under color of law except as authorized by statute.”<sup>102</sup> In a provision specifically addressing wartime surveillance, FISA provides that “[n]otwithstanding any other law, the President, through the Attorney General, may authorize electronic surveillance without a court order under this subchapter to acquire foreign intelligence information for a period not to exceed fifteen calendar days following a declaration of war by the Congress.”<sup>103</sup>

Despite concerns reportedly raised by officials from all three branches of the federal government, the NSA eavesdropping program was supported by legal opinions from within the Executive Branch. The Department of

98. See James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1; David E. Sanger, *In Address, Bush Says He Ordered Domestic Spying*, N.Y. TIMES, Dec. 18, 2005, at 1. Months later, more controversy erupted amidst reports that the NSA had collected records of tens of millions of telephone calls in the United States. See Leslie Cauley, *NSA Has Massive Database of Americans' Phone Calls: 3 Telecoms Help Government Collect Billions of Domestic Records*, USA TODAY, May 11, 2006, at 1A.

99. 50 U.S.C. §§ 1801–1811 (2000).

100. 18 U.S.C. § 2511(2)(f) (2000).

101. 50 U.S.C. §§ 1802(a)(1), 1803(a), 1805(a)(3). Department of Justice statistics indicate that the FISA court has granted virtually every warrant application presented to it since its creation in 1979. See FISA Orders 1979–2004, [http://www.epic.org/privacy/wiretap/stats/fisa\\_stats.html](http://www.epic.org/privacy/wiretap/stats/fisa_stats.html) (last visited Feb. 21, 2006).

102. 50 U.S.C. § 1809(a)(1).

103. *Id.* § 1811.

Justice defended the program initially in a letter to the chairmen and ranking members of the House and Senate Intelligence Committees,<sup>104</sup> and later and at greater length in a detailed white paper.<sup>105</sup>

The Bush administration's defense of the legality of the NSA surveillance program rests on two arguments. First, the Executive Branch argues that FISA's requirement of statutory authorization was satisfied as applied to communications involving suspected al Qaeda operatives by Congress's passage of the Authorization of Use of Military Force (AUMF) shortly after September 11, 2001.<sup>106</sup> The AUMF authorizes the President

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>107</sup>

Although the AUMF does not mention warrantless surveillance, the Executive Branch argues that the AUMF implicitly authorizes such surveillance. This argument relies heavily on Justice O'Connor's opinion for a plurality of the Supreme Court in *Hamdi v. Rumsfeld*, which concluded that the AUMF satisfied the requirement of the so-called Non-Detention Act that any detention of an American citizen be "pursuant to an Act of Congress."<sup>108</sup> If the AUMF was sufficient to overcome the Non-Detention Act, the argument goes, it must also be sufficient to overcome the requirements of FISA.<sup>109</sup>

Second, and even more adventurously, the Executive Branch argues that the President's inherent power under the Commander-in-Chief Clause of Article II "includes the authority to order warrantless foreign intelligence surveillance within the United States," and that Congress has no power to regulate that authority via FISA or any other statute.<sup>110</sup>

104. Letter from William E. Moschella, Assistant Attorney Gen., U.S. Dep't of Justice, to Pat Roberts, Chairman, Senate Select Comm. on Intelligence, et al. (Dec. 22, 2005), available at <http://www.cdt.org/security/20051222justiceletter.pdf> [hereinafter DOJ Letter].

105. U.S. Dep't of Justice, Legal Authorities Supporting the Activities of the National Security Agency Described by the President (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> [hereinafter DOJ White Paper].

106. DOJ Letter, *supra* note 104, at 2-4; DOJ White Paper, *supra* note 105, at 10-17.

107. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

108. 542 U.S. 507, 517 (2004) (plurality opinion of O'Connor, J.). The plurality assumed, without deciding, that the Non-Detention Act, 18 U.S.C. § 4001(a) (2000), applied to military detentions. *Id.*

109. DOJ Letter, *supra* note 104, at 3; DOJ White Paper, *supra* note 105, at 12-13.

110. DOJ Letter, *supra* note 104, at 2; DOJ White Paper, *supra* note 105, at 6-10. See also The President's News Conference, 41 WEEKLY COMP. PRES. DOC. 1885, 1887 (Dec. 19, 2005) ("[T]he legal authority is derived from the Constitution, as well as the authorization of force by the United States Congress."). Similarly, a 2002 brief submitted by the government argued that "the Constitution vests in

The Executive Branch's legal analysis in this instance does not meet the test of reasonableness. The statutory argument that the broadly worded AUMF is sufficient to satisfy or supersede FISA's carefully crafted requirements is simply untenable. FISA expressly prohibits warrantless surveillance except in precisely delineated circumstances, and there is no indication that Congress intended to authorize domestic wiretapping of U.S. citizens when it authorized "all necessary and appropriate force" in the wake of the September 11 attacks.<sup>111</sup> Indeed, Tom Daschle, who was the majority leader in the Senate when the AUMF was enacted, recalls that the Bush administration sought to insert the words "in the United States and" after "appropriate force" in the draft version of the AUMF, in order to authorize the President to take domestic action, but that the Senate leadership rejected the proposed change.<sup>112</sup> As for *Hamdi*, it is readily distinguishable: detaining active enemy combatants captured on a battlefield abroad is inherent in the use of force for purposes of war in a way that eavesdropping on American citizens within the United States is not.<sup>113</sup>

If any doubt remained about the unreasonableness of the Executive Branch's statutory analysis in the NSA surveillance matter, it was put to rest by the Supreme Court's decision in *Hamdan v. Rumsfeld*.<sup>114</sup> In *Hamdan*, the Court held that the AUMF does not authorize the President to convene special military commissions to try suspected Al Qaeda operatives.<sup>115</sup>

the President inherent authority to conduct warrantless intelligence surveillance (electronic or otherwise) of foreign powers or their agents, and Congress cannot by statute extinguish that constitutional authority." See Supplemental Brief for the United States at Part III.A., No. 02-001 (FISA Ct. of Review Sept. 25, 2002), available at <http://www.fas.org/irp/agency/doj/fisa/092502sup.html>.

By the same token, the administration has suggested that Congress's 2001 amendments to the National Security Act, which require the Executive Branch to brief members of Congress rather extensively in writing concerning the government's national security activities, unduly interfere with the President's Article II authority and are to that extent unconstitutional. 50 U.S.C. §§ 403q, 413(a)-(c) (Supp. II 2004); Statement on Signing the Intelligence Authorization Act for Fiscal Year 2002, 2 PUB. PAPERS 1555 (Dec. 28, 2001); Douglas Jehl, *Spy Briefings Failed to Meet Legal Test, Lawmakers Say*, N.Y. TIMES, Dec. 21, 2005, at A36.

111. Even assuming the AUMF counts as a declaration of war, Congress in enacting the AUMF only triggered a limited, fifteen-day exception to FISA. 50 U.S.C. § 1811 (2000).

112. Tom Daschle, *Power We Didn't Grant*, WASH. POST, Dec. 23, 2005 at A21.

113. Tellingly, in the same briefing in which the Attorney General argued that a warrantless surveillance program was consistent with FISA, he also conceded the opposite proposition by noting that the Executive Branch had unsuccessfully attempted to get FISA amended to authorize a warrantless surveillance program. See Press Briefing by Attorney Gen. Alberto Gonzales and Gen. Michael Hayden, Principal Deputy Dir. for Nat'l Intelligence (Dec. 19, 2005), available at <http://www.whitehouse.gov/news/releases/2005/12/20051219-1.html> ("We have had discussions with Congress in the past—certain members of Congress—as to whether or not FISA could be amended to allow us to adequately deal with this kind of threat, and we were advised that that would be difficult, if not impossible.").

114. No. 05-184 (U.S. June 29, 2006).

115. *Id.*, slip. op. at 29-30.

Rather, the Court held that in the absence of clear authorizing legislation the President must abide by the Uniform Code of Military Justice (UCMJ) and the Geneva Conventions, which in turn require military commission proceedings to comply with the law of war.<sup>116</sup> The lesson for the NSA controversy is clear: if the AUMF is insufficient to overcome the implicit and rather vague restrictions on military commissions embodied in the UCMJ—which includes deferential language permitting the President to depart from the ordinary rules governing criminal trials “so far as he considers practicable”<sup>117</sup>—then the AUMF is surely insufficient to overcome the explicit, comprehensive, and criminally enforceable limitations on electronic surveillance embodied in FISA.<sup>118</sup>

But it is the Executive Branch’s constitutional analysis in the NSA matter that is particularly troubling.<sup>119</sup> In contrast to OLC’s analysis of assisted suicide, which deflected responsibility for safeguarding the values of federalism to Congress and the judiciary, the executive’s analysis of the NSA surveillance program shows no regard for the checking function of the other branches. The paramount importance of that checking function was emphasized by Justice Stevens’s opinion for the Court in *Hamdan*, as well as by Justices Breyer and Kennedy in their concurring opinions.<sup>120</sup> From a popular constitutionalist perspective, too, there is a serious problem: until it was exposed by the media, the NSA surveillance program was carried out, and justified, *in secret*. It may well turn out that “the people” support the President’s actions in this area. Yet if the President’s constitutional authority as Commander-in-Chief entitles him clandestinely to ignore any and all statutes that he believes impinge upon his ability to prosecute a war of unknown duration against a stateless enemy—including statutes that prohibit torture, detention of U.S. citizens, and domestic wire-

116. *Id.*, slip op. at 25-30.

117. 10 U.S.C. § 836(a) (2000).

118. Astonishingly, the Executive Branch has continued to argue that the NSA surveillance program is authorized by the AUMF even after *Hamdan*. See Letter from William E. Moschella, Assistant Attorney Gen., U.S. Dep’t of Justice, to Senator Charles Schumer (July 10, 2006), available at <http://lawculture.blogs.com/lawculture/files/NSA.Hamdan.response.schumer.pdf> [hereinafter DOJ *Hamdan* letter].

119. I leave aside any Fourth Amendment issues that may be raised by the NSA program.

120. See *Hamdan*, slip op. at 29 n.23 (“Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.”); *id.*, slip op. at 1 (Breyer, J., concurring) (“Where, as here, no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger.”); *id.*, slip op. at 1 (Kennedy, J., concurring) (“Respect for laws derived from the customary operation of the Executive and Legislative Branches gives some assurance of stability in time of crisis. The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.”).

tapping—then not only is popular constitutionalism undermined, but the very notion of the rule of law is in peril.<sup>121</sup>

These case studies are of course unscientific and anecdotal; they are meant to be suggestive rather than definitive. What they suggest, however, is that one cannot address the issue of popular constitutionalism in 2006 without addressing the issue of presidential constitutionalism—and that presidential constitutionalism as it is currently practiced does not do a very good job of satisfying basic criteria of deliberativeness, transparency, and reasonableness. The people today do not speak for themselves on constitutional issues; increasingly, the President of the United States will claim to speak for them. Can we trust him to do so? It is a question that Kramer and other advocates of popular constitutionalism would do well to examine.

121. In the wake of *Hamdan*, the Executive Branch again argued that the President enjoys inherent authority to collect foreign intelligence within the United States notwithstanding any congressional regulation to the contrary, and suggested that FISA was unconstitutional insofar as it restricted that authority. See DOJ *Hamdan* Letter, *supra* note 118, at 2–3. For a prominent articulation of the Executive Branch's legal rationales for unlimited inherent presidential power during wartime, see Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., Office of Legal Counsel, to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm>.