

POLITICS, POLICE, PAST AND PRESENT: LARRY KRAMER'S *THE PEOPLE THEMSELVES*

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INTRODUCTION

I join this symposium on *The People Themselves: Popular Constitutionalism and Judicial Review*<sup>1</sup> wondering whether I have a dog in the fight. That a fight is under way is not in doubt. Essayists in the *Harvard Law Review* purport to find in Larry Kramer's various challenges to "the ultimate constitutional authority of the courts" ideas that "inspire dread and make the blood run cold."<sup>2</sup> In the *Texas Law Review*, L.A. Powe finds Kramer's work devalued by deep flaws, "stunning" omissions and "egregious historical errors."<sup>3</sup> So extravagant a reception recalls the legal academy's vigorous carpet-bombing of *The Transformation of American Law* a quarter-century ago.<sup>4</sup> Participants in this symposium, generally more sympathetic to the notion of popular constitutionalism than those whose blood runs cold at the very thought,<sup>5</sup> offer a more measured assessment.

I confess to some amusement at all this sweaty heaving, but then my vantage point is decidedly outside the ring, for I have no pretensions to be or become a constitutional lawyer. Nevertheless I am one of "the people," albeit a quite recent entrant upon citizenship, and, I take it, entitled as such

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

2. Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594 (2005) (book review) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)). To their relief, the authors discover little in the book but "ambitious error and confusion," *see id.* at 1640, which reveals popular constitutionalism to be a disastrously flawed concept.

3. L. A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 857, 865, 887 (2005) (book review).

4. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (1977). For a recent account of *Transformation's* reception, and its resilience in the face of critique, see Laura Kalman, *Transformations*, 28 LAW & SOC. INQUIRY 1149 (2003).

5. Alexander and Solum congratulate Kramer for his (unwitting) demonstration that "popular constitutionalism is about as unattractive as a constitutional theory could possibly be." Alexander & Solum, *supra* note 2, at 1640. They continue, "Sometimes, only the most zealous advocate of a theory can push the view to the extreme that illuminates its deepest flaws. *The People Themselves* is, in that sense, a magnificent accomplishment." *Id.*

to an opinion upon processes that have been described as of “special significance for the future of mankind.”<sup>6</sup> My conclusion upon completing *The People Themselves* was that Larry Kramer is clearly a knowledgeable scholar who has written a serious and original book worthy of attention. His exposition of the results of his detailed research on the origins of judicial review and the trajectory of its acceptance in American political culture is convincing; his analysis of the variety of options (notably departmentalism) that once accommodated non-supremacist forms of judicial review, and might do so again, is instructive; and his review of the changing forms of mobilization through which public opinion might be brought to bear on constitutional questions is imaginative and suggestive. Kramer’s conclusion that “the people” would do well to retrieve the Constitution from monopolization by legal elites and “lay claim to the Constitution ourselves”<sup>7</sup> might be thought an important reminder of what the first three words of that much-worshipped document actually are, and is hardly controversial except in the circles occupied by legal elites themselves. Certainly one encounters not only scholarship in this book, but also conviction—scholarship put to use. But the mobilization of scholarship to create usable pasts has hardly been an unfamiliar trope in the modern academy.<sup>8</sup> Indeed, the history of professional history in the United States, as elsewhere, is intimately bound up in the production of legitimacy for all manner of constitutive practices, not least those that have constituted the nation itself. As Thomas Bender has observed of the nineteenth century, “history, as a professional discipline, and the nation, as the new and dominant form of political subjectivity and power, established a tight connection that amounted

6. JAMES WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* 6 (1956). Adherents of popular constitutionalism should note that the iconic description of the creation of the Pike Creek Claimant’s Union that opens Hurst’s book prepares the way for as fulsome an invocation of popular constitutionalism’s foundational relationship to the American legal order as they could hope to find. *See id.* at 3–32.

7. KRAMER, *supra* note 1, at 247.

8. *See, e.g.*, THE USABLE PAST: GREEK METAHISTORIES (Keith S. Brown & Yannis Hamilakis eds., 2003); ROBERT G. MOELLER, *WAR STORIES: THE SEARCH FOR A USABLE PAST IN THE FEDERAL REPUBLIC OF GERMANY* (2001); ANGELA BRINTLINGER, *WRITING A USABLE PAST: RUSSIAN LITERARY CULTURE, 1917–1937* (2000); DAVID G. ROSKIES, *THE JEWISH SEARCH FOR A USABLE PAST* (1999); NORMAN KNOWLES, *INVENTING THE LOYALISTS: THE ONTARIO LOYALIST TRADITION AND THE CREATION OF USABLE PASTS* (1997); LOIS PARKINSON ZAMORA, *THE USABLE PAST: THE IMAGINATION OF HISTORY IN RECENT FICTION OF THE AMERICAS* (1997); USABLE PASTS: TRADITIONS AND GROUP EXPRESSIONS IN NORTH AMERICA (Tad Tuleja ed., 1997); DUBRAVKA JURAGA, *LITERATURE, HISTORY, AND POSTCOLONIAL CULTURAL IDENTITY IN AFRICA AND THE BALKANS: THE SEARCH FOR A USABLE PAST IN FARAH, NGUGI, KRLEŽA, AND ANDRIC* (1996); TOWARD A USABLE PAST: LIBERTY UNDER STATE CONSTITUTIONS (Paul Finkelman & Stephen E. Gottlieb eds., 1991); WILLIAM J. BOUWSMA, *A USABLE PAST: ESSAYS IN EUROPEAN CULTURAL HISTORY* (1990); HENRY STEELE COMMAGER, *THE SEARCH FOR A USABLE PAST, AND OTHER ESSAYS IN HISTORIOGRAPHY* (1967).

to collaboration. . . . [H]istorians and humanities scholars produced national histories and certified national literatures and cultures, which in turn helped to sustain the project of making the modern nation-state” by giving the nation-state the capacity “to define the framework of its self-understanding.”<sup>9</sup> Historians certified the literature and culture of rule by law as a monument to the constitutionalized nation no less than they did other national literatures and cultures. Now Kramer is attempting to use history to turn the tables a little.

On its face, then, *The People Themselves* hardly seems the egregiously outlandish little shop of populist horrors its critics claim to have found. Indeed, one might argue that Kramer’s purpose is to use the relationship between popular constitutionalism and judicial review in his history as much to gain critical purchase on the latter as to pursue a serious analysis of the former. For Kramer, that is, popular constitutionalism is a critical standpoint from which to write about judicial review. It is not developed as a substantive position in *The People Themselves*, but as a lens.<sup>10</sup>

But perhaps this is too indulgent an interpretation. So let us instead assume that Kramer indeed intended to write a comprehensive history of popular constitutionalism, at least through the mid-twentieth century, from which he might draw conclusions about the current trajectory of judicial review. If so, Kramer misses some opportunities and misinterprets some of his history. His book can be found wanting in certain of its assumptions, and overall seems needlessly narrow in perspective.

This reaction is informed in part by my own research on law and politics during the early Republic, research conducted some years ago, before “popular constitutionalism” was what Kramer’s *Harvard Law Review* critics are so pleased to call (twice, to remind us) “the theory *du jour*.”<sup>11</sup> At that time, I also undertook research on the ideology of judicial supremacy, so the agentive relationships that Kramer explores—between people and constitution, constitution and judiciary, judiciary and people—are not unfamiliar.<sup>12</sup> In this short essay I will make no attempt to engage the full sweep of *The People Themselves*. I want simply to focus briefly on three “sites” that the book traverses that I consider sites of missed opportunity. They are: *first*, the question of the people and the Constitution; *second*, the people and politics; *third*, the question of police and law. I conclude with

9. Thomas Bender, *Historians, the Nation, and the Plenitude of Narratives*, in *RETHINKING AMERICAN HISTORY IN A GLOBAL AGE* 1, 6 (Thomas Bender ed., 2002).

10. If so, Kramer has played rather a good joke on his critics.

11. Alexander & Solum, *supra* note 2, at 1594, 1640.

12. See generally CHRISTOPHER L. TOMLINS, *LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC* 1–219 (1993).

some thoughts on Kramer's resort to history—the question of past and present.

### I. THE PEOPLE AND THE CONSTITUTION

Kramer contends that the people of the founding era were not “an empty abstraction . . . a mythic philosophical justification for government.”<sup>13</sup> Far from it. “‘The people’ . . . had fought a revolution, expressed dissatisfaction with the first fruits of independence, and debated and adopted a new charter to govern themselves.”<sup>14</sup> The Constitution was “fundamentally, an act of popular will: the people's charter, made by the people.”<sup>15</sup> The argument of course is absolutely central to Kramer's thesis that it was “unthinkable”<sup>16</sup> that the people, having made their own Constitution, would turn ultimate control of it over to an unelected judiciary.

As a purely empirical statement, the claim that the Constitution was made by the people is incorrect. The Constitution was made by fifty-five delegates from all states but Rhode Island, who assembled in May 1787 in Philadelphia at the invitation of the Confederation Congress to attend a convention called at the express instigation of the Annapolis Convention (in September 1786) for the advertised purpose of revising the Articles of Confederation.<sup>17</sup> It is perhaps wise to remind ourselves that neither the proceedings of the Philadelphia Convention nor their product had any formal constitutional-legal basis. The process for amending the Articles of Confederation required action in Congress and agreement thereto, followed by unanimous consent of the states—a vote of approval in each and every state legislature—not agreement by nine of thirteen ratifying conventions.<sup>18</sup>

13. KRAMER, *supra* note 1, at 7.

14. *Id.*

15. *Id.*

16. *Id.*

17. See MAX FARRAND, *THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES* 9–12, 61 (1913).

18. Article 13 of the Articles of Confederation reads,

Every State shall abide by the determination of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the legislatures of every State.

Articles of Confederation art. XIII (1781), <http://www.usconstitution.net/articles.html>. On receiving the draft Constitution from the Philadelphia Convention, the Confederation Congress did not “agree” to it but resolved simply to refer it to the state legislatures without endorsement or recommendation. The state legislatures were themselves instructed that the Constitution was to be submitted to a ratifying convention called “in conformity to the resolves of the Convention made and provided.” CARL VAN DOREN, *THE GREAT REHEARSAL: THE STORY OF THE MAKING AND RATIFYING OF THE CONSTITUTION*

The Philadelphia Convention thus comprehensively flouted existing representational procedures. As a result, certain current and indubitably popular interests, notably debtors, were underrepresented.<sup>19</sup> Proceedings at the Convention were conducted in secrecy, a circumstance still bitterly resented years afterward, even by those not otherwise unsympathetic to the outcome.<sup>20</sup> Once released, the results of the delegates' deliberations proved controversial. A recent essay by Wythe Holt finds it probable that the 1787–1788 adoption of the Constitution was actually opposed by a majority of citizens, and describes the manipulation of certain of the state ratifying conventions to secure crucial votes in the Constitution's favor.<sup>21</sup>

Yet in important (albeit “philosophical”) respects the Constitution indeed *was* the people's; or rather, parts of it were. What were the people's parts, and what not, and to what extent, and in what fashion the parts were distinct, requires that for a moment we forget “constitutionalism,” popular or otherwise, lest we impose a rather spurious ideological (interpretive) unity, a shared goal or desire, on a variety of politically distinct intentions. Instead let us appraise the Constitution as a text “in itself.”<sup>22</sup> So doing, one will discover three distinct texts—the Preamble, the seven unamended articles adopted at the Philadelphia Convention, and the Bill of Rights.<sup>23</sup> The first text, in which “We The People of the United States” claim the existential authority to “found,” revels in that founding as a moment of justice, of possibility; the second text delineates certain substantive measures, from

OF THE UNITED STATES 177–78 (1948). On the background to the Philadelphia Convention, see FARRAND, *supra* note 17, at 7–12.

19. See Wythe W. Holt, Jr., *The Establishment of the Federal Court System (1787–1791)*, in THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 3, 9–10 (Christopher Tomlins ed., 2005).

20. Thus, as William Manning wrote in 1798,

The Federal Constitution by a fair construction is a good one principally, but I have no doubt but that the Convention who made it intended to destroy our free governments by it, or they never would have spent 4 Months in making such an inexplicit thing. As one said at the time of its adoption, it is made like a Fiddle, with but few Strings, but so that the ruling Majority could play any tune upon it they pleased.

See Samuel Eliot Morison ed., *William Manning's The Key of Liberty*, 13 WM. & MARY Q. (3d ser.) 202, 234 (1956). Manning took particular exception to attempts to use the content of deliberation at the Philadelphia Convention to explain the meaning of this or that provision.

As to the meaning of the Convention that formed it, it has nothing to do in the question, & it was an insult on the people to keep their debates secret at that time, & a grater one to site us to them now for an explanation, as Worshington did to the house of Representatives. The people excepted of it as it is, & no other way.

*Id.* at 235.

21. Holt, *supra* note 19, at 14–17.

22. This in itself is unusual. As Daniel Hulsebosch has recently pointed out, constitutional lawyers largely treat the Constitution itself simply as an occasion for their own exercises in interpretation. See Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 655, 662 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

23. U.S. CONST. pmbl; U.S. CONST. arts. I–VII; U.S. CONST. amends. I–X.

the formulation of which the people are comprehensively excluded, and creates a mechanism by which those measures shall be made effective; the third text records the deep apprehension that greeted the second text's emergence from clandestine debate into popular view. These three texts exist in tension. There is no unity among them—they are quite different in character and performance. As both sign and proof of this, each embraces a distinct philosophy of history and an entirely different form of time.<sup>24</sup>

The Preamble is indubitably the best claim the people can make that the Constitution is “theirs.” In the Preamble, the people ordain and establish the Constitution to secure the blessings of liberty, “to ourselves” but also to “our Posterity.”<sup>25</sup> If there is a moment of “founding,” this is where it occurs. Indeed, the very illegality of the proceedings emphasizes its revolutionary quality, stripped of precedent and sociology, when “time is out of joint”<sup>26</sup> and perhaps anything might happen. In the Preamble, present and future (the people and their posterity) sit together in remembrance of a past of injustice and disorder; they seek betterment—justice and tranquility; they pledge commonality and commonwealth for all and for generations to come.<sup>27</sup> In an act of supreme *self-awareness* the people fill the void of founding with redemptive intent: to “*establish*” justice; to “*insure*” tranquility; to “*promote the general Welfare*.”<sup>28</sup> These are the Constitution's conditions of existence. The people have infused the Constitution with certain immutable principles that will furnish the standard of rule.

But if the Preamble can be said to be the moment of founding, of justice and remembrance, the text that follows—the seven articles<sup>29</sup>—is its antithesis, an ontological breach with immutability, the return to historical

24. I pursue this argument at some length in Christopher Tomlins, *The Threepenny Constitution (and The Question of Justice)*, ALA. L. REV. (forthcoming 2006) (draft on file with author).

25. U.S. CONST. pmb.

26. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

27. Jacques Derrida reflects on such a moment as “[a] spectral moment, a moment that no longer belongs to time,” a moment

that no ethics, no politics, whether revolutionary or not, seems possible and thinkable and *just* that does not recognize in its principle the respect for those others who are no longer or for those others who are not yet *there*, presently living, whether they are already dead or not yet born. No justice . . . seems possible or thinkable without the principle of some *responsibility*, beyond all living present, within that which disjoins the living present, before the ghosts of those who are not yet born or who are already dead. . . . Without this *non-contemporaneity with itself of the living present*, without that which secretly unhinges it, without this responsibility and this respect for justice concerning those who *are not there*, of those who are no longer or who are not yet *present and living*, what sense would there be to ask the question “where?” “where tomorrow?” “whither?”

JACQUES DERRIDA, *SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL*, at xix–xx (Peggy Kamuf trans., 1994) (italics in original).

28. U.S. CONST. pmb. (emphasis added).

29. U.S. CONST. arts. I–VII.

time and the embrace instead of traditional force-of-law as the means to articulate what shall be the mechanism for the new order's realization. The mechanism itself comes in the text—the articles and sections that enumerate the distributions of power and create the relations of priority to institute effective governance.<sup>30</sup> No time for remembrance or redemption here; this text is rather a formula for new modalities of governance and practice—what federal governance shall consist in, what it shall have authority to do, what the states shall be prevented from doing, what governments shall do together. What *shall* be dictates what elements of past practice (those Articles of Confederation supposedly being amended) are deemed useful and what tossed aside. Here, the people “whose right it is,”<sup>31</sup> who as a transcendent collectivity called rule into being, have no presence as such—not as governors,<sup>32</sup> not as observers,<sup>33</sup> not even as an abstraction.<sup>34</sup> The people only exist in the form of an occasional “person,” who being of a certain age and a certain status is declared fit to perform this or that authorized role.<sup>35</sup> In the seven articles of the unamended text, signed by a majority of the conferees on behalf of the *states*, “we the people” no longer exists.

The absence of “we the people” from the unamended text is doubly underscored by the reappearance of the people (though not of “we”) in the Bill of Rights.<sup>36</sup> Their reappearance as such signifies a profound change wrought in the course of the Constitution. The animating and active people of the Preamble have become, by the Bill of Rights, the objects of governance. The only question remaining, and taken up in the Bill of Rights, is refinement of the precise extent. The machine is going of itself,<sup>37</sup> and the

30. See, e.g., U.S. CONST. art. I (vesting legislative powers in Congress); U.S. CONST. art. II (vesting executive powers in the President); U.S. CONST. art. III (creating the federal judiciary).

31. THOMAS PAINE, *Common Sense* (1776), in *COMMON SENSE AND OTHER WRITINGS* 3, 32 (Gordon S. Wood ed., 2003).

32. The mechanisms for popular representation adopted in Articles I and II are, of course, highly indirect. See U.S. CONST. art. I, §§ 1–3; U.S. CONST. art. II, § 1.

33. We have already noted the secrecy of the proceedings. See *supra* note 20 and accompanying text.

34. The words “the people” appear only once in the seven articles adopted by the Philadelphia Convention: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States.” See U.S. CONST. art. I, § 2.

35. See, e.g., U.S. CONST. art. II, § 1 (“No person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any Person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States.”).

36. U.S. CONST. amends. I–X.

37. “After our Constitution got fairly into working order it really seemed as if we had invented a machine that would go of itself, and this begot a faith in our luck which even the civil war itself but momentarily disturbed.” JAMES RUSSELL LOWELL, *The Place of the Independent in Politics*, in *POLITICAL ESSAYS* 295, 312 (1888). Lowell is quoted in MICHAEL KAMMEN, *A MACHINE THAT WOULD GO OF ITSELF* 18 (1986), which notes growing resort to “mechanistic” language in constitutional discourse during the first century of the Republic.

issue has become that of protections and freedoms that will sufficiently inure its objects to their fate.

Rather than forming the people's constitution, in other words, the articles adopted in Philadelphia come between the people and "their" founding purposes. In this light, rather than a statement that reminds us of the historical basis of the distribution of power to rule, we might instead think of "popular constitutionalism" as an exercise in opposition to the loss of the people's sovereign capacity to realize the objectives of the Preamble. Indeed, so successfully do the articles mute the immutable statements of the self-aware sovereign that "popular constitutionalism" usually appears on the back foot, its energies devoted primarily to forestalling the erosion of the Bill of Rights, rather than to recovery of the people's right to found or re-found a polity to realize the objectives of the Preamble.

## II. THE PEOPLE AND POLITICS

Whether the text in question is that suggested here (the Preamble) or by Kramer (the collection of texts called "The Constitution"), the question is the same: how to recover agentive capacity? *The People Themselves* points to politics as popular constitutionalism's means to self-realization. As a general recommendation this seems quite noncontentious. But "politics" can often mean activity—theorizing, organizational behavior—that in fact is dedicated to the *displacement* of politics, that is "the elimination from a regime of dissonance, resistance, conflict or struggle," and the creation in its place of agencies of normalization—juridical, administrative, regulative.<sup>38</sup> American legislative debates constantly invoke the superiority of "nonpartisanship"—the ending of politics, the substitution of expertise. Indeed, the idea expresses what we have come to call "state building," with all its accompanying connotations of enclosure and containment of the abnormal.

Such eliminations and stabilizations frame a continuing confrontation over the nature of politics during the founding era, and more recently, among historians. Witness, for example, the brief but sharp exchange between Staughton Lynd and Edmund Morgan in December 2005's *New York Review of Books* over how the sphere of the political should be understood.<sup>39</sup> Lynd celebrates the popular agitations of the Founding era—self-constituted egalitarian movements "of seamen, tenant farmers, city artisans,

38. See BONNIE HONIG, *POLITICAL THEORY AND THE DISPLACEMENT OF POLITICS* 2 (1993).

39. Staughton Lynd & Edmund Morgan, Letter, *History From Below*, N.Y. REV. BOOKS, Dec. 1, 2005, at 69.

slaves, Native Americans, and women”—that required no lead from their betters.<sup>40</sup> He finds their counterpart in the insurgent politics of 1960s civil rights and antiwar movements.<sup>41</sup> Morgan expresses a certain polite puzzlement that Lynd should measure political influence or success by any criteria other than “an effective role in national politics.”<sup>42</sup> Lynd’s popular movements—judged “disparate, local, and mostly unsuccessful”<sup>43</sup>—do not count. What counted was the Founders’ nationwide movement to declare independence and subsequently create a national government—“the only real republic”—that could “effect[] egalitarian reforms on a national scale.”<sup>44</sup> What was true of the Founding era, Morgan suggests, was true of the 1960s and is true now.<sup>45</sup>

This exchange canvasses two distinct and now venerable understandings of politics and history—from below (insurgent) and from above (normalizing). On the whole, *The People Themselves* seems to prefer the latter version. For the politics recommended here is not, *pace* Kramer’s critics, the politics of insurgency—or as they prefer to coarsen it, “mob rule”<sup>46</sup>—but the formal, representational politics of parties contesting for legislative and executive power and institutionalizing the results. Early in the book we encounter certain forms of popular action explored in the Thompsonian social history that has been so influential over the last forty years—rough music, charivari, skimmington, stang-riding—usually local, sometimes playful, always strikingly purposeful, directed principally at enforcement of a locale’s moral and cultural economy.<sup>47</sup> But popular action could also be more serious and widespread, as in grain riots and other forms of crowd activity that expressed the linked sensibility of popular right and rulers’ obligation defining the acceptable “countenance” of authority, and amounting, where the latter broke down, to an elaborated assertion of popular jurisdiction.<sup>48</sup> Kramer admires the revolutionary era crowd as a further advance on mass action, one that was quite consistently self-conscious,

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. Alexander & Solum, *supra* note 2, at 1636–37, 1640.

47. KRAMER, *supra* note 1, at 27; *see also* E.P. THOMPSON, *CUSTOMS IN COMMON* 467–538 (1991).

48. THOMPSON, *supra* note 47, at 185–351; *see also* John Walter, *Grain Riots and Popular Attitudes to the Law: Maldon and the Crisis of 1629*, in *AN UNGOVERNABLE PEOPLE: THE ENGLISH AND THEIR LAW IN THE SEVENTEENTH AND EIGHTEENTH CENTURIES* 47 (John Brewer & John Styles eds., 1980).

disciplined, and direct in its evocation of popular sovereignty.<sup>49</sup> But *The People Themselves* does not follow extra-institutional popular mobilizations consistently in all their many and varied forms beyond the early nineteenth century. The politics of the “murmuring commons,” as David Rollison has so beautifully named the early-modern politically-active people,<sup>50</sup> “began falling out of favor” in the early years of the Republic<sup>51</sup> (though it is left unclear from whose favor it fell), and Kramer switches his attention from the unruly to the design of expressly “party political” mobilizations, lionizing in particular Martin Van Buren, his Albany Regency, and the foundation of the Democratic Party.<sup>52</sup> When “mob activity” resurfaces in the 1830s, Kramer no longer admires it. It has no place in the normalized party politics of the Republic; indeed, it lacks a (recognizable) politics. 1830s “mobs” have lost the legitimacy of the mythologically respectable, polite crowds of the Revolution: they have “evolved into a *virulent* expression of racial, religious, and class-based resentments.”<sup>53</sup> Apparently the people acting up have become a disease.

While the appellation, “we,” is invoked throughout, therefore, the people *for themselves* take on in Kramer’s book an increasingly mediated, even spectral quality, *spoken for by others*. Eventually, in our era, that speech becomes so separated from the people as to be virtually clandestine. It occurs “between individuals, by e-mail, through staff, and so on,”<sup>54</sup> that is, bureaucratically, behind closed doors, in deals with lobbyists for “interests,” or between parties to create safe districts for themselves.<sup>55</sup> It appears Kramer sees no problem in these displacements of politics. In his view current politics is nothing more than a new anthropology or technology of popular representation—the disciplined republican citizenry has simply adopted new forms. Perhaps so. But to chart accurately the political activities of the people themselves requires that the historian also follow the people *outside* that arena that politicians name politics for their own ends as well as within it, which means following the people into their own “self-constituted” clubs and associations, societies and unions—all those “virulent” organizations called at one time or another illegitimate confederacies, criminal conspiracies and so forth. For otherwise we are led ineluctably to

49. See KRAMER, *supra* note 1, at 27; see also TOMLINS, *supra* note 12, at 52–54 (and sources cited therein).

50. David Rollison, *The Spectre of the Commonalty: Class Struggle and the Common Weal Before ‘The Atlantic World,’* 63 WM. & MARY Q. (3d ser.) (forthcoming Apr. 2006).

51. KRAMER, *supra* note 1, at 168.

52. *Id.* at 192–203.

53. *Id.* at 168 (emphasis added).

54. *Id.* at 238.

55. *Id.* at 238–39.

the grotesque outcome that “popular constitutionalism” means the likes of Senator Patrick Leahy, and hinges upon *his* understanding that *he* should be speaking *for* the people *against* juridical determination of electoral outcomes.<sup>56</sup> Why grotesque? Because political elites like Leahy will always accommodate themselves to specific outcomes that they may not themselves prefer precisely because those outcomes are produced by the actions of a conjoined political-legal structure in the propagation of which they, like juridical elites, have a deeply vested interest. In the pursuit of outcomes, American party politics is quintessentially oriented to the production of institutional outcomes that *end* politics in divisions of the spoils. I confess I found these later observations of politics in Kramer’s book odd. As long as we look to such men as Senator Leahy to stand for a “politics” that can express popular constitutionalism, let alone educate the people in it, the people themselves will remain precisely the spectral presence, the empty and somewhat homogenized abstraction, we desire to dispute.<sup>57</sup>

It is worth noticing that for all its criticism of constitutional theorizing for reducing the people to empty abstraction, *The People Themselves* does not actually do all that much to render them living. If we want the people to be a living people then we need to engage in a full recovery in all their pungency of the political-juridical ideologies manifested by those whose ideas have sustained popular constitutionalism as a continuing thread of discussion: those such as William Manning in the 1790s, Thomas Skidmore in the 1820s, Seth Luther and Frederick Robinson in the 1830s, Elizabeth Cady Stanton and William Garrison in the 1840s and 1850s,<sup>58</sup> and on and on and on—all speaking an unabashed and critical discourse explicitly against the claims of juridical elites, none of them present in *The People Themselves*. In their light, Kramer’s implication that meaningful direct action “dropped off” the map of popular politics in the late eighteenth century to return thereafter only as diseased resentment<sup>59</sup> seems quite wrong. Take as just a small sample William Manning’s contention in 1797 that free governments were always under threat of destruction by the combina-

56. *Id.* at 228.

57. Perhaps an anecdote will underscore what I see is an absolute and necessary distinction between two entirely distinct modes of politics I see at work in contemporary America and in American history. For what better image of political worlds in absolute (if, disappointingly, only conceptual) collision could one ask than C-Span’s broadcast of Senator William Frist and Defense Secretary Donald Rumsfeld singing “we shall overcome” at Rosa Parks’s joyful October 31, 2005, memorial service in Washington?

58. On Manning, Skidmore, Luther and Robinson, see TOMLINS, *supra* note 12, at 1–8, 154–55, 190–99, and sources cited therein. For Garrison, see HENRY MAYER, *ALL ON FIRE: WILLIAM LLOYD GARRISON AND THE ABOLITION OF SLAVERY* (1998). On Stanton, see Elizabeth Cady Stanton, Address at the Seneca Falls Convention (July 19, 1848), <http://www.nps.gov/wori/address.htm>.

59. KRAMER, *supra* note 1, at 168.

tion of “Judicial & Executive powers in favour of the interests of the few” through “construing & explaining away the true sence & meening of the constitution and laws” so as to “raise themselves above the Lejeslative power, & take the hole Administration of Government into their own hands.”<sup>60</sup> Manning’s remedy? Publicly funded schooling for all to bring opportunities for learning within reach of the commonality, and the widest possible promotion and dissemination of political knowledge and information through a mass press published by a national “Society of Labourers.”<sup>61</sup> Or take Robinson’s warning in 1834 to “the true democracy of the country” to be watchful of the manipulations of the aristocracy: “[T]hey continually contrive to change their party name. It was first Tory, then Federalist, then no party, then amalgamation, then National Republican, now Whig, and the next name they assume will perhaps be republican or democrat.”<sup>62</sup> Robinson deemed union among themselves essential to the defense of the people from the aristocracy, not political union but exercise of their “social right” to act in concert, a fundamental right denied by “the semblance of law,” that is by the judiciary, “the head-quarters of the aristocracy,” where “every plan to humble and subdue the people originates.”<sup>63</sup>

When we counterpose politics to juridical supremacy, then, we must be careful to examine “politics” critically. In the absence of critique we risk embracing a politics that offers nothing more “popular” than the politics offered by late nineteenth century French parliamentary socialists, so magnificently disparaged at the turn of the last century by the syndicalist George Sorel—the employment of the people in carefully controlled mobilizations to realize party ambition.<sup>64</sup> If, nevertheless, we are going to put our faith in the promise of *parliamentary* politics as the institutional site for the mobilization of a constitutionalism that contests the exclusive jurisdiction of juridical elites, let us do so *realistically*, in full realization of how restricted an arena for mobilization, in structural terms, such a politics has historically provided. We must not forget, first, that the purported golden age of an active citizenry manifested in the representational politics of the antebellum republic was as irremediably corrupted by the three-fifths com-

60. Morison, *supra* note 20, at 227. I discuss Manning at greater length in TOMLINS, *supra* note 12, at 1–8.

61. See TOMLINS, *supra* note 12, at 1–8.

62. FREDERICK ROBINSON, ORATION DELIVERED BEFORE THE TRADES’ UNION OF BOSTON AND VICINITY, ON FORT HILL, BOSTON, ON THE FIFTY-EIGHTH ANNIVERSARY OF AMERICAN INDEPENDENCE 6 (Boston, Charles Douglas 1834).

63. *Id.* at 11–13. I discuss the politics and ideology of labor mobilizations during the 1830s at some length in TOMLINS, *supra* note 12, at 152–205.

64. GEORGES SOREL, REFLECTIONS ON VIOLENCE 171–201 (T.E. Hulme & J. Roth trans., 1950).

promise as the current era is by juridically-approved gerrymanders.<sup>65</sup> We should not forget, second, that suffrage extension—the “increasing demands for [political] democracy and equality” of the 1830s that Kramer lauds<sup>66</sup>—was restricted to white adult males. Kramer, “to be sure,” acknowledges the constraint, but limply.<sup>67</sup> So it is important to stress that the participatory parliamentary politics of popular constitutionalism did not extend to women, blacks, paupers and vagrants, felons, aliens, the indigent, and so forth.<sup>68</sup> We should note, indeed, that US suffrage history is not a history of “steady and irresistible expansion,” but of strategic decisions whether to expand or to exclude.<sup>69</sup> Rather than inexorable, the ascendancy of white male democracy during the antebellum era was marked throughout by a patchwork of property qualifications; felon, pauper and alien exclusions; and a marked diversity of local restrictions on who could vote in what elections. By the middle of the century, white male suffrage was significantly wider than at its beginning,<sup>70</sup> but by no means “universal.”

We should not forget, third, that the many “apprehensions”<sup>71</sup> that dogged suffrage extension before the Civil War continued and heightened in the postwar decades.<sup>72</sup> This by many measures was the highest point of mass political participation ever. Turnout averaged 80% of eligible voters nationwide in presidential elections (85% in the North) and did not decline much in off-years.<sup>73</sup> “In late-nineteenth-century America, virtually everyone who was eligible to vote and able to do so went to the polls. And they did so in nearly every election, off-year contests as well as presidential elections, local and state races as well as national ones.”<sup>74</sup> But participation fell rapidly after the turn of the century, to an average of 60% of eligible voters by 1916.<sup>75</sup> No more than two-thirds of the eligible electorate has

65. On the effects of the three-fifths compromise, see GARRY WILLS, “NEGRO PRESIDENT”: JEFFERSON AND THE SLAVE POWER 1–13, 50–61 (2003).

66. KRAMER, *supra* note 1, at 191.

67. *Id.*

68. ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 53–76 (2000).

69. *Id.* at xvi–xxiv.

70. *Id.* at 52.

71. *Id.* at 47–49.

72. See, e.g., Sven Beckert, *Democracy in the Age of Capital: Contesting Suffrage Rights in Gilded Age New York*, in THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY 146 (Meg Jacobs et al. eds., 2003). For a general history of political participation from the Civil War to the eve of the Great Depression, see MICHAEL E. MCGERR, THE DECLINE OF POPULAR POLITICS: THE AMERICAN NORTH, 1865–1928 (1986).

73. MARK LAWRENCE KORNBLUH, WHY AMERICA STOPPED VOTING: THE DECLINE OF PARTICIPATORY DEMOCRACY AND THE EMERGENCE OF MODERN AMERICAN POLITICS, at xii (2000).

74. *Id.*

75. *Id.*

ever voted in a national election since.<sup>76</sup> In non-presidential elections, and in recent decades in presidential elections, too, participation has not exceeded 50%. In state and local elections turnout has dropped to the range of 20–25%.<sup>77</sup>

Retirement from participation of a quarter of the active electorate in fifteen years is not the “long, slow decline into apathy and alienation” to which Kramer speculatively alludes,<sup>78</sup> but a rather short and devastating dive off a cliff. It coincides systematically with the Progressive Era, and is explicable by specific and general manifestations of Progressivism. Kramer argues that Progressive reforms were intended “explicitly to reinvigorate and restore popular control of government and the Constitution.”<sup>79</sup> But this is questionable, at least when measured by voter participation. Progressive elites pursued systematic administrative control of the electoral process in order to undermine partisan influence and, ostensibly, to eliminate fraud.<sup>80</sup> Periodic and personal voter registration requiring detailed self-reporting to maintain eligibility discouraged participation, particularly among poor and minority urban voters.<sup>81</sup> Literacy tests and poll taxes—each a more directly disqualifying innovation—also spread, and not simply in the Jim Crow South.<sup>82</sup> Along with progressive reform of the electoral process went measures—such as the adoption of the Australian ballot, which made ticket-splitting possible—that undermined “the ability of the parties to act as agents of mass mobilization.”<sup>83</sup> Extreme Progressive distaste for partisan politics was accompanied by a reform discourse that favored a functional and bureaucratic administrative state that in its very structure distanced government from popular control.<sup>84</sup>

76. *Id.* at xi–xii.

77. *Id.*; KEYSSAR, *supra* note 68, at xv.

78. KRAMER, *supra* note 1, at 204.

79. *Id.* at 215.

80. KORNBLUH, *supra* note 73, at 118–37, 162–63. Kornbluh notes, “Although many reformers and later scholars have claimed that the major impact of Progressive electoral reforms, especially voter registration, was to eliminate fraud from the political process, there is little evidence to substantiate their claims.” *Id.* at 134.

81. *Id.* at 133–34, 136.

82. *Id.* at 131–33.

83. *Id.* at 134. On the Australian ballot, see *id.* at 123–26.

84. *Id.* at 148–60. Kornbluh describes the Progressive era as a period of “transformation from a participatory to an administrative political system.” *Id.* at 138. He concludes,

The development of the administrative state substantially insulated government from public involvement. Mass participation in electoral politics fell off precipitously and unevenly, creating an electorate that no longer accurately represented the American public. Not only did Americans stop voting, but also elections lost much of their meaning, for the arena of political decision making had shifted to one in which organized interests and their financial resources counted, rather than ballots. Although the transformation of American politics at the turn of the century created a government capable of responding to the demands of a modern society,

These developments and voting trends are a staple of the political history of the late nineteenth and early twentieth centuries. Different scholars have offered different explanations for them, but I am not aware that anyone has systematically contested their overall significance. It is difficult, therefore, to reconcile the vision of Northern progressivism as popular democracy that Kramer seems to embrace with elite progressivism's clear preference not for democracy *per se*, but for disinterested elite expertise as the solvent of problems formerly left to rambunctious and unpredictable partisan mobilizations. One need not allege an anti-voter conspiracy (except in the South) to make the point. It is clear that at the same time Progressive reforms were creating procedural barriers to participation, sectional electoral realignment was reducing partisan political competition and hence incentives to vote as well.

As electoral competition waned, political parties had less incentive to mobilize voters, who, in turn, were less inclined to bother to vote. Just when the complexities of voter registration, literacy tests, and poll taxes made participation much more burdensome, the reduction in two-party competition lessened the satisfaction that people derived from casting a ballot.<sup>85</sup>

In other words, in the early twentieth century parties ceased to be means to organize mass political participation and hence could not serve as vehicles for popular constitutionalism. The intervening century fails to offer convincing evidence that much has, in fact, changed. The growth of the administrative state has continued to distance government from public involvement. Outside some fifty or so congressional districts, there is little real incentive for a citizen to expect a vote may make a difference to the composition of "the people's House."<sup>86</sup>

### III. POLICE AND LAW

Let me now move briefly from the question of democratic expression to the question of state power, which is to say from principle to substance.<sup>87</sup> Now that the state has been "brought back in" to American history

the nature of this transformation raised serious questions about the quality of twentieth-century American democracy.

*Id.* at 159–60.

85. *Id.* at 148.

86. See Robin Toner, *Getting Pumped? Get Real*, N.Y. TIMES, Nov. 13, 2005, § 4, at 1.

87. Matters traversed in this section are treated more extensively in Christopher Tomlins, *Necessities of State: Police, Sovereignty and the Constitution* (forthcoming) (copy on file with author).

and political development,<sup>88</sup> scholars find themselves less regretting its absence than pondering the full extent, and effects, of its capacious presence.<sup>89</sup> For some time a few legal historians, and more recently like-minded others, have been exploring the conceptualization of state capacity implied in the discourse of *police*.<sup>90</sup> This is a large subject, too large to sketch its contours here. But though police is not addressed directly by Kramer it seems of decided relevance, particularly in light of the transition from participatory to administrative politics studied by Mark Kornbluh.<sup>91</sup> For one must presume that in contesting the orthodox historical understanding of judicial review, adherents of popular constitutionalism are engaged in an exercise designed to challenge the legitimacy not merely of judicial review as process but also of the outcomes that it has bred. That is, to seek to recover for ordinary citizens “a central and pivotal role in implementing their Constitution”<sup>92</sup> is surely to anticipate that citizens will set different priorities for state action than the supremacist judiciary.

In the matter of police, the poster child for judicial overstretch is, of course *Lochner v. New York*<sup>93</sup> and its eponymous “era.” In *Lochner* the United States Supreme Court held that the New York state legislature might not use its police powers to regulate the hours of bakery workers.<sup>94</sup> Holmes, in dissent, argued in effect that police is synonymous with governance, and that governance was the business of the legislative and executive arms of the state.<sup>95</sup> In *Lochner*, as he would again, years later, in *Buck v. Bell*,<sup>96</sup> Holmes argued that judges have no business articulating an intervening discourse of good or appropriate governance. Not only was the po-

88. See generally Meg Jacobs & Julian E. Zelizer, *The Democratic Experiment: New Directions in American Political History*, in THE DEMOCRATIC EXPERIMENT: NEW DIRECTIONS IN AMERICAN POLITICAL HISTORY, *supra* note 72, at 1–15.

89. *Id.*; see also CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 (1985); Christopher L. Tomlins, *The Heavy Burden of the State: Revisiting the History of Labor Law in the Interwar Period*, 23 SEATTLE U. L. REV. 605 (2000).

90. See TOMLINS, *supra* note 12, at 35–59; WILLIAM J. NOVAK, THE PEOPLE’S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA (1996); MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT (2005); THE NEW POLICE SCIENCE: POLICE POWERS IN COMPARATIVE PERSPECTIVE (Markus Dirk Dubber & Marianna Valverde eds., forthcoming 2006).

91. See *supra* notes 80–85 and accompanying text.

92. KRAMER, *supra* note 1, at 8.

93. 198 U.S. 45 (1905).

94. *Id.* at 57–58.

95. *Id.* at 75–76 (Holmes, J., dissenting); DUBBER, *supra* note 90, at 196, 201.

96. 274 U.S. 200 (1927).

lice of bakers (no less than the police of genes) within the power of the legislature, it was a power of a sort that was not to be countermanded.<sup>97</sup>

I have argued elsewhere that it is indeed possible to detect in the genealogy of police discourse an implication of democratized state capacity, of government as a means, informed by constitutional declarations of communal as well as individual rights, of maximizing opportunities for the sovereign people to participate in the framing of the collective good—grounded in the older communitarian idiom of “peace and unities” or “safety and happiness” but shaped by a developing consciousness of popular right.<sup>98</sup>

Unfortunately, to undertake a critical and historical analysis of police in action is to discover an expansive, productive and historically proliferating discourse of unmoderated state power as an end.<sup>99</sup> Holmes’s majority opinion in *Buck* and his dissent in *Lochner* both articulate that proliferation. Both, for example, cite approvingly to *Jacobson v. Massachusetts*, where the Court (Justices Peckham and Brewer dissenting) reaffirmed its commitment to the “fundamental principle” that “persons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the State;” to secure “the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be made, so far as natural persons are concerned.”<sup>100</sup> What *Jacobson* reaffirmed had already been serially reaffirmed

97. In *Lochner*, Justice Holmes wrote in dissent,

It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this. . . . The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. . . . [T]he accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

198 U.S. at 75–76. In *Buck*, Holmes wrote for the Court,

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. . . . Three generations of imbeciles are enough.

274 U.S. at 207.

98. TOMLINS, *supra* note 12, at 58–59.

99. See generally Christopher Tomlins, *To Improve the State and Condition of Man: The Power to Police and the History of American Governance*, 53 *BUFF. L. REV.* 1215 (2005); Christopher Tomlins, *Framing the Fragments. Police: Genealogies, Discourses, Locales, Principles*, in *THE NEW POLICE SCIENCE: POLICE POWERS IN COMPARATIVE PERSPECTIVE*, *supra* note 90.

100. 197 U.S. 11, 26 (1905) (internal quotations and citations omitted).

by the Court in earlier decisions. Indeed, courts, including the Supreme Court, and treatise writers had a long history of declaring the police powers of the state unlimited, even indefinable.<sup>101</sup>

On one reading, suggested recently by Markus Dubber, *Lochner* may be seen as an attempt to overcome to some small but essential degree the abdication of responsibility to check state power. That is, Dubber argues the Court's stance in *Lochner* was entirely appropriate: "*Lochner* did what courts, and the public, should do in the American view of law and government: it subjected state action to principled scrutiny. More specifically, it scrutinized the state's exercise of its police power."<sup>102</sup> In form and execution the Court's scrutiny might have been wanting, but not "the larger enterprise of exploring the limits of state police power."<sup>103</sup> One might have thought that Progressive era adherents of popular constitutionalism, desirous of "reinvigorat[ing] and restor[ing] popular control of government" would have agreed.<sup>104</sup> But in the debate over *Lochner*, everyone preferred Holmes' side. *Lochner* was the Progressives' F-word, Holmes their hero. Such has also been the case with many constitutional law scholars.<sup>105</sup>

Consider, though, that police means state segregation statutes, state eugenics statutes, state criminalization of interracial marriage, state sodomy laws, and state action to confront a host of other threats to the moral police of the public. Police, more broadly, means the management of population as a resource. Police and the administrative state that New Deal liberals taught generations to revere exist in intimate regard for one another. State action subjected to principled scrutiny? The New Deal needed a demonizing history of the *Lochner* decision.

It is interesting that the New Deal received the first installment of the history it needed from the hand of the young Roscoe Pound, who in later years would become one of its greatest enemies. None at the time was more effective in assailing *Lochner* as an instance of judicial interference that imperiled state power to act to manage population. In his 1909 *Yale Law Journal* article, "Liberty of Contract,"<sup>106</sup> Pound attributed the jurisprudential tendencies that informed the majority in *Lochner* to the influence of an exaggeratedly individualistic juridical ideology that denigrated "public

101. See DUBBER, *supra* note 90, at 81–138.

102. *Id.* at 195 (emphasis added).

103. *Id.*

104. KRAMER, *supra* note 1, at 215.

105. For an elegant summary of a century of opinion on the matter, see Jack M. Balkin, "Wrong the Day It Was Decided": *Lochner* and Constitutional Historicism, 85 B.U. L. REV. 677 (2005). See also Howard Gillman, *De-Lochnerizing Lochner*, 85 B.U. L. REV. 859 (2005).

106. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

right”; to an excessively “mechanical” or conceptualist mode of juridical reasoning that ignored practicalities; to an absence of regard for the societal role of state power; and to the general prevalence of legal principles over “situations of fact.”<sup>107</sup> His ideal was a “sociological” jurisprudence that would “adjust[] . . . principles and doctrines to the human conditions they are to govern.”<sup>108</sup> Pound was so successful that any promise of meaningful scrutiny of assumed authority that *Lochner* might have suggested would remain unrealized. For that, Pound too became a Progressive hero.

As I have said, this is one reading. One can think of others. To repeat, under certain political circumstances—a state fully under democratic control—police can be precisely the instantiation of the will of popular democracy that one might desire. But in the specific context of the structural transformation of American politics that I have summarized—Kornbluh’s transition from participatory to administrative politics—the real possibility of meaningful scrutiny of a Progressive state obsessed with ideologies of expertise embodying the therapeutic manipulation of populations seems at least worth questioning. Is it so disturbing that the Court might have experimented with scrutiny? The matter, I think, is worth debating.

107. *Id.* at 457–58.

108. *Id.* at 464. Just what this meant in practice is best illustrated by the approach Pound advocated in the realm of criminal and municipal justice. As Michael Willrich has established in some detail, Pound was a key figure in the turn-of-the-century reconstruction of urban court systems as administrators of urban populations through the discretionary application of “socialized law.” MICHAEL WILLRICH, *CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO* 98 (2003); *see generally id.* at xxxi–xxxiii, 96–115. In the cities, socialized law meant “centralized judicial bureaucracies with specialized branches,” *id.* at xxxii, such as (in Chicago’s case) branch courts addressing discrete populations and problems—domestic relations, morals, and juveniles. *Id.* at 114–15. More importantly, it meant giving law a new therapeutic role. As Willrich describes it, the socialization of law brought the installation of “staffs of disciplinary personnel” or “social experts” as strategic players in the court bureaucracies: “psychologists, psychiatrists, physicians, social workers, and probation officers . . . examined offenders and advised judges on the best ‘individual treatment’ given the offenders’ mental makeup, family background, and social history.” *Id.* at xxxii. As Progressive Era innovations spread, “treatments” proliferated:

To the conventional punitive measures of fines and incarceration, state legislatures added the far more discretionary techniques of indeterminate sentences, probation, parole, compulsory medical treatment, routine commitment to state institutions for the insane or feeble-minded, and eugenical sterilization. In socialized criminal justice, the case was only the starting point for a much broader set of investigations and interventions that aimed not so much to punish crime but to reform criminals and the larger social world that had produced them.

*Id.* at xxxii–xxxiii.

Rather than scrutinize state authority to discipline and punish, Pound desired its refinement and extension to “secur[e] social interests regarded directly as such, that is, disassociated from any immediate individual interests with which they may be identified.” Roscoe Pound, *Introduction to FRANCIS BOWES SAYRE, A SELECTION OF CASES ON CRIMINAL LAW*, at xxix, xxxii (1927). What were those social interests? “The general security, the security of social institutions, the general morals, the conservation of social resources, the general progress,” and, trailing last, “the individual life.” *Id.* at xxx. Preemptive interventions “to prevent disobedience” would be the new order of things—social control, “preventive justice.” *Id.* at xxxv–xxxvi.

## CONCLUSION: PAST AND PRESENT

Finally, and once more briefly, what can we say about the uses Kramer has made of history?

Professional history—the genre of scholarship in which *The People Themselves* for the most part participates—is a set of credentialed techniques (conceptual practices, research methodologies) for the production of narratives from archival remainders. Judged in this light, Kramer’s mobilization of historical techniques seems to me fundamentally conventional. He has undertaken thorough archival research, assembled evidence, drawn conclusions, and woven the whole into a story. The substance of the story may be controversial. Its presentation is not.

It is important, I think, to ask whether there are other completely different ways to write constitutional history. The question arises from what seems to me the essential complacency of American constitutional history: constitutional history assumes the Constitution. Hence one is always within the sphere of its possibility. From within, the Constitution appears as a protean, amoeba-like phenomenon, really an ideology, constitutionalism, not a text “in the National Archives”<sup>109</sup> (for the text is usually an afterthought—interpretation is what counts<sup>110</sup>). So here we encounter no argument over the Constitution, such as “whether it is good or not,”<sup>111</sup> but rather over how the assumed promise of the Constitution is properly to be realized, or extended. Noticeably, exit is not an option. So here the question is whether realization should occur through one ideology (popular constitutionalism) as opposed to another (call it elite juridical constitutionalism). The trope invoked is that of a “world we have lost” that can be ours again. The people have surrendered their constitution to juridical supremacy. They/we must take it back. History legitimates the quest.

The genre or mode of constitutional history is romance.<sup>112</sup> In fact, Kramer’s is an interesting variation on the genre, for although the implication is that a resurgence of popular constitutionalism will make things better, Kramer actually professes no blithe confidence in a positive outcome. It is up to “us.” This verges on what my colleague Bonnie Honig has dubbed “gothic” romance.<sup>113</sup> One might add that in full gothic mode Kramer

109. Alexander & Solum, *supra* note 2, at 1637.

110. See Hulsebosch, *supra* note 22, at 655.

111. Morison, *supra* note 20, at 217.

112. On modes of history, see HAYDEN WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* (1973). On genres of political (and legal) thought, see BONNIE HONIG, *DEMOCRACY AND THE FOREIGNER* 107–22 (2001).

113. Honig, *supra* note 112, at 109–115.

should also demonstrate a certain ambivalence, even fear, toward that to which he is attached. After all, what are “we” going to do with the Constitution once we have recovered it? Might we not abuse it?<sup>114</sup> Aren’t “we” in fact deeply crosscut by all those persisting socioeconomic antagonisms and cleavages that fragment the possibility that there indeed exists something that we can call “the people” at all? Class, gender, and race are not simply conveniently imagined categories of scholarly analysis; they are real social phenomena. How do you construct a “we” out of us and them? How can one know that popular constitutionalism, once it has taken back the Constitution, will not devour its professors? Kramer does not think that thought, or if he does it is only to deny its possibility. His romance of “the people” is almost pre-political in its faith.

In this faith lies both strength and vulnerability. Kramer manifests a deep normative commitment to the rightness of his cause, that is, the cause of a constitution reinvigorated by “the people themselves.” As I have intimated, it is not clear to me that the people, as such, have a common cause, as such. But let that pass. Taken on its own terms *The People Themselves* is intended as an exploration of the roots of a present in which the people must consciously decide whether or not they wish to “assume once again the full responsibilities of self-government”<sup>115</sup> surrendered over time as if in a fit of absence of mind. The book supplies the outline of a past that popular constitutionalism’s sympathizers can use in imagining how the people might take up those responsibilities. It contests the triumphal procession of a purposefully embedded ruling tradition and the appropriation of the people’s cultural treasure, their constitution, to that tradition. As a normative history it does not simply tell us how the present came to be, but does so in order to embrace what should be. It does so not to criticize, but to restore. *The People Themselves* manifests strength of conviction, and there is virtue in its expression in comparison to the professionalized production of history, which of late has eschewed the formulation of usable knowledge in the service of a rather self-satisfied embrace of “complexity.”<sup>116</sup> Nevertheless, in strength of conviction there also lies the danger of self-delusion. The usable past that Kramer desires to furnish for popular constitutionalism cannot substitute for the laborious construction of a real-

114. An important theme of Kramer’s critics is that left to our own devices beyond the radius of their wisdom, “we” almost certainly will. See Powe, *supra* note 3, at 890–94; Alexander & Solum, *supra* note 2, at 1619–40.

115. KRAMER, *supra* note 1, at 247.

116. History’s embrace of the aesthetic of complexity is discussed in Kunal Parker, *Context in History and Law: A Study of the Late Nineteenth Century American Jurisprudence of Custom*, 24 LAW & HIST. REV. (forthcoming 2006) (draft available at <http://www.press.uillinois.edu/journals/lhr/toc.php>).

izable basis upon which the idea of “the people” can be mobilized for the general good today.