

## POPULAR CONSTITUTIONALISM AS POLITICAL LAW

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## INTRODUCTION

This Article addresses some of the critical reviews of *The People Themselves*, focusing on how they respond to the proposition, which I believe to be correct and made in *The People Themselves*, that constitutional law is a distinctive or special kind of law. I call that kind of law *political law*.<sup>1</sup> Both parts of the formulation are equally important. Constitutional law is *law*, what is sometimes described as “hard” law.<sup>2</sup> As law, it sometimes induces decision-makers to make decisions that are inconsistent with their “pure” preferences, that is, those they would hold in the absence of law. My aim is primarily to clarify some methodological issues connected to the idea of constitutional law as political law, rather than to make a substantive contribution to the analysis. I observe at the outset, though, that I substantially agree with Kramer’s contention that we can find in U.S. history a persistent strain of popular constitutionalism—that is, as I understand the point, the deployment of constitutional arguments by the people themselves, independent of, and sometimes in acknowledged conflict with, constitutional interpretations offered and enforced by the courts. After setting out some general methodological considerations, I briefly discuss the way in which popular constitutionalism is continuous with, albeit distinct from, more standard descriptions of constitutional law, as involving a dialogue between the courts and the people. I conclude with an examination of some consequentialist criticisms of popular constitutionalism, that is, the claim

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1. Kramer’s term, drawn from John Phillip Reid, is “political-legal.” See LARRY KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 24, 63 (2004). Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027, 1037–38 (2004) [hereinafter Post & Siegel, *Popular Constitutionalism*], articulate the distinction as one between constitutional law, a term they reserve for “the judgments and opinions of courts,” and the Constitution, a term they say refers to “the fundamental beliefs of ‘We the People.’” I believe that Kramer’s terminology, and my own, is more illuminating because it does not attempt to draft conventional terminology into new service.

2. See generally Symposium, 6 CONST. COMMENT. 19 (1989) (addressing the question, Is the Constitution law?). See also Post & Siegel, *Popular Constitutionalism*, *supra* note 1, at 1034–37 (discussing “The Constitution as Law”), 1039 (asserting that “the Constitution has features of ordinary law”).

that the people themselves have in fact done quite badly in interpreting the Constitution, as compared to the courts. Here I return to some methodological considerations, as the basis for arguing that the case for popular constitutionalism is stronger than its consequentialist critics suggest.

### I. GENERAL CONSIDERATIONS

That constitutional law is to some substantial degree law used to be entirely uncontroversial, and we therefore have a reasonably good sense of how to think about the “law” part of constitutional law. That constitutional law is to some substantial degree political is now largely uncontroversial,<sup>3</sup> but many efforts to analyze the “political” part of constitutional law strike me as simplistic, at least in that they treat constitutional law as *only* politics, and understand politics to be the expression of unanalyzable preferences.<sup>4</sup> I take *The People Themselves* to be a sustained attempt to provide a rich body of historical information that provides the basis for thinking more deeply about the way in which constitutional law combines politics and law.<sup>5</sup>

How—definitionally—can we distinguish between the legal and the political components of constitutional law? One of the points I make in this Article is that we cannot expect sharp analytic distinctions to be available when our interest is in the actual practice of constitutional law throughout U.S. history. Still, I can offer some suggestions to orient thinking, to get us in the general area where we ought to be. So, for example, as law, constitutional law’s primary characteristic is that it is to a large degree retrospective: Decision-makers today look to decisions made yesterday, whether evidenced by the Constitution’s text or by judicial precedents, for guidance

3. I note, though, that I take a central element in the criticisms of *The People Themselves* offered by Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (book review) [hereinafter Alexander & Solum, *Popular Constitutionalism*], to be the insistence, in my view mistaken, that constitutional law is *only* law, indistinguishable from common or statutory law.

4. For a recent dramatic example, see Richard A. Posner, *The Supreme Court, 2004 Term—Forward: A Political Court*, 119 HARV. L. REV. 31 (2005).

5. I believe that European constitutional thought, influenced by Hans Kelsen, could be usefully consulted in understanding U.S. constitutional law. Kelsen designed the Austrian constitutional court, the major institutional alternative to the U.S. model for a court exercising the power of judicial review, as he did, precisely because he understood constitutional law to be a special kind of law, in which the political played a large role. He believed, I think mistakenly, that it followed from his understanding of constitutional law as political law that constitutional courts could act only as what he called negative legislators. For a discussion of Kelsen’s constitutional theorizing, stressing the role of the constitutional court as a negative legislator, see Bojan Bugarcic, *Courts as Policy-Makers: Lessons from Transition*, 42 HARV. INT’L L.J. 247, 256–57 (2001). I think it would be quite helpful, though I am not the person to do it, to develop a way of thinking about constitutional law as political law that would meld Kelsen’s insights with the lessons of the U.S. experience with constitutional review.

and constraint. This retrospective character makes legal analysis an exercise in interpretation—of texts, of practices, of history. In contrast, politics is to a large degree prospective: Decision-makers today make judgments about what would be best for the society going forward, without essential reference to prior events or practices.

The inevitable fuzziness of the distinction between the legal and political components of constitutional law should be immediately apparent from these suggestions.<sup>6</sup> For example, sensible decision-makers contemplating what would be best for society in the future will often, perhaps always, consult their understanding of what policies had worked well and poorly in the past, sometimes explicitly, sometimes implicitly (as when they think of large analogies such as “Munich” in trying to figure out how to deal with dictators). Still, politics *can* involve decisions that are entirely forward-looking.<sup>7</sup> Additionally, sometimes retrospective examination—that is, interpreting the law as it is—involves assessing the consequences that we think would follow from finding the law to be X rather than Y.

More interesting, and more directly related to Kramer’s work, the people acting politically sometimes (though not always) engage in an interpretive enterprise as well. Our political actions are sometimes efforts to understand who we *are* as a people, that is, who we have constituted ourselves to be through our history. A dramatic recent example is the debate over the adoption of torture and closely related techniques of interrogation as a method to extract information about threats to national security. An important component of the arguments made by those proposing a statute to ban further use of such techniques was that their use was a betrayal of who we were as Americans.<sup>8</sup> I take this argument to be one about constitu-

6. I note that an important element in some of the critical reviews of *The People Themselves* is a demand for more precision than is appropriate for the subject matter. See Alexander & Solum, *Popular Constitutionalism*, *supra* note 3, at 1602-07 (2005) (describing the authors’ “conceptual toolkit”). Alexander and Solum’s use of the phrase “cash out,” *id.* at 1607, is a strong signal of their interest in greater conceptual precision than seems to me appropriate. See also *id.* at 1596 (describing popular constitutionalism “before the Constitution [as] something cloudy—diffuse, unclear, and ambiguous”), 1618–19 (“[F]loating in a rarified atmosphere at the very highest level of abstraction, popular constitutionalism is thin and wispy.”); Dale Carpenter, *Judicial Supremacy and Its Discontents*, 20 CONST. COMMENT. 405, 432 (2003) (“I am unclear precisely what it means.”). I note that there is some tension between a description of Kramer’s work as abstract and the obvious historical detail with which it is filled.

7. Cf. Abraham Lincoln, Second Annual Message to Congress, (Dec. 1, 1862), in 5 COLLECTED WORKS OF ABRAHAM LINCOLN 518, 537 (Roy P. Basler ed., 1953) (“As our case is new, so we must think anew, and act anew. We must disenthrall ourselves, and then we shall save our country.”).

8. See, e.g., Press Release, U.S. Senator John McCain, McCain Statement on Detainee Amendments (Oct. 5, 2005), available at [http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content\\_id=1611](http://mccain.senate.gov/index.cfm?fuseaction=Newscenter.ViewPressRelease&Content_id=1611) (“The enemy we fight has no respect for human life or human rights. They don’t deserve our sympathy. But this isn’t about who they are. This is about who we are. These are the values that distinguish us from our enemies.”).

tional law in the context of prospective decision-making. Interpretation, the legal component of constitutional law as political law, is here inextricable from the forward-looking, political component of constitutional law as political law.

As I have said, these comments are aimed simply at getting us in roughly the right area to think about constitutional law as political law. How can we engage in a closer examination of that idea? In my interpretation of his work, Kramer answers, By looking at history. People *perform* constitutional law as political law through (some of) their mobilizations in politics.

To begin with, we must examine some narrow points about using history to examine constitutional law as political law. Not all popular mobilizations are performances of constitutional law, although many, perhaps most, are. Kramer does not develop criteria for distinguishing between those that are and those that are not. Nor are crisp criteria likely to be available. My own sense is that Madison's metaphor about momentary conflagrations that flare up in a single state but do not spread throughout the extended republic captures much of what is involved,<sup>9</sup> but it would take detailed examination of particular incidents to begin to get a better sense of the distinction.<sup>10</sup>

As Kramer properly emphasizes, popular mobilizations that *are* performances of constitutional law are not necessarily unmediated by standard political organizations.<sup>11</sup> In some eras, the people organize themselves "out of doors," in street demonstrations and the like, although even these mobilizations always have some sort of organizational basis.<sup>12</sup> Ordinarily,

9. THE FEDERALIST, NO. 10, at 60 (James Madison) (E.H. Scott ed., 1898) ("The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other States.").

10. L. A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 866–84 (2005) (book review) [hereinafter Powe, *Missing in Action*], describes a number of candidates for popular mobilizations: massive resistance to desegregation, domestic anti-Communism and McCarthyism, Richard Nixon's law-and-order campaign, advocacy of restoring school prayer, anti-busing agitation, anti-abortion protest, and anti-globalization. Of these, massive resistance, anti-busing, and anti-abortion protest pretty clearly count as popular mobilizations. The others are, in my view, more ambiguous. See also *infra* text accompanying note 14.

11. *But cf.* Alexander & Solum, *Popular Constitutionalism*, *supra* note 3, at 1600 ("Kramer's historical examples and list of political checks . . . include no mention of direct popular action.").

12. I am not a close student of these mobilizations, but I do recall reading Leonard Richards's study of Jacksonian "riots" and being impressed by the degree of organization underlying them. See LEONARD L. RICHARDS, "GENTLEMEN OF PROPERTY AND STANDING": ANTI-ABOLITION MOBS IN JACKSONIAN AMERICA (1970); see also RICHARD D. BROWN, REVOLUTIONARY POLITICS IN MASSACHUSETTS: THE BOSTON COMMITTEE OF CORRESPONDENCE AND THE TOWNS, 1772–1774, at 38–91 (Norton Library 1976) (1970) (describing the extensive, quasi-governmental role of the Committees of Correspondence prior to the American Revolution). I think it worth noting that Alexander and Solum seem to me almost obsessively concerned with the image of unruly mobs, which probably is

though, as Kramer repeatedly emphasizes, popular mobilization takes place *through* the ordinary forms of political organization, and especially through political parties and their leaders.<sup>13</sup>

This fact, however, introduces yet another complication: We have to worry about simulacra of popular mobilization, that is, about assertions by political leaders that they are acting in the service of the people themselves when in fact the political leaders are pursuing their own agendas. Examining particular incidents in detail seems to be the only effective analytic strategy, but—simply to suggest what we might want to look at—consider the advocacy by political leaders of constitutional amendments to authorize organized prayer in public schools or to immunize from constitutional attack legislation banning flag-burning as a means of political protest. In both cases the leaders claim, with some support from polling data, that a large portion of the public would like such amendments to the Constitution, and yet the consistent rejection of such amendments, and the fact that no one seems to suffer political damage from opposing the amendments, suggests that there is no underlying popular mobilization in those cases. I doubt that we are ever going to substitute crisp analytic categories, or “markers,” as Scot Powe asks for,<sup>14</sup> for historical judgment on this and related questions.<sup>15</sup>

As I have said, scholars are familiar with how political law—that is, constitutional law—is law. Kramer’s primary goal is to delineate the politi-

linked, as well, to their reference to interpretive anarchy. For references to mobs, see Alexander & Solum, *Popular Constitutionalism*, *supra* note 3 at 1622 (providing five reasons why “mobs . . . cannot do the job required by robust popular constitutionalism”), 1636 (while acknowledging that Whig mobs were “polite,” nonetheless asserting that “mob rule has a tragic history”). See also Powe, *Missing in Action*, *supra* note 10, at 893 (referring to “mass meetings” as the institutionalization of popular mobilizations).

13. Alexander & Solum overlook this feature of Kramer’s account. See, e.g., Alexander & Solum, *Popular Constitutionalism*, *supra* note 3, at 1635 (asserting that popular action wherein “the people would act through government institutions . . . would erase the distinction between popular constitutionalism and executive or legislative supremacy”); see also *id.* at 1621 (“[A]n authoritative interpretation that binds government officials . . . requires an institutional mechanism by which the multiple voices of popular opinion can be translated into a single voice of interpretive authority.”). On Kramer’s account, specific controversies are resolved by a complex process of institutional interaction, sufficient to satisfy the conceptual requirement Alexander and Solum impose. The difference between them and Kramer, it seems to me, is that they fail to explain why their conceptual requirement is for a single institutional mechanism operating identically across all historical periods.

14. Powe, *Missing in Action*, *supra* note 10, at 892 (after enumerating some public officials who may have been speaking for popular mobilizations, commenting, “Perhaps they all were; perhaps none of them were. But it would be nice to have a marker to know.”).

15. Powe discusses efforts to restore organized prayer to the public schools, but provides almost no evidence that this was a *popular* rather than a *politicians’* movement. The one datum he does provide—that according to a work published in 1971, “[t]wo-thirds of all Southern schools continued exactly as before,” *id.* at 876—is outdated and, in the absence of some indication of what percentage of students in Southern schools attended those schools, does not shed much light on the question of popular support for pro-prayer initiatives. *Id.* at 875–77.

cal component of political law. It is important to his effort that we avoid treating politics as mere preference. To use Bruce Ackerman's terminology, *normal* politics involves arguments about which of our preferences ought to be converted into public policy.<sup>16</sup> The politics in political law is different, and *not*, as in Ackerman's scheme, because of the greater normative weight that attaches to what the people are concerned with during constitutional moments.<sup>17</sup> It is different because it typically has a different rhetoric from normal politics, even though it takes the same form that normal politics does.

When popular mobilizations are mediated by political institutions, as they usually are, that form of mobilization is one of interaction among legislatures, the President and other executive officials, and the courts, over matters they all treat as being of constitutional significance. What matters to Kramer is that in these interactions, unlike those of normal politics, the legislative and executive participants clearly assert their equality with the courts on questions of constitutional interpretation. Interactions among the branches occur in normal politics, but Congress and the President accept that the courts have the last word in interpreting the law, that is, in the retrospective enterprise.<sup>18</sup> What makes constitutional law as political law different is that the legislative and executive participants explicitly insist that the courts' view of what the existing Constitution means has no special weight as law, but only the value that attaches to that view as a rational matter. Here the legislative and executive participants take the position that they too are entitled to engage in the retrospective enterprise of interpreting the Constitution, often because of the way in which the Constitution expresses who we are as a nation.

The fact that constitutional law as political law can be performed through interactions among the branches of government contributes to the inherent fuzziness of the category *popular constitutionalism*. Those interactions are structured to some extent. For example, the "case or controversy" requirement of Article III means that courts are rarely—though not *never*—

16. See 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 230–65 (1991).

17. For one thing, in Kramer's view (and mine), popular mobilizations are a more pervasive phenomenon than Ackerman's metaphor of constitutional moments suggests (although in practice Ackerman may be so profligate in identifying constitutional moments and near-moments that the difference between his view and mine may be quite small).

18. Of course, normal politics usually involves the adoption and interpretation of statutes, and Congress and the President can revise a statute prospectively if they disagree with how the courts have interpreted it. See, e.g., *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992) (holding that Congress can modify the substantive provisions of a statute to thwart an anticipated judicial interpretation, without violating the proscriptions of Article III). Compare *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding that Article III precludes Congress from retrospectively reviving causes of action previously barred by the expiration of the then-applicable statute of limitations).

the first movers in the interactions. However, in general, the interactions are fluid, and take different forms at different times.<sup>19</sup> That means that we are not going to be able to make strong claims about the inherent structure of constitutional law as political law, or even to be confident that we have identified episodes of constitutional law as political law rather than normal politics.<sup>20</sup> Ordinarily, I believe, all that we will be able to say is that at a given time constitutional law as political law was performed by a given kind of interaction between legislatures, Presidents, and courts, and at another time it was performed by another kind of interaction.<sup>21</sup> There can be no claim that how it was performed at any particular time captures the essence of popular constitutionalism. In other words, the analysis of popular constitutionalism is necessarily historical rather than conceptual.<sup>22</sup>

## II. POPULAR CONSTITUTIONALISM AS A FORM OF DIALOGIC CONSTITUTIONALISM

Dialogic accounts of constitutional law treat the people, legislatures, executives, and courts as in conversation. We can distinguish among dialogic accounts primarily by considering the time frame over which the conversation occurs, and secondarily (but importantly for purposes of understanding popular constitutionalism) by considering who signals that the conversation is over.

19. And, of course, Kramer's primary lament about the current period is that the people, and their political leaders, appear to have abandoned the commitment he finds in U.S. history to constitutional law as political law.

20. The strength and weakness of Ackerman's enterprise, I believe, lies in his effort to identify formal criteria that *do* identify constitutional moments. For my comments on that effort, see MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 4 (2003).

21. Kramer emphasizes this point in headings such as "Popular Constitutionalism, circa 1840." KRAMER, *supra* note 1, at 196. In one sense, it is fair to say that Kramer does not describe "how [popular constitutionalism] is supposed to operate," Carpenter, *supra* note 6, at 432, but only because, on his account, it is not "supposed" to operate in any particular way. Popular constitutionalism simply is the interaction among the people, political leaders, and political institutions (including the courts) over questions of constitutional meaning. I confess to having been unsuccessful in my efforts to persuade constitutional lawyers that the political question doctrine is a doctrine of constitutional law *qua* law in which the substance of constitutional law is simply the outcome of political contest. For one version of my argument, see Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203 (2002).

22. I am puzzled by Alexander and Solum's assertion that normative claims cannot be founded on an examination of historical experience unless that experience is refined into analytically precise terms. See Alexander & Solum, *Popular Constitutionalism*, *supra* note 3, at 1617 (criticizing Kramer's "deliberate looseness" when coupled with his "normative agenda"). Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 660 (2005) (book review), in referring to Kramer's "historical pragmatism," seems to me to have a better understanding of the relation between Kramer's historical inquiry and his normative proposals.

A standard political science model of the interaction between the Supreme Court and the political branches sees a dialogue occurring over a relatively long time frame. Originating with Robert Dahl in 1957,<sup>23</sup> and updated by Barry Friedman and others,<sup>24</sup> this model has the Court being brought into line with the constitutional views held by a political coalition that sustains itself in power for a suitably long period.<sup>25</sup> The mechanism for alignment is the appointment process: As older judges die or retire, they are replaced by new ones who share the constitutional views of the dominant political coalition.<sup>26</sup> Notably, in this model it is irrelevant whether the dominant coalition opposes judicial supremacy in constitutional interpretation or merely disagrees with the interpretations provided by a Court that it does not (yet) control. In the end, the dominant coalition comes to live with judicial supremacy because, once it has taken control of the Court, it then finds the issue of judicial supremacy irrelevant.

Scholars who emphasize the role of social movements in shaping constitutional law, such as Robert Post and Reva Siegel,<sup>27</sup> offer a model in which the conversation can take place over a shorter term than in the political scientists' model.<sup>28</sup> According to this view, the people influence constitutional law by organizing social movements that offer distinctive constitutional visions, typically oppositional to the vision dominant in the courts when the movements begin. Social movements influence constitutional law in two ways. One returns us to the political scientists' model: The movements affect electoral politics, which in turn affects the composition of the courts. But, the social movement model offers an alternative

23. Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

24. See, e.g., Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004).

25. For Powe's endorsement of this model, see Powe, *Missing in Action*, *supra* note 10, at 890 ("There is no time since the Civil War when a party won three consecutive presidential elections and failed to gain a majority on the Court.").

26. Cf. Alexander & Solum, *Popular Constitutionalism*, *supra* note 3, at 1618 (referring to the use of "the political process to change [the Supreme Court's] composition if we feel it has gone too far astray"); Powe, *Missing in Action*, *supra* note 10, at 885 (describing "judges" as the "instrument" contemporary political parties hope to use to implement their constitutional visions).

27. Post & Siegel, *Popular Constitutionalism*, *supra* note 1, at 1029 n.13, provide this list of their work: Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); 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); Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004); Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001).

28. Although it is not inherent in their model that it does.

mechanism: Judges observing the social movement and its effects on society change their views about what the Constitution means.<sup>29</sup> Unlike the political scientists' model, then, the social movement model does not depend on a change in the Court's composition for there to be a change in constitutional interpretation. Like that model, though, the social movement model understands the story to end when the courts come into line.<sup>30</sup>

Bruce Ackerman has offered a model with an even shorter time frame. Important to his account of constitutional transformation is the "switch in time."<sup>31</sup> Facing a mobilized public, and its political leadership, the courts abandon their previous interpretation of the Constitution and adopt the one offered by their conversational partners (here, more like adversaries). The interactions that produce the switch in time occur within a compressed time period, which is of course consistent with Ackerman's metaphor of "moments," that is, short periods of time in which important political and constitutional developments take place. Unlike the social movements model, here the mechanism of change is not persuasion but submission or fear that failure to change will produce severe adverse consequences for the Court. But, like that model, the conversation ends when the Court comes to agree with its adversaries. For Ackerman, after the Court changes, a new period of normal politics takes hold until the next constitutional moment.

Finally, we come to popular constitutionalism as a dialogic process. Here the conversation takes place in real time, much as in Ackerman's model. In popular constitutionalism, everyone—the mobilized people, their political representatives, and the courts—offers up constitutional interpretations all at once. The interactions among these political actors, that is, their conversation, produces constitutional law. What is distinctive about popular constitutionalism is that the courts have no normative priority in the conversation. For popular constitutionalists, it simply does not matter whether, or when, or how, the courts come to accept the constitutional interpretation offered by the people themselves.<sup>32</sup> Sometimes the conversa-

29. Cf. Alexander & Solum, *Popular Constitutionalism*, *supra* note 3, at 1626 (noting that "the Supreme Court could pay attention to popular criticism of its decisions").

30. Cf. Powe, *Missing in Action*, *supra* note 10, at 866 ("Forcing the Court to change its mind, either by convincing the Justices they erred or, more likely, by new appointments, would seem to be the most likely mechanism through which the people could control constitutional law.") Note the identification here of constitutional law with adjudicated law.

31. See, e.g., 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 18–20 (1998) (providing a "five-stage process" including the switch in time); BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY* 265 (2005) (describing "a recurring institutional dynamic," including a switch in time).

32. Cf. Post & Siegel, *Popular Constitutionalism*, *supra* note 1, at 1038 ("[T]he fundamental constitutional beliefs of the American people are informed and sustained by the constitutional law

tions will end with the legislature and executive, and the people, accepting the judges' decisions.<sup>33</sup> But, sometimes the conversations will end with the legislature or the executive going their own way, ignoring the imprecations hurled at them by the courts and supporters of judicial supremacy.<sup>34</sup>

This aspect of popular constitutionalism is likely to be unattractive to those who think that there is some necessary connection between analytic clarity and social stability.<sup>35</sup> As I have emphasized, popular constitutionalism does not offer crisp analytic categories that tell us what will happen when the people, through their legislators, urge one constitutional interpretation, the President urges another, and the courts yet a third. So, the seeker of analytic clarity will ask, Doesn't popular constitutionalism portend anarchy?<sup>36</sup> I have argued elsewhere that it does not,<sup>37</sup> because the "anarchy" argument mistakenly conflates a lack of analytic clarity with social disorder-

announced by courts, just as that law is informed and sustained by the fundamental constitutional beliefs of Americans.").

33. For this reason, the "populist *tu quoque*" offered by Alexander and Solum—that the people of the United States at present have accepted judicial supremacy—is not inconsistent with popular constitutionalism. See Alexander & Solum, *Popular Constitutionalism*, *supra* note 3, at 1638. Post and Siegel present a more defensible version of the point:

Americans have generally been committed both to judicially enforceable constitutional rights and to the idea that the Constitution reflects the political self-conception of the nation. They have understood that judicially enforceable rights play an important role in guaranteeing the conditions of popular constitutionalism, and that popular constitutionalism plays an important role in articulating the fundamental values that judicially enforceable rights function to instantiate.

Post & Siegel, *Popular Constitutionalism*, *supra* note 1, at 1036–37. And, for my version, see Mark Tushnet, *Forms of Judicial Review as Expressions of Constitutional Patriotism*, 22 L. & PHIL. 353, 375 (2003) ("[T]he people of the United States seem both (a) committed to strong-form judicial review, and (b) sufficiently self-governing to count as participants in a process of constitutional democracy."). Kramer's discussion of "Popular Constitutionalism, circa 2004," in KRAMER, *supra* note 1, at 227–48, should be read as arguing that the commitment to judicial supremacy or strong-form judicial review is historically contingent and perhaps historically anomalous. See also Hulsebosch, *supra* note 22 *passim*, one of whose general themes is that Kramer underestimates the degree to which the American people have historically been ambivalent about judicial supremacy, simultaneously committed to it and nervous about that commitment.

34. A popular constitutionalist might predict, and take some satisfaction in the fact, that the courts will eventually come into line, for any of the reasons set out in the other models. But, that prediction is not intrinsic to popular constitutionalism, which can tolerate long periods of judicial resistance to the views offered by the mobilized people and their political leaders.

35. And, of course, to those—whose views I address in the next Section of this Article—who think that the courts almost always offer better constitutional interpretations than the people themselves.

36. See Alexander & Solum, *Popular Constitutionalism*, *supra* note 3, at 1610–11 ("Without a mechanism to resolve the dispute, . . . boundary conflicts would . . . undermine the Constitution's ability to serve the rule-of-law functions of enabling peaceful dispute resolution . . . Even worse, such conflicts might degenerate into naked power struggles, raising the Hobbesian specter of social chaos."), 1613 (arguing that one version of popular constitutionalism's "underlying logic . . . leads to anarchy"). Cf. Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359 *passim* (1997) (arguing that judicial supremacy in constitutional interpretation is necessary to avoid interpretive anarchy, which has undesirable social consequences in making people uncertain about the legal rules that will govern their daily activities).

37. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 27–28 (1999).

der. Political institutions keep on operating without difficulty across a wide range of matters even as popular constitutionalism's conversations take place on some (of course important) issues. People in organized societies tolerate a fair amount of uncertainty on some questions as long as there is sufficient stability on other matters.<sup>38</sup> Proponents of the "anarchy" argument would have to offer some evidence that anarchy actually occurs before their position would have some bite. Kramer's account of popular constitutionalism in U.S. history strongly suggests that popular constitutionalism can exist with a fair amount of social stability.<sup>39</sup> Further, as I have indicated, popular constitutionalism's conversations are not entirely unstructured. They use the ordinary modes of political action, with which people are familiar and which, therefore, do not leave people feeling as if they are at sea in their daily lives.

### III. THE CONSEQUENCES OF POPULAR CONSTITUTIONALISM

Does popular constitutionalism portend real social anarchy, as distinguishing from conceptual messiness? One reason to think that it does not is the history Kramer recounts—a history in which substantial segments of the American public have been committed to popular constitutionalism, and simultaneously one in which the nation's social disorders have hardly been attributable to that commitment. Still, one could fairly have consequentialist concerns about popular constitutionalism: Even if the people themselves did not regularly riot in the streets, might not their constitutional interpretations be systematically worse than those proffered by the courts?

Answering that question obviously requires some systematic comparative analysis. Conducting such an analysis is difficult. Typically, what we get are anecdotes about occasions—sometimes, more than a few occasions—on which one institution performed badly according to the author's often unstated criteria of good performance.<sup>40</sup> With luck the author will explain why some other institution performed well (again according to

38. KRAMER, *supra* note 1, at 107, quotes Thomas Jefferson's version of this point: "[w]e have . . . in more than one instance, seen the opinions of different departments in opposition to each other, & no ill ensue."

39. For a historical study of a situation in which interpretive anarchy actually prevailed for a while, see Theodore W. Ruger, "A *Question Which Convulses a Nation*": *The Early Republic's Greatest Debate About the Judicial Review Power*, 117 HARV. L. REV. 826 (2004) (reviewing brief period in Kentucky history during which the legislature was given unabashed supremacy with no meaningful judicial review). I read Ruger as showing that interpretive anarchy did not produce any more day-to-day social instability than was otherwise characteristic of the locality in which it occurred.

40. Powe, *Missing in Action*, *supra* note 10, at 866–84 (describing several episodes of arguable popular constitutionalism), is exemplary.

those criteria), or would have performed well had it been given the chance, in the same circumstances. But, anecdotes, even several anecdotes, are not enough. What we need is some systematic analysis of comparative institutional operation.

Here are some components of such an analysis.<sup>41</sup> First, we would have to specify some time frame over which the analysis should occur. Institutions always operate imperfectly, and the timeline for imperfect operation will differ across institutions even if the institutions are equally good (or bad) overall. That means that it will usually be possible for an author to find some time period in which her favored institution operated well according to her criteria and the alternative institution operated badly. Examining only that time period might be quite misleading. Consider, for example, a ten-year period in which the Supreme Court does quite a good job of advancing constitutional interests and Congress does a bad job. Maybe we simply have identified an aberrational period. If we expanded our analysis to consider the decades before and after that period, we might find that Congress and the Court performed about equally well, or even that Congress outperformed the Court.

Those interested in addressing proposals for constitutional reform should aim for a forward-looking analysis. Such individuals would typically like to know how different institutions are likely to perform within some time horizon they think appropriate (their life span, that of their children, and so forth). But, of course, the only basis they have for evaluating likely future performance is past performance. Ad hoc choices of past time periods are likely to be misleading, and we must also be alert to the possibility that institutions operate differently now from the way they did in the past.<sup>42</sup>

Second, we have to take account of all types of good and bad performance. A court can perform badly by invalidating a statute that it “should have” upheld, or by failing to invalidate one that it should have struck down. Popular mobilizations can perform badly by inducing political leaders to introduce and enact bad statutes, or by failing to mobilize effec-

41. My approach is derived from that offered by Wojciech Sadurski, *Judicial Review and the Protection of Constitutional Rights*, 22 OXFORD J. LEGAL STUD. 275 (2002).

42. Cf. Powe, *Missing in Action*, *supra* note 10, at 894–95 (“The fact that Americans used certain institutions and procedures before the Civil War is hardly an argument for using them today. Neither the times nor the Constitution is static.”). For example, one might think that improvements in the technology of partisan gerrymandering and innovations in enforcing party discipline within the past decade make it inappropriate to project into the future an evaluation of congressional performance based on its behavior in the 1960s and 1970s. For a recent argument that such changes have indeed occurred, see JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY (2005).

tively enough to induce those leaders to enact good statutes. I have argued that evaluation of legislative capacity to interpret the Constitution should focus on completed legislative actions and those examples, rare in U.S. constitutional practice,<sup>43</sup> of constitutional provisions that impose affirmative duties on legislatures.<sup>44</sup> That assessment is unavailable with respect to popular constitutionalism more broadly understood, because there is no obvious way of knowing when a popular mobilization is “completed.”<sup>45</sup> Once again, judgment, rather than a measuring rod, is what we will need.

Third, we would have to specify what counts as advancing a constitutional value.<sup>46</sup> One manifestation of not specifying this is quite common and often unnoticed. The failing takes the form of assuming that only those values the Supreme Court takes seriously count as admissible in discussing what the Constitution, properly interpreted, means. So, for example, the author will compare what state legislatures did with respect to racial equality to what the Supreme Court did during some period, and what Congress did with respect to free expression to what the Supreme Court did, and more. This approach fails to take into account the possibility that there might be interpretations of constitutional provisions that the Supreme Court does not admit into discussion.<sup>47</sup> One might, for example, believe that the U.S. Constitution commits the nation to guaranteeing income security for all even though that position has little purchase in contemporary adjudi-

43. Other constitutions do impose some duties on legislatures. *See, e.g.*, THE CONSTITUTION OF THE PORTUGUESE REPUBLIC art. 283 (“Unconstitutionality by Omission”), available at [http://www.portugal.gov.pt/Portal/EN/Portugal/Sistema\\_Politico/Constituicao/constituicao\\_p37.htm](http://www.portugal.gov.pt/Portal/EN/Portugal/Sistema_Politico/Constituicao/constituicao_p37.htm).

44. Mark Tushnet, *Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies*, 50 DUKE L. J. 1395 (2001).

45. That is, of course, unless one rejects the premises of popular constitutionalism and takes judicial agreement with the people’s constitutional interpretation as the index of a mobilization’s completion.

46. For example, Powe’s consequentialist conclusions rest on the values held by standard contemporary liberals in the United States. This comes through particularly clearly in his assumption that popular mobilizations on issues of law and order and against the right to choose with respect to abortion obviously count against the claims of popular constitutionalism. For his discussion of these mobilizations, see Powe, *Missing in Action*, *supra* note 10, at 874–75 (law and order), 881–83 (anti-abortion rights). One might say that Powe “sees popular constitutionalism only when he [dis]approves of the cause,” *id.* at 887 (prefix in brackets added to quoted text; Powe was describing Larry Kramer).

47. This point differs from the related one, made familiar by Lawrence Sager, that some constitutional provisions are underenforced, in the sense that primary responsibility for advancing those values lies outside the courts. For Sager’s most recent explication, see LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 93–128 (2004). One important feature of underenforced provisions, at least as I understand Sager’s approach, is that the courts and other institutions acknowledge that a constitutional value is at stake, but the courts refrain from fully enforcing that value because of their institutional incapacities. Note that institutions other than the courts will necessarily come out “better” in enforcing constitutional provisions when we consider underenforced ones. My concern in the text above is with situations in which the courts do not acknowledge that a constitutional value is implicated.

cated constitutional law.<sup>48</sup> One holding that view might rank the Supreme Court's constitutional performance well below that of Congress.

At this point, my earlier observation that popular constitutionalism is, as law, in part a retrospective effort to identify who we are as a nation becomes particularly important. Without here (or, I fear, elsewhere) providing the kind of historical support that would be needed, I think it plausible to contend that the people of the United States have taken on several deep constitutional commitments, the most obvious of which are to income security and environmental protection. On this view, enacting the Social Security system and the Endangered Species Act were decisions about what the Constitution, properly interpreted, requires. And yet, the courts have never said that such statutes have constitutional dimensions. Taking the courts' assertions about what our constitutional rights are as providing the criteria for comparing how institutions perform will omit, by fiat alone, a comparison on the issues of income security and environmental protection.

Fourth, we have to compare institutional performance across the entire range of (what we regard as) constitutional provisions. For example, we might find that, in some time period, courts performed reasonably well on issues of free expression while legislatures performed badly, *and* that, in the same period, legislatures did a very good job of promoting income security. We would then have to identify some ranking and weighting scheme so that we could determine which institution operated better overall. To use a single-institution example, suppose the Supreme Court got a minor First Amendment question "right" while failing to invalidate a massive denial of racial equality. We could say that the Court operated badly, or well, only if we had some measure of relative importance. Now add the necessary comparative institutional focus, and the analysis becomes even more complex.<sup>49</sup> Suppose Congress enacts a relatively minor statute that violates principles of free expression (as we understand them),<sup>50</sup> and at the same time enacts a large-scale program enhancing income security. The First Amendment violation has to reduce the "goodness" we attribute to Con-

48. This is not a frivolous proposition. For the view from a generation or so ago, see Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

49. Many of the examples in Powe, *Missing in Action*, *supra* note 10, are non-comparative: one could couple massive resistance with the Supreme Court's abdication of the job of enforcing its desegregation decisions until after Congress enacted the Civil Rights Act of 1964 and the Voting Rights Act of 1965, for example. Notably, popular mobilizations during the period included the civil rights movement, which Powe mentions, *id.* at 893, but does not seem to count in his consequentialist evaluation of popular constitutionalism, and resulted in legislative action that preceded serious judicial efforts to desegregate Southern schools.

50. My current example is the federal mushroom advertising program held unconstitutional in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001).

gress because of the income-security legislation. Now we have to compare the imperfect operation of the courts with the imperfect operation of Congress.<sup>51</sup>

Finally, it bears emphasizing that we have to develop *arguments* for what goes on the list as a constitutional provision, for the rankings we give the items on the list, and for the weights we assign to particular actions and inactions. These are going to be arguments in substantive political theory.<sup>52</sup> It is quite unlikely that we will find substantial agreement among scholars about the list, ranking, and weights, given the existence of real disagreements about substantive political theory.<sup>53</sup>

Needless to say, no one really tries to do a serious comparison of institutions as they actually operate. I have already pointed out that popular constitutionalism includes a range of institutional interactions. Focusing solely on “mobs,” and within the category of mobs, only on those that can fairly be characterized as threatening anarchy, is at best the first step in an analysis of popular constitutionalism’s consequences, as compared to the consequences of judicial supremacy. That example suggests to me that what we see in purported comparative evaluations of popular constitutional and judicial supremacy are disagreements about substantive political theory.

#### CONCLUSION

The idea of something that is simultaneously law and political is obviously unfamiliar to U.S. constitutional theorists today, as the pervasive expressions of puzzlement about Kramer’s meaning demonstrate. It was not unfamiliar in earlier times, as Kramer shows in some detail. He also sketches an account of how it became unfamiliar, but providing the details of *that* account was not part of the charge he took upon himself. We do know *how* he would tell the story. He would not give us an analysis of concepts associated with judicial review, or of the coherence of a “footnote four” jurisprudence. He would—or at least I would—tell a story about poli-

51. Powe, *Missing in Action*, *supra* note 10, at 893 (“[T]he Supreme Court has been reasonably good on the upside and nowhere near as bad [as ‘mass movements of the twentieth century that have set themselves out to overturn an existing legal order’] on the downside.”), has the correct form an evaluation should take. Unfortunately, the analysis is not supported in an otherwise quite heavily footnoted essay, except by references to fascism and communism that seem to me inapposite to an analysis predicated on U.S. constitutional experience (and, with respect to Russian communism, inapposite as an example of a popular movement).

52. And not, I emphasize, an exercise in the analytic philosophy of law.

53. For example, my claim that we interpret the Constitution by the retrospective construction of an understanding of our national identity is clearly a contestable position in political theory.

tics operating in real historical time. Its main line would, I think, be about how Democrats first and then Republicans found political advantage in supporting judicial supremacy, and how those commitments persisted even as, or perhaps because, the outcomes the Supreme Court was producing were inconsistent with the substantive policies Democrats (mostly) and Republicans (to some extent) sought to advance.<sup>54</sup> In short, it would be an argument about constitutional theory made by means of a historical analysis of constitutional politics—as is *The People Themselves*.

54. This is not the forum for me to offer the story I would tell, but hints can be found throughout TUSHNET, *THE NEW CONSTITUTIONAL ORDER*, *supra* note 20.