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# A Symposium on The People Themselves: Popular Constitutionalism and Judicial Review; Introduction

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# A SYMPOSIUM ON *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW*

## INTRODUCTION

DANIEL W. HAMILTON\*

In November 2005, constitutional scholars and legal historians gathered at Chicago-Kent College of Law for a two-day conference to discuss both Larry Kramer's new book, *The People Themselves: Popular Constitutionalism and Judicial Review*,<sup>1</sup> and more broadly, the topic of popular constitutionalism itself. By the time the Symposium began, it was clear that Kramer's book had struck a nerve. Reviewed in almost every major law review, and in most major newspapers,<sup>2</sup> *The People Themselves* has generated intense discussion concerning the rise of judicial power in the United States and the role of popular politics in restraining, or failing to restrain, that power over the course of American history.

In an era of ever-increasing academic specialization, the book tells an ambitious story that at once takes on several eras of American constitutional history and also modern political and legal debates over judicial review. This broad canvas allows for several simultaneous conversations: those between historians of different eras, between the law school and the

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

2. See, e.g., Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (book review); Daan Braveman, *On Law and Democratic Development: Popular Constitutionalism and Judicial Supremacy*, 33 SYRACUSE J. INT'L L. & COM. 41 (2005); Erwin Chemerinsky, *In Defense of Judicial Review: A Reply to Professor Kramer*, 92 CAL. L. REV. 1013 (2004); Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653 (2005) (book review); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004); L. A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005) (book review); Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH L. REV. 1539 (2005) (book review); Symposium, *Theories of Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1341 (2005); Norman R. Williams, *The People's Constitution*, 57 STAN. L. REV. 257 (2004) (book review); Laurence H. Tribe, *The People's Court*, N.Y. TIMES, Oct. 24, 2004, § 7, at 32; Larry D. Kramer, Letter to the Editor, *Kramer vs. Tribe*, N.Y. TIMES BOOK REV., Nov. 21, 2004, at 6; John O. McGinnis, *Whose Constitution Is It, Anyway? Judicial Review Has Its Limits*, WALL ST. J., Aug. 11, 2004, at D8.

rest of the university, and, rarest of all, between an academic and a popular audience. Of course not everyone agrees with this provocative book,<sup>3</sup> but we can be certain that it can bear the weight of genuine inter-disciplinary discussion over the meaning and importance of popular constitutionalism.

In coming to grips with popular constitutionalism and with *The People Themselves*, the Symposium's papers and presentations asked new questions of constitutional history, constitutional theory, and the relationship between the two. Historians at the Symposium considered popular constitutionalism in several different eras, using *The People Themselves* as a jumping-off point for a reconsideration of some of the great questions of American constitutional history. Morton Horwitz in his keynote address, Daniel J. Hulsebosch, Gerald Leonard, and Richard Ross all consider popular constitutionalism in early American history, and in particular the way popular constitutionalism complicates the traditional story of the rise of judicial review in the late eighteenth and early nineteenth centuries.<sup>4</sup> Saul Cornell explores how the "Whiskey Rebellion" can be understood as an assertion of the "right of revolution" and an early instance of popular constitutionalism in action.<sup>5</sup>

Keith Whittington considers popular constitutionalism in the antebellum era, and in particular in the rise of the party system.<sup>6</sup> He concludes that "Kramer's positive account of the rise of judicial supremacy" is "inaccurate, both in terms of its political analysis and as a matter of history."<sup>7</sup> Instead, Whittington argues, "political parties are deeply implicated in the political dynamic that gives rise to judicial supremacy."<sup>8</sup> Mark Graber and Daniel Hamilton take the story forward to the era of the Civil War, asking how popular constitutionalism might reorient our view on the constitutional thought of Abraham Lincoln and Stephen Douglas and the making of constitutional interpretation during the war.<sup>9</sup> William Forbath takes the history

3. See, e.g., Powe, *supra* note 2.

4. See Morton J. Horwitz, *A Historiography of the People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813 (2006); Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825 (2006); Gerald Leonard, *Iredell Reclaimed: A Critique of Snowiss's History of Judicial Review*, 81 CHI.-KENT L. REV. 867 (2006); Richard J. Ross, *Pre-Revolutionary Popular Constitutionalism and Larry Kramer's The People Themselves*, 81 CHI.-KENT L. REV. 905 (2006).

5. Saul Cornell, *Mobs, Militias, and Magistrates: Popular Constitutionalism and the Whiskey Rebellion*, 81 CHI.-KENT L. REV. 883 (2006).

6. Keith E. Whittington, *Give "The People" What They Want?*, 81 CHI.-KENT L. REV. 911 (2006).

7. *Id.* at 913.

8. *Id.*

9. Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923 (2006); Daniel W. Hamilton, *Popular Constitutionalism in the Civil War: A Trial Run*, 81 CHI.-KENT L. REV. 953 (2006).

of popular constitutionalism still further into Progressive Era battles over the Constitution, an era which is for Forbath, “the first and last time Americans seriously considered profound institutional changes aimed at enlarging ordinary citizens’ role in determining the meaning of the Constitution and the course of its development.”<sup>10</sup>

Two pieces consider the historiography of popular constitutionalism and the methodology of *The People Themselves*. Mark Tushnet examines the way the study of popular constitutionalism contributes to “the idea of constitutional law as political law,” simultaneously a species of “hard” law and also a series of “constitutional arguments by the people themselves, independent of and sometimes in acknowledged conflict with, constitutional interpretations offered and enforced by courts.”<sup>11</sup> Christopher Tomlins places the book in the context of the historiography of the Constitution and examines what the book reveals about “the history of professional history in the United States.” and the “production of legitimacy for all manner of constitutive practices.”<sup>12</sup>

Constitutional and comparative scholars at the Symposium similarly examine popular constitutionalism and Kramer’s book from a variety of angles. Papers by Frank Michelman and Sarah Harding situate popular constitutionalism within the context of legal theory. Michelman examines the role popular constitutionalism plays in the larger debate over “the notion of the Constitution as popular-not-ordinary law” by probing the relationship of popular constitutionalism and the “doubtful case rule.”<sup>13</sup> Harding considers the normative arguments implicit in popular constitutionalism and in particular how Kramer’s arguments about judicial review fit within theoretical discussions over the meaning of disagreement and its institutional manifestations, within American constitutionalism and within a comparative perspective.<sup>14</sup>

Two papers by constitutional law professors are somewhat ambivalent about the place of popular constitutionalism within a modern interpretive regime. Neal Devins and David Franklin express concern that popular con-

10. William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 967 (2006).

11. Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991 (2006).

12. Christopher Tomlins, *Politics, Police, Past and Present: Larry Kramer’s The People Themselves*, 81 CHI.-KENT L. REV. 1007, 1008 (2006).

13. Frank I. Michelman, *Comment: Popular Law and the Doubtful Case Rule*, 81 CHI.-KENT L. REV. 1109, 1109 (2006).

14. Sarah Harding, *Kramer’s Popular Constitutionalism: A Quick Normative Assessment*, 81 CHI.-KENT L. REV. 1117 (2006).

stitutionalism is difficult, if not impossible, both to locate and to measure.<sup>15</sup> Is popular will reflected in the political branches of the government, and, if not, how can we begin to interpret or apply popular constitutionalism?

Robin West, Theodore Ruger, and Sheldon Nahmod are more sympathetic to the potential legal and social benefits of at least a partial embrace of popular constitutionalism. For Nahmod, popular constitutionalism might have the promise of reinvigorating public debate, or at least public understanding, of the Constitution and the ever-increasing power of the courts in American political life.<sup>16</sup> Ruger explores how popular constitutionalism might work in “ordinary lawmaking” and specifically its potential impact on interpretation of the commerce clause and the limits of congressional power, in particular providing a new set of arguments for judicial restraint.<sup>17</sup> West examines popular constitutionalism as potentially powerful new vision of the Constitution, allowing for a return to arguments before the courts and in public discourse that the Constitution contains affirmative obligations to “ensure that all citizens enjoy those basic capabilities necessary to lead a decent life.”<sup>18</sup>

At the Symposium, and in the intense debate over *The People Themselves* elsewhere, popular constitutionalism was considered as a powerful, new synthetic concept to many, and as somewhat elusive—and even potentially dangerous—to others. It is not yet clear whether popular constitutionalism will survive as a more-or-less discrete historical phenomenon or ideology, capable of definition, or whether it is best considered as a vessel for a more general set of questions about alternative visions of the Constitution and its relationship to popular social and political movements. If the outcome is not certain, the debate is fruitful. We hope you enjoy the pieces that follow.

15. Neal Devins, *Tom DeLay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055 (2006); David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI.-KENT L. REV. 1069 (2006).

16. Sheldon Nahmod, *Constitutional Education for The People Themselves*, 81 CHI.-KENT L. REV. 1091 (2006).

17. Theodore W. Ruger, *Preempting the People: The Judicial Role in Regulatory Concurrency and Its Implications for Popular Lawmaking*, 81 CHI.-KENT L. REV. 1029 (2006).

18. Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1128 (2006).