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POPULAR CONSTITUTIONALISM IN THE CIVIL WAR: A TRIAL RUN

DANIEL W. HAMILTON*

The People Themselves is simultaneously a work of constitutional history and constitutional theory, and the book provokes different responses from each discipline.¹ Constitutional law scholars have critiqued or defended Kramer's claim that the Supreme Court *should not* be the final or definitive authority on the meaning of the Constitution. Legal and constitutional historians have critiqued or defended Kramer's claim that the Supreme Court *was not* the final or definitive authority on the Constitution for much of American legal history.

Kramer is, of course, interested in proving both claims. The history in the book is put to work in the present. In response to modern concerns that increased popular control over the Constitution or increased division of constitutional interpretation between the branches will result in chaos, Kramer deploys his history as evidence that this fear is unfounded. Our own era of judicial supremacy, in which the interpretive supremacy of the Supreme Court is more or less unquestioned, is largely a historical anomaly. Kramer seeks to demonstrate that we moderns are out of step with a long and largely neglected tradition of popular control over the Constitution that thrived in the eighteenth and nineteenth centuries and lost ground beginning only in the decades that followed the New Deal era.²

Those of us primarily interested in the book as a work of history can treat Kramer's arguments as free-standing historical claims and can jump ship before the argument arrives in the present. That the book combines historical analysis with contemporary constitutional debate is itself a challenge to historians trained to avoid the sin of "presentism" above all else.³

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

2. *Id.* at 220–21.

3. See e.g., Lynn Hunt, *Against Presentism*, *PERSP.*, May 2002, at 7; see also PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* (1988).

Yet whatever his interest in shaping current constitutional interpretation, Kramer's book is important as a work of history for two main reasons. First, Kramer has been careful to ground his arguments in close readings of primary sources, and has avoided the "law office history" that legal historians, and Kramer himself, are quick to condemn.⁴ Second, Kramer's ambitious historical analysis—he ranges across more than two centuries of constitutional history—introduces a new set of interpretive questions that allow for a fresh understanding of constitutional practice across historical eras. Even as historians do the valuable work of testing the book's particular claims, the main historical impact of *The People Themselves* lies, I think, in its capacity to reframe the long-established set pieces of constitutional history.

It is important to remember that Kramer's book is not a history of the framing of the Constitution and its interpretation in the early Republic. This is a central focus, but its ambition is much greater. Kramer asserts not only that popular constitutionalism survived the Constitutional Convention and *Marbury v. Madison*, but that it remained a potent legal and constitutional force until roughly the end of the New Deal in the 1940s.⁵ One claim supports the other. If Kramer persuades us that popular constitutionalism lived for much longer than previously thought, if it did not wither in the antebellum era, then we can begin to see it in high relief in later eras and track its course after the Early National period and into the mid-nineteenth and twentieth centuries.

The ambition of the book—to tell the whole story of the rise and fall of American popular constitutionalism from the colonial era to *Bush v. Gore*—acts as a bracing rejection of the scholarly turn to increasingly specialized sub-fields of historical and constitutional inquiry. If the potential dangers of such a broad approach are manifest, so are the benefits. In particular, looking at constitutional history through the lens, or analytical frame, of popular constitutionalism provides a way to consider how conceptions of constitutional authority shifted across and inside different eras in legal history. Kramer's central insight—that the demand for popular control over the Constitution remained a powerful political and legal force for much longer than is commonly thought today—suggests that his work might in fact be a corrective to presentism. Our own era's constitutional history may well reflect our own era's devotion to judicial supremacy. Kramer's book acts as a caution to historians not to import the currently

4. See generally Larry D. Kramer, *When Lawyers Do History*, 72 GEO. WASH. L. REV. 387 (2003).

5. See KRAMER, *supra* note 1, at 207–26.

prevailing constitutional ideology into the past, and so neglect alternative ideologies that contested for dominance.

In this way, *The People Themselves* produces important interpretive questions as much as it produces original and important historical claims. To my mind, two overarching questions are framed by popular constitutionalism, one institutional and one ideological. First, as an institutional matter, how did popular constitutionalism work in practice, particularly once “the people out of doors” went indoors? If all three branches shared interpretive power over the Constitution, how was this accomplished on the ground in different historical eras? Second, from an ideological perspective, how did the underlying justification for popular control over the Constitution change over time? This question takes as its premise that popular constitutionalism is not a monolithic ideology moving through United States history.⁶ It is instead best understood as a set of broad interpretive questions that focus on shifting ideological arguments over popular control over the Constitution and their different institutional manifestations.

This approach to popular constitutionalism as a set of institutional and ideological questions offers a new way to consider the constitutional history of the Civil War. The periodization of U.S. legal history often divides into a pre-Civil War constitutional regime and a post-Civil War constitutional regime. In between is the constitutional history of the Civil War itself, which, while enormously studied, is still often treated as a largely self-contained phenomenon. The Civil War is considered in near isolation, a transformative event within which the Constitution was fundamentally altered, and after which modern constitutional law begins. One of the virtues of *The People Themselves* is that it provides a method for considering the constitutional questions of the Civil War in ways that link the great constitutional issues of the war to the rest of the century.⁷

It is fair to say that Kramer does not spend much time on the Civil War.⁸ In part this is not surprising. The Civil War was widely recognized, at the time and since, as a moment of popular constitutionalism, at least in

6. Here I am indebted to discussions with Saul Cornell and his description of the different “modalities” of popular constitutionalism, and to Richard Ross who framed the question this way: is popular constitutionalism one thing or multiple things with a strong family resemblance?

7. Other important books by Amy Dru Stanley and Michael Vorenberg have explored how legal and constitutional change during the Civil War itself helped was connected to what came before and to what came after, both exploring how the debates over emancipation helped transform notions of freedom during and after the Civil War. See generally AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION (1998); MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT (2001).

8. Indeed, the American Civil War is explicitly referenced only three times in the text, on pages 32, 93, and 214. KRAMER, *supra* note 1, at 339 (index).

so far as the Supreme Court was made suddenly less powerful as an interpreter of the Constitution on the eve of the war. The Court was largely marginalized on constitutional questions during the war, in large part as a result of the *Dred Scott Case*,⁹ which Charles Evans Hughes described as one of the great “self-inflicted wounds” in the history of the Supreme Court.¹⁰ Kramer treats *Dred Scott* almost as a vignette, an illustration of a moment when the Supreme Court badly overreached. Chief Justice Taney’s disastrous opinion is examined as the impetus for President Lincoln and the Congress essentially ignoring the Supreme Court and leading to a reassertion of popular constitutionalism.¹¹

For Kramer, the Civil War is a powerful example of a persistent popular constitutionalism, and once this claim is established, he moves quickly on. Yet he leaves a great unanswered question in his wake, namely, how did popular constitutionalism actually work during the Civil War, both institutionally and ideologically? If today, in a time of war, we look readily to the courts to ultimately delineate who is and who is not an “enemy combatant,” to determine what process detainees are due, and to decide what is torture and what is not, the Civil War is an instance when wartime constitutional decisions were made in the relative absence of a powerful Supreme Court and even in defiance of it. The Civil War thus has an arguably unique role inside the history of popular constitutionalism. It is a valuable test case, a sort of trial run for a popular constitutional regime that operated in a time of terrible crisis alongside a marginalized Supreme Court, just as a spate of new and urgent constitutional questions demanded immediate resolution.

We are, of course, familiar with many of the great constitutional questions of the Civil War. Was secession constitutional? Was a federal draft, an income tax, or the imposition of a naval blockade constitutional? What about the emancipation of four million slaves? Was emancipation a power that belonged to the president or to the Congress, and did it require a constitutional amendment? Who could suspend the writ of habeas corpus and for how long? All of these constitutional questions were effectively addressed during the Civil War, though only one by the Supreme Court, when it sustained the constitutionality of the Union’s naval blockade in *The Prize Cases* in 1863.¹²

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

10. CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES: ITS FOUNDATIONS, METHODS AND ACHIEVEMENTS* 50 (1928).

11. See KRAMER, *supra* note 1, at 211–13.

12. *The Prize Cases*, 67 U.S. (2 Black) 635, 691–92 (1863). Harold Hyman and William Wiecek have argued that the decision in the *Prize Cases* “added to the Court’s slim store of popular good will.”

The Civil War was a period when Chief Justice Roger Taney was widely reviled, and the Court largely discredited, if temporarily, in the North.¹³ It is an interesting question just how badly the legitimacy of the Court was damaged by the *Dred Scott* decision after the war, but there can be little doubt it was mostly ineffective on constitutional questions during the war.¹⁴ The Court was at its historical low point, and both the executive and Congress ignored manifest holdings and plain orders from the Court and its Justices.¹⁵

Kramer naturally turns to the decision because it stands at the center of one of the great constitutional contests between the Supreme Court and the executive. A great deal of work is devoted to exploring the extent to which President Lincoln openly defied the Supreme Court's decision in *Dred Scott*. In the leading analysis of Don Fehrenbacher, Lincoln's stance on *Dred Scott* was a "sophisticated realism that amounted to neither a full acceptance nor a complete rejection of the doctrine of judicial supremacy."¹⁶ For Lincoln, the *Dred Scott* case decided only the fate of Dred Scott, and the Court's declaration that the expansion of slavery into the territories was constitutionally protected was one important, but not final, voice. In his first inaugural address, Lincoln struck this balance, and his assertion of the necessity of popular control of the Constitution remains some of the most eloquent language of popular constitutionalism:

HAROLD M. HYMAN & WILLIAM M. WIECEK, *EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875*, at 365 (1982).

13. See 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* (1928). Warren writes that the *Dred Scott* opinion was met with "ridicule and abuse" from newspapers in the North, which "could not fail to weaken the Court's status with the people." *Id.* at 41. As for Taney personally, Warren's description of the reactions of the Northern press and radical Republicans in Washington to Taney's death gives a sense of the "extreme rancor" with which he was regarded. See *id.* at 110–18.

14. PHILLIP S. PALUDAN, *A COVENANT WITH DEATH: THE CONSTITUTION, LAW, AND EQUALITY IN THE CIVIL WAR ERA 190–91*, 205–06 (1975). As Carl B. Swisher noted, "in this time of civil war . . . little deference was accorded to judicial sportsmen. To a considerable degree the executive won dominance in matters which in other times would have been left to the courts." 5 CARL B. SWISHER, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE TANEY PERIOD 1836–64*, at 974 (1974).

15. One response to the *Dred Scott* decision among Republican politicians and press was to accuse the Supreme Court of being the mouthpiece of a "slaveholders' conspiracy" and adapting the Constitution for political ends. See DAVID M. POTTER, *THE IMPENDING CRISIS: 1848–1861*, at 286–89 (Don E. Fehrenbacher ed., 1976). The perception of the Court as illegitimate and politicized may have emboldened the other branches to make their own political-legal determinations in contradiction to those made by the Court. Thus, Lincoln's executive branch maintained the constitutionality of the suspension of the privilege of the writ of habeas corpus in spite of Justice Taney's decision that it was unconstitutional. In a similar vein, Congress abolished slavery in the territories in June of 1862 even though the Court had expressly denied Congress's power to do so in the *Dred Scott* opinion.

16. DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* 442 (1978).

I do not forget the position assumed by some, that Constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case, upon the parties to a suit, as to the object of that suit. . . . At the same time the candid citizen must confess that if the policy of the government, upon vital questions, affecting the whole people, is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made, . . . the people will have ceased, to be their own rulers, having, to that extent, practically resigned their government, into the hands of that eminent tribunal.¹⁷

Lincoln went on effectively to limit even his prior concessions to judicial power over litigants, most notably in the context of *Ex Parte Merryman*, when Justice Taney, sitting as a circuit court judge, ordered the release of a political prisoner arrested by the military following Lincoln's suspension of the writ of habeas corpus in Maryland.¹⁸ Taney's writ was blatantly ignored by the executive, prompting fury on the part of the aged Taney, who thundered,

These great and fundamental laws, which congress itself could not suspend, have been disregarded and suspended . . . by a military order, supported by force of arms. . . . I can only say that if the authority which the constitution has confided to the judiciary department and judicial officers, may thus . . . be usurped by the military power, at its discretion, the people of the United States are no longer living under a government of laws¹⁹

With *Scott* and *Merryman* in mind, as Fehrenbacher and others have noted, Taney's position as Chief Justice gave the Lincoln administration considerable constitutional leeway: "a Supreme Court headed by Taney was a court without enough influence to restrain executive or congressional power."²⁰

This was not due solely to sustained public hostility to the *Dred Scott* decision. The Court was in some amount of disarray, as Justice John A. Campbell of Alabama left Washington to join the Confederate government.²¹ Taney made little secret of the fact that he considered secession a valid, constitutional exercise of state power, and that much of the Lincoln administration's war policy was unconstitutional.²² Indeed, there is evi-

17. Abraham Lincoln, First Inaugural Address, (Mar. 4, 1861), in ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1859-1865, at 215, 220-21 (Don E. Fehrenbacher ed., 1989).

18. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487).

19. *Id.* at 152.

20. FEHRENBACHER, *supra* note 16, at 575.

21. DAVID M. SILVER, LINCOLN'S SUPREME COURT 9-13 (1956).

22. See FEHRENBACHER, *supra* note 16, at 574-75. Fehrenbacher asserts that, if possible, Taney "would have struck down many of the administration's principal war measures, including conscription, emancipation, and the currency program." *Id.*

dence that Taney was eager to strike down the Union draft, and had even prepared a decision to that effect, waiting only for litigants.²³

With the Supreme Court essentially out of the constitutional picture, the bulk of the fundamental, and often new, constitutional questions considered and addressed during the war were determined largely by the executive and executive branch. The question is, how? The short answer has traditionally been, by Lincoln.

Lincoln's arguments—in his two inaugurals, in messages to Congress, and in his letters and speeches—have drawn extraordinary scholarly scrutiny, and taken as a whole amount to a quasi-canon, a huge literature of Lincoln's constitutional thought, explicated in classic work by J.G. Randall and Harold Hyman, and more recently in important and influential books by Garry Wills, Daniel Farber, and George Fletcher.²⁴

In this literature, Lincoln is generally treated as a kind of constitutional oracle, a one-man final arbiter of the great constitutional questions of his day. Constitutional historians ask anew every generation, was Lincoln right or wrong on particular questions of constitutional law, implicitly asserting that constitutional questions rested essentially with him before his assassination and the emergence of a newly assertive Supreme Court in the Reconstruction era.

This literature is extremely valuable in its analysis of Lincoln as an extraordinarily important constitutional interpreter, and it highlights both his ability to translate his wartime actions and goals into crystalline constitutional principles, and his undeniable impact on constitutional law and interpretation. Yet I think the Lincoln-oriented line of inquiry is bearing less and less fruit. I fear we modern historians, in turning to Lincoln as a sort of constitutional oracle, reveal our reflexive reliance on a central, final source of constitutional authority, with Lincoln effectively fulfilling the function we today look for from the Supreme Court.

23. See Mark E. Neely, Jr., *Justice Embattled: The Lincoln Administration and the Constitutional Controversy over Conscription in 1863*, in *THE SUPREME COURT AND THE CIVIL WAR* 47, 52 (Jennifer M. Lowe ed., 1996) ("The Chief Justice, Roger B. Taney, had already written an opinion declaring the draft unconstitutional and had it waiting in his desk for the first case that came before him raising the issue!").

24. See e.g., HERMAN BELZ, *ABRAHAM LINCOLN, CONSTITUTIONALISM, AND EQUAL RIGHTS IN THE CIVIL WAR ERA* (1998); DANIEL FARBER, *LINCOLN'S CONSTITUTION* (2003); GEORGE P. FLETCHER, *OUR SECRET CONSTITUTION: HOW LINCOLN REDEFINED AMERICAN DEMOCRACY* (2001); HAROLD M. HYMAN, *A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION* (1975); MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (1991); MARK E. NEELY, JR., *THE LAST BEST HOPE OF EARTH: ABRAHAM LINCOLN AND THE PROMISE OF AMERICA* (1993); J.G. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (rev. ed. 1951); GARRY WILLS, *LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA* (1992).

The lens of popular constitutionalism may well allow us to tell a more textured and complete account of constitutional interpretation in the Civil War. We can finally begin to jettison the important but ultimately unanswerable question, was Lincoln right or was Lincoln wrong in some definitive way on particular questions of constitutional law? Instead we can ask, how did a popular constitutional regime function during the Civil War? With the Supreme Court largely on the sidelines, operating neither as a check nor as an interlocutor on constitutional questions, to what extent were constitutional questions considered by the other branches? As an institutional matter, how did the executive branch and the Congress articulate their interpretations of the Constitution and communicate them publicly?²⁵

These are questions about the Civil War to which we do not know the answers, and we can only consider these questions once we look at the Civil War through the lens of popular constitutionalism. In particular, I think, popular constitutionalism provides a fresh way to assess the importance of the cadre of constitutional thinkers brought in to work for the Lincoln administration. During the Civil War, Lincoln hired an impressive roster of lawyers and law professors who were given the task of interpreting the Constitution both for the president and for the public. Just as Lincoln was making his landmark constitutional arguments at Gettysburg and elsewhere, legal thinkers were hired across the burgeoning federal bureaucracy, including the office of the Attorney General and, most notably, in the War Department.

Their task was to address for themselves and for public consumption the great constitutional issues of the Civil War.²⁶ Lengthy constitutional tracts poured out of the Lincoln administration, and the tracts' arguments both wrestled with the nuts and bolts of military legal policy and considered, among others, the constitutional questions of the legitimacy of secession, the suspension of the writ of habeas corpus, conscription, the confiscation of property, and emancipation. This cadre worked simultaneously to justify the actions of the executive branch, and at the same time to keep those actions within constitutional norms.

The most prominent of this cohort were William Whiting, the Solicitor of the War Department, and Francis Lieber, a professor brought into the

25. For the role of the Congress in interpreting the Constitution on the eve of the Civil War, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: DEMOCRATS AND WHIGS, 1829-1861* (2005).

26. The Civil War thrust questions of constitutional interpretation into public discourse, and "focused enormous attention" on constitutional issues. PHILLIP SHAW PALUDAN, "A PEOPLE'S CONTEST": *THE UNION AND CIVIL WAR, 1861-1865*, at 27 (1988).

War Department.²⁷ The group also included, among others, the former Secretary of War Joseph Holt and two lawyers who ultimately became generals, Ethan Allen Hitchcock and Henry W. Halleck.²⁸ Whiting was a prominent Boston attorney, constitutional scholar, and former member of Congress who began writing in support of the Lincoln Administration's power to suspend the writ of habeas corpus when war broke out. Lincoln personally asked that Whiting become Solicitor General of the War Department. In that role he published *The War Powers of the President and the Legislative Powers of Congress in Relation to Rebellion, Treason and Slavery* in 1862, which became the constitutional handbook of the Lincoln Administration for discussion of the war power and martial law. This tract went through ten editions over the next two years and was ultimately enlarged in 1864 under a new title, *War Powers Under the Constitution of the United States*. Between 1862 and 1871, the book went through a total of forty-three editions and expanded from 144 to 355 pages.²⁹

Whiting was called on to provide a frame for considering the interaction of constitutional norms and military action at the outbreak of the Civil War, a conflict that was in part quite analogous to an international war between belligerents and in part quite distinct. His legal and constitutional analysis did advance an expansive war power located in the president and the military under his command, but it also elaborated the boundaries of executive authority within a constitutional order:

It is not denied that the powers given to the various departments of government are in general *limited* and defined . . . [b]ut the powers claimed for the President, and for Congress, in this essay, are believed to be delegated to them respectively under the constitution, expressly or by necessary implication.³⁰

Francis Lieber was a law professor from South Carolina by way of Prussia, who came to Columbia University on the outbreak of war, leaving behind a son who fought for the Confederacy and bringing one with him who fought for the Union. He was hired by the War Department to write a code delineating the powers of the army under martial law and to codify the laws of war that would operate on the Union army in the field. Lincoln

27. See generally FRANCIS LIEBER, AMENDMENTS OF THE CONSTITUTION: SUBMITTED TO THE CONSIDERATION OF THE AMERICAN PEOPLE (New York, Loyola 1865); WILLIAM WHITING, MILITARY ARRESTS IN TIME OF WAR (Washington, Gov't Printing Office 1863).

28. See HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION (1975) (crediting Joseph Holt with the widespread circulation within the Army of opinions delineating the boundaries of military law and courts martial).

29. For an early edition, see WILLIAM WHITING, THE WAR POWERS OF THE PRESIDENT, AND THE LEGISLATIVE POWERS OF CONGRESS, IN RELATION TO REBELLION, TREASON AND SLAVERY (2d ed., Boston, John L. Shorey 1862).

30. *Id.* at iii.

ordered this code, which became known as the Lieber Code, distributed to his officers. The Lieber Code was a careful attempt—one of the first—to define martial law and to regulate through a legal code the conduct of armies in the field.³¹

Historians have long known about these legal thinkers in the Lincoln administration. Harold Hyman's classic work on the constitutional history of the Civil War pays some sustained attention to this group of constitutional bureaucrats, and asserts that "[f]rom 1861–65, no university law faculty or private firm in the nation equaled this association of lawyers."³² Phillip Paludan has closely and effectively considered the constitutional thinking of Lieber, Parker, and other prominent legal intellectuals inside and outside the Administration.³³ Hyman considers the impact of these thinkers on military policy, and Paludan considers how their constitutional arguments can be mined to discern broad schools of thought in the Civil War era. No one has yet asked what role this group played in creating a functioning popular constitutional regime during the Civil War, a question that *The People Themselves* prompts us to ask.

The frame of popular constitutionalism provides a new way to assess the importance of these constitutional bureaucrats. If the focus is on Lincoln alone, we ask only, what difference did they make to Lincoln? If the focus is instead on how the executive branch made constitutional interpretations and arguments in an effort to sway public opinion, then the work of these lawyers takes on a different significance. In particular, the work of this group within the executive branch shows a forum for constitutional decision making that existed during the Civil War that existed apart from litigation in the federal courts. This cohort functioned as a sort of de facto constitutional commission, essentially ruling on abstract questions of constitutional law and interpretation. They show how the executive branch generated its own constitutional discourse in the midst of war, discourse designed to meet a huge public appetite for constitutional analysis of the rationale for executive action, in particular on the part of legal elites. These tracts sold widely, suggesting that Lincoln hired these scholars and made them visible because in some sense he had to hire them, that he could not use the relative absence of the Supreme Court to act without attention to constitutional norms.

31. See FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES, IN THE FIELD (New York, Van Nostrand 1863). For the classic piece on the importance of the Lieber Code, see Frank Freidel, *General Orders 100 and Military Government*, 32 MISS. VALLEY HIST. REV. 541 (1946).

32. HYMAN, *supra* note 24, at 190.

33. See generally PALUDAN, *supra* note 14.

It may seem strange to argue that the Lincoln administration was seriously concerned with the elaboration of constitutional norms in the midst of a bloody, seemingly endless war. Yet, the constitutional innovations of the Civil War era—of which there were many—were not unfettered improvisations on the part of the executive branch. Instead, they were part of a self-imposed drive on the part of the Lincoln administration to keep the exercise of constitutional power within what they and the American public perceived as legitimate boundaries, and they reflected an increasing commitment in the antebellum era to an ideology of the rule of law.

The tracts produced by these lawyers were, of course, not neutral or impartial, but neither were they constitutional fig leaves for a new imperial presidency. The works of Whiting and others are ineffective as propaganda. Their arguments are complicated, legalistic, and do not appeal to emotion. Nor do they resemble judicial opinions. There are no litigants and no “cases or controversies.” What these tracts resemble more than anything else are legal treatises in the manner of Joseph Story and James Kent. This quality is perhaps natural, as these lawyers were part of a generation of lawyers trained by the study of legal treatises.³⁴

In this attention to the precise powers and limits to constitutional authority, Civil War popular constitutionalism has, I think, a different ideological basis than its Revolutionary predecessor, or at least a different legitimizing principle. If the basis for revolutionary popular constitutionalism was popular sovereignty, or the Constitution operating as the embodiment of popular will, by the time of the Civil War we see a popular constitutionalism based more and more on an ideology of the rule of law. Certainly, popular sovereignty was not entirely eclipsed. Multiple ideological arguments, and even multiple understandings of the rule of law, remained potent. Nonetheless, a popular and legal devotion to the ideal of a rule of law that mediated the will of legal actors, including the majority, was increasingly coming to the fore within constitutional culture.

It is a fair question whether popular sovereignty ideology is an intrinsic element of popular constitutionalism. In an important early review of *The People Themselves*, Dan Hulsebosch argued that it was not; popular sovereignty ideology and popular constitutionalism were distinct and could align or separate in different historical eras.³⁵ To some extent Kramer tells

34. For the influence of treatises, particularly those of Kent and Story, on the legal culture of the nineteenth century, see generally DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 274–302 (2005).

35. Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 672–84 (2005) (book review).

this story. Kramer pays attention to changes in the professional training and identity of lawyers, reflected in the treatises of Joseph Story and James Kent. The emergence of the treatises as authoritative interpretations of constitutional law not only redefined what lawyers were taught, but also advanced a conception of constitutional law and courts: not as vehicles for popular sovereignty and servants of the people's will, but as the protectors of the constitution from excessive popular control and the legislative will of the majority.

This rule of law ideology required those interpreting the Constitution to place their arguments and their actions within the boundaries of legitimate constitutional norms that emphasized the subordination of political will, quite a different norm than that of the Revolution. And popular constitutionalism in the Civil War cannot be properly understood without a recognition of the demand for constitutional legitimacy the people imposed on the executive and the executive branch imposed on itself.

Turning to the present, Civil War popular constitutionalism provides a valuable case study for how contemporary popular constitutionalism might function. In *The People Themselves*, Kramer devotes much attention to the institutional popular constitutional techniques available to the legislature, such as cutting off funding and impeaching judges.³⁶ At the same time, in his discussions of presidents Jackson, Lincoln, and Roosevelt, Kramer locates many of the most powerful expressions of popular constitutionalism inside the executive branch. Yet I believe that there would be a great deal to be gained from considering in greater depth the institutional apparatus that exists inside the executive branch—and not just the President—for reasoned deliberation of constitutional questions. This includes, in their modern incarnations, the Office of Legal Counsel, the office of the Attorney General, and the White House Counsel.

Today, the executive branch pursues wartime constitutional policy while making every effort to remain as shielded as possible from public view, surfacing only periodically when haled into court or in order to testify before Congress, and producing only such testimony and such documents as it must. This retreat inside itself on the part of the executive branch may be a byproduct of modern judicial supremacy, as the executive branch takes advantage of a near-exclusive reliance on the courts to publicly resolve constitutional questions. This reliance may well have driven the rest of the constitutional decision making process inside the executive branch essentially underground.

36. See KRAMER, *supra* note 1, at 249.

This was not the case during the Civil War, when constitutional thinkers in the executive branch, and particularly the War Department, were regularly making detailed constitutional claims designed to persuade the public of the legitimacy of the executive's wartime constitutional interpretation. In America's greatest constitutional crisis, the Executive branch simultaneously seized unprecedented constitutional authority while at the same time making sustained constitutional arguments designed to legitimate that authority.

