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*The People Themselves* intervenes in a growing contemporary debate about the role of the Supreme Court in our constitutional system that began to emerge after the end of the Warren Court and reached a crescendo with *Bush v. Gore*. For the second time since *Lochner v. New York* was decided, some liberals have begun once again to switch sides on the virtues of judicial review. Many recent liberal books and articles inevitably bring to mind the flood of Progressive attacks on the democratic legitimacy of judicial review written between 1905 and 1937. Yet the book can be approached independently of its clear effort to advance one version of the current anti-judicial review agenda. The book has two overall goals. The first is to establish that a legitimate practice of popular constitutionalism—of the “people outdoors” exercising a separate and independent voice in constitutional debate—was well in place by the time of the American Revolution. The second goal is to demonstrate that the arguments for judicial supremacy—expressly articulated in *Cooper v. Aaron* and acted upon in *Bush v. Gore*—have been drowned out until recently by a “departmental” theory of judicial review. The claim that judicial supremacy is a very recent development in constitutional history is not new, but Kramer’s elaboration of the various paths to judicial supremacy and the real life significance of the competing theories of judicial review left behind, is important and original.

A DISCRETE AND COSMOPOLITAN  
MINORITY: THE LOYALISTS, THE  
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Historical interest in popular constitutionalism has enlivened the search for the origins of judicial review. Several precursors of judicial review in the state courts during the 1780s, in particular, demand explanation. If early modern Anglo-Americans did not perceive courts as enforcers of constitutional limits on legislatures, what explains these attempts by judges to curtail statutes in the “critical period” before the Philadelphia Convention? This article argues that these cases involved antiloyalist legislation and related laws that violated the Peace Treaty of 1783 or the law of nations, or otherwise obstructed diplomatic and commercial relations with the other empires of the Atlantic world. Lawyers and judges drew on available legal scripts—such as the customary liberties of Englishmen and the notion of imperial supremacy—to argue that courts had the power to curb state legislation that infringed on these superior sources of law. This use of the courts fitted into a larger, Federalist constitutional program that was designed to reintegrate the United States into the Atlantic world.

IREDELL RECLAIMED: FAREWELL TO  
SNOWISS'S HISTORY OF JUDICIAL  
REVIEW

*Gerald Leonard*

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Even after the publication of Larry Kramer's *The People Themselves*, the early history of judicial review suffers from the unfortunate influence of Sylvia Snowiss's *Judicial Review and the Law of the Constitution*. Snowiss misread, among other things, James Iredell's foundational argument in 1786 for the inevitability and necessity of judicial review. Snowiss claimed that early understandings of judicial review conceptualized it not as a legal doctrine but as a doctrine of political and revolutionary resistance. In fact, however, Iredell argued for judicial review as a straightforward, legalistic consequence of popular sovereignty. In Iredell's influential account, the transition from the British theory of legislative sovereignty to the American theory of popular sovereignty also brought a shift in the relations between legislative and judicial power (the separation of powers). The central implication for the courts was that they could no longer hide behind legislative authority. The judges now had to ensure their own authority to act by reference to the people's constitutions, lest they themselves illegally coerce the citizenry. Moreover, there was nothing in such a theory to suggest deference to the legislature when doing constitutional interpretation (Snowiss's "doubtful case rule"). When such a rule was embraced by Iredell and others, it seems not to have been a "corollary" of Snowiss's theory of early judicial review at all. Rather, it appears to have been a pragmatic concession to those who continued to resist Iredell's lawyerly logic.

MOBS, MILITIAS, AND MAGISTRATES:  
POPULAR CONSTITUTIONALISM AND  
THE WHISKEY REBELLION

*Saul Cornell*

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It is impossible to understand the Constitutional dynamics of the early Republic without some appreciation for the manifold ways popular constitutionalism shaped these early debates. Popular constitutionalism in the early republic encompassed an enormous spectrum of legal strategies. The peaceful efforts of the Democratic-Republican Societies to influence the course of Federalist policy stood at one pole, while mob action stood at the other. Even more important than either of these modalities of popular constitutionalism were the efforts of local communities and states to use the militia as check on federal power.

PRE-REVOLUTIONARY POPULAR  
CONSTITUTIONALISM AND LARRY  
KRAMER'S *THE PEOPLE THEMSELVES*

*Richard J. Ross*

905

Larry Kramer's depiction of pre-Revolutionary constitutionalism rests on two dichotomies that are valuable yet exclude middle positions. First, he distinguishes between fundamental law and ordinary law. Second, he argues that pre-Revolutionary judges could play one of two roles—since they were not supreme constitutional interpreters (the first of these roles), they must have possessed no special authority to determine constitutional meanings (the second, and remaining, possibility). Both of these dichotomies obscure middle positions that capture important aspects of the pre-Revolutionary constitutional tradition. My comments briefly identify these middle positions and suggest what is at stake in recovering them.

GIVE "THE PEOPLE" WHAT THEY  
WANT?

*Keith E. Whittington*

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Larry Kramer's *The People Themselves* argues that "popular constitutionalism" has been the dominant tradition over the course of American history, being eclipsed by "judicial supremacy" only in the last decades of the twentieth century. He posits that political parties have, since the age of Andrew Jackson, been the vehicle for pushing back the forces of judicial supremacy. This article argues that political parties are instead deeply implicated in the political dynamic that gives rise to judicial supremacy in the United States. The article identifies the features of the early party system that allowed it serve the popular constitutionalist function that Kramer emphasizes. It then shows that these are relatively rare features of American politics. Under more common political conditions, party leaders have ample incentives to encourage the growth of judicial supremacy precisely in order to advance the substantive constitutional commitments to which those political leaders adhere.

POPULAR CONSTITUTIONALISM,  
JUDICIAL SUPREMACY, AND THE  
COMPLETE LINCOLN-DOUGLAS  
DEBATES

The complete history of the Lincoln-Douglas debates provides additional support for the main thesis of Larry Kramer's *The People Themselves: Popular Constitutionalism and Judicial Review*, while casting doubt on a subtheme. The Lincoln-Douglas debates of 1840 are yet another instance when judicial power was contested in American history. Professor Kramer, however, treats American constitutional history as an ongoing struggle between aristocrats who support judicial supremacy and "democrats" committed to a more popular constitutionalism. The complete Lincoln-Douglas debates suggest that political struggles to control constitutional meaning have been more protean. Douglas was one of many ambitious politicians who rose to power championing popular constitutionalism, but after political allies established control over the courts, found judicial supremacy a useful means for stabilizing their political coalition, for exercising authority over resisting localities, and for entrenching their policy preferences. Lincoln was one of many ambitious politicians who first defended courts as a bulwark against an insurgent political movement with an alternative constitutional vision and then, after the insurgents had consolidated power and gained control over the judiciary, attacked courts when leading an different insurgent political movement with an alternative constitutional vision. Douglas in 1840 and Lincoln in 1858 were attacking institutions controlled by their political rivals and regarded appeals to popular constitutionalism as efforts to transfer constitutional authority to institutions they believed more favorably disposed to their constitutional vision. Lincoln in 1840 and Douglas in 1858 were defending institutions controlled by their political supporters and regarded appeals to popular constitutionalism as efforts to transfer constitutional authority to institutions they believed less favorably disposed to their constitutional vision.

POPULAR CONSTITUTIONALISM IN THE  
CIVIL WAR: A TRIAL RUN

*Daniel W. Hamilton*

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The Civil War was widely recognized, at the time and since, as a moment of popular constitutionalism, at least in 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, which Charles Evans Hughes described as one of the great "self-inflicted wounds" in the history of the Supreme Court.

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 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.

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

*William E. Forbath*

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This essay aims to revise and strengthen some important features of Larry Kramer's pioneering account of popular constitutionalism, particularly during the last century, which Kramer covers on the run. In doing so, the essay also complicates the normative path of Kramer's narrative. First, I discuss the role of racism in shaping American popular constitutionalism and its rivals. *The People Themselves* has been assailed for glossing over this and other dark chapters in popular constitutionalism's history. I sketch how and why Kramer's narrative should take these dark chapters on board. Next, I turn to the Progressive Era and the New Deal. In both these moments, Kramer argues, when matters came to a head, Americans "chose popular constitutionalism" over judicial finality. In fact, I argue, Americans preferred to have it both ways. While Progressives' and New Dealers' attacks on conservative judicial doctrines enjoyed broad support, efforts to demote the courts and institute more democratic allocations of interpretive authority never gained broad and deep popular approval. The Progressive Era was 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. Progressive efforts to rethink popular self-rule and make constitutionalism more democratic in a modern, urbanized America were deep and systematic—more so than Kramer's or any of today's constitutional thinkers. What can we learn from them? Popular political sway over constitutional questions in both eras stood in tension with a conservative current of popular skepticism about the people's collective enthusiasms about the uses of state power, a current that ran in favor of judicial finality. Americans refused to forsake the ideal or myth of judicially enforceable constitutional commitments standing obdurately above and beyond the sway of non-judicial political actors.

Throughout the twentieth century, I suggest, even in the thick of popular constitutional battles against the courts, Americans associated judicial finality with the stability of firm, unduckable, law-like constitutional guarantees. They disagreed about what rights the Constitution vouchsafed and about what rights were properly safeguarded by courts. But on all sides, they were believers in the indispensability of judicial finality in respect of some important set of rights, which they deemed essential to their rival conceptions of popular self-rule and constitutional democracy. This basic agreement on the virtues of judicial finality across the liberal-conservative divide, which Kramer bemoans as a late twentieth century development, arose many decades earlier. But contrary to Kramer, I do not find that this agreement has spelled the demise of popular constitutionalism. From the New Deal right down to the present, party politics and social movements, including movements to amend the Constitution, have been lively sites of popular involvement in—and popular influence over—the nation’s constitutional development.

POPULAR CONSTITUTIONALISM AS  
POLITICAL LAW

*Mark Tushnet*

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*The People Themselves* develops the idea that constitutional law is a special kind of law, political law. Examining some of the book’s reviews, this Article explains how political law can be developed through relatively unstructured interactions among the people, political leaders in Congress and the presidency, and the courts. It argues that understanding how constitutional law as political law is developed requires, not the development of crisp analytic criteria, but close historical analysis of particular interactions. The Article identifies criteria for evaluating how popular constitutionalism compares to judicial review as a mechanism for enforcing constitutional rights, arguing that a serious evaluation requires much more complex analysis than some critics have suggested.

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

*Christopher Tomlins*

1007

This article addresses aspects of the debate over Larry Kramer’s *The People Themselves* and, more generally, current interest in popular constitutionalism before engaging, briefly, with the book itself. Because I find Kramer’s book in general terms unexceptionable I see no particular reason to engage in the kind of lengthy critical assessment undertaken by those scholars whose disagreements with the book are pronounced. Instead I focus on three “sites” that the book traverses that I consider sites of missed opportunity. They are, first, the question of the people and the Constitution; second, the people and politics; third, the question of police and law. I conclude with some thoughts on Kramer’s resort to history—the question of past and present.

PREEMPTING THE PEOPLE: THE  
JUDICIAL ROLE IN REGULATORY  
CONCURRENCY AND ITS IMPLICATIONS  
FOR POPULAR LAWMAKING

*Theodore W. Ruger*

1029

The phrase “popular constitutionalism” most commonly refers to the role of the public—or perhaps its elected representatives—in framing answers to particular substantive questions of constitutional interpretation. This essay explores a different aspect of the popular constitution of the United States, one that is indifferent to particular substantive questions but that forms the basic structure in which most lawmaking takes place. The United States is not merely a federal system but one with concurrent federalism, in which many issues are regulated by both state and federal governments. This norm of regulatory concurrency became entrenched in the twentieth century even as the scope and depth of positive regulation of many social and economic issues proliferated. I argue that this concurrency norm itself is an important part of the public’s constitution, in that it permits the public multiple outlets for lawmaking, in which different coalitions and actors may prevail at least temporarily. The federal judiciary has played, and will play, a central role in constructing and preserving this concurrent structure, and with it the multiple spaces for public lawmaking that exist. Where Congress has regulated at least part of a regulatory field, courts are often faced with the question of how broadly to trump, or preempt, state regulation of the same topic. After much judicial disagreement in the first 150 years of the nation’s existence, by the New Deal era federal courts had embraced the concurrent idea of regulation as opposed to a more parsimonious theory of exclusivity arising from incremental federal regulation. By embracing this concurrency idea the Supreme Court enabled the proliferation and coexistence of both federal and state positive law in the later twentieth century. In the past decade, however, the Supreme Court and other federal courts have displayed more ambivalence on this point and have been demonstrably more willing to infer federal exclusivity even absent a clear Congressional statement, a development with troubling consequences for popular lawmaking.

TOM DELAY: POPULAR  
CONSTITUTIONALIST?

*Neal Devins*

1055

Focusing on congressional efforts to override state court decisionmaking in the Terri Schiavo case, this essay examines some of the practical problems associated with implementing Larry Kramer's popular constitutionalism. In particular, lawmakers will invoke the "will of the people" when, in fact, they are pursuing special interest politics. More than that, the Schiavo case calls attention to the increasing partisanship within Congress. This partisanship, contrary to the objectives of popular constitutionalism, makes lawmakers less likely to advance the national interest and more likely to focus their energies on their increasingly partisan base. For this very reason, today's Congress is less likely to facilitate Kramer's project than earlier Congresses.

POPULAR CONSTITUTIONALISM AS  
PRESIDENTIAL CONSTITUTIONALISM?

*David L. Franklin*

1069

This essay, which focuses on Larry Kramer's book *The People Themselves*, makes three points. First, although Kramer makes popular constitutionalism the conceptual centerpiece of his book, it's not at all clear what popular constitutionalism is. Kramer's work can be read to embody two very different versions of popular constitutionalism: a populist sensibility model and a departmentalist model. Second, whichever model Kramer has in mind, he has performed a valuable service by reminding us that the meaning of the Constitution is not identical to the doctrines the Supreme Court uses to implement that meaning. Third, popular constitutionalism in 2006 may in practice mean presidential constitutionalism—an outcome that should give us cause for concern. The essay concludes with two brief case studies, involving medical marijuana and warrantless wiretapping. Both case studies raise questions about the President's capacity to develop independent, reasonable constitutional understandings in a deliberative and transparent way.

CONSTITUTIONAL EDUCATION FOR *THE  
PEOPLE THEMSELVES*

*Sheldon Nahmod*

1091

Professor Nahmod, like Dean Kramer, remains profoundly disturbed by the Supreme Court's triumphalist decision in *Bush v. Gore*. However, he does not go so far as Dean Kramer in arguing normatively for a return to "popular constitutionalism." Rather, his more modest position is that the Supreme Court, Congress, and the President, together with the bar and the media, have a normative obligation to educate "the people themselves" in constitutional matters. This often-overlooked and vitally important "constitutional education" of the people is based on the self-government rationale of both our constitutional structure and the First Amendment. Professor Nahmod suggests how to promote the people's constitutional education.

COMMENT: POPULAR LAW AND THE  
DOUBTFUL CASE RULE

*Frank I. Michelman*

1109

A "doubtful case" or "clear mistake" rule is a rule calling for substantial deference by a reviewing court to a legislature's implicit affirmation of the constitutional probity of the statutes it enacts. Americans of the early Republic reportedly found a grounding for such a rule of judicial conduct in a conception of constitutional law as *popular* (not "ordinary") law. On examination, it proves difficult to trace a persuasive connection between the popular-law conception and demands for judicial adherence to a rule of deference to the implicit constitutional judgments of legislatures. Rather, the popular law conception calls for a kind of departmentalist approach to judicial review, one that would *reject* judicial deference to the contemporaneous constitutional judgments of legislatures. Deference would seem more in keeping with Alexander's Bickel's dismissal of the constitution-writing "people" as "an abstraction" than with popular constitutionalism's evocation of them as a real, live, active presence in the contemporary scene.

KRAMER'S *POPULAR  
CONSTITUTIONALISM*: A QUICK  
NORMATIVE ASSESSMENT

*Sarah Harding*

1117

This paper steps outside of the historical debate about the origins and development of judicial review and focuses on the normative claim that Kramer makes near the end of *Popular Constitutionalism*. Should the Court, as Kramer argues, have a little more humility when it comes to judicial review and its authority over constitutional interpretation? Should the Court have more respect for legislative decision-making? These questions are addressed through a brief exploration of the ideas of a leading skeptic of judicial review, Jeremy Waldron, and a glimpse at the experiences of other rights-respecting nations.

The article argues that the non-existence of welfare rights in American Constitutional law, and the non-existence of a widely shared sense of moral obligation to attend to poverty through the use of law, cannot be explained by reference to the Constitutional text or history. Rather, it is a function of the over-identification of ordinary morality with Constitutionalism, of the Constitution with law, and of law, with adjudicative law—what the article calls “the legal question doctrine.” As courts cannot, will not, and possibly should not enforce “welfare rights,” as a matter of adjudicated Constitutional law, so, we conclude, neither the Constitution, nor Constitutional law, nor Constitutional morality suggest the existence of such rights. But, the article argues, all of these definitional equivalencies are unfounded. Larry Kramer’s important book makes the historical argument that this configuration—the legal question doctrine—was not always a part of the understanding of Constitutionalism. The article concludes that a recognition the possibility of Constitutional and moral rights of welfare, and duties to provide it, in the face of adjudicative reluctance to do so, will require a major reorientation of our understanding of Constitutional jurisprudence—the meaning of law and the nature of legal obligation—as well as a re-thinking of our Constitutional history.

RESPONSE

*Larry Kramer*

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## II. STUDENT NOTES AND COMMENTS

“LEWD AND IMMORAL”: NUDE  
DANCING, SEXUAL EXPRESSION, AND  
THE FIRST AMENDMENT

*Kevin Case*

1185

Nude dancing is a particularly awkward fit with the First Amendment. Should the Constitution protect this kind of “speech?” The question has vexed the Supreme Court. While most of the Court has agreed that nude dancing falls within the First Amendment, plurality opinions relegate nude dancing to the “outer ambit” of shielded speech, setting forth confusing and ultimately unsustainable legal tests.

This Note contends that nude dancing can convey powerful and particularized erotic messages of sexual desire, availability, and appreciation of the nude female form. It is not mere “conduct.” Moreover, arguments for categorizing nude dancing as “low value” speech, such as those grounded in morality or aesthetics, fail to provide a principled basis for affording nude dancing lesser protection than is given to other types of expressive activity. This Note thus concludes that nude dancing should receive full First Amendment protection, and that attempts to regulate it should receive no lesser degree of Constitutional scrutiny.

THE USES OF HISTORY IN THE SUPREME  
COURT’S TAKINGS CLAUSE  
JURISPRUDENCE

*Jonathan Lahn*

1233

In a series of seminal cases interpreting the Fifth Amendment’s Takings Clause, the United States Supreme Court has used arguments that can be called “historical” to justify its holdings and negotiate the relationship between the static language of the Constitution and the dynamic realities of American life. While historical arguments have been a recurring theme in Takings Clause jurisprudence over the past eighty years, the way in which they are used has shifted. While historical accounts of changes in American society over time once served to justify new forms of governmental intervention in the realm of private property, a new historical discourse appears to be emerging. This “new” historical argument identifies a static historical norm—a “historical compact,” in Justice Scalia’s words—in early American society and seeks to bring modern Takings Clause jurisprudence into harmony with it. This Note begins by examining the way that history has been deployed in critical Takings Clause cases and identifies two modes of historical argument within the case law. It then compares the content of the putative “historical compact” with the historical realities of the government/property interface in early America. Ultimately, it embraces the once-prevalent “dynamic” use of history and concludes that the static “historical compact” championed by conservative Justices in recent Takings Clause cases is not a reflection of historical reality, but is rather a rhetorical device that masks judicial activism as adherence to tradition.

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