GIVE "THE PEOPLE" WHAT THEY WANT?*

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The literature on constitutionalism outside the courts has expanded and diversified rapidly over the past several years. It has produced normative calls for taking the Constitution away from the courts,[1] descriptive studies of how the Constitution is interpreted outside of courts,[2] and in many instances work that combines the normative and descriptive, as with Larry Kramer's *The People Themselves*.[3] It includes constitutional politics "in the streets,"[4] at the voting booths,[5] and among institutions.[6] Kramer's vision of "popular constitutionalism" offers one valuable perspective on how constitutional meaning is contested and remade in and through politics.

Kramer's book is a particularly rich addition to this literature. In addition to making a provocative challenge to "judicial supremacy" in the form of "popular constitutionalism," it elegantly tells the story of the foundation and growth of judicial review in the early republic. The normative argument that motivates and concludes the book has perhaps overshadowed the historical account that takes up the bulk of its pages,[7] but his tale of the transition from the customary constitutionalism of the British tradition to the text-based constitutionalism of the American tradition can readily stand on its own and is itself an important contribution to the study of American constitutionalism.

The historical narrative is primarily concerned with the period from the Revolution through the early Jacksonians. In this narrative, the Federalist flirtation with judicial supremacy was routed by the Jeffersonians in

* With apologies to Ray Davies. THE KINKS, GIVE THE PEOPLE WHAT THEY WANT (Arista 1981).

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1. *E.g.*, MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).
2. *E.g.*, KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999).
3. LARRY D. KRAMER, THE PEOPLE THEMSELVES (2004).
4. Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401 (2005).
5. 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).
6. WHITTINGTON, *supra* note 2.
7. *See, e.g.*, Laurence H. Tribe, *The People's Court*, N.Y. TIMES BOOK REV., Oct. 24, 2004, at 32 (critical review of *The People Themselves*); L. A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855 (2005) (book review) (same); Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2005) (book review) (same).

1800.[8] Some jurists, like Joseph Story, may have later accepted the view that the "federal courts were principally, and finally, responsible for the law of the Constitution,"[9] but these were minor deviations. More significant, however, was the nationalist response to threats of state nullification in the late 1820s and early 1830s. Such constitutional disputes were enough to convince politicians like Delaware Whig John Clayton that "we have no other direct resource . . . to save us from the horrors of anarchy, than the Supreme Court of the United States."[10] Kramer concludes, however, that other prominent politicians had a "very different response to the same experience" and offered an alternative that staved off judicial supremacy.[11] By the 1840s, political leaders such as Martin Van Buren "rescued and revitalized" popular constitutionalism through the vehicle of mass political parties. Political parties "reasserted popular control over constitutional development" and "marginalized the judiciary."[12]

Kramer leaves it to a short chapter to carry the story up to the present. Popular constitutionalism remained the "dominant" force, even if its "very diffuseness and decentralization" left room for "advocates of judicial supremacy to continue nursing their claim."[13] Whenever those advocates became too vocal, however, they were "pushed back" to the margins.[14] The evidence here is thin, consisting primarily of the examples of Abraham Lincoln and Franklin Roosevelt to demonstrate the vitality of popular constitutionalism.[15] By the 1980s, however, Kramer finds that liberals had finally joined conservatives in their embrace of judicial supremacy, lulled into abandoning popular constitutionalism by their approval of the substance of the activism of the Warren Court.[16] Only in the late twentieth century, within Kramer's lifetime and for the first time, did judicial supremacy become the dominant force in American constitutionalism. Not too late, one might think, to pull such a new growth up by its roots. All that is needed, Kramer implies, is for liberals to be reminded of their natural heritage as popular constitutionalists and judicial supremacy can once again be vanquished to the margins of American constitutional politics and discourse.

8. KRAMER, *supra* note 3, at 93–144.

9. *Id.* at 170.

10. *Id.* at 181 (quoting Speech of John M. Clayton (Mar. 4, 1830), *in* THE WEBSTER-HAYNE DEBATE ON THE NATURE OF THE UNION 349, 363 (Herman Belz ed., 2000)).

11. *Id.* at 173.

12. *Id.* at 205.

13. *Id.* at 207.

14. *Id.*

15. *Id.* at 209–18.

16. *Id.* at 222.

I want to take issue here with Kramer's assertion that the establishment of political parties banished judicial supremacy until the liberal children of the Warren Court forgot their patrimony. Kramer's positive account of the rise of judicial supremacy is, I believe, inaccurate, both in terms of its political analysis and as a matter of history. Although political parties can serve as the vehicle for a form of popular constitutionalism as Kramer imagines, they have generally found it difficult to do so. Instead, the political parties are deeply implicated in the political dynamic that gives rise to judicial supremacy in the United States. I develop that argument at length elsewhere,[17] and will only sketch a portion of it here.

In questioning Kramer's account of the marginalization of judicial supremacy, I do not question the importance of constitutionalism outside the courts. Judicial supremacy tends to crowd out extrajudicial constitutional interpretation, and the belief in judicial supremacy may encourage judges and others to deprecate the constitutional views of non-judicial actors, perhaps resulting in less deferential judicial review than might otherwise be warranted. Even if judicial supremacy is accepted—in that non-judicial actors are expected to give way in the face of judicial interpretations of the Constitution and embrace the logic of those judicial interpretations—there remains space for non-judicial actors to engage the Constitution prior to and in the interstices of judicial interpretation. Even if non-judicial constitutional interpretation is taken to be less authoritative than judicial constitutional interpretation, it may nonetheless remain politically and historically important.[18] Constitutionalism outside the courts may also be an important influence on constitutionalism inside the courts, such that in pronouncing their authoritative interpretations of the Constitution judges might take their cues from non-judicial actors.[19] Perhaps more basically, the theory of judicial supremacy is itself politically constructed by non-judicial as well as judicial actors; it rests on the political foundations of the Constitution outside the courts.[20] Political actors may well use the courts as the instruments

17. *See* KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY (forthcoming Jan. 2007).

18. *See, e.g.*, WHITTINGTON, *supra* note 2 (detailing how constitutional meaning has been constructed through political practice).

19. *See, e.g.*, Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 477 (2001) (relating the Rehnquist Court's federalism decisions to its supportive political environment); J. Mitchell Pickerill & Cornell W. Clayton, *The Rehnquist Court and the Political Dynamics of Federalism*, 2 PERSP. ON POL. 233 (2004) (tracing the political background to the Rehnquist Court's federalism decisions); KEN I. KERSCH, CONSTRUCTING CIVIL LIBERTIES (2004) (examining how political developments are integrated into constitutional doctrine).

20. *See* WHITTINGTON, *supra* note 17.

for advancing their constitutional understandings. The issue is simply when and how judicial supremacy arose in the United States.

Mass political parties could function as the instruments for vindicating preferred constitutional principles only under limited conditions. Those conditions were in fact in place for the early Democratic Party that Martin Van Buren helped found. What were the features of the early party system that allowed it to serve this popular constitutionalist function? They were several.[21]

First, the parties were organized around constitutional principles. The Jacksonians created a coalition committed to rooting out the corruption of the American system of protectionist tariffs, internal improvements and a national bank, and reestablishing limitations on federal power. The Whigs were formed in defense of the American System and in opposition to the Jacksonian exertions on behalf of their substantive constitutional vision. Party leaders on both sides reached out to new constituencies and integrated additional interests to the extent that they did not threaten these initial core commitments. Although some members of each party coalition may have some constitutional concerns in addition to these central commitments, these were supplemental. On the core constitutional issues that were priorities for party leaders, the party rank-and-file was unified and reliable.

Second, politicians were creatures of the party and subject to party discipline on these key issues. Unlike the first party period which organized the political competition of the social elite, notables such as John Adams and Thomas Jefferson, the second party period recruited men into politics whose only claim to lead was that they were loyal servants of the party. This not only democratized politics, allowing men such as Abraham Lincoln to rise to the presidency, but it also constrained politicians to faithfully represent the party caucus.[22] They had no personal authority by which they could oppose the demands of party. Moreover, given party control of ballots and campaign resources, individual legislators held their offices at the pleasure of the party organization.

Third, parties controlled the government. Once the second party system coalesced, the Democratic and Whig parties competed to secure a national electoral majority and bring the elected branches of the government

21. For readers who are interested, the information set forth on this topic throughout this article is discussed generally in MERRILL D. PETERSON, THE GREAT TRIUMVIRATE: WEBSTER, CLAY AND CALHOUN (1987).

22. *See* JAMES W. CEASER, PRESIDENTIAL SELECTION: THEORY AND DEVELOPMENT 123–69 (1979); *see also* JOEL H. SILBEY, THE AMERICAN POLITICAL NATION, 1838–1893 (1991) (describing party politics in the nineteenth century).

under the unified control of the party leadership. The legislative powers that the constitutional founders had separated were brought back under central direction by party organization and discipline. The Jacksonians did not achieve the same degree of electoral success as the Jeffersonians—they did not drive their partisan opponents into extinction—but they nonetheless could and did expect to govern without compromise when they carried the election.

Intraparty agreement on constitutional principles, robust party discipline, and unified party government allowed the parties of the early Jacksonian system to serve as vehicles for popular constitutionalism and to resist the blandishments and enticements of judicial supremacy. As long as these conditions held, important constitutional questions could be resolved by the people at the polls. In fact, they did resolve some questions. John Marshall had attempted to settle the question of the scope of the powers of the national government in *McCulloch*.[23] It was Andrew Jackson and his followers, however, who settled the issue, not through judicial supremacy but through legislative action backed by the presidential veto.[24] The limits of federal power were authoritatively pronounced not in judicial opinions but in party platforms and presidential messages.

Judicial supremacy had little to offer the early Jacksonians (or the Jeffersonians before them), but that situation was not stable.[25] As the relationship between the political parties and the salient constitutional issues of the day changed, so did the political supports for judicial supremacy. Popular constitutionalism as it played out in party politics can lead to partisan resistance to claims of judicial supremacy, as it did during Jackson's presidency. In other circumstances, however, it can converge with claims of judicial supremacy.

Presidents and other party leaders face a basic leadership task with two potentially conflicting goals. First, party leaders must seek to advance

23. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

24. *See* Mark A. Graber, *The Jacksonian Makings of the Taney Court* (Univ. Md. Sch. of Law, Legal Studies Research Paper No. 2005-63, 2005), *available at* http://ssrn.com/abstract=842184; Keith E. Whittington, *The Road Not Taken:* Dred Scott*, Judicial Authority, and Political Questions*, 63 J. POL. 365, 372–77 (2001); Gerard N. Magliocca, *Veto! The Jacksonian Revolution in Constitutional Law*, 78 NEB. L. REV. 205 (1999).

25. For present purposes, I am ignoring the federalism-related rationales for judicial supremacy. The desire of national officials to use the federal courts to control the states and limit interstate conflicts was a particularly important basis for the political support for judicial supremacy in the early republic and one that operated independently of the party-based dynamic sketched out here. *See* KRAMER, *supra* note 3, at 185–89; WHITTINGTON, *supra* note 17; Keith E. Whittington, *"Interpose Your Friendly Hand": Political Supports for the Exercise of Judicial Review by the United States Supreme Court*, 99 AM. POL. SCI. REV. 583, 586–87 (2005); Jack N. Rakove, *The Origins of Judicial Review: A Plea for New Contexts*, 49 STAN. L. REV. 1031, 1041–50 (1997).

the central constitutional and policy commitments of their party. Second, they must seek to keep their party coalition together and electorally successful.[26] Popular constitutionalism would suggest that presidents and party leaders ought to have constitutional commitments that they seek to realize in government practice (in addition to the various other policy commitments that they obviously pursue). Presumably, however, few successful politicians would be willing to pursue those commitments in ways that will doom their own ability and that of their allies to hold political office or otherwise severely damage their ability to exercise political power to achieve those and other policy goals.[27] When parties cease to be effective vehicles, given those constraints, for realizing the substantive constitutional commitments of popular constitutionalist presidents, then presidents will have incentives to turn to other institutions in order to achieve those commitments. Prominent among those alternatives is the Supreme Court. A popular constitutionalist president may well promote judicial supremacy in order to achieve the substantive constitutional commitments that he is charged with pursuing.

Under conditions that are quite common in American politics, judicial supremacy will become more attractive than political parties as a vehicle by which to advance the substantive constitutional commitments of presidents and party leaders. Mass political parties in the United States have historically faced pressure across all three of the conditions for party-based popular constitutionalism sketched out above.

First, parties become less attractive instruments for popular constitutionalism when party members are no longer unified on key issues. Parties can mobilize public opinion and legislative strength to resolve constitutional controversies and establish favored constitutional understandings far more effectively when the positions in those controversies cut along party lines rather than across party lines. When constitutional issues divide rather than unify co-partisans, then constitutional interpretation through political action becomes muted, and contesting those constitutional issues within the

26. Political scientists often assume that major political parties only seek to win elections and that policy positions are completely subordinate to that goal, and over time it is certainly true that the issue positions of the major parties are fluid. *See, e.g.*, ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957) (describing vote maximizing theory of party behavior); Kaare Strom, *A Behavioral Theory of Competitive Political Parties*, 34 AM. J. POL. SCI. 565 (1990) (outlining several theories of party behavior). In a given historical moment, however, party leaders are likely to take their immediate policy commitments as real and constraining.

27. There may be exceptions to this generalization. One thinks of John Tyler or Andrew Johnson in the White House, but such examples are both statistically rare and circumstantially exceptional. Moreover, however disastrous those presidencies seem in hindsight, it is possible that prospectively even these presidents held out hopes that their actions would ultimately reap political rewards by reconfiguring existing political coalitions.

political arena threatens party unity. Judicial supremacy helps pull those issues out of politics, allowing party leaders to focus on the issues that distinguish their partisan allies from their partisan foes.

Second, parties become less attractive and effective instruments for popular constitutionalism when they can no longer count on the discipline of their legislative members in the face of pressures to deviate. Rather than staking out clear issue positions and acting on them, parties may fissure when confronted with controversial constitutional issues, or worse, legislators may abandon party principles when tempted by the prospect of immediate political gains. While early Jacksonian politicians had little ability to deviate once the party had determined to stake out a position on key issues, legislators since the late nineteenth century have developed independent political resources that allow and encourage them to buck the party when the constitutional doctrine of the party seems locally or immediately risky to their personal hold on government office.[28] Internal dissidents can frustrate the realization of the constitutional vision for which a party putatively stands, and as a consequence party leaders have incentives to look outside of the electoral and legislative arenas to pursue that vision.

Third, parties become less attractive and useful instruments of popular constitutionalism when they can no longer secure electoral victory and organize the government on their terms. Martin Van Buren's own model of a people's party to control and defeat the designs of scheming aristocrats was grounded on the assumption that such a party, once organized, would naturally dominate its rivals and successfully restore constitutional fundamentals.[29] The two parties have proven more competitive than Van Buren anticipated, however. Although party competitiveness is a good thing in many ways, it is not particularly good for party adherence to foundational principles. One danger to Van Buren's vision is that his party of constitutional truth may lose an election, opening the door to constitutional error

28. On the separation of legislators from their parties, see, e.g., Nelson W. Polsby, *The Institutionalization of the U.S. House of Representatives*, 62 AM. POL. SCI. REV. 144 (1968); Samuel Kernell, *Toward Understanding 19th Century Congressional Careers: Ambition, Competition, and Rotation*, 21 AM. J. POL. SCI. 669 (1977); James C. Garand & Donald A. Gross, *Changes in the Vote Margins for Congressional Candidates: A Specification of Historical Trends*, 78 AM. POL. SCI. REV. 17 (1984); John R. Alford & David W. Brady, *Personal and Partisan Advantage in U.S. Congressional Elections, 1846–1990*, *in* CONGRESS RECONSIDERED 141 (Lawrence C. Dodd & Bruce I. Oppenheimer, eds., 5th ed., 1993); DAVID C. HUCKABEE, CONG. RESEARCH SERV., LENGTH OF CONGRESSIONAL SERVICE: FIRST THROUGH 107TH CONGRESSES (2002).

29. *See* Gerald Leonard, *Party as a "Political Safeguard of Federalism": Martin Van Buren and the Constitutional Theory of Party Politics*, 54 RUTGERS L. REV. 221 (2001). It is notable that Kramer emphasizes the institutional question of who should interpret the Constitution when examining the constitutional views of historical actors such as the early Jacksonians while giving little attention to the substantive question of what the Constitution meant for them.

whether (perhaps temporarily) endorsed by the electorate or accidentally thrust upon it. The Whigs ousted Van Buren himself from the White House in 1840 during an economic downturn that was likely to doom any incumbent administration and with a "log cabin and hard cider" campaign designed to obscure the ideological differences between the parties.[30] A referendum on constitutional values it was not. Another danger, and one that was facilitated by the rise of professional legislators who could separate themselves from party fortunes, is the possibility in the American constitutional system of divided government. Constitutional fidelity may be difficult if veto points are controlled by members of the other party who hold to constitutional heresies. Almost as problematic is the possible need to integrate heterogeneous ideological elements into a grand partisan coalition in order to cobble together an electoral majority. After the early Jacksonians, American party leaders have found it difficult to secure victory without the necessity of compromising with smaller factions who corrupt the party's constitutional message even as they provide needed congressional seats or electoral votes.[31] Such divisions within and among the elected branches of the federal government encourage party leaders to look outside the political arena to advance their constitutional ideals.[32]

If political parties become less attractive and the courts become more attractive as instruments for implementing the constitutional understandings of presidents and party leaders under such conditions, how common are they? It could be that they are quite common. Indeed, it is plausible that for most of the period that Kramer skims over in chapter eight, from the establishment of the second party system through the present, political circumstances have favored judicial supremacy rather than party-based popular constitutionalism.

It is party-based popular constitutionalism rather than judicial supremacy that has been rare in American history. Political parties have occasionally presented a united front on contested constitutional issues of the day and achieved a definitive victory in the political arena. Most often, these have been temporary achievements. Reconstructive leaders such as Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt have mustered political majorities behind constitutional visions that gave new

30. *See* PETERSON, *supra* note 21.

31. *See* Whittington, *supra* note 25, at 589–93 (discussing as examples the Cleveland Democrats and the Populists in the 1890s and the Democrats and the Dixiecrats in the 1940s and 1950s). The Jacksonians themselves faced this difficulty, though the ideological parts eventually meshed reasonably well. Opposition to protectionist tariffs only became Jacksonian orthodoxy after the demands of Southern nullifiers were integrated into the platform in 1833. *See* WHITTINGTON, *supra* note 2, at 93–106.

32. Whittington, *supra* note 25, at 589–93.

direction to American politics, guiding the actions of politicians as well as judges.[33] Disagreements even within those coalitions could be momentarily submerged beneath the greater desire to repudiate the commitments of the old political majority, whether those of the Federalists of the 1790s, the National Republicans of the 1820s, the slavery protecting Democrats of the 1850s, or the laissez-faire Republicans of the early twentieth century. Kramer points to two of those leaders—Lincoln and FDR—to bolster his case for the continued vitality of party-based popular constitutionalism across the intervening decades from the invention of Van Buren's Democratic Party to the advent of the Warren Court. But they were exceptional leaders.

Others have tried to claim the mantle of reconstructive leader, and as part of that effort have rejected the authority of the courts to ultimately determine constitutional meaning. Their claims were rejected. Theodore Roosevelt's Bull Moose campaign picked up radical Progressive critiques of judicial supremacy, but Roosevelt was defeated in 1912.[34] He was unable to win either the White House or the Republican Party organization. Kramer argues that the judicial supremacy issue was "contested" and that "the years between Reconstruction and the New Deal" were "a kind of golden age for popular constitutionalism," and he quotes the 1912 Progressive Party Platform in support of that proposition.[35] Kramer broadly asserts that "popular constitutionalism was the clear victor each time matters came to a head," but he notes only that "the judiciary survived the Progressive onslaught largely undamaged" in the early twentieth century.[36] Curious readers will have to look elsewhere to learn that it was the forceful advocates of judicial supremacy who won the electoral and legislative victories between Reconstruction and the New Deal, soundly beating such apparent standard bearers of popular constitutionalism as William Jennings Bryan, Theodore Roosevelt, and Robert La Follette.[37] It was conservative politicians like former president Benjamin Harrison, who viewed Bryan and his populist critique of the courts as an unbridled "assault upon our constitutional form of government," who carried the day.[38] For the leaders of the victorious political coalitions during these decades, such as Calvin Coo-

33. *See* Keith E. Whittington, *Presidential Challenges to Judicial Supremacy and the Politics of Constitutional Meaning*, 33 POLITY 365 (2001); WHITTINGTON, *supra* note 17.

34. *See* WILLIAM G. ROSS, A MUTED FURY 130–54 (1994).

35. KRAMER, *supra* note 3, at 215.

36. *Id.* at 207, 216.

37. *See* Keith E. Whittington, *Preserving the "Dignity and Influence of the Court": Political Supports for Judicial Review in the United States*, *in* THE ART OF THE STATE (forthcoming May 2006).

38. DONALD GRIER STEPHENSON JR., CAMPAIGNS AND THE COURT 127 (1999).

lidge, our "most precious rights" were best entrusted to courts, not legislative or popular majorities.[39] The courts were "undamaged" despite Populist and Progressive onslaughts precisely because the advocates of judicial supremacy were the ones winning national elections.

Successful political leaders have generally had reason to be supportive of judicial supremacy. Often it was their allies who were on the bench. Reconstructive leaders, who were able to occupy the corridors of power on behalf of causes and constituencies that had previously been excluded from them, could look at the Supreme Court and recognize its hostility to their constitutional and policy agenda. Other presidents could reasonably view the Court with more affection.[40] The electoral and legislative arenas have often looked less secure. Although the Jacksonians and Whigs could agree among themselves on constitutional issues involving federal economic policies such as the national bank and internal improvements, the increasingly salient issue of slavery drove a wedge through the established parties. While fire-eaters in the South and North could safely call for political action on the issue, those who hoped to lead national political coalitions were, like President James Buchanan, desperate "to suppress this agitation" by rendering it "a judicial question."[41] As the United States struggled through the process of industrialization in the late nineteenth and early twentieth century, divided government and ideological fragmentation were routine features of American politics.[42] Unable to consolidate their hold over the legislative agenda in that fractious environment, conservatives empowered the courts to supervise legislative and administrative policy on economics.[43] Although the success of the New Deal reclaimed political supremacy over economic policy and related matters such as the labor issue, the post-New Deal parties were less comfortable taking responsibility for a host of new constitutional issues. New Deal architects of the Court-packing plan such as Attorney General Robert Jackson and constitutional scholar Ed-

39. CALVIN COOLIDGE, FOUNDATIONS OF THE REPUBLIC 95 (1926).

40. *See* Keith E. Whittington, *Legislative Sanctions and the Strategic Environment of Judicial Review*, 1 INT'L J. CONST. LAW 446 (2003).

41. James Buchanan, Inaugural Address (Mar. 4, 1857), *in* 10 THE WORKS OF JAMES BUCHANAN 105, 106–09 (John Bassett Moore ed., Antiquarian Press 1960) (1908–1911); *see also* DON E. FEHRENBACHER, THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS 11–235 (1978); Mark A. Graber, *The Non-Majoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 46–50 (1993); Wallace Mendelson, *Dred Scott's Case—Reconsidered*, 38 MINN. L. REV. 16 (1954); WHITTINGTON, *supra* note 17.

42. *See* Charles H. Stewart III, *Lessons from the Post-Civil War Era*, *in* THE POLITICS OF DIVIDED GOVERNMENT 203 (Gary W. Cox & Samuel Kernell eds., 1991); JAMES L. SUNDQUIST, DYNAMICS OF THE PARTY SYSTEM 106–69 (rev. ed. 1983).

43. *See, e.g.*, Howard Gillman, *How Political Parties Can Use the Courts to Advance Their Agendas: Federal Courts in the United States, 1875–1891*, 96 AM. POL. SCI. REV. 511 (2002); GEORGE I. LOVELL, LEGISLATIVE DEFERRALS (2003).

ward Corwin began to identify a new constitutional agenda, focusing on freedoms that they regarded as more fundamental than property rights, that would justify the "enlargement of judicial review" as soon as the Court had made its switch in time.[44] Unable to cope with the pressures of the race issue at mid-century, Democratic and Republican presidents and presidential candidates alike sought refuge behind the shield of judicial supremacy and hoped that "the action of the Court . . . would remove this issue from the political arena . . . ."[45] Unwilling to take the responsibility for vetoing popular legislation that included provisions that offended their constitutional sensibilities, contemporary presidents such as Bill Clinton and George W. Bush have preferred to pass the buck to a Supreme Court that might be more willing and able to withstand the political heat.[46]

CONCLUSION

The People Themselves sets up a sharp opposition between popular constitutionalism and judicial supremacy. It is often unclear who exactly the judicial supremacists are in this story and how, if at all, they might ever get the upper hand. By contrast, the standard bearers of popular constitutionalism are often clear enough in Kramer's account, and they include such political leaders as Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt. History is replete, however, with political leaders who advocate judicial supremacy and deference to the constitutional wisdom of the courts. Most of the time, presidents and party leaders have ample reason to seek to entrust their constitutional aspirations to the judges and to offer political support for judicial supremacy. The Constitution outside the courts often makes its way into the courts, as judges are incorporated into the political process of articulating new constitutional meaning and enforcing old constitutional understanding. Politicians sometimes want to take a leadership role in interpreting the Constitution, but more often they are happy to cede responsibility for resolving controversial constitutional questions and instead to defer to the leadership of the judges. Proposals to prune or uproot judicial supremacy require that we first grap-

44. EDWARD S. CORWIN, CONSTITUTIONAL REVOLUTION, LTD. 111–12 (1941). Others on the left had similarly embraced courts as an alternative to popular constitutionalism by the time of the New Deal. *See* Emily Zackin, Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts (2005) (unpublished paper, on file with author).

45. JOHN BARTLOW MARTIN, ADLAI STEVENSON AND THE WORLD 266 (1977) (quoting Adlai Stevenson).

46. *See, e.g.*, Remarks and a Question-and-Answer Session with the American Society of Newspaper Editors in Dallas, Texas, 1 PUB. PAPERS 474, 485 (Apr. 7, 1995) (statement by President William J. Clinton); Statement on Signing the Bipartisan Campaign Reform Act of 2002, 1 PUB. PAPERS 503 (Mar. 27, 2002) (statement by President George W. Bush).

ple with the reasons why it has been such a persistent feature of the American political landscape. The justices have not hoodwinked the people and its representatives into accepting judicial supremacy. Judicial supremacy is a construction of the people's representatives and has more often than not been embraced by the people themselves.