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Response

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RESPONSE

LARRY KRAMER*

I want first to say thank you: to all of you, to Chicago-Kent, to Dean Hal Krent, and especially to Dan Hamilton for putting this together. I am overwhelmed—more overwhelmed than decorum permits me to reveal while standing here.

Let me start by saying a few words about the structure of the book. I began with an idea I discovered while doing research on colonial and revolutionary America. The thin version of this idea, which I labeled “popular constitutionalism,” is simply that the community controls the interpretation as well as the making of constitutional law, and does so in a meaningful sense. We need a thicker version, of course, but any thicker is a matter of how the thin version is instantiated and made real to the relevant community. That changed over time, and the history in the book was meant to show how this thin idea retained its vibrancy in constantly changing political, social, legal, and economic circumstances. The book is not meant to be a story of declension, and I don’t think of myself as telling either about the rise or about the fall of something. I want, rather, to show that there has been an ongoing debate about popular constitutionalism throughout American history.

The idea changes over time, of course. Popular constitutionalism in 1800 is not the same as it was in 1765; nor is it the same in 1840 as it was in 1800. The core idea remains unchanged: that the community exercises active control over the interpretation of its Constitution. But the means by which the community understands itself to exercise that control are quite different. The main development is a shift from direct to indirect means: from juries, petitions, mobs, and the like, to acts of representatives in the government itself. You can have direct control when (but only when) everything happens at the local level in small communities. This ceases to work, as our Founders discovered, once you create a national polity and a national government.

Put another way, the major development in the Early Republic is the move to some form of mediated popular constitutionalism. The community (meaning the popular political culture) still has a story about how it re-

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mains “in control,” but it’s a different story, as control is now asserted through formal government institutions that act for us and on our behalf. Instead of organizing boycotts or torching warehouses to block the enforcement of unconstitutional laws, we look to our representatives in government and, later, to political parties to act for us in getting offending legislation repealed or undone.

I tried in *The People Themselves* to describe this historical evolution in detail through approximately 1840, the point at which a modern party system is fully formed. After that, as many people have noted (both here and elsewhere), I moved quickly to the present day, in a short chapter of only twenty pages. This was partly a matter of space and time: it took me ten years to do the research and 240 pages to tell the story up to 1840 in a way I regarded as thorough, and the book was already longer than I or anybody else wanted it to be. But, more, my hope was that other people would pick up the storyline and carry it forward. My short survey of the period between 1840 and 1995 was meant merely to suggest that there was most definitely a story to be told. And while some reviewers have criticized me for not telling that story myself, a number of scholars have taken up the invitation. Nothing, I should say, could be more gratifying, and this is precisely the kind of work I hoped would be produced by historians who know the later periods of American history better than me. They have begun to fill in and complicate the story.

The book has a point, of course, and it is meant to speak directly to and about today’s debates. I’m bemused when historians criticize me (or each other) for being presentist. Historians are all and always presentist. Why else did the field suddenly grow obsessed with questions of race and slavery in the 1950s? Why else did historians suddenly begin looking at colonial era mobs in the late 1960s and early 1970s? The questions historians ask are invariably driven by the present. And much as they claim to be doing history without regard for present controversies, their views about those controversies are seldom hidden or difficult to discern. I just wanted to be a little more honest about it, to come right out and lay out the history’s implications for current controversies. Because there are implications and they need to be considered.

So Chris Tomlins is right that my book is an example of “committed history.”¹ But its commitments flowed from and emerged out of my historical research, rather than preceding it. I started with conventional views and a different project, and I was originally planning simply to record the

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

early understandings of federalism. As I became familiar with the founding era, however, I discovered a world that was very different from the one I had been taught to expect. And not only different, but also (I thought) attractive in many respects, particularly in its understanding of and commitment to popular government. So while the book is about history, it's not meant to be just a history book. I want historians to read it, and I hope it changes some of what they think (by showing how the Founding was less reactionary and more consistent with the Revolution than conventional wisdom now holds). But the book is also meant to be performative. It is meant to be a part of a current debate. It's meant to help restore and reinvigorate an idea that emerges from the history but that I think is a good idea and an important idea and an idea that ought to be relevant to us still.

I want next to turn briefly to the constitutional theory described in the book. For notwithstanding what some reviewers have said, there *is* a theory embedded in the narrative, and it is "departmentalism." To explain what this means, albeit briefly, we need to make two assumptions that I think must be taken as given if we're going to talk sensibly about the something like popular constitutionalism. One is that "the people" cannot act in an unmediated fashion on the national political stage. It's not worth even talking about a notion of unmediated popular constitutionalism. It just can't happen. We're too big, we're too diverse. Direct democracy can exist in a meaningful fashion only in tiny communities. Popular constitutionalism on any larger scale must take place through some set of mediating institutions. Nothing in the book looks back (romantically or otherwise) to the colonial era of direct action. Mobs were fine in their context and in their time, but no one, least of all me, is suggesting that this is a good way to go about doing things today.

Second, any mediation must ultimately be done through formal institutions of government. This doesn't necessarily mean the three branches of the federal government, but it does mean government structures of some sort. These formal institutions need not be the sole mediating device. To be sure, Jefferson and Madison thought otherwise. They wanted only the branches of government to mediate. But this simple model of departmentalism could not last, if it ever really existed at all. There are, or can be, a myriad of additional mediating institutions: political parties, unions, public interest organizations, chambers of commerce, and the like. At the end of the day, however, these unofficial mediating institutions must still work through the formal institutions of government, which provide the final test for any expression of popular will and popular constitutionalism. The measure of acceptance of an interpretation of the Constitution, in other

words, is always and necessarily found in some form of government action or inaction (whether as legislation, judicial review, or executive behavior of some sort) and popular reactions to it.

With these assumptions in mind, the question to ask is this: if the relevant polity has become complex and extensive, how can you engineer a system of popular control over constitutional interpretation? Madison put the question succinctly in *The Federalist No. 10*, when he referred to the need to find “a republican remedy for the diseases most incident to republican government?”² And note that first “republican,” which is too often overlooked. Not just any remedy will do, Madison says. It must be a *republican* remedy, which in today’s idiom means a democratic remedy. What can we do, in other words, to find a democratic solution to the problems inherent in democracy itself? One thing is clear. Judicial supremacy is *not* such a solution. Or, at least, it was not such a solution to Madison or Jefferson or most Americans in the Early Republic. The Constitution was law made by the people to govern their governors. It reflected their highest aspirations for the rule of law. The notion that responsibility for interpreting this precious document could or should be lodged in an institution not responsible to the people was simply unthinkable, utterly anathema to the core commitments of the American Revolution and the central premise of republican government.

So what was the solution? This was something Americans have argued and fought about from the beginning. For myself, and together with a substantial majority of Americans in the Early Republic, I like Madison’s and Jefferson’s solution, which went something like this: Create a government that has a multiplicity of politically accountable institutions, with different levels (state and federal) and different branches at each level (senates and houses and executives). These branches and departments of government should all be responsive and responsible to the people. But they should also all be to some extent separate from and independent of each other, and they should all be able to act in different ways to impede or obstruct one another. If all these politically accountable institutions then agree on the constitutionality of a measure of government, that’s as close as we’re ever going to come to knowing that the measure has the kind of popular support that must ultimately decide. And I mean not just that the measure is popular. I mean that it has the right kind of popularity: that it is a product of a reasonable and reasoned popular will.

The idea is really quite brilliant. On the one hand, all these different entities are responsible and responsive to the public. On the other hand,

2. See THE FEDERALIST NO. 10, at 65 (James Madison) (Jacob E. Cooke ed., 1961).

they are responsible and responsive in different ways and to different parts of the public. Members of the House are directly responsive to constituents, but only within a relatively small, geographically concentrated portion of a state; Senators were originally responsive only indirectly but to an entire state; the President is responsive to the nation as a whole. And so on. Representation in state and local governments is similarly complicated and redundant. The result is a bewildering system of overlapping polities and overlapping and competing political incentives, with politicians in a variety of situations attempting to lead and to follow the same constituents. If representatives in one branch are unresponsive or corrupted, people who are concerned may turn to another branch or another level of government. If representatives in one branch make a bad decision, representatives in another can use opposition to the decision to advance their own popularity and political agenda. This is what Madison meant in *The Federalist No. 51* when he said that “[t]he interest of the man must be connected with the constitutional rights of the place.”³ Because the branches (or rather the politicians who constitute them) are constantly competing for public favor, we can use them to generate a productive public deliberation.

To illustrate: Suppose the House passes a bill. Enacting this bill presumably reflects the Representatives’ judgment that a law to this effect would be desirable and is constitutional and thus something their constituents will like and approve. The bill goes to the Senate. Suppose the Senators (or a majority of them) disagree; they think either that the bill is bad policy or that it is unconstitutional. They refuse to pass it. Does that end the debate? Absolutely not. The function of checks and balances is not to end deliberation, but to begin it. The Senate’s refusal to enact the bill is meant to induce the Representatives to go back to their constituents and say, “Put pressure on those guys! Make them back off! It’s a good bill, it’s constitutional, we should have this.” The Senators, in the meantime, are not sitting idly by doing nothing. They are presumably making the same sorts of appeals, addressing constituents to explain why their view of the proposed law makes more sense. This is how Madison conceived of deliberative democracy. He did not want to create a legislature that would deliberate for us. He wanted to create incentives for governing officials to foster and lead a public debate.

We need to emphasize the verb “lead” in that last sentence. Government officials were meant to be more than ciphers, and Madison’s theory of representation reserved an important role for leadership. It mattered to Madison that elected officials be men of talent and education and higher

3. See THE FEDERALIST NO. 51 (James Madison), *supra* note 2, at 349.

than average intelligence. Those in government are supposed to know more. It's their job to think about policy, to learn the issues and complexities, to come up with solutions. But not to rule for us or over us. To debate *with* us (and each other). To ensure that the pertinent issues and arguments are properly aired and considered. When disagreements within government arise, elected officials are supposed to use their knowledge and experience to educate us, so we can decide based on reason and information. The public is thus exposed to the arguments on each side of an issue, and the representative nature of our government ensures that the public will actually decide. For at some point, having heard the arguments from proponents and opponents of the action in question, the public will settle on a view—at which point any stalemate will end and an outcome be determined. If the public backs the House, the Senate will yield and enact the law; if not, the law will die. But precisely because our government is responsive, the final decision will lie with the public. And because of the government's complicated structure, the public that eventually decides is more likely to be informed and acting on the basis of reason.

Nor does the process end in Congress. If the bill gets through both houses of the legislature, it still must get past the President, who may veto it, thus triggering another round of public deliberation. By creating a complex government, in other words, we created multiple checkpoints, each staffed by people with slightly different political incentives. This, in turn, ensures that if grounds to question a law exist, they will almost certainly be raised. And, as a result, we get the kind of public debate necessary to produce a responsible public opinion, which must be the governing voice in a democracy. (This, by the way, is a central point in Ted Ruger's paper,⁴ which makes exactly this sort of argument for the role of states in federalism.)

Madison lays out this theory of deliberative democracy in *The Federalist No. 51*. Interestingly, he never once mentions courts. The reason, I think, is that Madison did not see courts playing a particularly significant role in securing popular control of the government and the Constitution, at least not in the late 1780s. When it came to these problems, his focus was on politically accountable entities: the House, the Senate, the President, and their counterparts at the state level. Within a relatively short time, however, it became apparent that courts might have a role to play after all when it came to questions of the constitutionality of government action. How and why this idea emerged is described in chapters 2–5, as are the conceptual

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

moves that were needed to fold courts into the theory of departmentalism and deliberative democracy. Alongside the other branches, courts became a possible checkpoint: one more institution in which questions could be raised to throw problems back to the public for further discussion or deliberation.

Including courts added a new wrinkle, however. For if courts were to have this voice, we would need a way to control them, just as we control the other branches or departments of government. The process wouldn't work otherwise. The remedy would cease to be republican because the Constitution would cease to be subject to popular control. But how do you control courts, when judges are not elected? How do you control a branch that has been structured to be immune from political pressure?

Those who wrote today's European constitutions found one solution to this problem. In the constitutions adopted after WWII, the peoples of Europe cleverly structured their judiciaries to secure both independence and popular control. They did this by making their constitutional courts formally independent, but giving the judges who sit on them limited terms with staggering their appointments to ensure a regular turnover. To make sure that extreme views would not come to dominate, they further required these appointments to be approved by supermajorities in the legislature, thus ensuring that judges have broad political support. And, just in case, they made their constitutions relatively easy to amend. Power to pass on the constitutionality of legislation is not a problem in a system like this, because there is little or no likelihood that a constitutional court will depart from strongly help public views.

The problem is that no one had yet imagined anything remotely like modern judicial review when our Constitution was written. Worried mainly about direct executive or legislative interference in ordinary cases, especially criminal cases, we made our judges independent without the sort of compensating structural checks to secure broad popular control that one might want to include were courts to play an important role in defining the Constitution. As a result, when judicial review did emerge—when the idea grew that judges might have a say over the Constitution equal to that of the other branches—we confronted a problem. How could or should we control courts to ensure that they were equally accountable to and ultimately controlled by the authoritative voice of the community?

A minority in the Early Republic said we could not. Judicial independence, they said, required leaving courts with supremacy over the meaning of fundamental law. But most Americans found that solution unacceptable. Instead, they cobbled together a set of political responses to

control courts: responses that are undeniably cruder than those embodied in modern constitutions but the best they could come up with under the circumstances. They fired judges. They abolished courts and cut their budgets and slashed their jurisdiction and did all the things that we're told today we cannot and must not do. Fortunately, and for reasons I believe are built into our political system, they did these things rarely, and only after foolish provocation by judges who refused to pay attention. A political equilibrium emerged based on a potential threat that seldom needed to be used. Such is our system, then, a system that has, in my view, worked tolerably well across American history.

I am not opposed to judicial review, and it's important to realize that. My goal is simpler: to shear off judicial supremacy from judicial review and thus restore a true departmental system. Judges have a useful and sensible voice when it comes to questions of constitutionality. But if the system is to remain republican, we need something to control the courts, something more than hoping we can persuade them to change their minds or waiting to change their membership when one of them finally gets tired of the job or dies. Given my druthers, I would amend our Constitution and restructure the judiciary along the lines established by the Europeans. But insofar as that is not likely to happen, I prefer our homegrown system of crude control to nothing at all.

Does it really matter? Mort Horwitz raised this question in his keynote address.⁵ As Madison himself observed (in a letter I quoted several times in the book), courts are going to have the final say most of the time anyway: they come last in order, and few issues are going to be politically salient enough for Congress or the President to mount a successful attack. (Just ask Tom Delay and Bill Frist.) People don't like it when politicians attack courts, and for good reasons, both normative and cultural. Which is why I find the Chicken Little reactions to my book ridiculous; justice as we know it will not end if we say it is okay today to do the sorts of things advocated or done by, among others, Jefferson, Jackson, Lincoln, and both Roosevelts in the past. The country got by for 170 years without judicial supremacy. Courts are pretty robust institutions.

As suggested above, we need to think about the relationship of courts to the other branches in terms of a political equilibrium. The Court's ability to act, to decide cases and have its decisions enforced, is very much dependent on other actors, including not just politicians but also the general public. These other actors all have views about judicial authority, which

5. See Morton J. Horwitz, *A Historiography of The People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813 (2006).

affects what they do and when and how they choose to accept what the Court does. Everyone in the system—the judges, political leaders, ordinary citizens—reacts based partly on perceptions of whether a decision is right or wrong but also partly on views about who has what authority. People who disagree with a decision may still accept it if they understand it to be within the role reserved by our Constitution for the independent judiciary. There will, at the same time, always be a point too far: a point at which the disagreement is strong enough to trigger a reaction. But where that tipping point is located, how far the Court can go before a political response emerges, will vary depending on the extent to which people believe they are supposed to defer to courts and judges. Wherever the point is, in any event, the Court is going to respect it—meaning that once the point is established, it will be rare that the Justices do anything to get themselves into serious political trouble.

The question thus becomes: What is the Court's perception of its limits, and what are the perceptions of other actors as to the Court's limits? The existence or not of judicial supremacy is not likely to affect much the frequency with which the Court is attacked. Rather, it simply changes the equilibrium point. With judicial supremacy, the equilibrium is shifted so as to allow the Court to do things that it wouldn't and couldn't do (because it couldn't get away with them) without that authority.

A final point: Popular constitutionalism, as I conceptualize it, isn't something that can or should be cabined by fixed rules of recognition. The whole point is to leave this open-ended, to let politics find its own way of expressing popular understandings about the Constitution, whether through petitions or political parties, whether by packing the Court or by seeking to amend the text. Does that make the Constitution what people say it is and nothing more? Does it render the concept "constitutional" meaningless? I think not, because any openness is actually quite limited due to practical constraints imposed by the psychology of path dependency and the need to persuade others.

Few of us can break completely free from the intellectual framework we've inherited for determining what is or isn't constitutional; even if a handful of prophets can do so, arguments that are too far outside the box will not persuade others. We are unavoidably a participant in an existing constitutional culture. What makes an argument persuasive or not as a constitutional claim will inevitably grow out of some existing understanding about what is or is not constitutional. There is room for change. That's what makes our Constitution good and worthwhile. But it's not as though anything and everything is up for grabs and there is no law here.

Still, the range of possibilities opened up by popular constitutionalism can be scary. Things can go wrong. The public can embrace ideas that are horrible or immoral. So can judges, of course, or any elite or oligarch. But, to reiterate a point often made, what defines progressives as progressives is that they have faith in the ultimate common sense of the greater public. This should not be misunderstood as some romantic idealization of democracy and the noble yeoman. As Madison understood full well, courageous leadership is critical, and we need institutions from which that leadership can educate, inform, and help guide the formation of public opinion. For most of American history, the critical institution serving these purposes was the political party. Unfortunately, we spent much of the twentieth century blaming political parties for everything that was wrong with politics, and in doing so we badly weakened the critical institution that made politics work. If there is an agenda for constitutionalism today, its first concern is not substantive. It is institutional. We should not say “popular constitutionalism can’t work, so turn the Constitution over to the Court.” We should, rather, be asking what kind of institutions we can construct to make popular constitutionalism work, because we need new ones. We need to start rethinking and building institutions that can make democratic constitutionalism possible. And we need to start doing so now.