

MAKING POPULAR CONSTITUTIONALISM WORK

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Popular constitutionalism defies easy definition. Its leading theorists fail to offer a common reading of constitutional history, a common methodology, or even a common set of remedies. Given these diverse approaches, it is little wonder that one recurring complaint among popular constitutionalism’s critics is that the theory itself is incoherent. This criticism is overstated. Even as there are various strands of popular constitutionalism, its leading theorists do share one key attribute, a populist sensibility—a common belief that the American people (and their elected representatives) should play an ongoing role in shaping contemporary constitutional meaning. The question remains how best to achieve this shared goal, while also increasing popular constitutionalism’s normative appeal. In my view, the solution lies in committing to a broad-based agenda of both *civic renewal* and *institutional reform*—one that is as focused on the problems of legislative paralysis, incumbent entrenchment, and citizen apathy as it is on the threat posed by an aggressive judiciary. In this Essay, I outline such an agenda. In addition, I consider one reform proposal in detail—the public reconsideration of judicial decisions—or, as I shall call it, the “People’s veto.” In the end, I seek to show that one does not have to hold anti-Court views (or unrealistic expectations about the capacities of ordinary citizens) in order to accept that the American people should play a more direct, ongoing, deliberative role in constitutional decision-making.

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INTRODUCTION

Popular constitutionalism defies easy definition.¹ Its leading theorists fail to offer a common reading of constitutional history, a common methodology, or even a common set of remedies. For some popular constitutionalists, Congress and the President must be prepared to curb the Supreme Court when it strays too far from the constitutional views of the American people—through blunt means, if necessary.² For

1. To date, the best attempt to bring coherence to the diverse strands of popular constitutionalism was offered by David Pozen. See David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2053–64 (2010); see also KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY 3–18 (2007) (providing a useful summary of popular constitutionalism’s central claims). In this Essay, I address the leading normative theories of popular constitutionalism, such as those offered by Larry Kramer and Mark Tushnet. See LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999). This is to be distinguished from leading descriptive accounts, which argue that judicial decision-making usually tracks public opinion. See BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

2. See KRAMER, *supra* note 1, at 231; Larry Kramer, *Generating Constitutional Meaning*, 94 CALIF. L. REV. 1439, 1450 (2006) [hereinafter Kramer, *Generating*]; Larry D. Kramer, “*The Interest of the Man*”: James Madison, *Popular Constitutionalism, and the Theory of Deliberative Democracy*, 41 VAL. U. L. REV. 697, 748 (2006) [hereinafter Kramer, *Interest*]; Larry Kramer, *Response*, 81 CHI.-KENT L. REV. 1173, 1179–81 (2006) [hereinafter Kramer, *Response*]; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We the Court*, 115 HARV. L. REV. 4, 13 (2001) [hereinafter Kramer, *Foreword*]; Larry D. Kramer, *Undercover Anti-Populism*, 73 FORDHAM L. REV. 1343, 1358 (2005) [hereinafter Kramer, *Undercover*].

others, judicial review must be eliminated altogether.³ For still others, a middle approach is warranted, one that valorizes the role that the judiciary plays in translating popular constitutional meaning into official Court doctrine, while also criticizing judicial efforts to limit congressional power.⁴ Given these diverse approaches, it is little wonder that one recurring complaint among popular constitutionalism's critics is that the theory itself is incoherent.⁵ This criticism is overstated.

Even as there are various strands of popular constitutionalism,⁶ its leading theorists do share one key attribute, a populist sensibility—a common belief that the American people (and their elected

3. See TUSHNET, *supra* note 1, at 154–65; Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1348 (2006).

4. See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 7–8 (2003); Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in THE CONSTITUTION IN 2020, at 25, 25–29 (Jack M. Balkin & Reva B. Siegel eds., 2009); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 1945–47 (2003) [hereinafter Post & Siegel, *Legislative Constitutionalism*]; Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right's Living Constitution*, 75 FORDHAM L. REV. 545, 570–71 (2006); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1029 (2004); Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374 (2007); Jedediah Purdy, *Presidential Popular Constitutionalism*, 77 FORDHAM L. REV. 1837, 1840 (2009); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1345 (2006); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191, 192 (2008); Keith E. Whittington, *Extrajudicial Constitutional Interpretation: Three Objections and Responses*, 80 N.C. L. REV. 773, 779–80 (2002).

5. See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1595 (2005); Erwin Chemerinsky, *In Defense of Judicial Review: The Perils of Popular Constitutionalism*, 2004 U. ILL. L. REV. 673, 676; David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism*, 81 CHI.-KENT L. REV. 1069, 1069 (2006); Daniel W. Hamilton, *Popular Constitutionalism in the Civil War: A Trial Run*, 81 CHI.-KENT L. REV. 953, 956 (2006); Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 691 (2005); Pozen, *supra* note 1, at 2049; Saikrishna Prakash & John Yoo, *Against Interpretive Supremacy*, 103 MICH. L. REV. 1539, 1543 (2005); Suzanna Sherry, *Putting the Law Back in Constitutional Law*, 25 CONST. COMMENT. 461, 463 (2009).

6. Popular constitutionalism is hardly unique in this regard. For instance, originalism is also divided into various schools. For an overview of originalism's various strands, see generally Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989); and Lawrence B. Solum, *Semantic Originalism* (Ill. Pub. Law & Legal Theory Research Papers, No. 07-24, Nov. 22, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1120244.

representatives) should play an ongoing role in shaping contemporary constitutional meaning.⁷ Of course, we already know that the American people *do* play such a role—at least in some limited sense—through elections, social movements, and judicial nominations.⁸ As a result, even under our current system, constitutional doctrine tends to track public opinion in most high-salience areas.⁹

For popular constitutionalists, however, the invisible hand of public opinion is not enough. Instead, the American people—or, at least, their elected representatives—must have a direct means of enforcing popular constitutional understandings. The question remains how best to achieve this goal, while also increasing popular constitutionalism’s normative appeal. In my view, the solution lies in committing to a broad-based agenda of both *civic renewal* and *institutional reform*—one that is as focused on the problems of legislative paralysis, incumbent entrenchment, and citizen apathy as it is on the threat posed by an aggressive judiciary.

In previous work, I have focused on the role that civic education has played in promoting judicial supremacy and “Founder worship.”¹⁰ In those pieces, I argued that, in order to generate a self-governing

7. See RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 4–5 (1994); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991 (2006).

8. See JACK M. BALKIN, *CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD* (2011); WILLIAM N. ESKRIDGE JR. & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* (2010); FRIEDMAN, *supra* note 1, at 9; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* 5–7 (2004); GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 13–15 (1991); Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 559–66 (2009); Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1066–83 (2001); Barry Friedman, *Mediated Popular Constitutionalism*, 101 MICH. L. REV. 2596, 2606–13 (2003); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 7–18 (1996). *But see* Lawrence Baum & Neal Devins, *Why the Supreme Court Cares about Elites, Not the American People*, 98 GEO. L.J. 1515, 1516–19 (2010); Justin Driver, *The Consensus Constitution*, 89 TEX. L. REV. 755, 756–59 (2011); Richard H. Pildes, *Is the Supreme Court a “Majoritarian” Institution?*, 2010 SUP. CT. REV. 103, 114.

9. See generally FRIEDMAN, *supra* note 1, 9–16 (providing a history of the Supreme Court that focuses on the role that public opinion has played in shaping constitutional doctrine).

10. See Tom Donnelly, *Our Forgotten Founders: Reconstruction, Public Education, and Constitutional Heroism*, 58 CLEV. ST. L. REV. 115 *passim* (2010) [hereinafter Donnelly, *Reconstruction*]; Tom Donnelly, *A Popular Approach to Popular Constitutionalism: The First Amendment, Civic Education, and Constitutional Change*, 28 QUINNIPIAC L. REV. 321 *passim* (2010) [hereinafter Donnelly, *First Amendment*]; Tom Donnelly, Note, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 YALE L.J. 948 *passim* (2009) [hereinafter Donnelly, Note].

people, our nation's canonical stories must valorize each generation's ability to transform the American constitutional system. Rather than looking to the Supreme Court or to the mythical Founders for constitutional redemption, the American people must instead look to themselves. In this Essay, I outline a broad-based reform agenda designed to empower citizens in the here and now.

In Part I, I defend popular constitutionalism's "Founding Father," Larry Kramer.¹¹ Since the publication of his controversial *Harvard Law Review* foreword in 2001,¹² Kramer has been attacked by a parade of critics.¹³ In my view, in order to rehabilitate popular constitutionalism as a normatively attractive theory, one must begin by rehabilitating Larry Kramer's influential account. Although Kramer's anti-Court rhetoric no doubt contributes to his critics' vehemence,¹⁴ his account is not nearly as radical as it may first appear (or as his rhetoric may suggest).

In Part II, I outline a new agenda for popular constitutionalism. While first-generation popular constitutionalists have concerned themselves with the problems posed by an aggressive judiciary, I argue

11. Popular constitutionalism has been discussed in over 800 law review articles since 2000. It first appeared as a descriptor in 1987. See Richard B. Bernstein, *Charting the Bicentennial*, 87 COLUM. L. REV. 1565, 1619 (1987). The concept was first developed in detail by Douglas Reed in a 1999 article on state constitutionalism. Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999). Finally, it received its most complete treatment in Larry Kramer's 2001 foreword to the *Harvard Law Review*, which sparked widespread interest in the concept. See Kramer, *Foreword*, *supra* note 2.

12. Kramer, *Foreword*, *supra* note 2.

13. See Alexander & Solum, *supra* note 5, at 1594; Chemerinsky, *supra* note 5, at 676; William E. Forbath, *Popular Constitutionalism in the Twentieth Century*, 81 CHI.-KENT L. REV. 967, 969 (2006); Franklin, *supra* note 5, at 1069-70; Mark A. Graber, *Popular Constitutionalism, Judicial Supremacy, and the Complete Lincoln-Douglas Debates*, 81 CHI.-KENT L. REV. 923, 926-27 (2006); Hamilton, *supra* note 5, at 956; Morton J. Horwitz, *A Historiography of The People Themselves and Popular Constitutionalism*, 81 CHI.-KENT L. REV. 813, 817-18 (2006); Hulsebosch, *supra* note 5, at 691; Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 827-28 (2006); Robert J. Kaczorowski, *Popular Constitutionalism Versus Justices in Plainclothes: Reflections from History*, 73 FORDHAM L. REV. 1415, 1438 (2005); Gerald Leonard, *Iredell Reclaimed: Farewell to Snowiss's History of Judicial Review*, 81 CHI.-KENT L. REV. 867, 867-68 (2006); Pozen, *supra* note 1, at 2049; Prakash & Yoo, *supra* note 5, at 1543; Sherry, *supra* note 5, at 463; Keith E. Whittington, *Give "The People" What They Want?*, 81 CHI.-KENT L. REV. 911, 913 (2006); Norman R. Williams, *The People's Constitution*, 57 STAN. L. REV. 257, 259-60 (2004); L.A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 857 (2005) (book review).

14. See, e.g., Lawrence G. Sager, *Courting Disaster*, 73 FORDHAM L. REV. 1361, 1362 (2005) (criticizing Kramer's rhetoric as "heated").

that popular constitutionalism's second act must target other pathologies that undermine popular sovereignty.

In Part III, I consider one reform proposal in detail—an attempt at judicial reform that is designed to engage apathetic citizens. Even as the Supreme Court usually decides cases within the mainstream of public opinion, each term includes a handful of controversial five-to-four decisions on salient constitutional issues. Furthermore, since Justices retire irregularly (often holding on for as long as possible to ensure that a sympathetic President can appoint their successors), the Court only imperfectly reflects the constitutional views of governing coalitions over time. Finally, much to Kramer's chagrin, the Supreme Court's overall popularity has proven quite resilient,¹⁵ even in the face of controversial decisions like *Bush v. Gore*.¹⁶ Such decisions might earn the Court public criticism from losing parties (and their supporters); however, few serious efforts have been made in recent years to challenge the authority of the Court to fix constitutional meaning for the rest of us. In this final Part, I offer one possible solution to this set of problems—the public reconsideration of judicial decisions—or, as I shall call it, the “People’s veto.”

My proposal would limit this veto's reach to five-to-four decisions of the Supreme Court on constitutional issues. Following such a decision, the case would be sent to Congress for an up-or-down vote on public reconsideration. If a super-majority of both the House and Senate approved of this move, the case would then go to the American people and be settled by a national referendum. Although such a veto was controversial when first discussed a century ago, it remains one concrete way of injecting popular constitutional decision-making into our system while still retaining a strong federal judiciary overall. Furthermore, even as this proposal remains open to several (legitimate) objections, it is still a useful way of thinking through how popular constitutionalism might work in practice, including the tradeoffs involved in allowing the American people to speak more directly on controversial constitutional issues.

In the end, the reform agenda advanced in this Essay—including the People's veto—is intended to offer a system of popular constitutionalism that maintains a strong dose of judicial independence while still promoting various pathways (both old and new) for popular constitutional activism. In short, I seek to show that one does not have to hold anti-Court views (or unrealistic expectations about the capacities

15. For a comprehensive overview of opinion research concerning the Supreme Court, see generally PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily, Jack Citrin & Patrick J. Egan eds., 2008).

16. 531 U.S. 98 (2000).

of ordinary citizens) in order to accept that the American people should play a more direct, ongoing, deliberative role in constitutional decision-making.

I. REHABILITATING LARRY KRAMER: POPULAR CONSTITUTIONALISM,
THE SUPREME COURT, AND DELIBERATIVE DEMOCRACY

Perhaps no single figure is more closely associated with popular constitutionalism than Larry Kramer.¹⁷ At the core of his account is the following complaint: “[W]e have for all practical purposes turned the Constitution over to the Supreme Court.”¹⁸ For Kramer, the problem is not simply that the Court has too much power, but that the American people are complicit in the Court’s power grab. In Kramer’s view, not only must public institutions be altered, but the American people themselves must also change. Too insulated from popular pressure, the Court must be checked when it misbehaves. Too enamored of the Court, the American people must regain confidence in their own judgment. In the end, Kramer calls for a return to popular constitutionalism, a lost practice with deep roots in the American constitutional tradition.

Kramer’s diagnosis aside, the Supreme Court has maintained high levels of public support for decades—mostly by issuing constitutional decisions within the political mainstream.¹⁹ Although the Court’s rhetoric often sounds in judicial supremacy,²⁰ few scholars doubt that its decisions usually reflect the constitutional views of the American people (that is, when such views exist).²¹ This reality no doubt undercuts much of popular constitutionalism’s normative appeal—at least when framed as a theory for dealing with the discrete problem of

17. Pozen, *supra* note 1, at 2054 n.17 (“If my primary focus on Kramer seems methodologically suspect, I can say only that his writings have proven especially influential—they helped crystallize the perception of popular constitutionalism as a major school of thought—and that many have been interested in working out their implications.”).

18. Kramer, *Interest*, *supra* note 2, at 697.

19. See Frederick Schauer, *The Supreme Court, 2005 Term—Foreword: The Court’s Agenda—and the Nation’s*, 120 HARV. L. REV. 4, 57 & n.197 (2006).

20. See *City of Boerne v. Flores*, 521 U.S. 507, 529 (1997); *Baker v. Carr*, 369 U.S. 186, 211 (1962); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

21. See BALKIN, *supra* note 8; ESKRIDGE & FEREJOHN, *supra* note 8; FRIEDMAN, *supra* note 1, at 367–68; KLARMAN, *supra* note 8, at 5–6; ROSENBERG, *supra* note 8, at 336–38; Balkin, *supra* note 8, at 551–52; Balkin & Levinson, *supra* note 8, at 1076; Neal Devins, *The D’Oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1334 (2007); Neal Devins, *Tom Delay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055, 1056 (2006); Friedman, *supra* note 8, at 2598; Klarman, *supra* note 8, at 5.

judicial supremacy. Why curb the Court when it remains one of our most trusted (and popular) public institutions?

With Kramer as its most visible proponent, it is therefore little wonder that critics have dogged popular constitutionalism since its inception. These critics tend to fall into two camps. The first group complains that popular constitutionalism has been pitched at too abstract a level. As a result, these critics argue that it is difficult to know how popular constitutionalism would actually work.²² Not surprisingly, these critics call upon the next generation of popular constitutionalists to pay greater attention “to questions of institutional design.”²³

The second group fears that the solutions actually offered by prominent popular constitutionalists are too radical. Most of these barbs are directed at Kramer’s account, which valorizes blunt checks on an unruly Court (such as jurisdiction-stripping and court-packing). These critics argue that Kramer’s brand of popular constitutionalism would undermine judicial authority and result in majoritarian tyranny.²⁴ With

22. Chemerinsky, *supra* note 5, at 676; Franklin, *supra* note 5, at 1069; Hamilton, *supra* note 5, at 956; Hulsebosch, *supra* note 5, at 691; Pozen, *supra* note 1, at 2049; Sherry, *supra* note 5, at 463; *see* Alexander & Solum, *supra* note 5, at 1596; Prakash & Yoo, *supra* note 5, at 1543.

23. Pozen, *supra* note 1, at 2049.

24. *See, e.g.*, Chemerinsky, *supra* note 5, at 690 (“Popular constitutionalism’s central flaw is its failure to recognize that the protection of minorities and their rights cannot rely on the majority.”); Cass R. Sunstein, *If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 155, 158 (2007) (“On a conventional view, the central goal of constitutional law, or at least judicial review, is to impose a check on public judgments, and sometimes to override those judgments even if they are intensely held.”). Contrary to this conventional account of judging, many scholars have already explored instances where judges take public opinion into account—either consciously or unconsciously—when deciding constitutional cases. *See* Corinna Barrett Lain, *The Unexceptionalism of “Evolving Standards”*, 57 UCLA L. REV. 365, 401 (2009); Benjamin J. Roesch, *Crowd Control: The Majoritarian Court and the Reflection of Public Opinion in Doctrine*, 39 SUFFOLK U. L. REV. 379, 379 (2006); David A. Strauss, *The Modernizing Mission of Judicial Review*, 76 U. CHI. L. REV. 859, 861 (2009); James G. Wilson, *The Role of Public Opinion in Constitutional Interpretation*, 1993 BYU L. REV. 1037, 1040–42. For instance, as early as 1812, the Court used “settled . . . public opinion” as a justification for rejecting common law crimes in *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 32 (1812). In recent years, the Supreme Court has often turned to public opinion to help decide Eighth Amendment cases, as well as those concerning substantive due process. *See* THOMAS R. MARSHALL, PUBLIC OPINION AND THE REHNQUIST COURT 4, 9 (2009). Some scholars have recently defended this practice, as well. *See* Andrew B. Coan, *Well, Should They?: A Response to If People Would Be Outraged by Their Rulings, Should Judges Care?*, 60 STAN. L. REV. 213, 215–16 (2007); Richard Primus, *Double-Consciousness in Constitutional Adjudication*, 13 REV. CONST. STUD. 1, 2–3 (2007); Richard Primus, *Public Consensus as Constitutional Authority*, 78 GEO. WASH. L. REV. 1207, 1209–10 (2010).

these criticisms still lingering, popular constitutionalism has failed to “command significant support in the academy”²⁵ (or beyond).

This Essay is intended to respond to both sets of critics—first, by demonstrating that Kramer’s account is not nearly as radical as his critics suggest; and second, by offering a concrete, broad-based, affirmative agenda for popular constitutionalism. In this Part, I turn first to Kramer’s influential account.

A. Rehabilitating Kramer

Larry Kramer has offered the most full-throated defense of popular constitutionalism to date. It is, therefore, little surprise that his account is also the most criticized. Even as there is some facial plausibility to Kramer’s historical account and much to commend his forward-looking (if thin) reform agenda,²⁶ his version of popular constitutionalism has left many scholars either confused or dissatisfied (if not downright hostile). These difficulties are likely magnified by Kramer’s anti-Court rhetoric, which often obscures as much as it inspires.

What Kramer’s critics often miss is how robust a role the Court is still left to play within his system. His is not a system of legislative supremacy—akin to those of Mark Tushnet and Jeremy Waldron.²⁷ Instead, Kramer reserves an important checking role for the Court—just how big a role is an open question.

In addition, populist rhetoric aside, Kramer’s faith in the wisdom of the American people is qualified by a realistic assessment of the ability (and attention span) of the average citizen.²⁸ He does not propose a system guided by the immediate preferences of the American people or the bare actions of their elected representatives. Instead, he calls for one that promotes widespread public deliberation guided by elite leadership, a system relying on a dynamic conversation between lawyers and non-lawyers, elites and average citizens, judges and elected officials.²⁹ For Kramer, the American people must have the last word, to be sure, but the system must also ensure that the American people’s views are actually worth following.³⁰ Part of this is a matter of institutional design, but part of it is also a matter of public education.

25. Pozen, *supra* note 1, at 2063.

26. For a sketch of Kramer’s reform agenda, see KRAMER, *supra* note 1, at 249–51.

27. See TUSHNET, *supra* note 1, at 1–17; Waldron, *supra* note 3, at 1348.

28. See Kramer, *Interest*, *supra* note 2, at 728.

29. See *id.* at 703, 718.

30. See *id.* at 729–30.

At the core of Kramer's popular constitutionalism, then, lies a puzzle: how best to design a system that reconciles a populist sensibility with deliberative democracy. Kramer offers clues, but few concrete suggestions. The remainder of this Part is intended to clarify some lingering ambiguities by reconstructing and refining Kramer's system of popular constitutionalism.

B. Kramer's Theory: The Basics

Although Kramer's rhetoric in earlier pieces suggests an ever-shrinking role for the Court,³¹ his more recent articles outline a rather active one.³² It is unclear whether this is simply a clarification of his original intended position, a reevaluation based on thoughtful criticisms, or something in between.

Kramer imagines a constitutional system where final interpretive authority lies with the American people.³³ Simply put, popular constitutionalism "does not assume that authoritative legal interpretation can take place only in courts, but rather supposes that an equally valid process of interpretation can be undertaken in the political branches and by the community at large."³⁴ Importantly, this is not the system Kramer sees operating today. Instead, Kramer observes a system dominated by judges—the American people lacking the confidence to challenge the courts and assert their own constitutional vision.

In Kramer's eyes, the American people have acquiesced to judicial supremacy. The key symptom, for Kramer, is "the all-but-complete disappearance of public challenges to the Justices' supremacy over constitutional law . . . regardless of what the Justices say, and regardless of the Court's political complexion."³⁵ Instead of direct challenges through jurisdiction-stripping and budget-cutting, the American people and their representatives are content to await new

31. Kramer, *Foreword*, *supra* note 2, at 13.

32. *See, e.g.*, Kramer, *Interest*, *supra* note 2, at 697–98.

33. Several scholars question Kramer's historical account. *See, e.g.*, Forbath, *supra* note 13, at 967 ("In some important ways, I think Kramer is wrong about the character and significance of popular constitutionalism in America, particularly during the last century."); Kaczorowski, *supra* note 13, at 1438 (concluding that, while "Kramer's theory of constitutionalism is consistent with that of the Supreme Court and of the nation's constitutional practice from the founding through the Civil War," his account of American constitutional practice thereafter is flawed); *see also* Graber, *supra* note 13, at 927; Hamilton, *supra* note 13, at 810–11; Hulsebosch, *supra* note 13, at 861–62; Leonard, *supra* note 13, at 868–69; Powe, *supra* note 13, at 857; Whittington, *supra* note 13, at 913; Williams, *supra* note 13, at 259–60.

34. Kramer, *Interest*, *supra* note 2, at 700.

35. KRAMER, *supra* note 1, at 228.

appointments, attempt gradual persuasion, or (in rare cases) pursue constitutional amendments.³⁶

Kramer views these self-imposed restrictions as inconsistent with the American tradition of popular constitutionalism, as embodied by the actions of key figures like Thomas Jefferson, Andrew Jackson, Abraham Lincoln, and Franklin Roosevelt.³⁷ Kramer argues that, in a system of popular constitutionalism, “[p]roblems of fundamental law—what we would call questions of constitutional interpretation—were thought of as . . . problems that could be authoritatively settled only by ‘the people’ expressing themselves through [established] popular devices,”³⁸ “mainly through elections, but also, if necessary, by other, extralegal means.”³⁹

Indeed, Kramer provides an account of an evolving constitutional practice, as the “rowdy mobs of colonial America gave way to ‘departmentalism’ in the 1790s, which was then supplemented by the creation of modern political parties in the 1830s.”⁴⁰ In spite of this robust tradition, Kramer observes a deep crisis in our current constitutional culture, as “[s]ometime in the past generation or so . . . Americans came to believe that the meaning of their Constitution is something beyond their compass, something that should be left to others.”⁴¹ In one key passage, Kramer concludes:

[T]o control the Supreme Court, we must first lay claim to the Constitution ourselves. That means publicly repudiating Justices who say that they, not we, possess ultimate authority to say what the Constitution means. It means publicly reprimanding politicians who insist that “as Americans” we should submissively yield to whatever the Supreme Court decides. It means refusing to be deflected by arguments that constitutional law is too complex or difficult for ordinary citizens. . . . Above all, it means insisting that the Supreme Court is our servant and not our master: a servant whose seriousness and knowledge deserves much deference, but who is ultimately supposed to yield to our judgments about what the Constitution means and not the reverse. The Supreme

36. Kramer, *Interest*, *supra* note 2, at 698.

37. *Id.*

38. KRAMER, *supra* note 1, at 31.

39. *Id.* at 58.

40. Kramer, *Interest*, *supra* note 2, at 703.

41. KRAMER, *supra* note 1, at 229.

Court is not the highest authority in the land on constitutional law. We are.⁴²

In many ways, Kramer's work reads as a call to action. In his heated rhetoric,⁴³ however, Kramer often obscures the actual role the Court is still called upon to play within his system of popular constitutionalism—an active role that is often meant to check the elected branches, as well as the American people. In recent articles, Kramer develops a more nuanced view of the Court's role within his system—his overheated rhetoric largely replaced with a more refined account of popular constitutionalism.⁴⁴

C. Just How “Popular” Is Kramer’s Brand of Popular Constitutionalism?

Many of Kramer's early critics accused him of being a brute majoritarian, linking popular constitutionalism to instances of unchecked popular intolerance in American history.⁴⁵ These criticisms were surely the result of the book's overall tone and its many anti-Court flourishes, which often overshadowed some of Kramer's subtler insights.

In the face of these criticisms, Kramer recently elaborated on his preferred version of popular constitutionalism, which draws heavily upon James Madison.⁴⁶ No longer flirting with legislative supremacy, Kramer characterizes this system of “Madisonian” popular constitutionalism as a form of “deliberative democracy,” a system driven by public opinion, but not by the immediate preferences of the American people.⁴⁷ An avowed populist no more, Kramer prefers the reasoned judgment of a deliberative people, guided in their public reflections by well-informed political leaders.

In Kramer's revised view, our constitutional system's primary purpose is to provide the American people with the space needed to consider matters of great public importance. At the Founding, Madison was responding to two competing concerns. On the one hand, Madison believed deeply that a republican form of government must primarily be a product of the American people.⁴⁸ On the other hand, Madison was

42. *Id.* at 247–48.

43. *Id.*

44. *See, e.g.,* Kramer, *Interest*, *supra* note 2.

45. *See* Forbath, *supra* note 13, at 967; Kaczorowski, *supra* note 13, at 1427–28; Powe, *supra* note 13, at 856–57.

46. Kramer, *Interest*, *supra* note 2, at 703.

47. *Id.* at 703–04.

48. *Id.*

concerned about some of the excesses of the popular will, including mob violence and other unrefined expressions of public opinion.⁴⁹

Though mediated, this system was still to be “guided and controlled by public opinion.”⁵⁰ Indeed, Kramer observed, Madison “understood public opinion to . . . reflect[] definite views or positions on public affairs that had been given concrete expression by the people themselves.”⁵¹ However, Kramer added, “[T]he inevitability of popular control gave rise to a corresponding responsibility to refine and improve public deliberations, so as to ensure that the sovereign, controlling public opinion was also reasonable and just.”⁵² Most importantly, Kramer explained: “Madison was preaching majority rule but not simple majoritarianism. Majority opinion would hold sway, but the majority opinion that *should* hold sway had to be more than the fleeting passions or preferences of the moment, more than the unreflective reactions of a transient majority of citizens.”⁵³

Such a system would impose related duties on both the American people and their elected representatives.

For the American people, there was the obligation “to remain vigilant and involved”⁵⁴—an obligation that political scientists suggest is almost universally flouted today.⁵⁵ For the elected elite, in cases where public opinion was not settled, there was the responsibility to educate their constituents and shape their views⁵⁶—a responsibility that sounds almost farcical given the high levels of political distrust (and disdain) among the American people today. Indeed, anti-elitism (or, at least, anti-“Washington-ism”) may be one of the few ideologies with bipartisan appeal in our polarized age.

Nevertheless, there is considerable logic to Kramer’s Madisonian position:

[E]lected officials [must] be men of talent and education and higher than average intelligence. Those in government are supposed to know more. . . . When disagreements within government arise, elected officials are supposed to use their

49. *Id.* at 704.

50. *Id.* at 727.

51. *Id.* at 727–28.

52. *Id.* at 729.

53. *Id.* at 730.

54. *Id.* at 717.

55. See BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 5–7 (2004); Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 *STAN. L. REV.* 893, 895 (1998).

56. Kramer, *Interest*, *supra* note 2, at 718.

knowledge and experience to educate us, so we can decide based on reason and information.⁵⁷

In a key passage, Kramer provided Madison's argument for this form of mediated representation:

It did not matter that a question was constitutional in nature: turning directly to "the whole society" for an immediate answer . . . was perilous and unnecessary. Not because the public lacked the right to decide, and not because the public would never do so. The public's right to decide was, in fact, incontestable. But the experience of the ancients (as well as that of the Americans themselves) taught that a nation would all-too-quickly collapse if the public decided too directly, too often, and on too many things.⁵⁸

In short, Kramer argued, "[i]t was not majorities that Madison feared. It was unreflective, factious majorities"⁵⁹—Kramer's populist cry replaced with a more nuanced view of popular sovereignty.

At the same time, the refinement of public opinion would not be left to the elites alone, without other safeguards. The skeptical Madison simply did not trust the system to the pure motives of elites. Rather, he designed a system "to blunt the process of majority formation: to slow it down long enough to give government officials and other members of the 'literati' an opportunity to lead a proper public debate."⁶⁰ Madison's primary goal was "to refine and construct a public decision worthy of respect" through a system of mediated representation, to be sure, but also through "multiple representative institutions within an enlarged polity."⁶¹ Indeed, Madison called for a "*complicated* government," with "[s]tructural innovations in the form of federalism and separation of powers."⁶²

Kramer gives an example of how this system would work:

Suppose the President takes some action If that action is contrary to the political interest of actors in any part of the system, and a plausible constitutional objection exists or could be made, we can expect to see the issue raised. If, therefore, no one anywhere in this complex system objects, we have

57. Kramer, *Response*, *supra* note 2, at 1177–78.

58. Kramer, *Interest*, *supra* note 2, at 724.

59. *Id.* at 733.

60. *Id.*

61. *Id.* at 725.

62. *Id.* at 734.

about as good an assurance as we can ever realistically hope to get that there is no plausible objection.⁶³

Thus, Kramer's account of constitutional truth is akin to Justice Oliver Wendell Holmes' famous test in *Abrams v. United States*.⁶⁴ In the absence of verifiable truth on any contestable constitutional question, the best test is the ability of the idea to survive the gauntlet that is the American constitutional system. If it survives, we should not seriously doubt its constitutionality. Therefore, in the case of a constitutional dispute, the system is meant "to force the kind of public debate needed for 'the reason of society' to emerge and coalesce."⁶⁵

Kramer notes of the Founding generation: "Most people . . . had learned from experience to fear what elected legislatures might do when overcome by 'momentary inclinations' But rather than abandon republicanism or qualify popular constitutionalism, their solution was to slow politics down, to force greater deliberation."⁶⁶

In following this Founding-era vision, Kramer is, perhaps, guided most by a deep skepticism that any one institution of government could adequately represent the American people. Kramer explains:

Absolutely critical to this system [of popular constitutionalism] was a belief that no one department spoke for the people perfectly. All were imperfect agents, and it was only through the collective response of the public to all of them that we could develop and ascertain a "popular opinion" that was reasonably informed and reasonably reflective. A multiplicity of departments was the device that made deliberative democracy possible. This is why ensuring that no one branch or department had theoretical preeminence was so important. For anything else would tip the scales toward one imperfect agent when in fact *none* could purport to speak for the people authoritatively⁶⁷

Therefore, at root, Kramer is skeptical of each institution of government—not just the Court—a fact that can be lost in Kramer's earlier works. In those works, his rhetoric often obscures his more nuanced view of how the sovereign will is to be filtered through the imperfect institutions of government. At the same time, it is worth

63. *Id.* at 736.

64. 250 U.S. 616 (1919) (Holmes, J., dissenting).

65. Kramer, *Interest*, *supra* note 2, at 736.

66. KRAMER, *supra* note 1, at 80.

67. Kramer, *Generating*, *supra* note 2, at 1450.

noting that too deliberative (or too slow-moving) a system might undermine the American people's faith in their elected representatives, as salient problems remain unaddressed—a consequence that Kramer does not adequately consider. Over time, this dynamic might undermine public engagement and, therefore, *popular* constitutionalism. I will discuss this problem in greater detail in Part II.A.

D. Kramer, the Supreme Court, and (Deliberative) Popular Constitutionalism

In spite of his harsh denunciations of the Court, Kramer still reserves an important role for the judiciary within his system. Kramer's reasoning tracks that of Madison: Since the Constitution is supreme law, judges cannot simply ignore unconstitutional legislative acts.⁶⁸ “To do so would be to ignore . . . ‘the people’ and abet another branch’s violation of the people’s expressed will.”⁶⁹ Instead, “[i]n refusing to enforce unconstitutional laws, judges [a]re exercising the people’s authority to resist.”⁷⁰ Therefore, for Kramer, the exercise of judicial review in any given case—by itself—tells us precious little about whether the Court has acted illegitimately.

In a recent piece, Kramer linked his account of popular constitutionalism to the constitutional views of James Madison. Kramer explains that, although Madison was avowed popular constitutionalism, even Madison conceded that “[j]udges have a useful and sensible voice when it comes to questions of constitutionality,”⁷¹ even if judicial opinions should not be accorded “any special stature or status” per se.⁷² Kramer added:

[P]oliticians and ordinary citizens alike can and do appreciate that there are advantages in giving the Court some leeway to act as a check on politics. This includes understanding that many benefits of judicial involvement are systemic and long term, and so may require accepting individual decisions with which one disagrees.⁷³

Importantly, even with this concession, Kramer still “rejects . . . judicial supremacy,” which he describes as “overlaid atop judicial

68. Kramer, *Interest*, *supra* note 2, at 740.

69. *Id.*

70. KRAMER, *supra* note 1, at 63.

71. Kramer, *Response*, *supra* note 2, at 1180.

72. Kramer, *Interest*, *supra* note 2, at 741.

73. Kramer, *Undercover*, *supra* note 2, at 1358.

review to discourage and minimize opposition to the Court's decisions."⁷⁴

In the end, "by recognizing judicial review in this limited form," Madison was "simply adding courts to the [larger] process of public deliberation."⁷⁵ The final decision as to the constitutionality of a particular bill or action still rests with the American people—at least, in theory.⁷⁶ In practice, however, the Court will still serve an important (and active) role in settling important constitutional disputes within Kramer's system, especially since the American people lack a regularized, widely accepted, direct way of enforcing their constitutional views.

E. Making Popular Constitutionalism Work: Or, How To Solve a Problem Like Citizens United

Although an invisible hand might lead the Court to track public opinion over time, it may very well not. At the very least, even if it may do so in the aggregate, there may be notable outliers—outliers that ought to be subject to public deliberation and (if appropriate) reversal. Left *without* the clarity of a simple theory (like legislative supremacy) and *with* a system that allows for an active Court, Kramer leaves the ardent popular constitutionalist with little more than an instinct to guide her in any given case. Indeed, Kramer devotes precious little time to questions of constitutional methodology or substance. Instead, Kramer's account is best read as a defense of Court-curbing when the Court "goes too far"—leaving it to the American people (and their elected representatives) to determine when that line has been crossed.

Consider the (in)famous controversy over flag burning in 1989, for instance. Was the American people's immediate desire to ban flag burning "unreflective" and "factious," or was it sufficiently "refined"? Was the Court providing a "judicial veto" that signaled the need for further public deliberation, or was it subverting the "refined" will of a sovereign people? Viewed one way, the Court reigned judicially supreme over the will of the American people, as *Texas v. Johnson*⁷⁷ was an extremely unpopular decision at the time and the American people strongly supported efforts to overturn it.⁷⁸ Viewed another way,

74. *Id.* at 1357.

75. Kramer, *Interest*, *supra* note 2, at 742.

76. *Id.*

77. 491 U.S. 397 (1989).

78. *See id.* at 420. *See generally* Peter Hanson, *Flag Burning*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 15, at 184, 184–208 (describing an overview of opinion research on flag-burning).

the Court served its proper checking role within Kramer's Madisonian system, as Congress failed to pass a constitutional amendment and the American people quickly turned their attention to other matters.⁷⁹ Fast forward to 2011, and similar questions can be raised about *Citizens United v. Federal Election Commission*⁸⁰—to say nothing of a possible Court decision on so-called “Obamacare.”

Instead of focusing on how to identify a misbehaving Court, Kramer spends most of his time defending possible remedies that already exist within our current system. Kramer enumerates several such examples: “Justices can be impeached, the Court’s budget can be slashed, the President can ignore its mandates, Congress can strip it of jurisdiction or shrink its size or pack it with new members or give it burdensome new responsibilities or revise its procedures.”⁸¹

Kramer strongly advocates the use of these “mechanisms to make clear and to operationalize where ultimate authority lies” and to “restore the robust sense of popular constitutionalism on which this nation was founded.”⁸² However, one wonders whether Kramer’s support for these practices may be self-defeating, as it is difficult to conceive of a situation where they would not strike the average American as “lawless” (at worst) and ad hoc (at best). This is especially true when these Court-curbing prescriptions are coupled with Kramer’s account, which does not provide any metric for determining when the Court deserves to be checked by the American people. This ambiguity raises the specter of freewheeling, ad hoc, popular constitutional activism. Such a specter may be fueling much of the speculation that Kramer’s theory could easily lead to majoritarian abuses—especially in times of public frenzy.

Perhaps with public education, such views could be changed. Nevertheless, one cannot help but feel that these tools are both inadequate to the specific challenges facing our constitutional system and (possibly) harmful to popular constitutionalism’s cause. For the ardent popular constitutionalist, perhaps it is better to devote one’s time to constructing and defending new and more direct mechanisms for enforcing popular constitutional understanding.

Interestingly, Kramer himself concedes the difficulty of using his proposed tools in practice, noting that “[i]t takes a proverbial long train of abuses . . . before a large enough majority of the public will allow responsive measures.”⁸³ Nevertheless, Kramer concludes that the

79. Hanson, *supra* note 15, at 198–200.

80. 130 S. Ct. 876, 917 (2010).

81. KRAMER, *supra* note 1, at 249.

82. Kramer, *Interest*, *supra* note 2, at 748.

83. *Id.* at 752.

judiciary's "strength or weakness should be a product of its ability to make decisions that persuade the public, unaided by an artificial doctrine designed to disarm the other branches and lull the public into passivity."⁸⁴

Although Kramer is surely right that the Court's legitimacy should be derived from the persuasiveness of its reasoning, there is little doubt that our system lacks a workable means of channeling the constitutional judgments of the American people in a way that is focused, regularized, deliberate, and direct. One cannot escape the sense that our system lacks an adequate mechanism for the American people to finally "call the question" and weigh in directly on the most salient constitutional issues—other than by surmounting the cumbersome, state-based process outlined in Article V. Kramer's Court-curbing suggestions may be the best available candidates within our current constitutional system, but additional reforms appear necessary to realize a workable system of popular constitutionalism in the twenty-first century. It is to just such an agenda that we now turn.

II. ENVISIONING POPULAR CONSTITUTIONALISM'S SECOND ACT

Kramer's attempt to graft his version of popular constitutionalism onto our current system, while admirable, is nevertheless incomplete—and I doubt that Kramer would disagree. His is a prophetic call to action—with full knowledge that large-scale change is necessary to make popular constitutionalism work—hence the overheated rhetoric, the tendentious historical narrative, and the thin reform agenda. However, Kramer is surely right that popular constitutionalism's long-term agenda must be one of both *institutional reform* and *civic renewal*.

The central flaw in Kramer's account is its myopic focus on the rise of judicial supremacy—to the exclusion of all other challenges facing popular constitutionalism. In so doing, not only does Kramer take on a popular foe (the Court), but also he ignores the broader agenda that follows from popular constitutionalism's normative core. In short, popular constitutionalists should do more than attack judicial supremacy. They should also focus on other features of our constitutional system that undermine popular self-rule.

84. *Id.*

A. Kramer's Madisonian System, Legislative Paralysis, and an Inert Citizenry

Kramer diagnoses two problems with our constitutional culture—judicial supremacy and an inert citizenry. These two phenomena are, of course, interconnected. In Kramer's view, judicial supremacy has arisen as American citizens have receded from playing an active role in constitutional decision-making. Although Kramer overstates the aggressiveness of the modern-day Court, he is surely correct in identifying citizen inactivity as a profound problem for popular constitutionalism. However, Kramer devotes little time to exploring how the structure of our constitutional system—even without widespread judicial supremacy—might contribute to citizen apathy.

Within our constitutional system, little can be accomplished without compromise.⁸⁵ This has always been true. And, this was Madison's goal.⁸⁶ However, with an increase in partisan polarization in recent decades, compromise has become exceedingly difficult.⁸⁷ Designed for a civic republican elite transcending faction,⁸⁸ our constitutional system is ill-suited to the current era of close competition between two bitterly divided parties.⁸⁹ Instead, this is a prescription for legislative paralysis,⁹⁰ and this paralysis undermines popular constitutional activism in at least two ways.

85. See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 326 (2011).

86. See THE FEDERALIST NO. 51, at 291 (James Madison) (Robert A. Ferguson ed., 2006).

87. Pildes, *supra* note 85, at 326.

88. THE FEDERALIST NO. 57, *supra* note 86, at 316 (James Madison) (“The aim of every political constitution is . . . first, to obtain for rulers men who possess most wisdom to discern, and most virtue to pursue, the common good of the society . . .”).

89. See Pildes, *supra* note 85, at 326. Of course, Publius was well aware of these dangers. Take the following passage, for instance, which described how partisanship plagued the Pennsylvania Council of Censors:

Throughout the continuance of the council, it was split into two fixed and violent parties. . . . In all questions, however unimportant in themselves, or unconnected with each other, the same names stand invariably contrasted on the opposite columns. Every unbiased observer may infer . . . that unfortunately *passion*, not *reason*, must have presided over their decisions. When men exercise their reason coolly and freely on a variety of distinct questions, they inevitably fall into different opinions on some of them. When they are governed by a common passion, their opinions, if they are so to be called, will be the same.

THE FEDERALIST NO. 50, *supra* note 86, at 286 (James Madison).

90. Pildes, *supra* note 85, at 326.

First, ongoing legislative paralysis promotes feelings of disillusionment, distrust, and alienation among average citizens.⁹¹ For partisans, they look to Washington and see their plans thwarted by self-interested political enemies. For independents, they look to Washington and see trivial squabbling between petty elites. Therefore, for slightly different reasons, each set of voters gives low marks to their elected officials and loses confidence in their leaders' ability to solve the nation's problems.⁹²

Second, our two-party stalemate works to empower the Supreme Court. Even as Congress's approval rating has plummeted over the last decade, the public's support for the Supreme Court has remained stable and high.⁹³ Furthermore, support for the Court has proven resilient—even in the face of high-profile, controversial decisions like *Bush v. Gore*.⁹⁴ This asymmetry alone makes it difficult for our elected officials to challenge the Court when it acts in unpopular ways.

In addition, it is exceedingly difficult for Congress and the President to challenge a misbehaving Court given our constitutional system's veto points. Therefore, any challenge to the Court would likely require bipartisan compromise. However, such compromise is unlikely in our era of heightened partisan polarization⁹⁵—even in the face of an unpopular decision by the Supreme Court. For evidence, look no further than *Citizens United*. Even a modest and popular legislative response to promote disclosure has gone nowhere.⁹⁶

Finally, even if Court-curbing received large-scale initial support from average citizens, one would expect this support to be short-lived in most cases. The reason is simple: If Congress chooses to pursue Court-curbing after an unpopular decision, one can expect the parties to fracture over such an action.⁹⁷ In other words, as the issue races to the

91. The vast majority of Americans connect partisan fighting between the two parties to legislative paralysis. See *Congress: Misc. Questions*, POLLINGREPORT.COM, <http://www.pollingreport.com/congress.htm#misc> (last visited Sept. 7, 2011).

92. *Id.*

93. See *Supreme Court/Judiciary*, POLLINGREPORT.COM, <http://www.pollingreport.com/court.htm> (last visited Sept. 7, 2011).

94. 531 U.S. 98 (2000). See generally Manoj Mate & Matthew Wright, *The 2000 Presidential Election Controversy*, in PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY, *supra* note 15, at 333–52 (opinion research on *Bush v. Gore*).

95. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2324–25 (2006).

96. Michael A. Memoli, “*Disclose Act*” Fails to Advance in Senate, L.A. TIMES, Sept. 24, 2010, at AA2.

97. See JAMES. A. GARDNER, WHAT ARE CAMPAIGNS FOR?: THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS 86 (2009); DONALD GREEN, BRADLEY PALMQUIST & ERIC SCHICKLER, PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS 4 (2002); Alan I. Abramowitz, Brad Alexander &

top of the public agenda—which any plausibly successful challenge to the Court surely would—we can expect partisan voters to follow their trusted leaders and polarize over the issue.⁹⁸

In the end, such a system leaves us with an empowered Court and a disillusioned citizenry. Kramer focuses myopically on the challenges presented by the Court, as well as the remedies available under the current constitutional system. In the remainder of this Part, I offer a broader agenda for popular constitutionalism.

B. An Agenda for Popular Constitutionalism

Even as the American people have lost faith in their political system,⁹⁹ popular constitutionalists have remained fixated on the

Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75, 80 (2006); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1, 3 (2009); Scott J. Basinger & Howard Lavine, *Ambivalence, Information, and Electoral Choice*, 99 AM. POL. SCI. REV. 169, 171 (2005); Gary C. Jacobson, *Polarized Politics and the 2004 Congressional and Presidential Elections*, 120 POL. SCI. Q. 199, 206 (2005); Levinson & Pildes, *supra* note 95, at 2324–25; Pildes, *supra* note 85, at 277.

98. In our polarized age, popular constitutionalism is likely to take the form of narrow, warring factions of constitutional “Protestants” attempting to influence the views of our leading political parties, as well those of our fellow citizens. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* 11 (1988). On the one hand, partisan polarization may make it easier for these factions to convince one of the major parties to adopt a new constitutional view and, therefore, “grow the faith” rather quickly—whether by converting party leaders on the merits, frightening them through success in party primaries, or a bit of both. Once these leaders convert to the new faith, their partisans—including those in the general public—are likely to follow. On the other hand, partisan polarization may also make affirmative, bipartisan constitutional action in our elected branches—whether in the form of Section Five legislation or popular challenges to the Court—more difficult. In effect, it may place a ceiling on most constitutional proselytizing, making a single, dominant (truly *popular*) constitutional faith much less likely. Therefore, we may see an increased number of popular constitutional complaints about controversial Court decisions, but even fewer immediate threats to judicial supremacy.

In the absence of bipartisan constitutional consensus at the federal level, constitutional factions will likely search for ways to promote large-scale constitutional change outside of the strict confines of our national legislative process (with its various veto-points). Although the most obvious alternative pathway for constitutional change is litigation, scholars interested in popular constitutionalism must also tend to sites of constitutional conflict at the state and local level. In our increasingly polarized world, popular constitutional factions may be more likely to target *subnational* institutions with outsized *national* influence—a form of “federalism-all-the-way-down” run amok. See Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010).

99. See Dan Balz & Jon Cohen, *Both Sides Seen as Too Stubborn, but Especially GOP*, WASH. POST, July 20, 2011, at A01; Alicia M. Cohn, *Poll: GOP More Unpopular than During Clinton Impeachment*, THE HILL (Aug. 9, 2011, 11:49

problems posed by an insulated and powerful Court—to the exclusion of other features of our constitutional system that undermine popular sovereignty, such as legislative paralysis, incumbent entrenchment, and citizen apathy.¹⁰⁰ This is a mistake.

Although judicial reform is a sensible goal, popular constitutionalists should advance a broad agenda that is committed to both *popular* self-rule and *constitutionalism*. Such an agenda should include reforms that: (1) speed up our political system; (2) maximize the number of competitive elections; (3) narrow the gap between judicial decisions and the American people’s constitutional views; and (4) improve civic competence and confidence. I consider each item, briefly, in turn.

1. LEGISLATIVE PARALYSIS

For the ardent popular constitutionalist, it must be possible for the American people to act on their substantive vision of the Constitution when their preferred leaders win elections—particularly a series of them. I already outlined the challenges posed by legislative paralysis in Part II.A. My proposed solution is twofold: (1) eliminate (or, at least, reform) the filibuster;¹⁰¹ and (2) defend Congress’s Section Five power from judicial assault.¹⁰² In other words, reformers should work to speed up our political system and empower Congress to act on its constitutional vision.

Concededly, even then, there is still value to having veto points in place to ensure that any given coalition has truly earned the right to govern.¹⁰³ In other words, popular constitutionalists should still be interested in designing a system that ensures that the governing

AM), <http://thehill.com/blogs/blog-briefing-room/news/176073-poll-gop-more-unpopular-now-than-during-clinton-impeachment>.

100. *But see* PARKER, *supra* note 7, at 58–65; MARK TUSHNET, *WHY THE CONSTITUTION MATTERS* 28–32 (2010).

101. *See* Gerard N. Magliocca, *Reforming the Filibuster*, 105 *Nw. U. L. Rev.* 303, 327–28 (2011).

102. *See* Post & Siegel, *Legislative Constitutionalism*, *supra* note 4, at 1945–46.

103. *See* 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 6 (1991); THE FEDERALIST NO. 85, *supra* note 86, at 483 (Alexander Hamilton). Here, my instincts are similar to those of Bruce Ackerman, whose “dualistic” system attempts to distinguish between decisions made “by the American people” and those made “by their government.” ACKERMAN, *supra*, at 6. For Ackerman, statutes enacted in times of normal politics are the product of a national government acting as a “mere stand-in[] for ‘the people themselves.’” *Id.* at 192. For a full account of Ackerman’s system, *see* 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998); and Bruce Ackerman, *The Living Constitution*, 120 *HARV. L. REV.* 1737 (2007).

coalition's constitutional vision reflects the *considered* views of the American people—or, at the very least, the American people's entrenched constitutional instincts. Therefore, bicameralism, the presidential veto, and judicial review would remain important within my system of popular constitutionalism.

In the end, even within my proposed system, a faction would still have to win the House, the Senate, and the Presidency before attempting to alter our constitutional order in any significant way. Furthermore, such an attempt would still require victories over the course of several election cycles (or, at least, a massive landslide in one cycle). In certain circumstances, the governing coalition would also have to win enough elections to stack the judiciary with their preferred appointees. Therefore, my proposed agenda is not one of radical majoritarianism. Instead, it is a package of modest reforms designed to counteract the pathologies caused by legislative paralysis.

2. INCUMBENT ENTRENCHMENT

Over the last two decades, Congress has remained extremely unpopular,¹⁰⁴ with its approval rating in recent years dipping to its lowest level ever.¹⁰⁵ At the same time, House incumbents have continued to be reelected over ninety percent of the time,¹⁰⁶ including in the so-called “change” elections (like 2006).¹⁰⁷ For popular

104. SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT) 28 (2006).

105. See *CNN/ORC Poll: Most Americans Dislike Debt Deal, Think Lawmakers Acted Like ‘Spoiled Children’*, CNN.COM (Aug. 2, 2011, 12:05 PM), <http://politicalticker.blogs.cnn.com/2011/08/02/cnn-poll-three-quarters-believe-politicians-acting-like-spoiled-children/>.

106. *Reelection Rates Over the Years*, OPENSECRETS.ORG, <http://www.opensecrets.org/bigpicture/reelect.php> (last visited Sept. 7, 2011); see Scott Ashworth & Ethan Bueno de Mesquita, *Electoral Selection, Strategic Challenger Entry, and the Incumbency Advantage*, 70 J. POL. 1006, 1006 (2008); Walter J. Stone et al., *Incumbency Reconsidered: Prospects, Strategic Retirement, and Incumbent Quality in U.S. House Elections*, 72 J. POL. 178, 178 (2010).

107. Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666, 666 (2009). Even in the famed “Republican Revolution” of 1994, ninety percent of incumbents won their races, including eighty-four percent of *Democratic* incumbents. ROBERT K. GOIDEL, DONALD A. GROSS & TODD G. SHIELDS, *MONEY MATTERS: CONSEQUENCES OF CAMPAIGN FINANCE REFORM IN U.S. HOUSE ELECTIONS* 57 (1999). Although the 2010 election defied these larger trends, most incumbents still fared well at the polls. Of the 393 races featuring incumbents, eighty-five percent were reelected overall. See *House Big Board—Election Results 2010*, N.Y. TIMES, <http://elections.nytimes.com/2010/results/house/big-board> (last visited Feb. 18, 2012). Furthermore, sixty-four percent of these incumbents won by at least twenty points, and

constitutionalism to work, there must be real electoral checks when our constitutional system underperforms. Therefore, reformers should support efforts to promote electoral competitiveness—particularly in the House. Possible prescriptions include: (1) campaign finance reforms that free up additional start-up capital for candidates interested in challenging incumbents,¹⁰⁸ and (2) redistricting reforms that increase the number of competitive electoral districts overall.¹⁰⁹ I address campaign finance reform in detail in a companion piece, so I will refrain from discussing these prescriptions any further here.¹¹⁰

3. JUDICIAL REFORM

Each term, the Supreme Court decides a handful of controversial cases by a bare majority. At times, these closely divided decisions reflect the views of the vast majority of Americans.¹¹¹ At other times, these decisions prove unpopular.¹¹²

Even as our current constitutional system works tolerably well with Court doctrine largely tracking the constitutional views of the

over three-quarters won by double digits. *Id.* These numbers—though an improvement over recent election cycles—are still alarming, given the historic levels of voter dissatisfaction in 2010.

108. See GOIDEL, GROSS & SHIELDS, *supra* note 107, at 65; Abramowitz, Alexander & Gunning, *supra* note 97, at 82; Kenneth Benoit & Michael Marsh, *The Campaign Value of Incumbency: A New Solution to the Puzzle of Less Effective Incumbent Spending*, 52 AM. J. POL. SCI. 874, 875 (2008); Robert Biersack, Paul S. Herrnson & Clyde Wilcox, *Seeds for Success: Early Money in Congressional Elections*, 18 LEGIS. STUD. Q. 535, 535 (1993); Andrew J. Dowdle, Randall E. Adkins & Wayne P. Steger, *The Viability Primary: Modeling Candidate Support before the Primaries*, 62 POL. RES. Q. 77, 80–81 (2009); Robert K. Goidel & Donald A. Gross, *Reconsidering the ‘Myths and Realities’ of Campaign Finance Reform*, 21 LEGIS. STUD. Q. 129, 129 (1996); Jacobson, *supra* note 97, at 213; Cherie D. Maestas & Cynthia R. Rugeley, *Assessing the “Experience Bonus” through Examining Strategic Entry, Candidate Quality, and Campaign Receipts in U.S. House Elections*, 52 AM. J. POL. SCI. 520, 520 (2008).

109. Richard H. Pildes, *The Supreme Court, 2003 Term—Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 55–83 (2004).

110. See Tom Donnelly, *Candidate Venture Capital*, 80 U. CIN. L. REV. (forthcoming June 2012).

111. A recent example may be *District of Columbia v. Heller*, 554 U.S. 570 (2008). See generally *Guns*, POLLINGREPORT.COM, <http://www.pollingreport.com/guns.htm> (last visited Sept. 7, 2011) (summary of polling data on the Second Amendment and related gun rights).

112. A recent example is *Citizens United v. Fed. Election Comm’n*, 130 S. Ct. 876 (2010). See, e.g., *In Supreme Court Ruling on Campaign Finance, the Public Dissents*, ABC NEWS (Feb. 17, 2010), <http://abcnews.go.com/blogs/politics/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents>.

American people over time, it is all but impossible to reverse an unpopular Court opinion in the short term—even when it bitterly divides the Justices themselves. This deficiency is made all the more troubling by the fact that Justices retire irregularly, often holding on for as long as possible to ensure that a sympathetic President can appoint their successors. Therefore, the Court only imperfectly reflects the constitutional views of governing coalitions over time.

To promote popular constitutionalism, reformers should support efforts to end life tenure for Supreme Court Justices and establish a set term for each Justice¹¹³—a reform that is already popular with the American people.¹¹⁴ This would ensure that each President is guaranteed a certain number of appointments each term. It would also limit efforts by the Justices to choose their own successors. Over time, this would lead to greater popular control over the Court's decisions, as judicial philosophy would more closely track public opinion (at least of the governing elite). In other words, the Justices would still be able to use professional legal reasoning when deciding cases; however, over time, the Court's reasoning would more closely reflect the constitutional views of recent Presidents (and Senators).

More controversially, reformers should also offer a mechanism that allows for popular reconsideration of closely divided Court decisions on salient constitutional issues. I will discuss this proposal in greater detail in Part III.

4. CITIZEN APATHY (AND IGNORANCE)

For decades, political scientists have painted a bleak picture of the average citizen.¹¹⁵ These studies have presented her as politically inactive and civically ignorant.¹¹⁶ On this account, not only does the average citizen lack knowledge about most issues on the public agenda, but she also knows little about the fundamentals of our constitutional

113. Such reform proposals already exist and have received widespread support from various scholars. *See, e.g.*, Letter from Paul Carrington et al. to Joseph R. Biden, Jr. et al. (Oct. 6, 2009), *available at* http://128.164.132.13/News/20092010Events/Nov09_Conference/Documents/Supreme%20Court%20Proposals%20with%20signatoriesas%20of%2010-6-09.pdf.

114. *See Supreme Court/Judiciary, supra* note 93.

115. *See* ACKERMAN & FISHKIN, *supra* note 55, at 5; *see also* Ortiz, *supra* note 55, at 895 & n.12.

116. *See* ACKERMAN & FISHKIN, *supra* note 55, at 5; Ilya Somin, *Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*, 89 IOWA L. REV. 1287, 1304–05 (2004).

system.¹¹⁷ While such a citizen may be able to use partisan cues and retrospective considerations to make tolerable political choices on Election Day, this research is likely to leave the ardent popular constitutionalist with little cause for optimism.¹¹⁸ Indeed, this research suggests that setting either the “popular” or the “constitutional” bar too high would render popular constitutionalism unrealistic—at least as an ongoing, central feature of the American constitutional system in the here and now.¹¹⁹

Therefore, popular constitutionalists should also promote an agenda that improves the constitutional confidence (and competence) of the American people. The proposals presented above are designed to do just that. In addition, reformers should use school curricula, public forums, and media outlets to promote an agenda that helps to move contemporary constitutional culture past “Founder” worship and judicial supremacy.¹²⁰

C. A Way Forward

In the end, popular constitutionalism is best understood as an institutional revolution focused on reforming our constitutional system to promote civic competence, citizen activism, and electoral responsiveness. It is a substantively agnostic agenda, even as most individual reformers will likely be driven to popular constitutionalism’s cause by concrete constitutional visions.

Furthermore, even under my proposed system, constitutional factions would still face considerable obstacles before being able to realize their respective visions. Competitive elections. Partisan

117. See ACKERMAN & FISHKIN, *supra* note 55, at 5; Somin, *supra* note 116, at 1304–05.

118. See Richard J. Ross, *Pre-Revolutionary Popular Constitutionalism and Larry Kramer’s The People Themselves*, 81 CHI.-KENT L. REV. 905, 908 (2006); Christopher Tomlins, *Politics, Police, Past and Present: Larry Kramer’s The People Themselves*, 81 CHI.-KENT L. REV. 1007, 1020 (2006).

119. See ACKERMAN & FISHKIN, *supra* note 55, at 5; James A. Gardner, *Anti-Regulatory Absolutism in the Campaign Arena: Citizens United and the Implied Slippery Slope*, 20 CORNELL J.L. & PUB. POL’Y 673, 703–04 (2011); Ross, *supra* note 118, at 908; Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 151 (2010); Somin, *supra* note 116, at 1304–05; Tomlins, *supra* note 118, at 1020.

120. See Donnelly, *Reconstruction*, *supra* note 10, 117–25; Donnelly, *First Amendment*, *supra* note 10, at 321–27; Sheldon Nahmod, *Constitutional Education for The People Themselves*, 81 CHI.-KENT L. REV. 1091, 1099–1105 (2006); Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. (forthcoming 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1807226; Donnelly, Note, *supra* note 10 *passim*.

polarization. Bicameralism. The presidential veto. Judicial review. Nevertheless, this reform agenda is designed to make it somewhat easier for victorious coalitions to govern—and, in turn, for those coalitions to be toppled if they fail to satisfy the American people.

In Part III, I discuss one proposed reform in detail—the public reconsideration of judicial decisions—or, as I shall label it, a “People’s veto.”¹²¹ Although a controversial proposal when first discussed a century ago, I hope to offer a version that is tailored to deal with a discrete, ongoing problem—closely divided Court decisions on high-salience constitutional issues. Ideally, over time, it would also help to promote civic renewal.

III. BACK TO THE FUTURE: BULL MOOSE CONSTITUTIONALISM

A century ago, Theodore Roosevelt spoke to a convention assembled to revise the Ohio State Constitution. There, he presented his “Charter for Democracy,” arguably the most comprehensive defense of popular constitutionalism offered by any major figure in American political history. Spurred by recent court decisions striking down various labor laws, Roosevelt called for reforms that would ensure that the American people had the final say over important constitutional questions. In so doing, Roosevelt attacked judicial supremacy, believing it “both absurd and degrading to make a fetish of a judge or anyone else.”¹²²

At the center of Roosevelt’s reform agenda was a simple (albeit controversial) proposal—the public reconsideration of judicial decisions. Roosevelt summarized his proposal as follows: when judges decide a constitutional question, “the people should have the right to recall that decision if they think it wrong.”¹²³ He added:

If any considerable number of the people feel that the decision is in defiance of justice, they should be given the right by petition to bring before the voters at same [sic] subsequent election, special or otherwise, as might be decided, and after the fullest opportunity for deliberation and debate, the question whether or not the judges’ interpretation of the

121. I suspect that Kramer would agree with this proposal—indeed, he called the Progressive era the “golden age of popular constitutionalism.” See KRAMER, *supra* note 1, at 211. Where we may disagree is how well our current system can promote direct citizen involvement in constitutional interpretation without further changes.

122. Hon. Theodore Roosevelt, Former President of the U.S., Address Before the Ohio Constitutional Convention: A Charter of Democracy (Feb. 21, 1912), *in* S. Doc. No. 62-348, at 14 (1919).

123. *Id.*

Constitution is to be sustained. If it is sustained, well and good. If not, then the popular verdict is to be accepted as final, the decision is to be treated as reversed, and the construction of the Constitution definitely decided¹²⁴

Interestingly, Roosevelt limited this remedy to “decision[s made] by a close majority” of judges—in other words, to cases where judges had “decided every which way” (and where it was “foolish” to talk of any legal consensus on the issue).¹²⁵ Therefore, Roosevelt sought to preserve a role for judicial independence in those cases where a legal consensus existed, even as he subjected closely divided constitutional decisions to a popular check.

The reasoning behind Roosevelt’s proposal was simple enough: The American people should be “the masters and not the servants of even the highest court in the land.”¹²⁶ In short, they should be “the final interpreters of the Constitution.”¹²⁷ While Roosevelt conceded that judicial decisions would go unchallenged in “the majority of cases,”¹²⁸ he nevertheless contended that “experience has shown the vital need [for] the people . . . to pass upon [certain] opinion[s].”¹²⁹

Roosevelt offered his proposal in a time of perceived crisis. In the shadow of *Lochner v. New York*,¹³⁰ Roosevelt feared that the American people might lose the power to address the great social and economic issues of the day—the will of the American people replaced by the commands of an elite judiciary. Kramer’s historical narrative aside, we face no such crisis today.¹³¹ Nevertheless, Roosevelt’s prescription ought to outlive its *Lochner*-era context—or, at least, so I shall argue in this Part.

A. The “People’s Veto”: An Overview

To make popular constitutionalism work, reformers should offer a formal mechanism for reconsidering constitutional decisions by the

124. *Id.* at 15.

125. *Id.* at 18.

126. *Id.* at 16.

127. *Id.*

128. *Id.* at 15.

129. *Id.*

130. 198 U.S. 45 (1905).

131. Arguably, we did not even face such a crisis during the *Lochner* era itself. See DAVID E. BERNSTEIN, REHABILITATING *LOCHNER*: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM (2011).

Supreme Court.¹³² Such a reform would offer a middle way between judicial supremacy and Article V exclusivity. Furthermore, it would also promote ongoing constitutional engagement among average citizens.

As I envision it, the People's veto would be reserved for five-to-four decisions of the Supreme Court on constitutional issues. These are the decisions that often occur when the majority is attempting to push constitutional doctrine in a new direction. Such a veto would permit the American people to weigh in before the majority is able to do so.

Americans tend to value judicial decision-making for the stability it brings to our constitutional system—usually, due to the perceived value associated with honoring precedent. In mine-run cases, the American people would not be permitted to intervene. Instead, the legal consensus—as embodied by at least six Justices—would prevail, unchecked. Only in five-to-four decisions would our constitutional system change—in other words, in cases without a legal consensus and where there are especially plausible constitutional constructions on either side of the issue. Here is how the process might work.

Once the Court issues a five-to-four decision on a constitutional question, the case would be sent to Congress for an up-or-down vote on public reconsideration. If Congress votes for reconsideration, the case would then go to the American people. This would place the constitutional issue squarely on the public agenda, therefore stirring the average citizen from her civic slumber and focusing her attention on the upcoming decision. The final outcome for that specific case would then be dictated by a national referendum. The long-term effects of such a vote on constitutional doctrine would be determined by each individual judge in future cases, as well as by subsequent interactions between the judiciary, the elected branches, and the American people.

B. Getting the Details Right: Some Limiting Principles

Future debates over the details of this proposal should be guided by the following two considerations. First, the mechanism must allow sufficient time between the Court's decision and the national referendum to allow for sober deliberation. In other words, reformers

132. Such a mechanism was implemented in Colorado through a constitutional initiative in 1912. JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 135 (2006). It was declared unconstitutional by the Colorado Supreme Court nine years later. *Id.* In 1912, Senator Joseph Bristow sponsored a resolution that would have allowed Congress to send any congressional law invalidated by the Supreme Court to the American people. *Id.* at 333 n.10. His proposal went nowhere. *See id.* Similar proposals have received little support since.

should try to minimize the likelihood that the American people decide the issue based on a snap judgment, or while in a public frenzy. Instead, the goal is to ensure that the final decision is made based on the considered views of the American people.¹³³

Second, the trigger mechanism, lodged in Congress, should require a super-majority vote. This would limit the number of times that the American people would be called upon to settle constitutional questions—reserving the People’s veto for especially controversial issues, or egregious Court decisions. This would also ensure that concerns about the Court’s decision transcended party lines—a rare occurrence.

In the end, the People’s veto would permit the American people to stand above the Supreme Court in the constitutional hierarchy, even if the Court would remain the final constitutional voice in nearly all cases. The American people would only be permitted to intervene in situations where the public had reached a bipartisan consensus that the Court had erred. (Perhaps *Citizens United* was such a case.) It could also be used in situations where the Court rules on a case involving a high-salience constitutional issue. (The “Obamacare” litigation springs to mind.) In all other cases, the Court’s authority would remain unchallenged.

However, even if the People’s veto does not affect the outcome of a single case, it still has the symbolic importance of once again placing the American people at the top of the constitutional hierarchy by giving them a plausible check on an aggressive Court. Over time, citizens may begin to view themselves differently—as the authoritative constitutional *interpreters* in close cases—not just as hypothetical lawgivers.

C. An Objection: The Threat of Majoritarian Tyranny by the Unenlightened Masses

The strongest objection to this proposal would focus on the threat of majoritarian tyranny. Such a threat is particularly menacing given the civic ignorance of most citizens. Better to preserve our current system of strong-form judicial review than to subject it to the whims of the American people.

This objection is made all the more plausible by the failures of direct democracy at the state level. State-level referenda often suffer from “poor voter turnout,”¹³⁴ “confusing [or deliberately misleading]

133. In addition to a majority vote after a sufficient period of time, reformers may also require votes in successive years to reverse the Court’s decision.

134. Aaron J. Reber & Karin Mika, *Democratic Excess in the Use of Zoning Referenda*, 29 URB. LAW. 277, 277 (1997).

ballot language,”¹³⁵ and undue influence by “moneyed interests.”¹³⁶ Each of these flaws distorts the ability of these devices to represent the “considered” views of the average citizen. Indeed, the average citizen’s opinion on any given state-level initiative is usually “superficial,” at best.¹³⁷ These are not small problems. Nevertheless, I have tailored my proposal to address each of them.

First, contrary to many state-level examples, the People’s veto has the advantage of focusing the average citizen’s mind on a specific constitutional issue presented by a specific case. Indeed, the facts of the case may help citizens face the concrete effects of their constitutional views—which are often hidden in abstractions.

Second, unlike the obscure issues that often appear on state ballots, any issue that triggers the People’s veto would likely be highly salient since it would have to satisfy the super-majority trigger in Congress. Indeed, these constitutional issues may be even easier to decipher than the citizen’s typical vote for a candidate for public office, which requires the voter to know about both the powers that accompany each office and the records of each of the candidates—that is, if the citizen is interested in deciding based on anything other than partisan cues or retrospective considerations.

Third, citizens would be able to refer to the majority opinion, as well as any concurrence(s) and dissent(s), in each case. This should lead to more transparent and focused decision-making than in other political contexts. Indeed, the respect that most people already have for the Court will make the authoring Justices key opinion-leaders when the public deliberates. As a result, although there would surely be public commentary and well-financed campaigns covering the constitutional issues in any given case, it would be relatively easy for the American people to cut through the clutter and find reliable (or, at least, trusted) sources of information. Like many a first-year law student, voters may even be struck by how persuasive each side of a difficult case sounds, once they have heard the strongest arguments offered by each side.

135. *Id.*

136. Michael L. Ferguson, *Initiatives, Referenda, and the Problem of Democratic Inclusion: A Reply to John Gastil and Kevin O’Leary*, 78 U. COLO. L. REV. 1537, 1538 (2007). For background history on the rise of direct democracy in the United States, see generally K.K. DuVivier, *The United States as a Democratic Ideal? International Lessons in Referendum Democracy*, 79 TEMP. L. REV. 821, 821–34 (2006); David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13, 13–21 (1995); and Nathaniel A. Persily, *The Peculiar Geography of Direct Democracy: Why the Initiative, Referendum and Recall Developed in the American West*, 2 MICH. L. & POL’Y REV. 11, 11–13 (1997).

137. Magleby, *supra* note 136, at 39.

Finally, few issues would be likely to trigger the People's veto. Therefore, unlike the long list of low-salience issues that often clutter state ballots, the average citizen would be able to focus her mind on a limited number of constitutional questions over time—perhaps no more than one every few years.

D. An Example: Obamacare

So, what difference might the People's veto make, in practice? Take the most high-salience issue percolating in the lower courts today and appearing on the Court's current docket—the constitutionality of the Affordable Care Act's individual mandate.¹³⁸ When the media reports on the ongoing Obamacare litigation, it is taken as self-evident that the Supreme Court will ultimately “settle” or “decide” the constitutional question.¹³⁹ With the People's veto, these stories would change.

Rather than anticipating a five-to-four decision that would “settle” the constitutional controversy (with Justice Anthony Kennedy's construction of our Constitution likely to prevail in a close case), the media would focus instead on whether such a decision would trigger the

138. See *Florida ex rel. Att'y Gen. v. U.S. Dep't of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011); *Baldwin v. Sebelius*, 654 F.3d 877 (9th Cir. 2011); *N.J. Physicians, Inc. v. Obama*, 653 F.3d 234 (3d Cir. 2011); *Thomas More Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011); *Calvey v. Obama*, 792 F. Supp. 2d 1262 (W.D. Okla. 2011); *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1307 (N.D. Fla. 2011); *Mead v. Holder*, 766 F. Supp. 2d 16 (D.D.C. 2011); *Florida ex rel. Bondi v. U.S. Dep't of Health & Human Servs.*, 780 F. Supp. 2d 1256 (N.D. Fla. 2011); *Goudy-Bachman v. U.S. Dep't of Health & Human Servs.*, 764 F. Supp. 2d 684 (M.D. Pa. 2011); *Virginia ex rel. Cuccinelli v. Sebelius*, 728 F. Supp. 2d 768 (E.D. Va. 2010); *U.S. Citizens Ass'n v. Sebelius*, 754 F. Supp. 2d 903 (N.D. Ohio 2010); *Florida ex rel. McCollum v. U.S. Dep't of Health & Human Servs.*, 716 F. Supp. 2d 1120 (N.D. Fla. 2010); *Thomas More Law Ctr. v. Obama*, 720 F. Supp. 2d 882 (E.D. Mich. 2010).

139. See Rebecca Adams, *In Year Two of the Health Care Overhaul, the Wonks Will Really Go To Work*, C.Q. TODAY, Mar. 11, 2011; David Leonhardt, *In Health Law, Old Arguments Get New Airing*, N.Y. TIMES, Dec. 15, 2010, at A1; Liv Osby, *Both Sides Expect Supreme Court to Settle Health-Care Law*, GREENVILLE NEWS (S.C.), Dec. 14, 2010; Jim Provance, *Referendum on Senate Bill 5 Will Stay on Ballot*, THE BLADE (Toledo, Ohio), Aug. 13, 2011; David G. Savage & Noam N. Levey, *Appeals Judges Reject Key Element of Health Care Law; Supreme Court Likely to Settle Insurance Mandate*, CHI. TRIB., Aug. 13, 2011, at 7; Editorial, *A Grim Prognosis: ObamaCare Loses Round in VA Court*, WORCESTER TELEGRAM & GAZETTE, Dec. 15, 2010, at A13; Editorial, *Happy Birthday?*, LAS VEGAS REV.-J., Mar. 23, 2011, at 8B; Editorial, *Health Care: Showdown*, RICHMOND TIMES-DISPATCH, Aug. 16, 2011; Editorial, *Health Law Needs the Individual Mandate or Something Like It*, USA TODAY, Feb. 14, 2011, at 11A; *Health Law Stands in S.D.*, ARGUS LEADER (Sioux Falls, S.D.), Feb. 4, 2011.

People's veto—and, if so, how the American people would likely “settle” the controversy. Over time, this might change the constitutional psychology of the American people. They would no longer presume that the Supreme Court would “get the final say” on high-salience constitutional issues. Instead, they would ask themselves how they would decide the issue—and why.

To be clear, once the People's veto is triggered, I am not expecting a constitutional debate akin to a law school seminar, or for the political elite to serve as the ideal moderators. Nevertheless, I do expect the Justices to play an important role as seminar leaders, teaching through their opinions.¹⁴⁰ In addition, I expect the mechanics of the process to maximize individual-level focus, interest, and impact—and, therefore, to elicit results that are more consistent with the American commitment to popular sovereignty than five-to-four decisions by the Supreme Court.

Finally, over time, the People's veto may promote broader constitutional engagement among average citizens—a goal shared by all popular constitutionalists. Reporters would begin to ask questions about whether a controversial case would trigger the People's veto. Citizens might begin to feel more comfortable dealing with constitutional questions. They may even pay closer attention to the Court's handiwork. After each five-to-four decision, an increasing number of opinion polls would ask whether the American people agree with the most recent decision or whether they wish to reconsider it as a collective people. Such a dynamic would arguably make the American people feel closer to their Constitution, as the average citizen would feel as though they were participating in the creation of constitutional law on an ongoing basis.

In the end, my goals track those of the Progressives a century ago, who sought to “reinvent the institutions of public, citizenly involvement in constitutional politics and decision-making.”¹⁴¹ On this view, the People's veto could get the public to think more often (and, perhaps, more deeply) about constitutional issues. Optimistically, the new dynamic could serve as an ongoing constitutional dialogue—with the Court speaking, and the American people responding to what the Court has said.¹⁴² In this, like the Progressives, I envision direct and

140. See Christopher L. Eisgruber, *Is the Supreme Court an Educative Institution?*, 67 N.Y.U. L. REV. 961, 962–66 (1992).

141. William E. Forbath, *The Will of the People?: Pollsters, Elites, and Other Difficulties*, 78 GEO. WASH. L. REV. 1191, 1197 (2010). However, Forbath may reject my proposal as “a plebiscitary brand of democracy.” *Id.* at 1199.

142. Cf. ACKERMAN & FISHKIN, *supra* note 55, at 12 (“Deliberative polls and other microexperiments establish that ordinary people are perfectly willing to take up the task of citizenship within appropriate settings.”).

deliberative democracy “bound up with one another,” with my model potentially “bringing an informed public opinion to bear on constitutional [issues].”¹⁴³ Concededly, this is almost certainly too optimistic. Nevertheless, by demystifying and popularizing constitutional adjudication, the People’s veto might educate, engage, and empower the average citizen over time.

CONCLUSION

In the end, the People’s veto is a modest remedy—limited to five-to-four decisions that are salient enough to be passed along to the American people by Congress.

Even with a “People’s veto,” our revised constitutional system would still reserve an important role for professional legal reasoning through judicial review. Indeed, judges would still almost always get the final word on constitutional questions—at least in the short-term. The only constitutional cases that would go to the American people would be those where: (1) there was a genuinely close question, resulting in a five-to-four Court decision; and (2) a super-majority of Congress supported public reconsideration. From there, the Court’s decision would only be reversed by a national vote held after a period of public deliberation (probably guided by the opinions of the Justices themselves).

Nevertheless, over time, the American people would have shared responsibility for constitutional decision-making—at least, in the most controversial, salient cases. It is not a stretch to assume that this would change their perspective—as they begin to perceive themselves as at the top of the constitutional hierarchy—a position often obscured by a system formally committed to Article V exclusivity. The same goes for members of Congress, who would be asked to vote on whether to send controversial cases to the American people in the first place.

The Court’s perspective would also change. Even as they would remain unchecked in the vast majority of cases, the Justices might think twice before issuing a five-to-four decision—seeking broader consensus rather than proceeding with a decision that commands only a bare majority of the Justices. In addition, when issuing five-to-four decisions, the Justices, like lower court judges, would fear reversal. This might promote judicial humility, tempering some of their more aggressive statements of judicial supremacy in recent years.

In addition, it may change the dynamics of the certiorari process, as the “Rule of Four” would now give the presumptive losers of a

143. Forbath, *supra* note 141, at 1199.

given constitutional case an added incentive to place it on the Court's docket for possible public reconsideration. This could address lingering concerns that the Court's docket is shrinking—both in terms of the total number of cases taken and those cases' importance.¹⁴⁴ Even for the majority, it may add to its decision's legitimacy to receive the public's imprimatur in a national referendum.

Finally, the People's veto may also encourage the Justices to write in a more straightforward, accessible manner, as the majority would be tasked not only with getting it right, but also with writing the majority opinion in a way that could persuade the political elite, as well as the average citizen. Therefore, rather than claiming to speak in the name of the American people, as they often do, the Justices would actually have to earn the public's support by focusing the public's mind, writing persuasive opinions, and prevailing at the ballot box. Such a dynamic may bring the Constitution closer to the American people—thus, aiding in the process of civic renewal.

In short, the People's veto is but one concrete way of making popular constitutionalism work. Nevertheless, it is a reform that deserves to be included in popular constitutionalism's second act.

144. See Sanford Levinson, *Assessing the Supreme Court's Current Caseload: A Question of Law or Politics?*, 119 YALE L.J. ONLINE 99, 101–02 (2010), <http://yalelawjournal.org/the-yale-law-journal-pocket-part/supreme-court/assessing-the-supreme-court%E2%80%99s-current-caseload:-a-question-of-law-or-politics?/>.