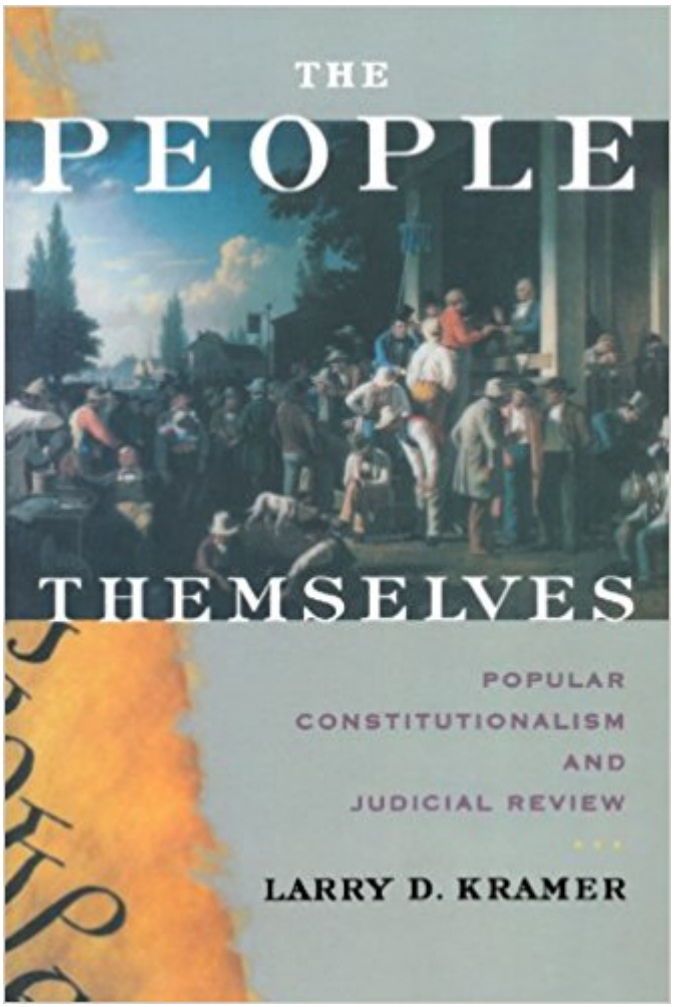
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The People Themselves: Popular Constitutionalism And Judicial Review



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Synopsis

In this groundbreaking interpretation of America’s founding and of its entire system of judicial review, Larry Kramer reveals that the colonists fought for and created a very different system--and held a very different understanding of citizenship--than Americans believe to be the norm today. "Popular sovereignty" was not just some historical abstraction, and the notion of "the people" was more than a flip rhetorical device invoked on the campaign trail. Questions of constitutional meaning provoked vigorous public debate and the actions of government officials were greeted with celebratory feasts and bonfires, or riotous resistance. Americans treated the Constitution as part of the lived reality of their daily existence. Their self-sovereignty in law as much as politics was active not abstract.

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Customer Reviews

"A serious, provocative meditation on what kind of legitimacy the Supreme Court ought to have in a constitutional democracy. Kramer forces us to take seriously the possibility that Supreme Court Justices are no better than we are at deciding matters of fundamental moral and political concernwe should thank Kramer for forcing us to take a hard look at the undeniable social costs of judicial review."--Law and Politics Book Review"A major achievement...it will be ignored at the peril of anyone who seeks to understand constitutional history is future politics"--American Historical Review"...masterful opening chapters...deserves great praise for his detailed historical research, which recaptures the flavor of early constitutionalism and its deep connection with an active and

spirited American people. He also deserves great praise for untangling the different conceptions of "constitution" floating around and rendering that understanding easily accessible to a modern audience...a provocative and original analysis of American constitutionalism that will command a wide audience."--Perspectives on Politics"Mr. Kramer is to be applauded for reminding us that courts do not enjoy a monopoly on the Constitution’s true meaning and that senators and presidents alike should take the Constitution seriously in the confirmation process and at other times as well."--The Wall Street Journal"Offers a fresh way of viewing the origins and limits of judicial review. The People Themselves challenges conventional constitutional jurisprudence and conventional constitutional history with a deeply researched historical pedigree for popular refusal to accept the Supreme Court’s usurping title to the people’s document."--The New York Review of Books"Larry Kramer explains one of the great mysteries of modern America--why for 40 years, have the freest people in the world been powerless to stop courts of appointed lawyers from eroding their freedoms?.... a manual on how the American people can legitimately exercise their historic right to create what he calls popular constitutionalism."--Newt Gingrich, The New York Post"Rarely since Edmund Burke’s ’Speech on Conciliation with America’ in 1774 has the legal dimension of the American Revolution been understood with such precision and presented with such conviction."--First Things"Kramer has marshaled an impressive array of evidence and has made a thorough survey of modern scholarship to build his case for what he calls ’popular constitutionalism.’"--First Things"An instructive tour through the early history of American constitutionalism."--National Review

Larry Kramer is Richard E. Lang Professor of Law and Dean of Stanford Law School. He served as a law clerk to Justice William J. Brennan, Jr., of the United States Supreme Court and taught at the law schools of the University of Chicago, the University of Michigan, and New York University before moving to Stanford. He has written extensively in both academic and popular journals on topics involving the role of courts in society.

At the outset, I should say that anyone who is interested in constitutional development and/or theory ought to read this book. It is well-written, creative, and thought-provoking. On the other hand, I cannot help but feel that the author wrote two books, one of which was long (the historical part) and one of which was very short (the normative part). I’m still not clear on how Kramer envisions judicial review w/out judicial supremacy in practice and I also think that he may underestimate the risks of undermining judicial supremacy, which, for better or for worse, Americans have gotten used to. I just

wish that he had better defended some of the normative claims that he made in the last chapter, which I found to be the most interesting part of the book, and really engaged the owrries that Tribe and Dworkin (and many others) have raised about more popular forms of constitutionalism. I would be surprised if Kramer would be pleased by Newt Gingrich's favorable review of his book; it shows that popular constitutionalism may have conservative political implications that someone like Kramer would be hesitant to embrace. Indeed, many left-leaning law professors are attracted to various forms of popular constitutionalism in the first place, precisely because they're so unhappy w/ a federal judiciary that is dominated by conservative jurists. At any rate, I highly recommend this book, and I would encourage the reader to make up his or her own mind about its merits.

Through this epic history, Dean Kramer reminds us of the tradition (as old as our Republic) that We The People are the supreme authority to interpret--explain and shape--the Constitution of the United States.

Excelent

Larry D. Kramer has constructed a masterful work here that belongs in every American's library. When it comes to subjects like judicial review, many author's, themselves often constitutional attorneys, have a tendency to go out of their way to try to write "over the head" of the political novice. Not the case with Kramer's work. He writes in a succinct fashion that will be appreciated by both judicial professionals and constitutional beginners alike.Much evidence is found here which doesn't really repudiate, and in many ways, supports that judicial review was in fact, the intent of the framer's and perhaps even a logical conclusion. Kramer doesn't really attempt to defy the judiciary claim of their right of review, but beyond that point, Kramer takes the gloves off and pounds away at what he categorizes as "judicial tyranny", the court usurping it's constitutional boundaries.Kramer details the 200 year evolution of the court's abuse of power, beginning before MARBURY when the idea of judicial review came into play, through what we find today with the judiciary legislating from the bench and completely dismissing state's rights. It is also most interesting how the author chronicles Madison's changing opinion of judicial review.This book, in many ways, mirrors and supports the earlier work by Martyn Babitz, THE ILLUSION OF FREEDOM, where both authors support Madison's concession that the "states only political recourse [over the federal courts] is through elections and impeachment". But Kramer hints of other possibilities at controlling our out of control judiciary in his epilogue when he writes;"The Constitution leaves room for countless political

responses to an overly assertive Court: 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."Interesting possibilities, to be sure. In conclusion, I believe Kramer concedes judicial review as bona fide, but constructs a solid foundation to dispute the notion of judicial supremacy. This is a very enjoyable book that I learned a great deal from. The book at times, does read a bit slow, but that has nothing to do with Kramer's writing style, it has to do with the fact that you are constantly finding new information and referring back to the bibliography, which will no doubt lead the reader to numerous other books to add to your reading list. I look forward to future books by this author.Monty RaineyJunto Society

This is a very fine work of scholarship. The research is staggering in its comprehensiveness, and it is a definite contribution to the literature on the federal courts at a time when there is much attention being devoted to judicial power. The basic thesis of the book is that throughout American constitutional history, what the author terms "popular constitutionalism" has played a "pivotal role" in interpreting the Constitution. The author believes that "judicial supremacy" has caused a disfunction in the political system and needs to be offset by more attention to the expressions of popular direction in making interpretations. In order to argue his thesis, the author has produced a very valuable history of judicial review.At the outset, the author carefully defines his terms, including "customary constitution," "fundamental law," "natural law" and "common law." Next the author moves on to a discussion of judicial review in England to try and demonstrate that no solid precedent for this practice had developed prior to the drafting of the Constitution. An excellent example of popular sovereignty is the fact that juries during this period often made findings of law as well as fact. The author devotes considerable attention to the purported pre-constitutional precedents for judicial review, finding them either to be overstated or misinterpreted. The historical record does disclose limited acceptance of the practice, but only in cases where the judiciary was protecting its own prerogatives. The author argues that the issue really did not come up very much at this point. Similarly, a solid discussion is devoted to the Constitutional convention and the ratification debates where, once again, the issue came up only sporadically.The post-ratification period also is examined in several chapters. Once again, the author concludes that there was no clear consensus on the practice of judicial review. The emegence of political parties inhibited popular interpretation, since it placed a layer between the people and the government. However, Jacksonian opposition to the practice persisted. It is only after the Civil War, with the increasing

professionalization of the bar and the enhanced conservatism of courts that the practice became recognized (after all, it was not until the Dred Scott decision in the 1850's that the Court again exercised the power it had staked out in Marbury v. Madison). The "Old Court's" abuse of the power was checkmated by the New Deal Settlement stemming from FDR's court-packing attempt. That is, the power would be exercised to review laws impacting individual right, but not Congressional powers such as commerce and general welfare. This compromise lasted until the Rehnquist Court.There is a lot to consider in this volume. The author's arguments are well thought out and he is straightforward when discussing historical periods when the sentiment in favor of judicial review was pronounced. None of the arguments for judicial review (e.g.,avoiding the tyranny of the majority) persuades the author that the practice should continue without restraint. The only problem I found in the argument was not with the historical evidence (although I don't necessarily share the author's reading of the historical record) but in his conclusion. How would "popular constitutionalism" operate within our current system? That is, how would the people's will be communicated to the courts and Congress, so they could interpret the Constitution and statutes accordingly? Some discussion on this point strikes me as a necessity. For those without some background in the topic, the book may be a bit heavy going due to its comprehensiveness. But for illuminating an important historical approach to the judicial review issue, it is hard to surpass.

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