

THE PEOPLE OR THE COURT

WHO REIGNS SUPREME, HOW, AND WHY?

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with a *Preface* by *Suzanna Sherry*^{*}

PREFACE

Matt Downer’s paper comes from the same seminar^a as that of Will Marks, and also focuses partly on Barry Friedman’s *The Will of the People*. But Downer considers Friedman’s work together with Larry Kramer’s *The People Themselves: Popular Constitutionalism and Judicial Review*. He finds intriguing similarities and differences between the two, and he criticizes both for their failure to be specific about who “The People” are and whether there are any limits on what they can do. Downer ultimately identifies what he calls a “fundamental flaw” in each book. Kramer, he argues, doesn’t really trust the people after all. And Friedman’s most arresting claims are either unconvincing or, if true, essentially trivial. Downer’s paper is an excellent critical review of two celebrated and influential recent scholarly books, more interesting than some of the previously published reviews.

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^a For a description of the seminar, see Suzanna Sherry, *Preface* to Will Marks, *Whose Majority Is It Anyway? Elite Signaling and Future Public Preferences*, 4 J.L. (1 NEW VOICES) 13, 13 (2014).

I.

INTRODUCTION

In his book, Barry Friedman argues that since our founding the Supreme Court has increasingly aligned itself with *The Will of the People*.¹ While this view seems to directly contradict Larry Kramer's central thesis – that *The People Themselves*² initially directed the Court but have since abdicated that role – the two theories share key elements, assertions, and flaws. Both advance a normative view of The People as arbiters of constitutional meaning and directors of Supreme Court decisions. Because their descriptive narratives conflict, however, their prescriptive recommendations predictably diverge as well. Their frameworks also share similar bouts of vagueness and lack of constraint: 1) neither sufficiently defines *who* constitutes The People, and 2) neither adequately describes what, if anything, constrains the substance of popular will – are *any* interpretations permitted, no matter how implausible or rights-endangering? Finally, two foundational – and equally surprising – flaws undermine their primary contributions: upon close scrutiny, Kramer lacks faith in The People after all and Friedman's most celebrated conclusions prove either unsurprising or unconvincing.

II.

ALONG THE SAME LINE,
BUT IN OPPOSITE DIRECTIONS

Like Kramer,³ Friedman purports to describe both how things are as well as how they should be.⁴ Normatively, they both ad-

¹ BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION* (2009).

² LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

³ See *id.* at 227 (“Americans in the past always came to the same conclusion: that it was their right, and their responsibility, as republican citizens to say finally what the Constitution means.”).

⁴ See, e.g., FRIEDMAN, *supra* note 1, at 16 (“This, then, is the function of judicial review in the modern era: to serve as a catalyst, to force public debate, and ultimately to ratify the

vance very similar proposals: The People *should* assume primary responsibility for interpreting constitutional meaning. Descriptively, they almost directly contradict each other. Kramer argues that The People once embraced – and have since abdicated – their role as constitutional arbiters. Friedman, by contrast, suggests that The People had to – and did – grow into their current authority to direct the Court’s trajectory and have maintained it to varying degrees ever since. Unsurprisingly, their conflicting narratives produce conflicting prescriptions. Kramer urges The People to seize back their abdicated role whereas Friedman seems content to stay the course.

A. Normative Alignment

While Kramer explicitly idealizes The People’s role as “the final authority on the meaning and interpretation of the Constitution,”⁵ Friedman proves far more circumspect. He initially seems to maintain careful objectivity, focusing primarily on his view of the historical reality, rather than his ideal. Upon closer scrutiny, however, his normative view shines through, both in the slightly broader context of these careful statements and in the passion of his ostensibly objective prose.

Friedman’s language is a far cry from Kramer’s forceful advocacy. As eloquently described by commentators, Kramer challenges the Supreme Court’s usurpation of constitutional interpretive authority⁶ and seeks to “[b]ring[] the people back as the protagonists of American constitutional history.”⁷ Friedman, by contrast, carefully neutralizes his use of “should” and “ought” with sharply conditioned language: “To say that the Supreme Court follows popular opinion,” he writes, “or even that it *should*, is hardly to say that the Court *ought* to be responsive to every passing fancy . . . of the American

American people’s considered views.”).

⁵ L.A. Powe, Jr., *Are “The People” Missing in Action (and Should Anyone Care)?*, 83 TEX. L. REV. 855, 855-56 (2005).

⁶ *Id.* at 855.

⁷ Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 655 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

people.”⁸ But in context, it seems that he means only that the Court should divine the enduring will of The People rather than follow popular whim.⁹ He quickly follows his disclaimer with ringing endorsements from Woodrow Wilson and Theodore Roosevelt of judges who will “follow” the “permanent popular will” rather than the “popular opinion at the moment.”¹⁰ If invoking revered American figures falls short of revealing his inclination, his next move lays it bare. Friedman cites *Korematsu v. United States*¹¹ – one of the most reviled opinions in Supreme Court history¹² – to illustrate the danger of judges following the “popular opinion at the moment” rather than the “permanent popular will.”¹³

If juxtaposing Wilson and Roosevelt with the justices who decided *Korematsu* does not indicate Friedman’s normative views, the passion with which he closes his book seems to settle the question: “Judicial review is our invention; we created it and have chosen to retain it. Judicial Review has . . . forc[ed] us to . . . interpret[] our Constitution ourselves. In the final analysis, when it comes to the Constitution, we are the highest court in the land.”¹⁴ While couched in descriptive terms, it is hard to mistake Friedman’s normative view: that The People are – and *should* be – “the highest court in the land.”¹⁵

Despite differences in how explicitly they acknowledge their normative commitments, Kramer’s and Friedman’s normative visions of the relationship between The People and the Court seem closely aligned.

⁸ FRIEDMAN, *supra* note 1, at 382 (emphasis added).

⁹ *See id.* (noting the long-standing distinction between “the passions of the moment and some deeper sense of the popular will”).

¹⁰ *See id.*

¹¹ 323 U.S. 214 (1944).

¹² Suzanna Sherry, *Why We Need More Judicial Activism* in CONSTITUTIONALISM, EXECUTIVE POWER, AND POPULAR ENLIGHTENMENT 14 (Giorgi Areshidze, Paul Carrese, and Suzanna Sherry eds., forthcoming 2014), available at <http://ssrn.com/abstract=2213372> (including *Korematsu* as one of the six most “universally condemned [Supreme Court] cases”).

¹³ FRIEDMAN, *supra* note 1, at 382; *see also id.* (“Decisions like *Korematsu* indicate the difficulty with putting one’s faith in the notion that judges will be able to perceive the difference between what is momentarily popular opinion and what is ultimately right . . .”).

¹⁴ *Id.* at 385.

¹⁵ *Id.*

B. Descriptive Conflict

Because both authors focus on the shifting degree to which The People – rather than the Court – direct constitutional interpretation, we might expect similar descriptive narratives. But Kramer views The People’s influence as sharply declining whereas Friedman sees a steady increase. Even more striking, Kramer views the Court as the current supreme arbiter of constitutional meaning – in practice if not by right – and Friedman views the Court as firmly under The People’s collective thumb. Kramer sees popular abdication; Friedman sees popular conquest.

Kramer cites numerous examples of The People controlling constitutional interpretation from early American history, including the 1795 protests against the Jay Treaty of New York¹⁶ and the constitutional debates preceding the election of 1800.¹⁷ He argues that the colonists, framers, and early Americans all viewed constitutional meaning as subject to popular interpretation.¹⁸ Since then, however, The People have steadily abdicated their authority to the courts.¹⁹

Friedman views the shift in control over constitutional interpretation as flowing in the other direction. In his view, the period immediately following independence saw the “remarkably quick acceptance of judicial review.”²⁰ But before long, The People “saw the danger of unaccountable judges.”²¹ Though sometimes marked by ebbs and flows, this recognition initiated the shift toward constitutional interpretation by The People.²²

More notable than their conflicting views of the shift’s direction, Kramer and Friedman also fundamentally disagree about the current

¹⁶ KRAMER, *supra* note 2, at 4.

¹⁷ *Id.* at 49.

¹⁸ *See generally id.* at 4-21.

¹⁹ *See id.* at 7 (“Time and again, the Founding generation and its successors responded to evolving social, political, and cultural conditions by improvising institutional and intellectual solutions to preserve popular control over the course of constitutional law – a kind of control we seem to have lost, or surrendered, today.”).

²⁰ FRIEDMAN, *supra* note 1, at 12.

²¹ *See id.*

²² *See id.* at 12-16 (surveying the “four critical periods in the American people’s changing relationship with judicial review and the Supreme Court”).

balance of power. Kramer explicitly suggests that “[w]e the People have – apparently of our own volition – handed control of our fundamental law over to” the courts.²³ He then frames much of the book as urging The People to reclaim “the full responsibilities of self-government.”²⁴ Friedman, on the other hand, dedicates the bulk of his six-hundred-page book to demonstrating that The People’s will has constrained and still constrains the Court’s behavior. He acknowledges that the Court “exercises more power than it once did” but quickly argues that it does so with the permission – and under the watchful eye – of The People.²⁵

Perhaps most strikingly, Kramer’s and Friedman’s views of how The People came to occupy their current roles directly contradict each other. Kramer cites The People’s volitional abdication of interpretive authority as the cause of the current balance of power.²⁶ Friedman depicts a more rocky transition of power. He notes “the fragility of [the Court’s] position”²⁷ and suggests that The People’s supremacy was hard won by “disciplining the Court,” sometimes causing “violent upheaval.”²⁸ Indeed, Friedman argues that such “violence . . . is no longer necessary” because the Court now “understands” its place.²⁹ When the Court merely contemplates overstepping its delegated authority, The People need only “raise a finger” for “the Court . . . to get the message” and shrink back into its corner to avoid “retribution.”³⁰ Friedman suggests that the relationship between The People and the Court is like “any other marriage,”³¹ but such a – seemingly abusive – “marriage” is a far cry from Kramer’s characterization of the Court as aggressive and The People as acquiescent.

²³ KRAMER, *supra* note 2, at 233-34 (internal quotation marks omitted).

²⁴ *See id.* at 247.

²⁵ *See* FRIEDMAN, *supra* note 1, at 12, 14, 376 (“The Court has [more] power only because, over time, the American people have decided to cede it to the justices.”).

²⁶ KRAMER, *supra* note 2, at 233-34.

²⁷ FRIEDMAN, *supra* note 1, at 14.

²⁸ *Id.* at 376.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

C. Prescriptive Divergence

Unsurprisingly, Kramer prescribes far more drastic action than Friedman finds necessary. Given their common normative ideal, their conflicting narratives result in conflicting prescriptions. Kramer urges The People to seize back their abdicated role whereas Friedman seems to support staying the course of popular control.³² Although Kramer's book can fairly be characterized as a call to arms urging The People to "assume once again the full responsibilities of self-government,"³³ Friedman can afford more complacency. To the extent that The People have, in Friedman's view, already achieved his normative ideal, staying the course makes perfect sense. Perhaps his contentment with the current state of affairs also helps to explain his willingness to leave his normative view implied.³⁴ Regardless, if "we" – The People – already constitute "the highest court in the land," foregoing a forceful call to arms seems quite reasonable.³⁵

III.

COMMON SHORTCOMINGS: EXCESSIVE VAGUENESS
AND INSUFFICIENT CONSTRAINTS

Comprehensive theories of judicial review often suffer from excessive vagueness and insufficient constraints. Kramer's and Friedman's books are no exceptions. Specifically, neither Kramer nor Friedman sufficiently defines *who* constitutes The People and both fail to adequately describe what, if anything, constrains the substance of popular will. These two critiques could be interpreted to overlap. For example, a higher standard for who constitutes The People would necessarily constrain popular will. As explained be-

³² Compare KRAMER, *supra* note 2, at 8 ("[I]n charting how the[] [Founding Fathers tried] to explain and preserve the active sovereignty of the people over the Constitution[[]], perhaps, we may find some reasons to reawaken our own seemingly deadened sensibilities in this respect.") with FRIEDMAN, *supra* note 1, at 376 ("Now that the justices and the public understand how things work, the system tends to rest in a relatively quiet equilibrium. . . . [T]here is every indication the American people and the justices want this [relationship] to [continue].").

³³ *Id.* at 247.

³⁴ See *supra* Part II.A.

³⁵ FRIEDMAN, *supra* note 1, at 385.

low,³⁶ I use “constraint” narrowly to reflect limits on the *substance* of The People’s constitutional interpretations.

A. Who Are The People?

A theory that subjects the Supreme Court’s interpretive authority to the will of The People would seem to depend upon a clear definition of exactly who constitutes The People. And yet, Kramer and Friedman both fail to provide one. One way to approach the question is to divide it into two: who can be counted as among The People and how do we know when a group is speaking as (or for) The People?

1. Who Can Be Counted As Among The People?

Although this inquiry may seem unnecessary, Kramer highlights the question by discussing at some length the constitutional interpretation performed by pre-Declaration colonists.³⁷ Daniel Hulsebosch further suggests that “Kramer’s ordinary people are not necessarily citizens” and that immigrants of questionable political status have constituted an “enduring problem[]” for definitions of The People since the 1790s.³⁸ Friedman, meanwhile, avoids introducing similar doubts by leaving the question entirely open. He begins his narrative after the Declaration and does not seem to contemplate non-citizens getting a say.³⁹ Nevertheless, to the extent that Friedman fails to address who can count as The People, he fails to resolve this ambiguity.

2. How Do We Know When a Group is Speaking as (or For) The People?

Kramer struggles to illustrate exactly when and how The People speak. He cites examples of The People speaking through their elected officials, but not every act by the President or Congress is

³⁶ See *infra* Part III.B.

³⁷ See KRAMER, *supra* note 2, at 4-21.

³⁸ Hulsebosch, *supra* note 7, at 692.

³⁹ See FRIEDMAN, *supra* note 1, at 12 (beginning historical analysis “from the time of independence”).

necessarily endorsed by The People.⁴⁰ Kramer offers no mechanism to distinguish which actions by elected officials represent The People and which do not. Ironically, his omission empowers the Court to decide.

If efforts by the Congress and the President prove troublesome, we can turn to Kramer's discussion of The People acting even more directly. Citing precedent from Grotius, Pufendorf, Locke, and the Boston Tea Party, Kramer commends "mob or crowd" action as a "respectabl[e]" and "direct expression of popular sovereignty."⁴¹ As an example of this expression, Kramer highlights the 1795 protests against the Jay Treaty in New York City. Alexander Hamilton led a group of "hastily assembled" Federalist merchants to disrupt a 5,000-person protest against the treaty. Hamilton argued that whether to ratify the treaty was, constitutionally, a question for the Senate and the President.⁴² The protesters "hiss[ed,] cough[ed,] and hoot[ed,]" eventually "explod[ing] in fury" and driving Hamilton and his supporters away, allegedly throwing a rock or two for good measure.⁴³ How should Kramer's ideal Supreme Court interpret such an episode? Should it make a difference if, instead of merely 5,000 protestors, there had been "similar scenes . . . repeated around the country"?⁴⁴ How many protestors would be enough to justify the Court inferring the popular will? Should the Court con-

⁴⁰ Kramer cites the 1800 election of Thomas Jefferson as an exercise of The People's "interpretive authority." Because "the great controversies of the 1790s had been *constitutional* controversies," he argues, "the fiercely contested election of 1800" served as "an extended national referendum on whose views of the Constitution were correct." KRAMER, *supra* note 2, at 49. But unless we conclude that *all* of Jefferson's constitutional interpretations represented The People's will, a court would have to decide which issues were contested with sufficient ferocity. Kramer's example thus ironically empowers the Court to decide which constitutional interpretations earned The People's endorsement. This method of resolving constitutional disputes superficially resembles Bruce Ackerman's idea of constitutional moments, with a key difference. Whereas Ackerman's framework incorporates multiple factors in the attempt to constrain the inquiry, Kramer provides none at all. See *generally* 1 BRUCE ACKERMAN, WE THE PEOPLE (1991).

⁴¹ See, e.g., KRAMER, *supra* note 2, at 27 (internal quotation marks omitted).

⁴² See *id.* at 4.

⁴³ *Id.*

⁴⁴ *Id.*

sider the centrality of the constitutional question at issue?⁴⁵

Friedman is equally guilty of proposing an inadequate method to determine when The People have spoken.⁴⁶ If Friedman wants the Supreme Court to subject its constitutional interpretations to the will of The People, he should provide some mechanism that allows the Court to do so. To ascertain the popular will, Friedman variously looks to opinion polls,⁴⁷ opinion editorials,⁴⁸ political commentators,⁴⁹ and newspaper accounts of outraged letters to the Court.⁵⁰ If we rely on Friedman's suggested indications of The People's will, a judge's opportunity to scan the crowd for friendly faces seems even greater in the quest for popular will than in the search through legislative history for definitive statutory meaning.⁵¹

Compounding this uncertainty, Friedman uses the term "majoritarian" throughout his book, but never defines it. Can a plurality constitute the popular will? The barest of majorities? What about a majority of the popularly elected House of Representatives? The less proportionate Senate? The President? Like Kramer, Friedman never tells us. He entrusts the authority to interpret the Constitution to The People, but then never tells us how to know when a group actually speaks for them.

Friedman introduces even more uncertainty than Kramer does by suggesting that the Court should distinguish between the "permanent popular will" and the "popular opinion at the moment."⁵² Friedman acknowledges the "problem" that judges might not "be able to perceive the difference" but then argues that "[t]he magic of

⁴⁵ For a modern example raising these sorts of questions, see Powe, *supra* note 5, at 884 (citing protests against the World Trade Organization).

⁴⁶ In a later work, Professor Friedman appears to recognize the problem, but does not satisfactorily resolve it. See Barry Friedman, *The Will of the People and the Process of Constitutional Change*, 78 GEO. WASH. L. REV. 1232, 1240-44 (2010).

⁴⁷ See, e.g., FRIEDMAN, *supra* note 1, at 373.

⁴⁸ See, e.g., *id.* at 336.

⁴⁹ See, e.g., *id.*

⁵⁰ See, e.g., *id.*

⁵¹ Cf. Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing legislative history is . . . akin to 'looking over a crowd and picking out your friends.'").

⁵² FRIEDMAN, *supra* note 1, at 382.

... [this] system ... is that it works whether the judges rule properly or not – precisely because everything important happens after they render their decision.”⁵³ The Court can get a case wrong, he explains, reflect upon the public reaction, and then correct its course as needed.⁵⁴ To illustrate this “magic,” Friedman cites *Roe v. Wade*.⁵⁵ There, he argues, the Court accurately predicted the popular opinion *trend* but the decision still only received “plurality support in the polls.”⁵⁶ Thus, when *Planned Parenthood v. Casey*⁵⁷ came along, the Court had the opportunity to converge on a position that “was remarkably in line with popular opinion.”⁵⁸

Friedman’s assurances, however, ring hollow for two primary reasons. First, public opinion can prove fickle and difficult to predict. Abortion seems a likely candidate for an issue on which public opinion would remain steady. Yet, a 2012 Pew study concluded that support for legalized abortion fell 10% between 1995 and 2001.⁵⁹ From 2004 to 2013, opposition to gay marriage fell 17%,⁶⁰ while support for gun control fell 21% between 2000 and 2012.⁶¹ In all three cases, the shift reversed the majority and minority positions. Are these trends or fluctuations? The Court would be hard pressed to decide. Indeed, the support for legalized abortion had rebounded 4% by 2012, with a majority again supporting “legalized abortion in all or most cases.”⁶²

Second, Friedman’s safety mechanism creates an inverse relationship between the certainty the Court reaches before acting and the speed with which it can correct errors. Distinguishing between permanent and momentary public opinion – that is, between trends and fluctuations – seems to require a substantial waiting period be-

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 410 U.S. 113 (1973).

⁵⁶ FRIEDMAN, *supra* note 1, at 382.

⁵⁷ 505 U.S. 833 (1992).

⁵⁸ FRIEDMAN, *supra* note 1, at 382.

⁵⁹ *Pew Research: Gun rights, abortion, gay marriage views over time*, JOURNALIST’S RESOURCE (May 16, 2012), <http://perma.cc/8HES-R3RK>.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

fore a Court feels confident in overturning a previous holding. Doing so, however, prolongs the error. Returning to Friedman's example, nineteen years passed between *Roe* and *Casey*. Fifty-eight years passed between *Plessy v. Ferguson*⁶³ and *Brown v. Board of Education*.⁶⁴

B. What Constrains The People's Constitutional Interpretations?

Both Kramer and Friedman base their theories on the idea that the popular will limits – or even dictates – the behavior of the Supreme Court. But neither author identifies what – if anything – constrains the assortment of constitutional interpretations available to The People. Are they limited to choosing between *reasonable* constructions of an ambiguous provision? If not, does their ability to embrace *unreasonable* constructions essentially replace Article 5 as the mechanism by which we actually *amend* – rather than merely interpret – the Constitution?

Such an amendment-by-popular-acclamation seems within Friedman's grandest descriptions of The People's authority – “[W]e are the highest court in the land”⁶⁵ – but it seems to exceed his more modest explanations that “[t]he people . . . have had the ability all along to assert pressure on the judges.”⁶⁶ The former seems similar in nature to Bruce Ackerman's theory that sufficiently salient “constitutional moments” can *amend* the constitution.⁶⁷ As I noted previously, Ackerman's framework at least maintains a relatively high standard for when such a moment exists.⁶⁸ Neither Kramer nor Friedman provides any such standard.

If The People are limited to choosing among reasonable constructions of ambiguous constitutional provisions, who decides which constructions are reasonable? If The People decide, we are back to amendments-by-acclamation. If the Court decides, then it is hard to determine how exactly The People “are the highest court in

⁶³ 163 U.S. 537 (1896).

⁶⁴ 347 U.S. 483 (1954).

⁶⁵ FRIEDMAN, *supra* note 1, at 385.

⁶⁶ *Id.* at 370.

⁶⁷ See ACKERMAN, *supra* note 40.

⁶⁸ See *id.*

the land.”⁶⁹ Kramer never addresses the question at all. Friedman seems to avoid directly confronting it by describing the interaction between The People and the Court as a “dialogic process” of “popular response” and “judicial re-decision.”⁷⁰ But truly resolving the quandary would require a clear delineation of authority. And if the resolution allows the Court to play a role, even one that allows for a popular outrage forcing a judicial reversal, that seems at odds with Friedman’s basic and explicit premise that “[u]ltimately, it is the people (and the people alone) who must decide what the Constitution means.”⁷¹

Neither Friedman nor Kramer sufficiently specifies how the relationship between the Court and The People should maintain (Friedman) or revive (Kramer) The People’s authority. But each also suffers from a central flaw, to which I turn in the next section.

IV.

THE FLAWS AT THE CENTER OF THE ARGUMENTS

The final similarity between Kramer and Friedman is that each of their arguments contains a central flaw. Kramer’s argument suffers from an inherent contradiction: it simultaneously depends upon but fails to embrace faith in The People’s decisions. Friedman’s flaw lies in his basic description that the Court avoids substantial deviation from popular will because of The People’s threat of violent discipline: the parts of his description that are accurate are unsurprising and the parts that would be surprising he fails to persuasively demonstrate as accurate.

A. Kramer Doesn’t Trust The People After All

Kramer ties the outcome of the struggle between The People and the Court to a simple question: “[W]hether [Americans] share [a] lack of faith in themselves and their fellow citizens.”⁷² If The

⁶⁹ FRIEDMAN, *supra* note 1, at 385.

⁷⁰ *Id.* at 382.

⁷¹ *Id.* at 367.

⁷² KRAMER, *supra* note 2, at 247.

People *lack* faith in each other, he writes, they will “hand[] their Constitution over to the” courts.⁷³ But if they *have* faith in each other, they will “assume once again the full responsibilities of self-government.”⁷⁴ Kramer acknowledges that “the choice is ours to make, necessarily and unavoidably.”⁷⁵ Neither the Constitution, history, nor tradition “make[s] it for us.”⁷⁶ In advocating his popular constitutionalism, Kramer claims to possess this faith in The People. But he also seems to acknowledge that The People have already chosen to cede their authority to the courts.⁷⁷ Kramer argues that The People should have faith in each other and abandon this decision. Perhaps instead he should trust the choice they have already made to delegate some of their authority to the courts. He attributes the abdication to The People’s lack of faith in each other.⁷⁸ But his refusal to accept The People’s decision seems to reflect his own lack of faith instead.

Friedman avoids this mistake. He recognizes that “the Court has this [interpretive] power only because, over time, the American people have decided to cede it to the justices.”⁷⁹ But, unlike Kramer, Friedman treats that choice with respect, acknowledging that “there is every indication the American people” want “the relationship to continue.”⁸⁰

B. Friedman’s Fundamental Descriptive Conclusions Prove Either Unsurprising or Unconvincing

Friedman’s most notable descriptive conclusion is that the Court is majoritarian after all. While he concedes that the Court defies popular will on occasion, he argues that it does so rarely and not by

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *See id.* at 233-34 (“We the people have – apparently of our own volition – handed control of our fundamental law over to [the courts]”).

⁷⁸ *Id.* at 247.

⁷⁹ FRIEDMAN, *supra* note 1, at 14.

⁸⁰ *Id.* at 376.

much.⁸¹ Perhaps more notably, Friedman claims that the Court *tries* not to deviate from popular will to avoid The People's discipline.⁸² But both of these conclusions prove disappointing.

1. The Unsurprisingly Majoritarian Court

Friedman's argument that the Court acts in a manner *largely* consistent with the popular will introduces a few new details in the long scholarly debate about the counter-majoritarian difficulty. But his broader position – that the Court hews more closely to the popular will than some assume – is not entirely new.⁸³ More importantly, it should be completely unsurprising because of our constitutional structure.

Structurally, we should not be surprised that the Supreme Court largely acts within an “accept[able]” range of the popular will.⁸⁴ After all, the Justices are appointed by a popularly elected President and confirmed by at least half of the popularly elected Senate.⁸⁵ How far, then, should we expect Justices to stray from the will of those who popularly elected the President and the Senate?

The People also retain the Article V right to amend the Constitution, an additional structural constraint that limits the degree to which the Court can stray from popular will. This does not prevent all deviations, of course, but it imposes an outside limit. Friedman might respond that Article V requires such a high degree of consensus that amending the Constitution proves an unrealistic check on judicial defiance. To the extent this is true, Friedman should also consider the implications for his own theory. If the constitutionally

⁸¹ See *id.* at 381-84 (describing the “democratic constitution”).

⁸² See *id.* at 376 (“[I]t has taken the Court and the public some time to learn how their relationship might work; now that it is understood, violent upheaval is no longer necessary.”).

⁸³ See, e.g., Powe, *supra* note 5, at 890 (“If the Court were countermajoritarian, then popular constitutionalism would offer a functional solution, but given the realities of modern judicial review, that solution does not seem necessary.”).

⁸⁴ FRIEDMAN, *supra* note 1, at 13.

⁸⁵ Though Senate confirmation only requires fifty votes, overcoming a filibuster has long required sixty votes. The Senate recently removed the ability to filibuster all but Supreme Court nominees. See Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), <http://perma.cc/7LXD-AG2P>.

sanctioned process for amendments requires such a high degree of consensus, then extra-constitutional processes for “amendments” – including at least those of Ackerman, Kramer, and Friedman himself – seem increasingly suspect as legitimate exercises of constitutional authority.

2. The Unconvincing Description of the Court’s Motivation

Friedman also argues that the Court conforms to the popular will deliberately in order to avoid The People’s threats of “disciplin[e]” and “violent upheaval.”⁸⁶ Specifically, Friedman enumerates some of the “weapons [available] to control the justices”: Court packing, impeachment, and jurisdiction-stripping measures.⁸⁷ He quotes Lord Bryce to justify the Court’s surrender in the face of such threats: “To yield a little may be prudent, for the tree that cannot bend to the blast may be broken.”⁸⁸ Acknowledging that these weapons have fallen out of use, Friedman suggests that the memory of “violent upheaval” in years gone by continues to deter deviations from the popular will.⁸⁹ Friedman then moves on to his next argument, leaving the attentive reader to notice the lack of compelling evidence to support this naked assertion.

Of course it is not difficult to understand how past battles *could* create a more compliant Court, historical reexaminations notwithstanding.⁹⁰ But *could* falls far short of *did* or *does*. In addition to failing to support this conclusion, Friedman fails to seriously consider alternative explanations.

One possibility is that the disputes of today are structured in a way that makes counter-majoritarian decisions unlikely. Consider the survey data already discussed.⁹¹ Guns, gay marriage, and abor-

⁸⁶ *Id.* at 376.

⁸⁷ *Id.*

⁸⁸ *Id.* (citation omitted).

⁸⁹ *Id.*

⁹⁰ See generally BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF CONSTITUTIONAL REVOLUTION* (1998) (contending that FDR’s Court-packing plan did not really cause the Court’s “switch in time”). This uncertainty undermines the claim that such threats can coerce Court compliance with the popular will.

⁹¹ See *supra* text accompanying notes 59-62.

tion are three of the most contentious issues of the last few decades. Yet public opinion was so close on all three that a small shift over a short period reversed the majority and minority positions.

Friedman persuasively argues that the Court has largely served majoritarian ends. Given our governmental structure and confirmation process, however, this conclusion should not surprise us. Friedman then argues that the Court is motivated to pursue majoritarian ends in order to avoid threats from The People. This conclusion proves unconvincing: Friedman lacks evidence and fails to consider alternative explanations.

V.

CONCLUSION

Despite a shared normative ideal – The People as the ultimate arbiters of constitutional meaning – Friedman’s and Kramer’s descriptive narratives and prescriptive recommendations sharply clash. Nevertheless, their theories both suffer from excessive vagueness and insufficient constraint in terms of how we define *who* constitutes The People, and how (or even whether) we constrain the substance of popular will. Upon close scrutiny, moreover, central flaws undermine both theories. Kramer’s claim of faith in The People seems overcome with doubt and Friedman’s most celebrated conclusions prove either unsurprising or unconvincing.

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