# WHO ARE "THE PEOPLE"?

ROMAN J. HOYOS*



*"Authority to speak for the People cannot be lightly presumed."*

-Bruce Ackerman

*"For us, the rule of law represents the sovereign people."*

-Paul Kahn

* Professor of Law, Southwestern Law School.

**Abstract**—The question animating this paper is one that is central to American constitutional history. Curiously, however, the concept "the people" has not been well-studied either by historians or constitutional and political theorists. This problem is not limited to scholarship; it is pervasive throughout our political culture. We constantly debate when the people have spoken, acted, decided, or willed without ever seriously asking who "the people" are. The "popular turn" in American constitutional theory (sometimes called "popular constitutionalism") has brought attention back to the concept in a serious way. But as their critics have pointed out, the key concept at the center of the popular turn has gone largely unexamined.

The aim of this paper is to examine "the people" as it has been conceptualized in the work of three major theorists of the popular turn—Bruce Ackerman, Akhil Amar, and Larry Kramer. Despite the claims of their critics, it is possible to put their works together in a way that unearths a working, if imprecise, concept of "the people." This becomes clear when we filter their work through that of German legal and political theorist Carl Schmitt. A controversial figure because of his relationship to the Nazi Party in the early 1930s, Schmitt nevertheless developed a radical democratic theory. A number of Schmitt's concepts can be seen in the work of Ackerman, Amar and Kramer, despite the fact that only Ackerman has demonstrated any awareness of Schmitt's work. These concepts—the three moments of democracy, sovereignty, sovereign dictatorship, the constituent power, and acclamation—can help bring greater conceptual clarity to the popular turn. In particular, they help to account for the impression given by the popular turn that the people are seemingly everywhere and nowhere.

One of Schmitt's key interventions was to disaggregate the people in time. In other words, "the people" act differently depending upon the moment of democracy they occupy. In their sovereign moment, outside and above the constituted order, the people exercise their sovereign authority to create a constitution, usually through the mechanism of the sovereign dictatorship (i.e. a constituent assembly). In the second moment, the people act within the constituted order through their legal "competencies" assigned by a constitution, usually through elections and representation. In the third moment of democracy, the people return to a place outside the constituted order, but next to it, rather than above. Here, the people rely upon their constituent power not to found a constitutional order but to develop new constitutional norms within it. They accomplish this through opinion-creating activities that occur in public, which Schmitt terms "acclamation." Although they have given some attention to the first moment,

the bulk of the popular turn has focused on the people in their third moment. And in some ways, they have developed and refined Schmitt's idea of acclamation further than he did himself. Read through a Schmittian lens, the popular turn gives us a way to read constitutional history that accounts both for origins and change over time, and provides the foundation for an historical, and perhaps democratic, jurisprudence.

## INTRODUCTION

The question that animates this paper is one that I have been pondering (or been dogged by) for some time now. It arises from a larger book project I'm working on that deals with the history of constitutional conventions in nineteenth-century America. What I've discovered is that this question—who are the people?[1]—is central to American constitutional history. Yet, as I've sought for ways to answer this question from a historical perspective I've discovered that the concept "the people" has been either under-theorized or under-conceptualized by historians as well as constitutional and political theorists. This problem is not limited to scholarship; it is pervasive throughout our political culture. We constantly debate when the people have spoken, acted, decided, or willed without ever seriously asking who "the people" are.

Making this inattention to such a constitutionally significant concept more curious, over the past couple of decades liberal constitutional theorists have begun to search for an organic theory of American constitutionalism and constitutional change rooted in "the people" as an alternative to judicial review or formal textual amendment.[2] As Bruce Ackerman explained in one of the earlier texts in this literature, "[r]ather than solving the counter-majoritarian difficulty, I mean to dis-solve it . . . ."[3] This move grew out of a dissatisfaction among liberal theorists with the conservative direction of the U.S. Supreme Court, especially as it began to appear that

---

[1] There is some debate over the proper conjugation of the verb "to be" as applied to the people. Political theorists suggest that "is" is more accurate than "are," as the people constitutes a single collectivity. *See* PAULINA OCHOA ESPEJO, THE TIME OF POPULAR SOVEREIGNTY: PROCESS AND THE DEMOCRATIC STATE 1 n.1 (2011). While I agree that that is correct when discussing a particular instantiation of the people, my aim here is to develop "the people" as a protean concept that can manifest itself in a variety of ways in a variety of times. *Cf.* MARGARET CANOVAN, THE PEOPLE 3 (2005) ("The vagueness of 'the people' is a mark of its political usefulness; captured at different times by many different political causes, it [can be] stretched to fit [] different shapes.").

[2] For some of the principal texts, *see, e.g.*, BRUCE A. ACKERMAN, WE THE PEOPLE, 3 vols. (1991-2014); AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION (2000); CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR (2008); LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); RICHARD PARKER, "HERE, THE PEOPLE RULE:" A CONSTITUTIONAL POPULIST MANIFESTO (1994); MARK V. TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Gary D. Rowe, *Constitutionalism in the Streets*, 78 S. CAL. L. REV. 401 (2005).

[3] Bruce A. Ackerman, *The Storrs Lecture: Discovering the Constitution*, 93 YALE L.J. 1013, 1016 (1984). Despite Ackerman's declared aim, his inquiry still seems to be largely governed by the counter-majoritarian difficulty.

judicial review was becoming judicial supremacy.[4] When combined with the fleeting prospect of the Court changing ideological direction, liberal theorists had to look outside the courts for answers.[5]

The search for alternatives dug up "the people" as a potentially rich source of power to combat the Supreme Court's final interpretive authority over constitutional issues.[6] Titles of key works like *We the People* and *The People Themselves* demonstrate the self-consciousness of the popular turn.[7] This organic approach to constitutional change required a turn to history; to root constitutional theory in political practice required a turn to the past.[8] While the term "popular constitutionalism" has become associated specifically with Larry Kramer's work, the basic idea of the people's central significance to American constitutionalism was evident in works by authors such as Ackerman and Amar over a decade earlier.[9] In fact, it is fair to date the popular turn to the late 1980s.

---

[4] *See, e.g.*, 3 ACKERMAN, *supra* note 2, at 27 (describing how the "New Deal-Civil Rights regime" is under "assault" by the Roberts Court). *See also* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 431 (2d ed. 2008) (describing that, in recent years, liberal theorists have turned away from the courts due to the Rehnquist and Roberts' Court's "hostility to significant social reform . . . .").

[5] I suspect, though I have not examined the issue, that Gerry Rosenberg's book may have had an impact on searching outside the courts for social change, too. Rosenberg argued, controversially, that courts by themselves were ineffective agents of social change. ROSENBERG, *supra* note 4, at 10 ("[C]ourts will generally not be effective producers of social reform for three reasons: the limited nature of constitutional rights, the lack of judicial independence, and the judiciary's inability to develop appropriate policies and its lack of powers of implementation."). My personal experience with the book, and with Gerry, inspired me to look beyond the courts in my own scholarship.

[6] As Doni Gewirtzman explained in 2005, "'the People' have become constitutional theory's hottest fashion." Doni Gewirtzman, *Glory Days: Popular Constitutionalism, Nostalgia, and the True Nature of Constitutional Change*, 93 GEO. L.J. 897, 898 (2005) ("'[T]he people' have become constitutional theory's hottest fashion.").

[7] 3 BRUCE ACKERMAN, *supra* note 2; KRAMER, *supra* note 2.

[8] Bruce A. Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453, 472–486. Indeed, Ackerman notes that the reason his project turned out to be so "time-consuming" is that he was "compelled to reexamine in detail many features of [] history that the present [] narrative consign[ed] to historical oblivion." *Id.* at 477.

[9] Historians had come to understand the ideological significance of "the people" even earlier. *See, e.g.*, GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787 (1998 ed.). Indeed, historian Edmund S. Morgan's book, which is on the historical foundations of popular sovereignty, appeared shortly before Ackerman's. EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (rev. ed. 1988). Morgan also reviewed Ackerman's book. Edmund S. Morgan, *The Fiction of the People*, The New York Review of Books, Apr. 23, 1992 (reviewing 1 BRUCE ACKERMAN, *supra* note 2), http://www.nybooks.com/articles/1992/04/23/the-fiction-of-the-people/.

However, it was Kramer's work that really seemed to set the hares a-runnin'.[10] Both the strengths and weaknesses of Kramer's work seemed to generate new scholarly avenues, both historical and theoretical. Subsequent work found that constitutional interpretation outside the courts seemed to be quite common, even if its more strictly legal effects did not seem quite clear at the beginning.[11] The deepening of the popular turn deepened the historical turn, and theorists and historians seemed to be talking to each other once again, at least at some level.[12]

Nevertheless, the key concept at the center of the popular turn has gone largely unexamined. This has been one of the chief sources of criticism of this literature.[13] And for good reason. As Doni Gewirtzman explains;

> The problem begins with "the People," a term popular constitutionalists invoke with some regularity, but are reluctant to define. To the extent there is a shared definition, it apparently refers to any participant in constitutional interpretation who is not a federal judge. At different times, "the People" inhabit the shoes of, among other entities, the electorate, prominent interest groups, identity-based social movements, the United States Congress, the President, political parties, state government institutions, or impact-litigation plaintiffs. The result is an academic construction where "the People" look a lot like Woody Allen's Zelig, inhabiting whatever incarnation is needed to conform with the theoretical backdrop.
>
> This lack of definition allows scholars to claim democratic legitimacy and invoke a populist legacy for their interpretive narratives without having to examine the nuts and bolts of how our political system actually operates. It also permits popular constitutionalists to project all sorts of images onto this blank slate, including nostalgic portrayals of popular civic engagement from days long past.[14]

---

[10] *See* KRAMER, *supra* note 2.

[11] *See, e.g.*, Matthew D. Adler, *Popular Constitutionalism and the Rule of Recognition: Whose Practices Ground U.S. Law?*, 100 NW. U. L. REV. 719, 750–65 (2006); Raphael Rajendra, *"The People" and "the People:" Disaggregating Citizen Law Making From Popular Constitutionalism*, 27 L. & INEQ. 53, 86 (2009) ("[D]ecisions about constitutional meaning are made dynamically by individuals constantly . . . . [I]t develops in the dialectic among social movements, or in the struggle for power between individual activities and government actors.").

[12] *See, e.g.*, Daniel W. Hamilton, *A Symposium on the People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006).

[13] *See, e.g.*, Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594 (2004) (reviewing KRAMER, *supra* note 2); Randy E. Barnett, *We the People: Each and Every One*, 123 YALE L.J. 2576 (2014); Lucas A. Powe, Jr., *Are "the People" Missing in Action (and Should Anyone Care?)*, 83 TEX. L. REV. 855, 891 (2005) (reviewing KRAMER, *supra* note 2) ("[I]t is surprising that Kramer never tells us who [the "People"] are and how to know whether those claiming to speak in the people's name . . . really are doing that.").

[14] Gewirtzman, *supra* note 6, at 900.

In short, constitutional theory "continues to treat the People as a vague abstraction."[15] As Larry Alexander and Lawrence Solum have pointed out, one of the problems that needs fleshing out "is the distinction between 'The People' and 'the people.'"[16] This is to say that there is a difference between the people as a sovereign (or "organic" in their terms) entity or power, and individuals simply acting together collectively.[17] This problem is not confined to popular constitutionalists; the identity, locus, nature, and scope of sovereign power has long been a central problem in Western religion and politics.[18] The popular constitutionalists have simply begun to focus our attention on a distinct manifestation of that problem. Nonetheless, given their interest in "the people," their failure to adequately conceptualize it is problematic.

The purpose of this article, then, is to begin to bring some conceptual coherence to "the people." First, I want to shed light on the ways in which modern constitutional theorists have thought about "the people" by focusing on three of the popular turn's most important theorists: Bruce Ackerman, Akhil Amar, and Larry Kramer. Each of these theorists operate with a different conception of the people. This is due, in part, to different purposes and methodologies. But their conceptions are not totally incompatible, and they are certainly not incoherent. Their claims and concepts do need to be reworked, however. I attempt to gain some conceptual clarity of "the people" by turning to the work of a controversial figure, Carl Schmitt. Schmitt was a conservative German legal and political theorist who briefly and infamously joined the Nazi Party in the mid-1930s.[19] Although considered a fascist by some, and a Nazi legal theorist by others (which he was for a time), most of his key works were written during Germany's Weimar Republic (1919-1933), when he demonstrated little interest in Nazism.[20] The extent to which these writings gave intellectual legitimacy to the rise of Nazism and the figure of the Fuhrer remains hotly debated. But it is not those aspects of his work that are of interest here.

---

[15] *Id.* at 937.

[16] *See* Alexander & Solum, *supra* note 13, at 1606.

[17] *Id.*

[18] For recent work on this point, *see*, *e.g.*, GENEVIEVE NOOTENS, POPULAR SOVEREIGNTY IN THE WEST: POLITIES, CONTENTIONS, AND IDEAS (2013); SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT, AND FUTURE OF A CONTESTED CONCEPT (Hent Kalmo & Quentin Skinner eds., 2010).

[19] Manfred H. Wiegandt, *The Alleged Unaccountability of the Academic: A Biographical Sketch of Carl Schmitt*, 16 CARDOZO L. REV. 1569, 1587 (1995). For a more recent and detailed account of Schmitt's life, *see* REINHARD MEHRING, CARL SCHMITT: A BIOGRAPHY (Daniel Steuer trans., Polity Press 2014) (2009).

[20] Wiegandt, *supra* note 19, at 1579–82.

More importantly, Schmitt's works are widely recognized as some of the most trenchant critiques of twentieth-century liberalism.[21] And despite his conservatism and doubt about his democratic bona fides, Schmitt developed one of the most interesting juridical theories of democracy.[22]

Schmitt's work is almost entirely unknown to the popular turn. Interestingly, however, Schmitt does make an appearance in Ackerman's *We the People*.[23] Ackerman cites the German edition of Schmitt's *Constitutional Theory* (*Verfassungslehre*) in an early footnote in volume 2 in order to disassociate his work from Schmitt's work.[24] But the footnote itself suggests that Ackerman himself sees some similarity between the projects. My claim here, though, is not about influence. Building out from this footnote, I want to use Schmitt's work to highlight some of the strengths and weaknesses of the popular turn, as well as attempt to knit together a more coherent account of "the people" that can be constructed from the works of Ackerman, Amar, and Kramer.

Schmitt worked on a similar set of questions, and provides a conceptual framework for working through our question about who the people are.[25] Particularly useful are his theories of sovereignty, sovereign dictatorship, constituent power, and acclamation—tying these ideas together is his theory of democracy, in which he places the people in time.[26] The people act differently depending upon which "moment of democracy" they are in.[27] We will see that the popular turn has only been occasionally interested in the people in their sovereign moment. They have, however, been extremely interested in the third moment where the people act through acclamation, which is a very broad conception of "public opinion."[28] Understanding Schmitt's concepts will go a long way to explaining the people as conceived in the popular turn, and, more importantly, how the people have acted in American history.

---

[21] Emanuel Richter, *The Critic of Liberalism: Carl Schmitt: The Defective Guidance for the Critique of Political Liberalism*, 21 CARDOZO L. REV. 1619, 1619 (2000) (describing how Schmitt's critique of "liberalism led to a broad reception among defenders and opponents of liberal thought from various ideological camps.").

[22] ANDREAS KALYVAS, DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY: MAX WEBER, CARL SCHMITT, AND HANNAH ARENDT 95 (2008).

[23] 2 ACKERMAN, *supra* note 2, at 425 n.4.

[24] *Id.*

[25] *See* Andreas Kalyvas, *Carl Schmitt and the Three Moments of Democracy*, 21 CARDOZO L. REV. 1525 (2000).

[26] *Id.* at 1536–38.

[27] *Id.* at 1529–30.

[28] CARL SCHMITT, CONSTITUTIONAL THEORY 278 (Jeffery Seitzer ed. & trans., 2008) (1928).

Viewing the popular turn through a Schmittian lens demonstrates that "the people" is a protean concept.[29] But this is not fatal. That the people can act in different ways means that we must be more attentive to the element of time.[30] This requires that scholars be more explicit about whether the people are constituting, governing, or amending. That the people can act directly or through representative institutions does not undermine the juridical utility of the concept.[31] In fact, conceptually and juridically, the people are at their strongest when it is possible for them to act in each of the moments.[32] When the possibility of acting in any one moment is diminished, the people's authority loses its sway.[33]

## I. THE PEOPLE AND THE POPULAR TURN

To a certain extent the popular turn and their critics are speaking past each other. Scholars writing within the popular turn deploy "the people" in ways that their critics do not and have not attempted to understand.[34] But there are differences even within the popular turn itself. This is due in part because the scholars are not all writing in conversation with one another; each has his own purposes for turning to the people. By using the works of Bruce Ackerman, Akhil Amar, and Larry Kramer to tease out these differences, I hope to at least begin to find some theoretical purchase on the concept. This concept will hopefully generate further inquiry.

### *A. Who are the People?: The Other Question*

Perhaps the most common way to think about the people, and the one critics often throwback to the popular turn, is to ask who are or should be considered in the calculus that makes up "the people."[35] The question is one of inclusion, and leads to descriptive accounts of the people, which

---

[29] *See infra* Section II.E.

[30] ESPEJO, *supra* note 1, at 52.

[31] *Id.* at 131.

[32] Kalyvas, *supra* note 25, at 1561–62.

[33] This is part of Schmitt's critique of liberalism. *Compare* SCHMITT, *supra* note 28 *with* CARL SCHMITT, POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY (George Schwab trans., 1985) (1922).

[34] *See, e.g.*, Barnett, *supra* note 13; Powe, *supra* note 13; Alexander & Solum, *supra* note 13.

[35] *See, e.g.*, ROBERT A. DAHL, DEMOCRACY AND ITS CRITICS 4 (1989) ("Within 'a people' only a limited subset of persons is entitled to participate in governing. These constitute *the* people in another sense. More properly, they are the citizens or citizen body, or as I shall often say here, the *demos*. Who ought to be a member of the demos? This question has always been troublesome to the advocates of democracy"); JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION (1991).

focus on "a collection of real individuals," or "how real, live Americans think and behave."[36] On a basic level, a descriptive conception is inescapable. Both exponents of the popular turn and their critics start at this point. For "the people" to operate as a believable concept, actual people have to act in ways that appear to be authoritative. This concept is the fact that Edmund Morgan told us is crucial to the fiction of popular sovereignty.[37]

Descriptive accounts focus on questions about which people are included within "the people." Excluding people from the status of citizenship has long been a source of criticism of democratic theory.[38] Significant numbers of people have always been excluded from citizenship and the franchise on racial, sex, gender, age, and various other status grounds.[39] This exclusion is, I think, one of liberalism's influences on democracy: the focus on the individual has in turn focused our attention on which people make up "the people." In some ways this focus has bolstered the democracy impulse; as membership within the polity can never be complete we must, to be good democrats, continuously re-examine our democratic principles. Thus, this "quest for inclusion" has been a central dynamic in American history.[40] But this also points toward the impossibility of democracy. As Paulina Ochoa Espejo has explained, "[e]very time you try to frame an actual populace according to the traditional conception of a unified people, the populace has already changed. How can you legitimize a democratic foundation if you cannot show that the people are or have ever been unified?"[41] In other words, purely descriptive accounts can never account fully for "the people."[42]

Moreover, as descriptive accounts of "the people" go, popular constitutionalism has usually failed to impress. Actual people, at least in modern times, are apathetic and disinterested at best when it comes to constitutional matters. Participation rates in politics are low.[43] When judged by how people actually engage politics, the potential for a popular constitutionalism seems fanciful. Doni Gewirtzman, for instance, has summarized

---

[36] Gerwirtzman *supra* note 6, at 901.

[37] MORGAN, *supra* note 9.

[38] *See, e.g.,* WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 19 (2015); DAHL, *supra* note 35, at 123–28.

[39] DAHL, *supra* note 35, at 363.

[40] SHKLAR, *supra* note 35.

[41] ESPEJO, *supra* note 1, at 2.

[42] Or for sovereignty more generally. HENT KALMO & QUENTIN SKINNER, SOVEREIGNTY IN FRAGMENTS: THE PAST, PRESENT AND FUTURE OF A CONTESTED CONCEPT 8 (2010).

[43] Michael Serota, *Popular Constitutional Interpretation*, 44 CONN. L. REV. 1637, 1664 (2012).

the literature on political participation and found that ordinary people participate at increasingly lower rates, and that they lack a basic knowledge of constitutional questions.[44] Some studies indicate that ordinary people doubt their ability to make decisions. This is not surprising giving the level of legal technicalities that govern a modern constitutionalism driven by legal doctrines.[45] Given these problems of political participation, "the people" appear to be *merely* a fiction.[46]

The critiques of descriptive accounts of the people have thus raised two main problems: capacity and participation.[47] If ordinary people neither participate nor believe in their ability to understand—much less make constitutional decisions—then we may rightly question whether we want to place upon them the responsibility of sovereignty. On the other hand, if only a small portion of the individuals within a polity or jurisdiction participate in decision-making processes, can we really make claims that such a policy is "democratic"? While these are serious questions for liberal democratic theory, they can obscure other important questions about the people and popular sovereignty.

The "who" of democracy has long been open and contested. Democracy has rarely been understood simply as rule by all. It has been understood as the propertied, the poor, the uncounted, the many, among others.[48] While more people participating make claims that "the people" have acted increasingly believable, purely descriptive accounts cannot get us all the way to *the* people. Something more is required to account for "the gap between the scattered individuals and the ideal people."[49] Any attempt to answer our question must rely to some extent on the actions and activities of actual people. But there must be some way to determine when political action becomes an authoritative act of "the people." This is what the popular turn ultimately seeks to understand, even if its practitioners have not always been clear about it.

---

[44] Gewirtzman, *supra* note 6, at 925–28.

[45] *Id.* at 924–25. *See also* Todd E. Pettys, *Popular Constitutionalism and Relaxing the Dead Hand: Can the People be Trusted?*, 86 WASH. U. L. REV. 313 (2008); Serota, *supra* note 43. There is evidence that people have not always doubted their ability to make decisions. *See, e.g.*, Marsha L. Baum & Christian G. Fritz, *American Constitution-Making: The Neglected State Constitutional Sources*, 27 HASTINGS CON. L. Q. 199 (2000). There is also some evidence that constitutions fail to impress; that is that constitutions do not adequately express the will of the people. Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133 (2013).

[46] *See* Alexander & Solum, *supra* note 13, at 1621.

[47] Pettys, *supra* note 45, at 324–29; Serota, *supra* note 43, at 1664.

[48] BROWN, *supra* note 38 (explaining various interpretations of what democracy means).

[49] ESPEJO, *supra* note 1, at 2.

### *B. Ackerman and the Procedural People*

Unlike Amar and Kramer, Ackerman is principally concerned with the *Brown* problem, or to put in Alexander Bickel's terms, the "counter-majoritarian difficulty."[50] Rather than rely upon a search for legal principles to explain *Brown* (and the problem of judicial review more broadly), Ackerman instead turns to politics. Through this turn to politics, Ackerman seeks to "dis-solve" the counter-majoritarian difficulty by constructing a two-track process of constitutional development consisting of periods of normal politics and constitutional moments.[51] This is our first glimpse at the move that the popular turn seeks to make. In periods of normal politics, constitutional *law* governs.[52] The function of judicial review is to preserve the constitutional principles generated in the era's constitutional moment. In preserving these principles, judicial review plays a democratic role in preserving the choices made by the people. In contrast, constitutional moments, which occur outside the confines of law, create the "regimes" in which normal politics takes place.[53] This "regime-centric" approach attempts to displace the problem of judicial review by giving the courts a role during the normal politics period, but it places the burden of constitutional change within a constitutional order on "the people."[54]

It is in the constitutional moment that the people emerge in Ackerman's account. Looking back on American history with the eye of a political scientist, Ackerman has identified a general process by which the people have exercised their power to make constitutional decisions and effect constitutional change in constitutional moments.[55] The process of the people's coming into existence is a difficult one. "Decisions by the

---

[50] Ackerman, *supra* note 8, at 527–36 (1989). Ackerman places *Brown v. Board of Education*, 347 U.S. 483 (1954) at the cusp of two constitutional moments. First, it is "a compelling synthetic argument explaining why *Plessy* had become inconsistent with the foundational principles of the new constitutional order established in the aftermath of the struggle between the New Deal Presidency and the Old Court." *Id.* at 531. Nevertheless:

> while the presidency or the Congress had initiated the previous rounds of constitutional politics, this time the Supreme Court initially seized the initiative. *Brown v. Board of Education* put the issue of racial equality at the very center of a great generational debate, forcing President Dwight Eisenhower and Congress to confront questions they happily would have ignored.

3 ACKERMAN, *supra* note 2, at 5 (2014).

[51] Ackerman, *supra* note 3, at 1016.

[52] 3 ACKERMAN, *supra* note 2, at 43.

[53] Ackerman, *supra* note 3, at 1013–14.

[54] *Id.*

[55] 1 ACKERMAN, *supra* note 2, at 307.

People occur rarely, and under special constitutional conditions," writes Ackerman.[56]

> Before gaining the authority make supreme law in the name of the People, a movement's political partisans must, first, convince an extraordinary number of their fellow citizens to take their proposed initiative with a seriousness that they do not normally accord to politics; second, they must allow their opponents a fair opportunity to organize their own forces; third, they must convince a majority of their fellow Americans to support their initiative as its merits are discussed, time and again, in the deliberative fora provided for "higher lawmaking." It is only then that a political movement earns the enhanced legitimacy the dualist Constitution accords to decisions made by the People.[57]

Importantly, this process of constitutional change occurs outside of the formal requirements of Article V.

The well-known process of creating a constitutional moment involves five steps: signaling, proposing, triggering, ratifying, and consolidating.[58] The signaling occurs in a constitutional impasse; that is, where political leaders cannot agree on a matter of grave constitutional significance and each side offers different proposed solutions to the problems.[59] This impasse gives heightened meaning to a subsequent triggering national election, giving others the opportunity to choose between the competing sides. The victor is then given a mandate to pursue its policies, which challenge the principles of the existing constitutional order.[60] Once the voters ratify these decisions in a subsequent national election, the "dissenting institutions" must decide whether to continue to dissent or to acquiesce to the new principles.[61] Once they acquiesce a new regime is consolidated, and the constitutional order is governed by new principles that are laid down either in the form of textual changes to the constitution, Supreme Court opinions, or statutes. This process ultimately "culminates in the proclamation of higher law in the name of We the People."[62]

Ackerman has identified four constitutional moments in American history: the Founding, Reconstruction, the New Deal, and the Civil Rights

---

[56] *Id.*

[57] *Id* at 6.

[58] 2 ACKERMAN, *supra* note 2, at 65–68, 85–88.

[59] *Id.* at 24–26; 1 ACKERMAN, *supra* note 2, at 48–49.

[60] 2 ACKERMAN, *supra* note 2, at 24.

[61] *Id.*

[62] 1 ACKERMAN, *supra* note 2, at 7.

Revolution.[63] Led by the Federalists during the Founding, the Republicans in Reconstruction, the Democrats in the New Deal, and the Supreme Court in the Civil Rights Revolution, American leaders initiated a process that culminated in new understandings of the Federal Constitution.[64] The Founding was the only moment that produced an entirely new constitution. In the others, formal amendments, legislation, or both came to define the new constitutional order.

While most readings of Ackerman focus on his dualism theory, his regime approach is at least as important.[65] The constitutional moment is a break in constitutional time that creates a new constitutional regime on the other side.[66] Not all regimes are created in the same way. For instance, they have been initiated by Congress, the President, and the Supreme Court, and they have produced different principles in different types of texts.[67] By focusing on regimes, Ackerman attempts to elaborate the creation of a new normative order that is created by the people acting within the constitutional order (and occasionally outside of it).[68] This move attempts to displace the Supreme Court's monopoly on constitutional development. This is clearest in the third volume of *We the People*, where Ackerman attempts to create a new constitutional canon, one that includes congressional statutes along with Court opinions and constitutional amendments.[69] In this moment, *Brown* is not the final word, but a gambit that signals, proposes, and triggers further action. Congress, Ackerman argues, followed upon this gambit by passing a series of civil and voting rights acts.[70] What made this legislation particularly significant is that it rejected the Supreme Court's state action interpretation of the Equal Protection Clause that the Supreme Court had used to limit the scope of that

---

[63] For a much different construction of the civil rights movement, *see* KATHERINE IRENE PETTUS, FELONY DISENFRANCHISEMENT IN AMERICA: HISTORICAL ORIGINS, INSTITUTIONAL RACISM, AND MODERN CONSEQUENCES (2d ed. 2013).

[64] *See generally* 1 ACKERMAN, *supra* note 2 (discussing the evolution of understanding the Federal Constitution).

[65] 2 ACKERMAN, *supra* note 2, at 8–10.

[66] *Id.* at 65–68, 85–88.

[67] Others have conceptualized the courts in popular constitutionalist terms. *See*, *e.g.*, Ori Aronson, *Inferiorizing Judicial Review: Popular Constitutionalism in Trial Courts*, 43 U. MICH. J. L. REF. 971 (2010); Emily Zackin, *Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to Courts*, 42 L. & SOC'Y REV. 367 (2008). *See also* Paul Frymer, *Distinguishing Formal From Institutional Democracy*, 65 MD. L. REV. 125 (2006).

[68] 2 ACKERMAN, *supra* note 2, at 12–15.

[69] 3 ACKERMAN, *supra* note 2, at 7–8.

[70] *Id.* at 7.

clause.[71] Acceptance by the Court and by Americans in general, including people who would otherwise have resisted such legislation, constituted the ratification of this more capacious understanding of the Fourteenth Amendment, and consolidated new constitutional principles.[72]

A key element to the constitutional moment is illegality. This is especially true for the Founding and Reconstruction moments.[73] As Jack Rakove has pointed out, "Ackerman's account of the Founding events of the 1780s goes to great lengths to stress the underlying illegality of the whole originating constitutional enterprise."[74] Rakove criticizes what he sees as Ackerman's over-emphasis on illegality, arguing that norms of constitutional legitimacy that emerged after 1776 explain the non-illegality of the Founding.[75] But illegality is important for Ackerman in identifying who the people are. He relies heavily on *Federalist* No. 40 to make

---

[71] *Id*. at 12.

[72] *See id*. at 6–7.

[73] *See* 1 ACKERMAN, *supra* note 2, at 41–42. *See also* 2 ACKERMAN, *supra* note 2, at 99–119; Sanford Levinson, *Popular Sovereignty and the United States Constitution: Tensions in the Ackerman Program,* 123 YALE L.J. 2644, 2656–57 (2014) (pointing out that the illegality of the New Deal and Civil Rights Revolution is harder to pin down). Indeed, it seems to slip out of Ackerman's analysis for the worse, at least if every moment depends upon the people exercising their sovereign authority. The New Deal's illegality rested primarily upon the Supreme Court holding several statutes unconstitutional; this lasted until President Roosevelt's Court-packing plan produced the infamous "switch-in-time," and law-making (or perhaps constitution-making) efforts that did not follow Article V soon followed. 2 ACKERMAN, *supra* note 2 at 268; For the civil rights revolution, *Brown v. Bd. of Education* appears to be the illegality, as it marked "a decisive break with Jim Crow," i.e. the existing legal order. 3 ACKERMAN, *supra* note 2, at 50–51. However, it is possible, to reconstruct the nature of these constitutional moments.

[74] Jack N. Rakove, *The Super-Legality of the Constitution, or, a Federalist Critique of Bruce Ackerman's Neo-Federalism,* 108 YALE L.J. 1931, 1933 (1999).

[75] *Id.* at 1957. Rakove, though, appears to over-emphasize how settled the new constitutional structure was, and in doing so he fails to account for several important debates over ratification. *Id.* at 1945. Yet, he argues that there was something "super-" or "extra-" legal about the founding:

> Madison and other Framers understood, then, that the mode of constitutional adoption that they proposed to pursue involved more than a set of strategic maneuvers designed to outflank the requirements of Article XIII and the imputation of 'illegality' and to secure constitutional legality through political legitimacy. Their concept of ratification rested on a superior grasp of the nature of constitutionalism itself. It was a new understanding that drew upon elements of thought that had been available in 1776 but that had not been synthesized or appreciated until the precedent of Massachusetts and the admitted hurdles the Federalists had to surmount provided an occasion to do so.

*Id.* He also argues, by pointing to Samuel Beer's work and others, that republicanism laid a foundation for the concept or doctrine of ratification. *Id.* at 1952. But these intellectual sources

this point about the Founding: "as the revolutionary years moved on, Americans insisted that the People could deliberate on constitutional matters only in special bodies whose very name name—'convention'—denied that *legal forms* could ultimately substitute for the engaged participation of citizens."[76] "By conceding illegality," he continues, "Federalist No. 40 was not undermining the Convention's authority but, if anything, enhancing it—linking it to the institutional form that Publius's contemporaries associated most intimately with We the People."[77] Illegality was also central to Reconstruction. The Thirteenth and Fourteenth amendments could not be said to have followed the strictures of Article V. The Thirteenth was ratified by states whose representatives Congress refused to recognize, and the Fourteenth was ratified by states under Union military control as a condition for readmission to the Union.[78] But here again Ackerman uses this illegality to his advantage, turning it into a "condition for constitutional creativity."[79] It signals a time for focused public energy on grave matters of constitutional concern, a time in which "formal illegality, mass energy, public spiritedness, *and* extraordinary rationality are fused in a combination fateful for the dualist enterprise."[80]

Ackerman's illegal constitutional moment comes perilously close to Carl Schmitt's notion of the exception. While we will deal with Schmitt's ideas more below, the basic idea involves the suspension of the existing constitutional order to restore it or create a new one.[81] The state of exception has been characterized in a number of ways. Perhaps most relevant here is Giorgio Agamben's description of it as the dissolution of the distinction between law and politics.[82] This dissolution can make it appear to be illegal, as Ackerman characterizes, or "super-" or "extra-legal" as Rakove characterizes it.[83] But in keeping with Ackerman's terminology for the moment, illegality provides the circumstance for the emergence of

---

say little to nothing about the influence of such ideas on those unfamiliar with such ideas, regardless of how "superior" Madison's grasp of constitutionalism was.

[76] 1 ACKERMAN, *supra* note 2, at 175.

[77] *Id.*

[78] *Id.* at 44–46.

[79] *Id.* at 175.

[80] *Id.* at 177.

[81] *See* GIORGIO AGAMBEN, STATE OF EXCEPTION 31–35 (Kevin Attell trans., 2005).

[82] *See id.* at 1.

[83] Rakove, *supra* note 74, at 1945.

the popular sovereign, precisely because existing legal norms have receded and opened the door for the people to exercise their constitution-making power.[84]

But there are important differences between Schmitt and Ackerman. Ackerman backs away from Schmitt's potentially radical thesis to one commensurate with his more moderate liberal perspective. Instead of appearing in a pure state of exception, "The People, in contrast, reveal themselves *only through an amendment process* that can best be categorized negatively— 'neither wholly federal, nor wholly national.' Then, but only then, can we begin to hear the irregular, but public spirited rational, voice of the citizenry, deliberating and deciding on fundamental principle as they did during the conventions of the Revolutionary era."[85] Focusing on "an amendment process" leads Ackerman to a narrower conception of the people, as "ratifiers" in elections.[86] Despite originating in illegality, then, the people seem to appear in a sort of legal form. Illegality is turned into a sovereign act of the people by a ratification that occurs at the subsequent election, often during a regular vote for members of Congress and for President of the United States. This process is more apparent during the other constitutional moments.

Another difference between Schmitt and Ackerman is that Ackerman's procedural approach requires analysis, in addition to politics, to determine who the people are.[87] The people are involved in the constitutional decision-making process, but that participation is somewhat attenuated. Instead, it relies upon the analyst (perhaps a political scientist) looking back in time, to divine whether the people have in fact acted.[88] If the question can only be answered by the analyst, we are left with a concept and a practice that lacks political heft; the people are at their most abstract at this point. Determining who the people are, then, ultimately rests upon analysis, argument, and divination, rather than popular or political will.

Perhaps the biggest problem, from the perspective of our question, is that Ackerman is really more concerned about identifying when constitutional moments have occurred than he is about identifying who the people are. It is not a program for the people to act going forward precisely be-

---

[84] *See* 1 ACKERMAN, *supra* note 2, at 11.

[85] 1 ACKERMAN, *supra* note 2, at 185–86.

[86] *See id.* at 54–55.

[87] Gerwirtzman, *supra* note 6, at 901–02 n.38.

[88] *See id.* at 899, 912.

cause it depends upon the analyst to determine when a regime has consolidated.[89] This is apparent in volume 3 when he criticizes the Rehnquist and Roberts Courts for abandoning the principles created by the civil rights regime, instead of conceptualizing the Courts' jurisprudence as the potential beginning of a new regime.[90] Moreover, despite being interested in the people, the spotlight in Ackerman's work is trained on American political leaders; they are the people who initiate change (signal and propose) and navigate the amendment process. The people in Ackerman's account mostly just respond to or ratify the action initiated by their political leaders.[91] But acquiescence is hardly the basis for a robust conception of the people.

Interestingly, acquiescence is an important theme in Roger Sherman Hoar's treatise on constitutional conventions written in the early twentieth century. Hoar used acquiescence to deal with a newly-disembodied people.[92] Acquiescence as a way of interpreting constitutional decisions takes on greater importance as "the people" become harder to identify and unable to enact their will.[93] Ratification conceived of as acquiescence begins to expose the limits of Ackerman's conception of the people. It is not clear who the people are even within Ackerman's analysis. Is "the people" the process itself, or are the people limited to the ratification stage? If they are limited to ratification, then we are dealing with another ordinary representative institution—the electorate.[94] But unless the electorate is presented with a clear yes-or-no question, it is difficult to determine what, if anything, it has decided.

Although Ackerman's concept of higher lawmaking appears at times to sound in popular sovereignty, the popular activities he describes operate wholly within the constituted order.[95] But if sovereignty exists beyond the legal or constituted order, this makes no sense. The people in moments of

---

[89] 1 ACKERMAN, *supra* note 2, at 59–60.

[90] *See* 3 ACKERMAN, *supra* note 2, at 335.

[91] Daniel J. Hulsebosch, *Civics 2000: Process Constitutionalism at Yale,* 97 MICH. L. REV. 1520, 1525 (1999). *See also* ESPEJO, *supra* note 1, at 126–134 (explaining Ackerman's process theory).

[92] *See* ROGER SHERMAN HOAR, CONSTITUTIONAL CONVENTIONS: THEIR NATURE, POWERS, AND LIMITATIONS 3 (1917). *See also* Roman J. Hoyos, *A Province of Jurisprudence? Invention of a Law of Constitutional Conventions, in* LAW BOOKS IN ACTION: ESSAYS ON THE ANGLO-AMERICAN LEGAL TREATISE 108, 125 (Angela Fernandez & Markus D. Dubber eds., 2012).

[93] *See* HOAR, *supra* note 92, at 214–19.

[94] JOHN ALEXANDER JAMESON, THE CONSTITUTIONAL CONVENTION: ITS HISTORY, POWERS, AND MODES OF PROCEEDING 23 (1867).

[95] *See* 1 ACKERMAN, *supra* note 2, at 266–94.

higher lawmaking seem to be caught within the realm of normal politics. And at times, the people in normal politics are constructed as not acting at all, leaving governmental decisions to their representatives. Ackerman is certainly on to something here, but his conceptual categories do not seem to match his descriptive account.

While Ackerman does not get us to a fully realized people, his work is useful for beginning to think through our problem. First, his dualism suggests that the people can act in different ways at different points in time.[96] His dualism does not quite capture all of the moments in which the people can act.[97] However, when we combine his dualism with his regime-centered approach, we will find that his people are actually acting in more than two moments in time. Finally, although useful in identifying the people in their sovereign capacity, Ackerman's concept of illegality needs refinement. Illegality is important for understanding the people's role in both the Founding and Reconstruction, but it is both less useful and less necessary for understanding the New Deal and the Civil Rights Revolution. Understanding these differences will also help to clarify the people in time. Schmitt's work on sovereignty, the constituent power, and the time of democracy will be helpful in fleshing out these problems.

### *C. Amar and the Textual People*

For Akhil Amar, the answer to our question is a matter of textual interpretation.[98] Distinct from Ackerman and Kramer, Amar's approach stems more from an interest in federalism than judicial review per se.[99] Indeed, Amar seems much less interested in questions about judicial review than others writing in the popular turn. Amar cut his teeth in constitutional theory on the federalism debates of the 1980s and 1990s, especially the debates about the incorporation of the Federal Bill of Rights into the Fourteenth Amendment.[100] For Amar, the Federal Bill of Rights is the centerpiece to American thinking on popular sovereignty.[101] In contrast to modern jurisprudence that sees the Bill as primarily concerned with the

---

[96] *See* 2 ACKERMAN, *supra* note 2, at 5–6.

[97] *See, e.g.*, MAX WEBER, CARL SCHMITT & HANNAH ARENDT, DEMOCRACY AND THE POLITICS OF THE EXTRAORDINARY 169–74 (Andreas Kalyvas ed., 2008).

[98] Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V,* 55 U. CHI. L. REV. 1043, 1095 (1988) [hereinafter *Philadelphia Revisited*]; Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V,* 94 COLUM. L. REV. 457, 458 (1994) [hereinafter *The Consent of the Governed*].

[99] *See* Amar, *Philadelphia Revisited, supra* note 98, at 1044.

[100] *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism,* 96 YALE. L.J. 1425 (1987).

[101] Amar, *The Consent of the Governed*, *supra* note 98, at 497.

protection of individual rights, Amar argues for an interpretation that exposes a Bill that was, initially at least, majoritarian, popular, and republican (as opposed to individual and liberal).[102] In a brief nod to the judicial review question, Amar argues that the Bill of Rights was much "more majoritarian than counter."[103] But as with the others, Amar is less concerned with developing robust ideas about the people, than he is in pursuing some other objective.

Standing at the heart of the Bill of Rights, as originally conceived at least, was the unenumerated yet "transcendent sovereign right of a majority of the people themselves to alter or abolish government."[104] The recognition and protection of these rights runs through all ten amendments, and it even runs through some that were not ratified. The right to alter or abolish government was commonly included in state bills and declarations of rights and so its lack of express inclusion in the Federal Bill of Rights requires some explanation.[105] Amar finds it in the Preamble to the Federal Constitution, which states that "We the People of the United States . . . do ordain and establish this Constitution . . . ."[106] Such a clear expression of popular authority, one that destroyed an old constitution while creating a new one might seem to obviate the need for express recognition of this transcendent right. These words, he explains in a later book, "did more than promise popular self-government. They also embodied and enacted it. . . . [T]he Founders' 'Constitution' was not merely a text but a deed—a *constituting*."[107] And that is precisely the discussion that took place when James Madison sought to amend the Preamble to include the right to alter or abolish government.[108] "Not a single representative quarreled with Madison on the substance of this claim," Amar writes.[109] Rather, they thought it was merely "superfluous."[110] Thus, although somewhat "repackaged" in the assembly clause, the right to alter or abolish government reverberates throughout the Bill of Rights.[111]

---

[102] AMAR, *supra* note 2, at xii–iii.

[103] *Id.* at xiii.

[104] *Id.*

[105] *Id.* at 28.

[106] *Id.* at 26–30.

[107] AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 5 (2005).

[108] AMAR, *supra* note 2, at 27.

[109] *Id.*

[110] *Id.*

[111] *Id.* at 27–28.

The Bill of Rights adumbrated those constitutional realms that remained live for popular action after power had been delegated to the federal government. It protected the rights to both alter and abolish government by recognizing the peoples' avenues for contesting governmental decisions, and offering protections for when they did.[112] The Bill of Rights emphasized the limited nature of the Federal Constitution, demonstrating that political representation—a particularly sensitive issue[113]—was not the only vehicle through which the people could express their authority to limit "economic self-dealing" by federal officials.[114] Petitions, assemblies, juries, militias, even state governments, all held popular political potential, so long as people acted collectively in public; while petitions and assemblies were the most obvious vehicles for constitutional change.[115] But the mere recognition of the persistence of this kind of political participation would have been merely superfluous without force to back it up. The Second Amendment's protection of the militia, or "an armed populace," provided that force.[116] There was a long-standing connection between the militia and "the people," which was textually supported in the Bill of Rights by the use of the term "the people" in the Second Amendment.[117] That it was adjacent to the First Amendment, Amar argues, is further evidence of the connection between the forming militia, petitioning, and assembling.[118] This was, at least in part, how the militia secured a "free State."[119]

Juries received the most attention in the Bill of Rights. Even in amendments where they were not specifically identified, for example, in the Fourth Amendment, their role was clearly implicit. The Fourth Amendment, in fact, protects the "right of the people," rather than individual "persons," against "unreasonable searches and seizures" of "persons, houses, papers, and effects," and bars issuing warrants without probable

---

[112] *Id.* at 27.

[113] *Id.* at 8–17.

[114] *Id.* at 17–19. I actually think the issue goes beyond protections about "economic self-dealing." It likely also referred to the concern for the creation of norms—or what we might also call "norm protection."

[115] *Id.* at 26.

[116] *Id.* at 47.

[117] *Id.* at 48–49.

[118] *Id.* at 49.

[119] *Id.* at 47; MORGAN, *supra* note 9, at 153–73. How effective militias actually were in such a role is an open question.

cause.[120] The amendment, Amar argues, thus protects against the persecution of popular political leaders.[121] Finding a connection between the Fourth and the Seventh Amendments, which protects the right to a jury in common law trials, Amar argues that the assumption lying behind the amendments was that juries would determine whether a search or seizure was "reasonable" in a civil suit for damages for trespass against the official.[122] Moreover, limiting warrants, which were issued *ex parte* only to those situations where probable cause existed worked to ensure that searches and seizures occurred within the watchful eye of a public and popular jury.[123]

The Fifth and Sixth Amendments added other protections, at the center of which was the jury. The Fifth Amendment protected against illegitimate criminal prosecutions by requiring them to be vetted through a grand jury, a public and popular institution.[124] The amendment also protected defendants against double jeopardy and self-incrimination, and sought to ensure the due process of law.[125] The Sixth meanwhile ensured that trials would be "speedy and public," that juries would be "impartial" and local, and prevented the seclusion of defendants by requiring that they be "informed" of charges, have the opportunity to confront witness, and have legal representation.[126] When combined with the Seventh Amendment, we can see that "the jury played a leading role [as populist protectors] in protecting ordinary individuals against governmental overreaching."[127]

This popular, political reading of the Bill of Rights comes full circle in what Amar calls the "popular sovereignty amendments" (the Ninth and Tenth), which bookend the Preamble's focus on "the people."[128] These amendments return us to the right to alter or abolish government, "the most obvious and inalienable right underlying the Ninth Amendment . . . ."[129] So understood, the Ninth Amendment means that popular political authority is not exhausted by textual enumeration. Amar seems to suggest that the people can reclaim their authority only in a constitutional convention,

---

[120] U.S. CONST. amend. IV.; AMAR, *supra* note 2, at 68.

[121] AMAR, *supra* note 107, at 68.

[122] *Id.*

[123] *Id.* at 69.

[124] U.S. CONST. amend. V.; AMAR, *supra* note 107, at 84.

[125] AMAR, *supra* note 2, at 78.

[126] U.S. CONST. amend. VI.; AMAR, *supra* note 2, at 97.

[127] AMAR, *supra* note 2, at 84.

[128] *Id*.

[129] *Id.* at 120.

the language I omitted in the quote above.[130] But the text itself appears to be more open-ended, allowing for any public political activity to alter or abolish government.[131] In this reading, the Tenth Amendments suggests that the people can also at times act through their state governments, in addition to re-emphasizing that the federal government is one of delegated power only.[132]

Amar's contribution to the popular turn is critical. It prefigures what Kramer would subsequently call "popular constitutionalism."[133] By consciously and expressly recognizing in the Bill of Rights several areas of political activity beyond the reach of federal regulation, Amar demonstrates that Americans were thinking specifically about the ways in which popular politics would continue to play a role in constitutional development.[134] Amar's popular reading of the federal Bill of Rights, which I find persuasive, is not, however, an outline of American ideas of popular sovereignty, but rather of the closely related but broader concept of the constituent power, which includes popular sovereignty.[135] While Amar shoves everything into this single idea, Schmitt disaggregates them into his times or moments of democracy. A great deal of what Amar discusses, in fact, falls into the category of acclamation rather than sovereignty. Schmitt's concepts of democracy and the constituent power, especially its relation to acclamation, should allow us to refine Amar's arguments, and to make them more precise.

### *D. Kramer and the Interpreting People*

Kramer, like Ackerman, is concerned with the problem of judicial review, though with an intensified aspect of it: judicial supremacy.[136] For Kramer, "We the Court" has supplanted "We the People" as the defining characteristic of modern American constitutionalism.[137] To demonstrate this transformation, Kramer turns to history to uncover long-standing interpretative practices by constitutional actors other than the U.S. Supreme

---

[130] *Id.*

[131] *Id.*

[132] *Id.* at 123–24.

[133] KRAMER, *supra* note 2, at 3–8.

[134] *See generally* AMAR, *supra* note 2 (describing the continual role of politics in what would become "popular constitutionalism").

[135] *Id.* at 119–33.

[136] Kramer refers to his work as "a revisionist history of the origins of judicial review." KRAMER, *supra* note 2, at 7.

[137] Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5 (2001).

Court.[138] More than Ackerman's people or Amar's, Kramer's people play an active role in constitutional development on a regular basis. This has been the chief source of concern for his critics, as any political act can appear to be popular constitutional interpretation.[139] But Kramer's ultimate problem for the purposes of our question is the same as Ackerman's and Amar's: he is less concerned with developing a conception of the people than he is with developing his departmentalism theory of constitutional interpretation. Kramer's people, like the others, are political, but they are not necessarily outside and above the constitution—rather, they appear to exist next to it.[140] Kramer's people are not explicitly concerned with making positive textual changes to a constitution or creating an entirely new constitution, but of interpreting the existing constitution, often through the ways outlined in the Bill of Rights.[141] In Kramer's words, the framers of the U.S. Constitution "embraced a political ideology that celebrated the central role of 'the people' in supplying government with its energy and direction, an ideal that remained at all times in the forefront of their thinking—Federalist and Anti-Federalist alike."[142]

Kramer's search for the people begins with English constitutionalism, which by the time of the American Revolution had identified the people as key actors with a neatly delineated, but not yet sovereign, role.[143] The people's role in constitutional development grew out of two fundamental characteristics of English constitutionalism. First was the idea that government was grounded in the consent of the governed.[144] Second, and related, was a constitutional practice that depended upon custom as well as a variety of texts, which provided the basic intellectual, institutional, and ideological framework within which the English constitutional system operated. Kramer calls this the "customary constitution."[145]

Change was inherent in this system. The two most important sources of change, Kramer tells us, were consent and prescription.[146] "Consensual

---

[138] KRAMER, *supra* note 2, at 93–127.

[139] Christopher L. Tomlins, *Politics, Police, Past and Present: Larry Kramer's the People Themselves*, 81 CHI.-KENT L. REV. 1007, 1009, 1014; Alexander & Solum, *supra* note 13, at 1603–03; Powe, *supra* note 14, at 856, 882–83. *See also* Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991–92, 1003 (2006).

[140] KRAMER, *supra* note 2, at 7.

[141] *Id.* at 7–8.

[142] *Id.* at 6.

[143] *Id*. at 12.

[144] *Id*.

[145] *Id*. at 9–34.

[146] *Id*. at 15.

changes" are the most obvious to modern onlookers; they are "clear convulsive changes," like the Glorious and American Revolutions.[147] "Prescriptive" change, by contrast, depended upon custom. It occurred "by inauguration of new practices; once they had achieved a degree of acceptance they could be cited as 'precedents.'"[148] In other words, "acquiescence" to a previously unconstitutional act or activity could acquire constitutional legitimacy over time, similar to the consolidation phase in Ackerman's constitutional moments. A prescriptive conception of constitutional change implied a potentially robust role for popular action, as it depended upon constant engagement in politics.[149] In fact, "[a]nxiety about allowing precedent to become established was a pervasive feature of eighteenth-century constitutional practice ...."[150]

These basic dynamics of the customary constitution survived the American Revolution, even as it was transformed by it. "The men who crafted new state constitutions were building on an existing heritage: a theory and practice of constitutionalism many of whose fundamental premises were undisturbed."[151] The Ninth Amendment to the Federal Constitution acknowledged the continuing viability of the practices underlying the customary constitution, as did major cases and political debates of the 1780s and 1790s.[152]

But the Revolution did have its effects; it transformed the customary constitution into what Kramer calls "popular constitutionalism."[153] There were several sources of change. With independence came obligations to govern realms formerly regulated by Great Britain.[154] The new written constitutions gave more precision to constitutional arrangements and power, leading to a distinction between making and interpreting constitutional law that did not exist under a customary constitution, where gradual constitutional change was simultaneously making and interpreting a constitution.[155] New, explicit, written constitutions "took for granted the people's responsibility not only for making, but also for interpreting and enforcing their constitutions—a background norm so widely shared and

---

147 *Id.*

148 *Id.* at 16.

149 *Id.* at 16–17.

150 *Id.* at 17.

151 *Id.* at 40.

152 *Id.* at 40–56.

153 *Id.* at 53.

154 *Id.* at 50.

155 *Id.* at 50–51.

deeply ingrained that specific expression in the constitution was unnecessary."[156] While Kramer does not cite Amar on this point, his argument is strengthened by Amar's work. For one thing, Amar tells us that Americans did expressly acknowledge the people's responsibility for making, interpreting, and enforcing their constitutions in the right to alter or abolish government clauses.[157] Like Amar, Kramer focuses mostly on the right to alter government.[158] Also like Amar, he sees the amendment clauses in American constitutions as an expedient way to channel popular authority through specified constitutional procedures, but in no way exhausting or "reducing the prospect of political unrest."[159] In fact, the means available to the people to interpret and enforce their constitutions overlapped with those identified in the Federal Bill of Rights, like pamphleteering (i.e. speech), petitioning, assembling, and creating juries.[160] But these were by no means exhaustive of the ways in which the people could act (Ninth and Tenth Amendments).[161] "Resistance through any or all of these means was thus a 'political-legal' duty, enjoined on everyone in the community concerned with maintaining liberty against arbitrary power."[162]

The "emphatic embrace of popular sovereignty" tied all of these changes together by resting the entire government on the people rather than confining them to a single house in the legislative body, as they were in Parliament.[163] This suffused power enlarged the realm of popular responsibility for constitutional development, which Kramer directs into his departmental theory of constitutional change.[164] With each branch of government now dependent upon the people for their authority, each could interpret a constitution for itself, without binding any other branch.[165] Within this context, even the practice of judicial review could be an expression of popular constitutionalism. It was simply an alternative to political unrest as a form of constitutional change.[166]

The decline of popular constitutionalism (or perhaps its transformation) is a long and complicated tale, but Kramer does point out two

---

[156] *Id.* at 53.

[157] *See* AMAR, *supra* note 2, at 47.

[158] *See generally* KRAMER, *supra* note 2.

[159] *Id.* at 53.

[160] *Id.* at 25–26.

[161] *Id.* at 24–29.

[162] *Id.* at 28.

[163] *Id.* at 54.

[164] *Id.* at 106.

[165] *Id.* at 106–10.

[166] *Id.* at 93–127.

causes worth considering. One cause was the changing relationship between law and constitutionalism, and the other was the changing political practices.[167] As law became more professionalized and rooted in reason, it became a technical field left to the expertise of lawyers and judges. As more cases concerning constitutional issues were put before courts, constitutionalism got caught within this vortex of legality. The emergence of political parties narrowed the range of political activity and channeled many constitutional questions through a party sieve.[168] Spontaneous popular political action thus got channeled through more formal institutions. But, however the people changed, Kramer has nevertheless given us a potentially powerful account of how people acting collectively can affect constitutional change in ways both large and small. Popular politics can both introduce new norms and challenge prevailing ones.

Nonetheless, Kramer's concept of "the people" remains slippery. This is due in part to his rather broad definition: "a collective body capable of acting."[169] Kramer's definition has been the most frustrating to critics of the three theorists discussed here.[170] It might be more accurate to say that Kramer's people are plural rather than singular—collective bodies, rather than a single collective body. This is evident in the tools available to these peoples for "correction" of and "resistance" to government action, including the franchise, petitions, assemblies, posses, juries, boycotts, and mobs.[171] While his capacious definition has helped us to see groups of people as constitutional actors and agents, it does not capture the people in a sovereign sense. Resistance, for example, is a curious way for Kramer to conceptualize popular constitutional activity.[172] It suggests a hierarchy of constitutional authority that actually diminishes popular authority.[173] Resistance suggests that there is a higher authority wielding sovereign power.[174]

The capaciousness of Kramer's people appears to make them omnipresent. Ackerman's procedural people, and Amar's textual people are at

---

[167] *See id.* at 148–50, 155–56 (noting the changing relationship between law and constitutionalism); *id.* at 156, 164–65, 168 (noting the changing political practices).

[168] *Id*. at 145–69. For other interpretations, *see* Tabatha Abu El-Haj, *Changing the People: Legal Regulation and American Democracy*, 86 N.Y.U. L. REV. 1 (2011); Hoyos, *supra* note 92.

[169] KRAMER, *supra* note 2, at 25.

[170] Larry Alexander, *Popular Constitutionalism*, 118 HARV. L. REV. 1594, 1606–07 (2005).

[171] KRAMER, *supra* note 2, at 168.

[172] *Id.* at 91.

[173] *Id.* at 92.

[174] *Id.* at 91.

least bounded, and can in some instances help us to identify outcomes. Kramer's associational people, however, give us little guidance in determining when *the* people have decided.[175] This is part of what Christian Fritz means when he characterizes popular constitutionalism as a subspecies of popular sovereignty.[176] This problem is related to the first. Kramer's primary concern with the interpretation and enforcement of an existing constitution means that "the people" operate at a level below sovereignty.[177] "However," as Fritz explains, "the idea of a collective [popular] sovereign is a broader foundational principle that justified the creation, revision, and even the destruction of constitutions."[178] Kramer's notion of popular constitutionalism, according to Fritz, "would operate whether or not the people were the sovereign."[179] As mere interpreters, Kramer's people operate necessarily within the existing constitutional system.[180] But as Fritz points out, "[t]he fact is that for many Americans before the Civil War the collective sovereign was not procedurally bound."[181]

---

[175] *Id.* at 128.

[176] CHRISTIAN G. FRITZ, AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA'S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR 281 (Maeva Marcus et al. eds., 2007).

[177] KRAMER, *supra* note 2, at 188.

[178] FRITZ, *supra* note 2, at 281.

[179] *Id.* Fritz's alternative concept of the collective sovereign, by contrast, involves "the creation of constitutions as well as their destruction. Besides giving life to a constitutional system, the concept that the people were the sovereign defined the relationship between that sovereign and the government," rather than the government and its subjects or citizens.

[180] KRAMER, *supra* note 2, at 7.

[181] FRITZ, *supra* note 2, at 283. Yet, even in Fritz's work questions remain about what exactly a "direct role for the people" means. To say that the people are not procedurally bound does not get us much closer to determining when the people have spoken or how they might act. Even Fritz's account of the people ultimately comes down to, like so many others, elections. In a key passage for instance, Fritz argues that:

> When 'rebellion' arose, all sides sought to find the expression of the sovereign. Those who subdued by force the Regulators, the whiskey excise tax protestors, and the advocates of the People's Constitution [of Rhode Island] remained true to their insistence on a formal expression of the people's will. They recognized and obeyed the voice of the people when the polls removed them from power shortly after they defeated the 'rebels.' For Friends of Government, a formal step to recognize the voice of the people was necessary, and when the polls supplied this, they respected it. For the so-called rebels, state-sanctioned elections reflected the will of the people but were not the only means of detecting that expression. After suppression, the 'rebels' used the formal mechanisms their suppressors insisted were necessary to prevail.

*Id*. at 287. This leads Fritz, then, back to elections, which are part of the procedurally-bound people that he criticizes Kramer for emphasizing. Fritz does recognize the problem, however:

What skews Kramer's conception of the people is his obsession with judicial review. What is important for Kramer is not establishing or identifying "the people" as such, but identifying a source of constitutional decision-making that de-emphasizes the role of the United States Supreme Court.[182] This leads Kramer away from a detailed exploration into the ways in which ordinary people exercised their constitutional power to a discourse analysis of the ideas of political thinkers, judges, and jurists.[183] "The people," though actual in Kramer's conception, nonetheless remain mostly a backdrop in his account of popular constitutionalism. What remains is how jurists thought about "the people" and used them for their own ends. But Kramer is not explicit that this is what he is doing—and he has been rightly criticized for failing to do so.[184] Thus, Kramer's people are lost in a nether world between fact and fiction.

In fact, it is Kramer's ideological conception of the people that has been so maddening to his critics.[185] Operating with descriptive conceptions of the people, Kramer's critics cannot reconcile his ideological account with the ways that people in fact act.[186] Moreover, Kramer is interested ultimately in constitutional *interpretation* rather than political action, distinguishing his work from Amar's and Ackerman's.[187] Interpretation, though, is even fuzzier than Ackerman's analytical account of the people. Any individual or group of individuals can be interpreters. This makes every act of interpretation appear to be "popular," without giving us any way of determining which interpretations are authoritatively of "the people themselves."[188] At least with Ackerman, we ultimately get an outcome that we can easily identify (at least with the first two moments). With

---

> Did the people have an active, direct, and ongoing role in the affairs of government after they created those governments? Or did they instead play a more passive role, limited to elections, with their representative exerting the people's sovereignty for all intents and purposes? Clearly, this latter supposition risked contradicting the principle undeniably established by the Revolution: that in America the people—*however one understood them*—were the sovereign.

*Id*. at 289 (emphasis added).

[182] KRAMER, *supra* note 2, at 7–8.

[183] Tomlins, *supra* note 139.

[184] Alexander, *supra* note 170, at 1637.

[185] William E. Forbath, *Popular Constitutionalism in the Twentieth Century: Reflections on the Dark Side, the Progressive Constitutional Imagination, and the Enduring Role of Judicial Finality in Popular Understandings of Popular Self-Rule*, 81 CHI.-KENT L. REV. 967, 974 (2006).

[186] Alexander, *supra* note 170, at 1623.

[187] KRAMER, supra note 2, at 7–8.

[188] Adler, *supra* note 11, at 722.

Kramer's work we are left to wonder what effect the interpretation of any group claiming the status of the people actually has.[189]

Moreover, as legal interpretation, popular constitutionalism runs into the problem of the rule of recognition.[190] Under this rule, a law is without force unless its power and authority are recognized.[191] From that perspective, groups of people can interpret a constitution all they want. That interpretation alone, however, does not give one group of people any greater claim to being *the* people's interpretation than any other group's. Kramer's "departmentalism" is a partial attempt to address this problem. What appears to be decisive for Kramer is how popular interpretation gets taken up by the departments of government.[192] It is when Congress or the President takes up a popular constitutional interpretation that a group's interpretation becomes "the people's," thus giving that institution's constitutional interpretation a popular authority equal to or greater than the Court's.[193]

His departmentalism ties interpretation to institutional action.[194] For the people to be able to act authoritatively, they need an institution to act in their name. The question of who the people are is tied to how the people can act, or perhaps *en*act.[195] If a group of people can enact a decision, and that decision is recognized as binding upon a larger community, that group has a stronger claim to be acting as *the* people rather than as *a* people. The problem for Kramer is that his departmentalism theory undermines strong claims about popular constitutionalism; it remains popular *constitutionalism* rather than popular *sovereignty*.[196] Kramer's people are actual people whose interpretations of a constitution make them agents in constitutional development. But Kramer's people are not a sovereign people who can enact their will.

Many of these problems can be smoothed out, however. Kramer's pluralist people, the constitutionalism-sovereignty distinction, and the rule of recognition can all be explained or dissolved when read through Schmitt. As with Ackerman's and Amar's work, Kramer's will benefit from Schmitt's disaggregation of democracy in time, the constituent

---

[189] *Id.*

[190] *Id*.

[191] *Id*. at 733.

[192] KRAMER, *supra* note 2, at 145.

[193] *Id.* at 8.

[194] *Id.* at 146–47.

[195] *Id.* at 129.

[196] *Id.* at 107.

power, and acclamation.[197] But, as Fritz has pointed out, Kramer is almost entirely unconcerned with sovereignty, and dictatorship plays little to no role in his theory.

### *E. The Popular Turn's People*

Before turning to Schmitt, I want to attempt to build an overarching theory of the people from the works considered here. Dealing with them individually still leaves us with an open question as to who the people are, and when they have acted. Although the popular turn has helped us to understand that constitutional change has occurred, their work still has not developed a conception of the people that gives us clear indications about their actions. Partly, this is their own fault, as they have been less interested in the concept itself than in the ways it helps to develop other ideas. A particular point of confusion is that they seem to be talking about "the people" in their sovereign capacity but examining them in less than sovereign moments. Lack of conceptual clarity can thus appear to be a bait and switch. But to be more charitable, it reflects imprecision, which threatens to undermine the entire project by making the sovereign people appear everywhere, and thus nowhere.

If we were to articulate a conception of the people that encompasses these three theorists, it might look something like the following: The people in the United States are the source of legal and constitutional norms, and only they, not some specific institution acting in isolation, can create new norms.[198] The people generate these new norms in a variety of different ways. One is during a constitutional moment. This moment can be initiated either from above by political leaders seeking approval, ratification, or acquiescence by the people, or from below by the people themselves exercising their right to alter or abolish government.[199] Change from below can either occur either formally or informally. Formal change emerges from social movements leading to revision of constitutional text; while informal change, by contrast, occurs when over time the norms underlying this political pressure take hold as custom or prescription, which get uploaded through interpretation by one or more institutions.[200] Once the new normative order is consolidated, the courts and other legal actors must operate within the confines of the new normative matrix. In other

---

[197] SCHMITT, *supra* note 28, at 272.

[198] *See supra* Part I.A–I.C (discussing the various views of Ackerman, Amar, and Kramer on the conception of the people).

[199] *Id.*

[200] *Id.*

words, American constitutionalism and constitutional development is not the specific domain of framers or courts.[201] Through dissent, discussion, debate, organization, and other political activity, new norms in the form of constitutional text and meaning can be created. Courts may be a part of that messiness, but they are not the penultimate expositor or creator of constitutional norms.[202]

But even this account could use more conceptual precision. Thus, enter Carl Schmitt.

## II. CARL SCHMITT'S PEOPLE

Carl Schmitt's oeuvre was devoted to exploring the relationships and tensions between law, democracy, and the state.[203] His interest in these relationships grew out of his experience in the Weimar Republic as well as the limitations of legal positivism, the prevailing legal theory in Germany at the time.[204] According to positivists, most notably Hans Kelsen, law was an internally consistent and coherent system of norms.[205] The problem, as Schmitt saw it, was in the origin of that system of norms, which could not be accounted for or explained by positivism.[206] Schmitt attempted to account for the origin of norms both in his theory of democracy and his theory of sovereignty.[207]

Schmitt's theory of sovereignty was intended to account for the origin of a comprehensive set of norms, or a constitutional order.[208] He pointed out that a legal or constitutional order does not found itself—rather, it requires a political decision.[209] Schmitt's decisionism is controversial, but his explorations of democracy, sovereignty, its sister concept the

---

[201] *Id.*

[202] *Id.*

[203] ELLEN KENNEDY, CONSTITUTIONAL FAILURE: CARL SCHMITT IN WEIMAR 7 (Duke Univ. Press, 2004).

[204] *Id.* at 40.

[205] Jeremy Waldron, *Can There Be a Democratic Jurisprudence?*, 58 EMORY L.J. 675, 683 (2009).

[206] Jeremy Waldron has suggested that this problem is not inherent in positivism. *Id.* Others have suggested that there is even a hole at the center of sovereignty, one that is filled either by transcendence or immanence. *See, e.g.*, JACQUES DERRIDA, THE BEAST AND THE SOVEREIGN (Geoffrey Bennington trans., Univ. of Chicago Press Ed. 2009) (2008).

[207] KENNEDY, *supra* note 203, at 40.

[208] *Id.* at 79–80.

[209] *Id.* at 85.

constituent power (especially its relationship to acclamation), and dictatorship can be useful for the popular turn, and for developing its critical potential. While Schmitt's attempt to elaborate these concepts as juridical concepts, rather than as either political or strictly legal concepts, makes his work particularly useful for modern American constitutional theorists, the connections he draws between them are sometimes fragmentary and suggestive. Reading the popular turn through a Schmittian lens thus not only helps us to sharpen the turn conceptually, it affords the opportunity to develop connections between Schmitt's key concepts themselves.

### *A. The Three Moments of Democracy*

My aim here is to identify the key points of intersection between Schmitt's ideas of the sovereignty, sovereign dictatorship, and acclamation, and to use them as a foundation to begin to answer our question. One key to understanding these concepts and their relationships is Schmitt's division of democracy in time. According to Schmitt, there are three moments of democracy.[210] In the first, the people exist outside and above the law.[211] This is essentially a founding moment, where the people exercise their sovereign authority to create a new constitution.[212] In the second, the people exercise their power through representation; they recede from active engagement in politics, leaving such matters to their representatives.[213] The third moment is Schmitt's least developed. Here the people exist "next to" the constitutional or legal order. Through acclamatory practices, or "public opinion," the people use their influence to change norms within the constitutional order.[214]

The people act differently depending upon the moment of democracy in which they exist. In the first moment, the people act through its constituent power to make a constitution.[215] It is in this moment where Schmitt's concepts of sovereignty and sovereign dictatorship operate. In the second moment, the people act mostly as electors, but also through any specifically identified "competency," or power explicitly delegated to a

---

[210] SCHMITT, *supra* note 28, at 271.

[211] *Id.* at 268.

[212] *Id.*

[213] *Id.* at 268–71.

[214] *Id*. at 275. Kalyvas, *supra* note 25, at 1558–61.

[215] SCHMITT, *supra* note 28, at 268.

legally or constitutionally defined people.[216] In the third moment, the people act again through their constituent power, but this time merely to change a constitution rather than to create one.[217] Here, the people are most diffused, "unformed and unorganized."[218] The only requirement is that they act in public, which can be done in a number of ways.[219]

It is possible to understand these three moments as a process. In fact, Schmitt's three moments of democracy look very similar to Paulina Ochoa Espejo's processual conception of "the people." According to Espejo:

> a people as process is an unfolding series of events coordinated by the practices of constituting [the first moment], governing [the second moment], and changing [the third moment] institutions. On the one hand, the people requires a set of practices and institutions, some of which are obligatory and constrain individual action [first and second moments]. On the other hand, it also includes a fleeting community of hopes, expectations, memories, and fraternal feelings, periodically subject to drastic and unexpected changes [first and third moments].[220]

This does not mean that the people must be constantly engaged in each aspect of the process—constituting, governing and changing institutions. The key is "coordination."[221] This means that the three components to the process, or the three moments to use Schmitt's term, must remain possible or potential. Reducing, or attempting to reduce, the people to a single moment or stage in the process destroys *the* people, disaggregating them into individual people or discrete institutions.[222]

Historians and constitutional theorists have largely focused their attention on the second moment of democracy, where voting and elections are the focus.[223] The popular turn has moved beyond this, and focused mostly on the third moment, and occasionally on the first.[224] Schmitt's utility to the popular turn thus rests mostly on his development of the first and third moments of democracy.[225] His concepts of sovereignty and sovereign dictatorship and their relationship to the constituent power of con-

---

[216] *Id.*

[217] *Id.* at 271.

[218] *Id.*

[219] *Id.* at 271–73.

[220] ESPEJO, *supra* note 1, at 13.

[221] *Id.* at 137.

[222] *Id.* at 162–65.

[223] SCHMITT, *supra* note 28, at 268.

[224] *Id.* at 270–71.

[225] *Id.* at 268, 271.

stitution-making belong to his elaboration of the first moment of democracy, while his conception of the relationship between the constituent power and acclamation belong to the third.[226]

### *B. Sovereignty and the Exception*

Schmitt's formulation of sovereignty is well-known to those familiar with his work: "Sovereign is he who decides on the exception."[227] What makes Schmitt's definition particularly interesting is that he rejects abstract definitions, preferring to focus instead on what he calls "concrete application."[228] How to know who or what is the highest power in a state is the definitive question, "and that means who decides in a situation of conflict what constitutes the public interest or interest of the state, public safety and order, *le salut public*, and so on."[229] The concrete or sociological nature of his conception necessitates a case-by-case inquiry to determine who the sovereign is.[230]

To begin our search for the people in their sovereign capacity, Schmitt suggests that we look for an exception.[231] This, of course, begs the question of what an "exception" is. There are many terms and concepts that have been used to identify exceptional moments, e.g.: "state of necessity," "state of siege," "martial law," "emergency powers," emergency decrees," etc.[232] As a juridical matter, "exception" or "state of exception" is the better term. First, it provides a contrast to law understood as a norm. In response to legal positivists, Schmitt contrasted the norm to the exception, which he argued gave law its meaning.[233] Thinking in terms of this

---

[226] *Id.*

[227] SCHMITT, *supra* note 33, at 1. John McCormick is deeply skeptical of Schmitt's reduction of sovereignty into the exception, declaring it "patently false" and "dangerous." John P. McCormick, *The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers, in* LAW AS POLITICS 217 (David Dyzenhaus ed., 1998). It appears, however, that McCormick fails to appreciate the distinction between what Schmitt himself called "ordinary" or "police" emergencies and the exception. Schmitt was not always clear in maintaining this distinction himself. But it is important for us to distinguish between police and exception, between techniques of governance and sovereignty.

[228] SCHMITT, *supra* note 33, at 6.

[229] *Id.* ("[T]he connection of actual power with the legally highest power is the fundamental problem of the concept of sovereignty.")

[230] CARL SCHMITT, DICTATORSHIP: FROM THE ORIGIN OF THE MODERN CONCEPT OF SOVEREIGNTY TO PROLETARIAN CLASS STRUGGLE, 21 (Michael Hoelzl & Graham Ward trans., Polity Press eds., 2014).

[231] SCHMITT, *supra* note 33, at 11–14.

[232] AGAMBEN, *supra* note 81, at 4–6.

[233] SCHMITT, *supra* 33, at 10–14.

norm-exception distinction can help guide us to an understanding of the people in juridical terms, maintaining a connection between politics or sovereignty and law.

The second reason for preferring "exception" over other terms, especially "emergency" is that Schmitt distinguished between ordinary emergencies and the genuine exception.[234] For instance, he was quick to distinguish the exception from police, or "police emergency measures."[235] Police is a close cousin to the exception.[236] What we call the police state, for example, is often used as a synonym for a totalitarian dictatorship, which grew out of the state of exception.[237] Nonetheless, police and exception are distinct. Police is a governmental power, or a technique or technology of governance. It is concerned with ordering society by preventing, responding to, and eliminating threats to the public health, safety, welfare, and morals.[238] Although police is concerned with threats and emergencies, its main goal is to discipline individuals to prevent such emergencies. Traffic laws are a classic example of police techniques. Stop signs and stoplights, lane markers, and traffic laws are aimed at making drivers aware of safety in order to prevent accidents, injuries, and deaths.[239] Quarantine is another classic police measure invoked during a public health crisis. A quarantine historically has allowed the state to circumvent normal, pre-existing rules, procedures, and laws protecting the individual for the sake of the public welfare.[240] But this suspension of specific laws to meet a temporary localized emergency does not constitute a state of exception.

By contrast, the exception is not concerned with matters of governance but with the ultimate source of power and authority within a polity.[241]

---

[234] *Id.* at 12.

[235] *Id.*

[236] There is an emerging body of literature on the "new" police science, or critical police theory. MARKUS DIRK DUBBER & MARIANA VALVERDE, POLICE AND THE LIBERAL STATE (Stanford Univ. Press ed. 2008). For the "old" police science, *see* ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS (Univ. of Chic. Press 1904); CHRISTOPHER TIEDEMAN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES, (Da Capo Press ed. 1971) (1886). For historical studies of police and the police power in the United States, *see* CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC (Cambridge Univ. Press ed. 1993).

[237] AGAMBEN, *supra* note 81, at 4.

[238] *Id*.

[239] Christopher Tomlins, *Framing the Fragments: Police: Genealogies, Discourses, Locales, Principles*, *in* DUBBER AND VERDE, EDS., THE NEW POLICE SCIENCE, 256–67.

[240] *See*, e.g., MICHAEL WILLRICH, POX: AN AMERICAN HISTORY (2011).

[241] SCHMITT, *supra* note 33, at 15.

In other words, the police power is concerned with governance, and the exception sovereignty. Thus, while both police and exception are concerned with emergencies, the exception constitutes *the* emergency: "the suspension of the *entire existing order,*"[242] by which Schmitt meant the legal or constitutional order.[243] The emergency that calls for this suspension is not a localized emergency threatening the public safety or morals, it is a threat to the very existence of the state itself.[244] The purpose of suspending the constitution, though, is not suspension itself; the aim is to preserve the state, and ultimately the reestablishment of a constitutional order, either new or old.

So who, then, can decide on the exception? In the Weimar Republic, emergency powers were granted to the Reichsprasident in Article 48.[245] Schmitt would later use this to help build an executive-based theory of sovereignty. There is no analogue to Article 48 in the United States Constitution, though there are hints and suggestions.[246] But neither did Article 48 limit Schmitt in identifying possible sovereigns. In various works, Schmitt identified the people and "the prince" as possible sovereigns.[247] In *Political Theology*, Schmitt began to move toward a personalistic, charismatic, and theological conception of the sovereign, for reasons that will

---

[242] *Id.* at 12.

[243] *Id*. at 7. In *Constitutional Theory*, Schmitt offers several different definitions of "constitution," distinguishing at a general level between absolute and relative conceptions. Absolute definitions rest upon the conflation of state and constitution in some way. Relative definitions rest upon the dissolution of unity into discrete constitutional laws. Schmitt's discussion of written constitutions comes in the chapter on relative definitions. But here the American experience intrudes to complicate matters:

> the principle, constitution = lex scripta, still need not mean the dissolution of the unified constitution into a series of individual constitutional laws. Historically, the practice of modern written constitutions begins as an opposition to English constitutional practice, which is principally based on custom and usage. The English colonies in North America, which declared themselves independent states . . . gave themselves written constitutions, which would be drafted and promulgated by the 'constitution-making' assemblies as statutes. These constitutions, however, were considered codifications, not individual constitutional laws. When the concept of the written constitution leads to the handling of the constitution as a statute, initially it is only in the sense of an absolute concept of the constitution, more specifically, as a *unity* and as an *entirety*.

SCHMITT, *supra* note 28, at 69.

[244] *Id*. at 8.

[245] SCHMITT, *supra* note 33, at 201.

[246] *E.g.*, Paul Weidenbaum, *The Executive and Judiciary in Continental Europe*, 17 OR. L. REV. 13, 27 (1937).

[247] SCHMITT, *supra* note 33, at 21.

not detain us here.[248] In *Constitutional Theory*, however, he sketched the outlines of a popular sovereignty and its core, the constituent power.[249]

John McCormick warns that Schmitt's theory of sovereignty in *Political Theology* is characterized "by the ambiguous demands of the political exception."[250] This ambiguity opens the door to modern totalitarianism, which is characterized by the unlimited authority of a charismatic, authoritarian executive power. While this may certainly be a concern, McCormick fails to appreciate the conversation between *Political Theology* and *Constitutional Theory*, which marks a shift in focus from the exception to the constituent power. With respect to the first moment of democracy, the constituent power assumes that an exception exists, and shifts attention to the way out of it.[251] In this moment, the constituent power assumes the form of a "constitution-making power," which "is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence."[252] But for popular sovereignty to work, the people must be able to make this decision without mediation. To understand how Schmitt believes this can occur is to understand both the limits and the possibilities of the popular sovereign.

### *C. Dictatorship*

In Schmitt's democratic theory, the exception never became a state of exception in the sense of becoming an indefinite state of affairs.[253] It was intended, instead, to explain the origins of a legal system.[254] Strictly speaking, the exception is a threat to the entire constitutional order. Determining when such threat exists and how to meet it is the role of the sovereign. How to move out of the exception back to the norm is a distinct though related question, what Andreas Kalyvas has termed the "extraordinary" moment of constitution-making.[255] This move back to the norm is particularly difficult when dealing with a popular sovereign. But if the people could exercise its power through some institution, distinct from a legal or governmental institution, they could realize their constitution-

---

[248] SCHMITT, *supra* note 33, at 5–15.

[249] *See, e.g.*, SCHMITT, *supra* note 33.

[250] McCormick, *supra* note 227, at 229.

[251] SCHMITT, *supra* note 33, at 142.

[252] *Id.* at 125.

[253] *Id*. at 255–67.

[254] *Id*.

[255] KALYVAS, *supra* note 22, at 133–34.

making power.[256] As Schmitt explained, "[t]he further execution and formulation of a political decision reached by the people in unmediated form requires some organization, a procedure, for which the practice of modern democracy developed certain procedures and customs."[257]

This is where Schmitt's concept of dictatorship becomes useful. Dictatorship is largely unfamiliar to American constitutional scholars, and its foreignness is likely to put many off. It is not entirely absent from American constitutional theory, however; and there have been recent efforts to revive consideration of it.[258] Schmitt himself relied upon the Abbe Emmanuel Sieyes's concept of "extraordinary representation" to develop the conception of dictatorship useful to our question, which may serve as an alternative conception.[259] Because I want to maintain a strict distinction between representation and sovereignty here, and because it is an analytically useful term the way that Schmitt uses it, I will continue to use the term *dictatorship* here.

Schmitt examined the historical development of the concept in his book *Dictatorship*.[260] However, in *Constitutional Theory* he examined in greater detail the "sovereign dictatorship" concept he first developed in *Dictatorship*.[261] He was not always explicit about this, but his example of sovereign dictatorship—the constituent assembly—plays such a critical role in the democratic theory he developed in *Constitutional Theory* that the connection is inescapable.

Dictatorship occurs in an exception, that a-legal zone where the distinction between law and politics dissolves.[262] Its purpose is to protect the sovereign against threats to its constitution. In Schmitt's theory, dictatorship offers the way out of the exception; it is a "transitional" state, "a

---

[256] *Id*.

[257] SCHMITT, *supra* note 33, at 34.

[258] *But see* CLINTON ROSSITER, CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES (Princeton Univ. Press 1963); Andrew Arato, *Forms of Constitution Making and Theories of Democracy*, 17 CARDOZO L. REV. 191 (1995); Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Design and Dangers*, 94 MINN. L. REV. 1789 (2010). Rossiter, Levinson, and Balkin are interested in dictatorship's relationship to emergency government powers rather than its constitution-making dimensions.

[259] Abbe Emmanuel Sieyès, *What is the Third Estate?, in* POLITICAL WRITINGS: INCLUDING THE DEBATE BETWEEN SIEYÈS AND PAINE IN 1791 92, 152 (Michael Sonenscher ed., 2003).

[260] *See* SCHMITT, *supra* note 33.

[261] SCHMITT, *supra* note 33, at 109–10.

[262] *See* AGAMBEN, *supra* note 81.

means to reach a certain goal."[263] The dictatorship is created by a commission from the sovereign, which defines the dictator's power by creating a specific mandate, such as waging war, suppressing an uprising, or drafting a new constitution.[264] While the dictator has unlimited power to take action within that commission, the commission itself also acts as a limitation.[265] Conceptually, then, it offers a way to institutionalize the people without falling into the representation problem and collapsing the people into the rule of law.

Schmitt distinguishes between two types of dictatorship: commissarial and sovereign.[266] The two are distinguished by the source and object of the commission, as well as by their relationship to the existing constitutional order. In a commissarial dictatorship, the dictator's commission comes from a constituted authority, a *pouvoir constitue*.[267] This commission gives the dictator power to suspend the constitution as it relates to a specific threat, but only to preserve the existing constitution.[268] The example that Schmitt uses is Abraham Lincoln's suspension of the writ of habeas corpus during the Civil War.[269] A constitutional officer (President Lincoln) suspended the constitution as it applied to certain people on the basis of a constitutional law–Article I, section 9, clause 2.[270] The entire constitution was not suspended, only a specific right as it applied to certain people, and only in order to save the constitution that was suspended in part.[271] The existing constitution remains valid, "because the suspension only represents a concrete exception."[272]

A sovereign dictatorship, by contrast, is a more far-reaching suspension of constitutional and constituted authority. A sovereign dictatorship:

> does not *suspend* an existing constitution through a law based on the constitution–a constitutional law; rather, it seeks to create conditions in which a con-

---

[263] SCHMITT, *supra* note 33, at xl.

[264] *Id*. at 1.

[265] *Id*.

[266] *Id*. at 2.

[267] *Id*. at *xliv*.

[268] *Id*. at 118 (emphasis added).

[269] *Id*.

[270] U.S. CONST. art. I, § 9, cl. 2. Ultimately, "dictatorship gains an authority whose essential significance consists in the rights of suspending legal restrictions and of interfering with the sovereign rights of third parties, depending on the concrete situation." SCHMITT, *supra* note 33, at 30.

[271] SCHMITT, *supra* note 33, at 30.

[272] *Id.* at 118.

> stitution–a constitution that it regards as the true one–is made possible. Therefore, dictatorship does not appeal to an existing constitution, but to one that is still to come.[273]

In other words, the pre-existing constitution is wiped away to clear the way for an entirely new constitution. In contrast to the commissarial dictatorship, which relies upon the *pouvoir constitue*, the power to destroy the existing constitution comes from the *pouvoir constituant*, or constituent power, a power that exists beyond all constituted power.[274] In fact, Schmitt describes the sovereign dictatorship as pure unconstituted power, or the power to make constitutions.[275]

Schmitt relied upon the Abbe Sieyes's idea of "extraordinary representation" to develop his notion of sovereign dictatorship. He used Sieyes to respond to "Condorcet's attempt to use legal regulation in rationalizing the right of resistance."[276] In other words, Sieyes' work pointed the way to a political, rather than legal, explanation for the origins of a constitutional order. According to Sieyes, extraordinary are distinct from ordinary representatives because they are not concerned with matters of government and administration, but with exceptional and extraordinary moments. Thus, "*[e]xtraordinary* representatives have whatever new powers it pleases the Nation to give them . . . by virtue of an extraordinary commission from the people." As a result of this commission, "their common will has the same worth as that of the nation itself."[277] This equation of representative and nation pushes towards the identity that Schmitt places at the core of democracy.[278] Thus, although Sieyes uses the term "representation," the extraordinary representative seems closer to embodiment rather

---

[273] *Id.* at 119.

[274] *Id.*

[275] It is both interesting and instructive that Schmitt does not use the American federal constitutional convention of 1787 as an example of sovereign dictatorship. That convention's commission came from the Continental Congress (a constituted power), and then was explicitly ignored. No delegate to the convention claimed that their power came from the constituent power. Rather, they claimed that it came from a state of emergency. The convention nevertheless used this to their advantage to claim that it was simply a recommending body, and that the constituent power (the people) would ultimately decide to accept or reject the convention's recommendation.

[276] SCHMITT, *supra* note 33, at 123.

[277] Sieyes, *supra* note 259, at 139. *But see* critique of Schmitt's interpretation of Sieyes in Derrida, citing Etienne.

[278] Schmitt defined "democracy" as "the identity of ruler and ruled, governing and governed, commander and follower . . . that results from the substantial equality that is the essential presupposition of democracy." SCHMITT, *supra* note 28, at 264.

than representation in its liberal or governmental mode, as its goal is to carry out a specific mandate rather than to reflect interests.

The problem, of course, is that sovereign dictator is difficult to commission. In contrast to commissarial dictatorships, which are commissioned by a specific decision by a constitutional officer, such as Lincoln's to suspend the writ of habeas corpus, constitutional conventions or constituent assemblies are typically created through a more sustained process.[279] Andrew Arato has identified five elements to Schmitt's sovereign dictatorship: the dissolution of the constituted government, a popularly-elected assembly, a provisional government in the assembly, a referendum on the proposed constitution, and the dissolution of the assembly upon ratification.[280] But inserting "procedure" into democracy is potentially problematic on two related fronts. First, institutionalizing the people threatens to become mere representation. The impossibility of complete identity between governor and governed (the hallmark of democracy) is one of the "boundaries of democracy."[281] While representation is appropriate for the people within a constituted order, to exercise their sovereign authority in the first moment of democracy the identity between governor and governed needs to be at its closest in order to express the will of the *demos*.[282] The second problem with "certain procedures" is its potential to introduce legality into the exception, which must remain a-legal. The task, then, if we seek to maintain the distinction between the moments of democracy, is to distinguish "certain procedures and customs" from both law and representation.

Paulina Ochoa Espejo's idea of "processualism" is useful here. Rather than viewing procedures in a strictly legal sense, Espejo views them as "an unfolding series of events coordinated by the practices of constituting, governing, and changing institutions."[283] In other words, we should not think of procedures and customs as being normative, but simply as a mechanism for organizing or mustering what Schmitt calls "the genuinely assembled people." This processualism does not create a representative institution, it creates a legitimate one.[284]

---

[279] "[S]ince any democracy is conceivable only according to specific rules and guidelines, one easily runs into the problem of circularity when demanding constitutions be made democratically." Arato, *supra* note 258, at 191–231.

[280] *Id.* at 203.

[281] SCHMITT, *supra* note 28, at 302.

[282] *Id.* at 268–69.

[283] ESPEJO, *supra* note 1, at 13.

[284] Hobbes began to develop a notion of embodiment when developing the idea of the "lieutenance of God." As Jacques Derrida explains, "this logic . . . refer[s] to some one who is also

Indeed, for Schmitt, the process of commissioning the sovereign dictator is a matter of convenience; it is the commission that is determinative, which for the sovereign dictatorship is constitution-making. As Schmitt explains, "*The constitution-making power is the political will, whose power or authority is capable of making the concrete, comprehensive decision over the type and form of its own political existence.*"[285] And "The people are the bearer of the constitution-making power and, as such, grant themselves their constitution."[286] The sovereign dictatorship enables the sovereign to make such decisions, to promulgate a new constitution, and to move from exception to a new constituted order. This is a particularly important function for a popular sovereign because of the many obstacles inhibiting the people from organizing into a single collectivity capable of making decisions. The constitution-making function of the sovereign dictator thus provides the condition for the popular sovereign to come into existence in a constitutionally or juridically meaningfully way, as "it seeks to create conditions in which a constitution . . . is made possible."[287] It is not a representative of the people, rather commissioned by the people for this specific duty to create a constitution.

The commission is not intended to create a "mirror" or "portrait" of society, but to give the sovereign a distinct form by giving it a distinct power.[288] Once assembled, the constituent assembly is not bound by any pre-existing constitution or process. Rather, "[t]he will of the people to provide themselves a constitution can only be made evident through the act itself and not through observation of a normatively regulated process. Self-evidently, it can also not be judged by prior constitutional laws or

---

a body, an incarnation of God on earth, to a son of man as son of God, or to some one who, in the Bible, will have represented God . . . . Be it Moses, Christ, the monarch king as Christian king or an assembly of men elected and instituted as sovereigns, their place always stands for the place of God." DERRIDA, *supra* note 206, at 53–54. *See also* Paul W. Kahn, *Political Time: Sovereignty and the Transtemporal Community*, 28 CARDOZO L. REV. 259, 266 (2006) ("For centuries, the sovereign was quite literally embodied in a subject: the monarch was the mystical corpus of the state. . . . The sovereign did not just claim a 'divine right' to rule — a claim about derivation of legitimacy. Rather, the sovereign was the appearance of the divine."); ACKERMAN, *supra* note 2, at 177–78 ("[T]he Federalist treats constitutional conventions as if they were perfect substitutes for *the people themselves*."); *Genesis* 1:26–28 ("Then God said, 'Let Us make man in Our image, according to Our likeness; and let them rule … over every creeping thing that creeps on the earth.'").

[285] SCHMITT, *supra* note 28, at 125.

[286] *Id.* at 255.

[287] SCHMITT, *supra* note 33, at 119.

[288] ERIC SLAUTER, THE STATE AS A WORK OF ART 123–66 (2009).

those that were valid until then."[289] Thus, despite the process for organizing the people, the constituent assembly exists beyond law, and it is in no way limited by it. By "organising the unorganisable," the process is designed to create the conditions for legitimacy, or the belief that the popular sovereign has in fact commissioned the sovereign dictator.[290] As Schmitt explained in *Constitutional Theory*:

> the current practice of democratic constitutions elaborated certain methods, whether it is the election of a constitution making assembly [i.e. a sovereign dictatorship] or it is a popular vote. These methods are frequently bound up with the idea of democratic legitimacy, so that one inserts a certain process into the concept of legitimacy.[291]

Nevertheless, "[t]he people's constitution-making will is bound by no particular process."[292] So long as the constituent, or constitution-making, power is held by the people, "the character of democratic legitimacy can be attributed to the most diverse constitutions".[293]

Once we understand that the procedures for creating a sovereign dictatorship are techniques of legitimacy, rather than legality, the nature of the sovereign dictatorship becomes clearer. The sovereign dictator does not represent the sovereign; it cannot as it does not exist within the constituted order. Rather, the sovereign dictator *is* the sovereign for purposes of the commission, but only for purposes of the commission. Although the dictator has unlimited power within the scope of its commission, the commission can be withdrawn at any time. Even if never withdrawn, once the object of the commission has been complete (e.g. the promulgation of a new constitution), the dictatorship comes to an end. Moreover, if the sovereign dictator goes beyond its commission, the sovereign can still uphold this exercise of authority if it so chooses, as the Americans did in 1789.

Sovereign dictatorship, then, is an important element to a robust democracy. The sovereign dictatorship helps to account for the people's omnipresence as well as their concrete acts by facilitating their organization in exceptional moments without falling into the representation trap. The "certain procedures and customs" operate as techniques of legitimization rather than legalization to ensure that the sovereign dictator embodies the

---

[289] SCHMITT, *supra* note 28, at 131.

[290] *Compare id.* at 130–39, *with* CARL SCHMITT, DICTATORSHIP 123-31 (Michael Hoelzl & Graham Ward trans.) (2014).

[291] SCHMITT, *supra* note 28, at 138–39.

[292] *Id.*

[293] *Id.*

people rather than simply representing them.[294] By embodying the people in an institution, the sovereign dictatorship makes the people capable of deciding upon the exception. This is particularly important when the sovereign is the people: a collective sovereign that is otherwise virtually impossible to organize.[295] In the United States, the sovereign dictator has been the constitutional convention, an important agent of constitutional change throughout much of American history.

### *D. Acclamation*

While the embodiment of the people is critical in the first moment of democracy, representation defines the people in the second moment. This occurs through both legislatures and electorates. As Andreas Kalyvas has explained, once a new order is constituted, the sovereign people recede.[296] In its place, the constitution delegates specific competencies to the now-constituted people, mostly in the form of voting. The constitutional competencies defining the constituted people allows them to elect representatives and to vote on specific ballot questions. These are relatively narrow competencies, allowing the highly politicized people of the extraordinary moment to rest during periods of normal politics.[297] In the first moment of democracy, then, the people exist completely outside of the constituted order; in the second moment, they exist entirely within the constituted order.

---

[294] *Id.* at 132–38.

[295] According to Schmitt, it was here that the twin forces of liberalism and emergencies undermined and ultimately destroyed democracy, thus requiring a more personalistic sovereign that he elaborated polemically in *Political Theology*. As he explained in *Constitutional Theory*:

> the *practice* of modern democracy has rendered the democratic principle relative to an organizational means of legislation. Moreover, certain *affairs* and *materials*, in particular *financial questions*, and the methods of so-called direct democracy are often excluded from the process or this procedure is limited to such materials. Finally, the process of direct democracy can frequently be forced aside by *emergency decisions*.

SCHMITT, *supra* note 28, at 303 (emphasis in original). The chief defects of the modern liberal (or "liberal-democratic") state was that it "ignored the sovereign," evaded the decision, and ultimately destroyed the people through the secret ballot. *Id.* at 272–74. *Constitutional Theory* is a more extended and less polemical examination of the ideas he canvassed in *Political Theology* and *The Crisis of Parliamentary Democracy*. Jeffrey Seitzer & Christopher Thornhill, *An Introduction to Carl Schmitt's Constitutional Theory: Issues and Context*, *in* CARL SCHMITT, *supra* note 28, at 26–35.

[296] KALYVAS, *supra* note 22, at 127–63 (2008).

[297] *Id.*

Rather than rest on this dichotomy between exception and norm, however, Schmitt develops a third moment of democracy.[298] In this moment, the people exist, perhaps paradoxically, both within and outside of the constituted order. The specifically identified constitutional competencies do not "exhaust" popular power. Even with a constituted order, the people can still exercise powers beyond those specifically delegated to or reserved by it under the constitution. Here, they serve as "constitutional regulators" through what Schmitt calls "acclamation," or "public opinion."[299] Acclamation is not superior or anterior to the constitution; it exists alongside it. It accounts for a surplus of authority that can never be fully enclosed or contained by the allocation of specified competencies within a constitution.[300] That is to say that although the people as sovereign recede once the decision has been made, and specific "competencies" delegated or reserved to the people by the new constitution, the people nonetheless remain in unorganized form. The specific competencies (Article V of the United States Constitution, for instance) do not and cannot exhaust the forms and modes by which the people can act even within a constituted order. "[T]he people in its essence persists as an entity that is unorganized and unformed."[301] Schmitt calls this "acclamation," which is an exercise of the constituent power, and a form of norm-creation within a constituted order.[302]

---

[298] SCHMITT, *supra* note 28, at 271–79.

[299] *Id.*

[300] This is, I think, one meaning of Eric Santner's notion of "surplus of immanence:"

> With this shift [from monarchy to popular sovereignty], however, a figure whose sacral soma was seen to embody a 'vertical' link to a locus of transcendence—to divine authorization—comes to be dispersed 'horizontally' among the 'people,' who now come to be both blessed and plagued by a *surplus of immanence*. The new bearers of the principle of sovereignty are in some sense stuck with an excess of flesh that their own bodies cannot fully close in upon and that must be 'managed' in new ways.

ERIC L. SANTNER, THE ROYAL REMAINS: THE PEOPLE'S TWO BODIES AND THE ENDGAMES OF SOVEREIGNTY xxi (2011). As I read Santner, he appears to be talking less about popular sovereignty than liberalism. Indeed, his Freudian approach to the topic suggests that very thing, as Freud was intensely focused on the individual, not the people. Much of what Santner has to say can be applied to the people, too. Though I think the story plays out differently, the liberal strands that contaminate democracy (in the Schmittian sense) ultimately lead to many of the themes Santner identifies. But it does not flow directly from monarchy to the individual without going through the people.

[301] SCHMITT, *supra* note 28, at 271.

[302] *Id.* at 271–79.

In referring to acclamation as "public opinion" Schmitt did not mean to refer to polling practices that have come to define current understandings of public opinion. In fact, he would have rejected the idea that polling has any connection to *public* opinion in the constitutional sense that he was developing. What makes the opinion public in the constitutional sense is that a decision, even a decision not to decide, is a "genuinely assembled people." Modern polling practices contain no element of assembly; they simply calculate the sum of private individual opinions. For opinion to be public, or acclamatory, there must be assembly, action, and some sort of public decision. In fact, Schmitt leaves open the terrain of acclamatory practices.

The assembled people can be created by "ordered procedures" like voting, or they can occur spontaneously.[303] The spontaneous assemblies, though, seem to carry greater weight. In fact, Schmitt was contemptuous of modern liberal democratic voting practices, which he believed no longer contained a public element.[304] This seems counter-intuitive, at least from a liberal perspective. Isn't the electorate the most genuinely-assembled people? In fact, the secret ballot was one of the chief targets in Schmitt's critique of liberalism. The secret, or "Australian," ballot was intended as a cure for electoral corruption, and thus a measure to restore popular power. As James Mill explained the argument,

> The unfortunate voter is in the power of some opulent man; the opulent man informs him how he must vote. Conscience, virtue, moral obligation, religion, all cry to him, that he ought to consult his own judgment, and faithfully follow its dictates. The consequences of pleasing, or offending, the opulent man, stare him in the face; the oath is violated, the moral obligation is disregarded, a faithless, a prostitute, a pernicious vote is given.[305]

According to Mill, then, the secret ballot released individuals from the strictures of social and political hierarchy, enabling the people to finally choose their representatives freely.[306] Yet, while secrecy in voting could liberate individuals, it did not come without costs to democracy.

---

[303] *See* SCHMITT, *supra* note 28, at 272.

[304] *Id.* at 40; *cf.* Abu El-Haj, *supra* note 168 (arguing that the political process does not require extensive legal regulation).

[305] Joseph H. Park, *England's Controversy over the Secret Ballot*, 46 POL. SCI. Q. 51, 52 (1931) (quoting James Mill, *Thoughts on Moderate Reform in the House of Commons*, WESTMINSTER REV., July 1830, at 1, 11), https://babel.hathitrust.org/cgi/pt?id=uc1.c080953742;view=1up;seq=12.

[306] *See id.*

Schmitt understood these costs. We can see the seeds in Mill's quote. While seemingly focused on the people, the actual object of the secret ballot is the individual. With the secret ballot the individual becomes paramount. "Democracy" then becomes the product of innumerable individual decisions rather than a single decision made by the constituent power. In other words, the secret ballot leads to the fragmentation of the *demos*. Secrecy in voting makes an election a private matter, one that occurs behind a screen rather than in public. The secret ballot not only disaggregates the people into so many individuals, it prevents the people from emerging by rendering a quintessential political act private.[307] When the concrete people begin to think of themselves as individuals with interests distinct from the *demos*, liberalism begins to take prominence over democracy. This privatization of voting means that no democratic legitimacy can emerge from elections, and that the people cannot be genuinely assembled in an election. As Schmitt explains:

> Considered in constitutional terms, the assembled are not the people and do not engage in a public function. Where the people engage in constitutionally sanctioned functions, such as elections and votes, the assembly is *not* directly part of the legally established process. The election or vote, more precisely, is a *secret individual vote*.[308]

What is most important to the genuinely assembled people is that they must act in public. This is where Schmitt reveals his understanding of the distinction between liberal and democratic constitutionalism. The people and public are synonymous from the perspective of acclamation. Schmitt's concept of "public" is important here. First, it requires presence. The absence of the people requires representation, which is necessary in the second mode of democracy once the people have receded. It is the presence of concrete people that places acclamation "next to" rather than within a constituted order.[309] By acting publicly, the people announce their presence, removing the need for and overcoming the problems created by

---

[307] SCHMITT, *supra* note 28, at 273.

[308] *Id.* Schmitt would go on to say:

> It is fully conceivable that one day through ingenious discoveries, every single person, without leaving his apartment, could continuously express his opinions on political questions through an apparatus and that all these opinions would automatically be registered by a central office, where one would only need to read them off. That would not be an especially intensive democracy, but it would provide a proof of the fact that the state and the public were fully privatized.

*Id.* at 274. However, we seem to be approaching that moment.

[309] *See id.* at 272, 275.

representation. "People and public exist together: no people without public and no public without the people. By its *presence*, specifically, the people initiate the public. Only the present, truly assembled people are the people and produce the public."[310]

Spontaneity, rather than order or legal prescription, is typically a component of the genuinely assembled people. Schmitt does not use this term himself, but it is clearly the direction he intended. He persistently emphasized that the people in this moment remained "unorganized," and that acclamation "can never be recognized legally and made official[;] in some sense, it remains uncontrollable."[311] Rather, it is "incomprehensible and resistant to organization."[312] By "organization" Schmitt meant top-down efforts to organize the people. His examples of genuine assemblies bear out this construction: "street demonstrations and public festivals, in theaters, not he running track, or in the stadium."[313] These "simple and elementary appearances . . . " "intrinsically contain[] unexpected political possibilities."[314]

By acting in public, the people become present, revealing their constitutional regulatory authority and enabling it to create or ratify new specific norms as they pertain to specific constitutional provisions. One of the central questions animating Schmitt's work was the origin of norms or a system of norms; accounting for this was the point of his conception of sovereignty. The sovereign decision creates a comprehensive system of norms. What it does not capture, however, is the emergence of new norms within a constituted order. That is the role that acclamation plays. New norms can also be introduced from above within the constituted order, and then subjected to popular approval though referenda and the like. But as Schmitt pointed out, that mode of decision-making was problematic from a democratic perspective because the formulation of the question was often decisive.[315] In that way, the governors could control the governed.

Acclamation enables the people to prevent total control by their representatives, and to reassert their constituent authority without having to suspend the constitutional order. As Antonio Negri has explained:

---

[310] *Id.* at 272.

[311] *Id.* at 275.

[312] *Id.* at 276.

[313] *Id.* at 272.

[314] *Id.*

[315] *Id.* at 272, 303–05.

> [C]onstituent power has been considered not only as an all-powerful and expansive principle capable of producing the constitutional norms of any juridical system, but also as the subject of this production—an activity equally all-powerful and expansive. From this standpoint, constituent power tends to become identified with the very concept of politics as [the] concept is understood in a democratic society. To acknowledge constituent power as a constitutional and juridical principle, we must see it not simply as producing constitutional norms and structuring constituted power but primarily as a subject that regulates democratic politics.[316]

Democratic politics, then, is not limited to constitution-making, in the sense of a comprehensive decision on the exception. It also entails the maintenance of the legitimacy of an existing constitutional order by providing for the creation of new norms within a constituted order. A new norm is consolidated most clearly when "legal institutions and procedures" recognize it; they can "bring it to expression, to validate it, and beyond its official content, to create an indicator of public opinion."[317]

But if the power of acclamation lies in its un-organizability, its weakness lies in the concomitant lack of decisiveness. An *opinion* acclamation is difficult to determine and easily manipulated. With the rise of modern polling practices, as well as advertising and public relations techniques as applied to political campaigns, what counts as public opinion often rests upon shaky grounds.[318] Beyond the question of whether this opinion counts as "public," Schmitt also understood the manipulability problem: "[t]he weakness is that the people should decide on the basic questions of their political form and their organization without themselves being formed or organized. This means that their expression of will are easily mistaken, misinterpreted, or falsified."[319] In fact, a paradox emerges as we seek ways to more accurately gauge public opinion: in doing so we create (or manipulate) public opinion rather than simply calculate it.

Even more problematic for Schmitt, is the general apathy of the people, which leads to evasion rather than decision.[320] This propensity toward avoidance of the decisions made Schmitt skeptical of popular sovereignty

---

[316] ANTONIO NEGRI, INSURGENCIES: CONSTITUENT POWER AND THE MODERN STATE 1 (Maurizia Boscagli trans., 1999).

[317] SCHMITT, *supra* note 28, at 278.

[318] *See* SARAH ELIZABETH IGO, THE AVERAGED AMERICAN: SURVEYS, CITIZENS, AND THE MAKING OF A MASS PUBLIC 113 (2007).

[319] SCHMITT, *supra* note 28, at 131.

[320] *See* SCHMITT, *supra* note 33, at 49. According to Cristi, Schmitt "does not fully perceive that democracy and the notion that sustains it, namely popular sovereignty, diverge substantially from liberalism, the slayer of sovereignty." Renato Cristi, *Carl Schmitt on Sovereignty and Constituent Power*, *in* LAW AS POLITICS, *supra* note 33, at 183.

and pushed him towards the personalistic concept of sovereignty in *Political Theology*.[321] And this is the key point. When acclamation, which is most important in the third mode of democracy, moves farther away from both the original decision and the potential for a further decision, it becomes "mere" acclamation.[322] In other words, it loses its bite, and simply becomes subject to manipulation precisely because of the likelihood that the people will not mobilize its sovereign authority. Nevertheless, it remains a potentially powerful component of popular power, and it is necessary for a robust democracy.

### *E. Schmitt's People*

Schmitt's conception of the people is a protean one. But that should not be taken as fatal. We can now see that the people act differently and through different mechanisms depending upon the moment of democracy in which they exist. The people as a constitution-maker acts different than the people as governors, who act differently than the people as constitutional regulators. Even within each moment the people can vary. Sovereign dictatorships come and go; there are many ways to organize a government and system of representation, and many ways to place limits on the constitutional activity of governors.[323] This protean quality is part of the people's strength. What is important is to be clear about which moment we are in, and which power is being exercised.

Also important, however, is the possibility for the people to act in each moment. Espejo's processualism theory helps us to understand that the moments of democracy must be connected in order to achieve a robust, even radical, form of democracy.[324] All three must work together and be possible for any particular mode to be meaningful, and for democracy to be a distinct, legitimate, and viable competitor to liberalism. In fact, the disaggregation of these moments is part of Schmitt's critique of liberalism.[325] Viewing each moment in isolation entails avoiding the decision, making representation merely procedural, and channeling acclamation through law and legal procedures, thus shifting the plane of democracy toward individual rights rather than the power of the people.

---

[321] *See* SCHMITT, *supra* note 33, at 30–32.

[322] Mitchell Dean, *Three Forms of Democratic Political Acclamation*, TELOS, Summer 2017, at 9, 19.

[323] *See* SCHMITT, *supra* note 33, at 75–77.

[324] ESPEJO, *supra* note 1, at 196–99.

[325] *Id.* at 120.

Understood in light of processualism, Schmitt's concepts of sovereignty, dictatorship, and acclamation are quite useful for re-incorporating those moments of the people that stand outside of the constituted order (sovereignty and acclamation) into constitutionalism.[326] First, if we are concerned with the people in their sovereign capacity, Schmitt encourages us to look for exceptional or extraordinary moments to determine whether the people have decided.[327] The sovereign dictatorship is particularly important for the popular sovereign. The delegation of the constitution-making power to a specific institution gives the people the capacity to decide. Without such an institution, the people languish as an unorganized mass, unable to make a comprehensive decision on the constitutional order. Finally, in identifying acclamation as a form of constituent power, Schmitt keeps law and democracy distinct in order to preserve a space for the people to act in ways beyond those allowed, delegated, or reserved by the existing constitution, where liberalism would prefer to keep them contained.[328]

## III. SCHMITT AND THE POPULAR TURN

The popular turn has been a proving ground for Schmitt's ideas, if unwittingly. Elements of Schmitt can be found in the works of Ackerman, Amar, and Kramer. This has not been self-conscious, of course. Of the three, only Ackerman has demonstrated any knowledge of Schmitt's work, and that only to distance himself from Schmitt.[329] But it is possible to read each through a Schmittian lens to piece together a more coherent and useful conception of "the people." The popular turn has elaborated the people mostly in the third moment, or its acclamatory phase, even as its practitioners have often spoken more in terms of the sovereign first moment.[330] Amar has identified specific constitutional recognition of acclamation in the right to alter or abolish government clauses.[331] And Kramer and Ackerman (in his third and fourth constitutional moments) have elaborated acclamatory practices throughout American history. The first moment of

---

[326] *See* SCHMITT, *supra* note 33, at 125–26.

[327] *Id.* at 14–15.

[328] *Id.* at 6.

[329] Sanford Levinson has noted that "there is an undoubtedly Schmittian strain in Ackerman." Levinson, *supra* note 73, at 2650–51. *See also* KALYVAS, *supra* note 22; Kalyvas, *supra* note 25, at 1540 n.6.

[330] *Cf.* FRITZ, *supra* note 2, at 298 ("Our attenuated notion of the people as the sovereign is now a pale imitation of the place 'the people' occupied when the constitution was formed and as it was elaborated and understood by many Americans before the Civil War.").

[331] Amar, *Philadelphia Revisited*, *supra* note 98, at 1057–58.

democracy is not totally absent, however. Schmitt's theory of sovereignty incorporates and connects the people and exception through a mechanism that embodies and reflects the people's authority rather than merely representing it, which should help us to understand the role of illegality in Ackerman's first two constitutional moments.[332]

### *A. Amar and the Constituent Power*

Amar is less concerned with exceptional moments than Ackerman is. In many ways, Amar is opposed to the exception. But I think it would be more accurate to say that he simply cannot see it. Amar's people can never act illegally, because they have expressly reserved to themselves the right to alter or abolish the government, which he interprets as legal rather than extra-legal, illegal, or a-legal.[333] In fact, Amar uses this right to argue that Americans could *legally* change the U.S. Constitution beyond the requirements of Article V of the federal constitution.[334] The right to alter or abolish the government for Amar is not the device by which the sovereign declares an exception to exist; it is not a suspension of law. The right is a legal right and thus lies within law's domain not at its liminality. Thus, for Amar, there is no state of exception. Abolishing government is, awkwardly, bounded by a norm. This marks the limit of Amar's conception of the people. A reconceptualization is in order.

Amar's legalistic right to alter or abolish the government distinguishes his people from Ackerman's. As we've seen, illegality is central to Ackerman's conception of the people.[335] Illegality helped Ackerman to develop his idea of "constitutional moments" in which the people exercise their constitutional and sovereign authority that legitimized (or constitutionalized) those otherwise illegal acts. By contrast, Amar views both the Founding and Reconstruction as entirely legal because they were rooted in the right to alter or abolish the government. The existence of this right gives legal authority to extra-constitutional acts of the people. This is not revolution. Rather, the right to alter or abolish the government operates through certain, established procedures, such as constitutional conventions and elections, which keeps the people on a legal plane.[336]

---

[332] *See id*. at 1047–49.

[333] *Id*. at 1050–52.

[334] *Id*. at 1054–57; *see also* Amar, *The Consent of the Governed*, *supra* note 98.

[335] Ackerman, *supra* note 3, at 1017 n.6.

[336] *See, e.g.*, Akhil Reed Amar, *The Central Meaning of Republicanism: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 750 (1994) ("Exactly

In contrast to Ackerman's people, Amar's people never leave the constituted order to make changes to it. "All governmental policy and governmental policymakers could, in time," Amar argues, "be *lawfully* replaced by the *sovereign* people via constitutional conventions and ordinary elections."[337] Amar then creates a two-track legal amendment process in which the Federal Constitution can be amended either through the procedures laid out in Article V or upon the equally legal right to alter or abolish the government.

But Amar's attempt to wrap the people in legality is curious, especially given his emphasis on the right to alter or abolish the government. How can a government be abolished by legal means? And if the power to amend the Constitution through Article V is a legal method, what is gained by characterizing the right to alter the government as also legal? While sovereignty may not be power or authority completely unrestrained, neither is it constrained by law. Thus, although Amar is at pains to demonstrate the legal character of the people, a sovereign people nonetheless continue to lurk in constitutional shadows beyond the actual constitution itself.

Amar's reduction of the right to alter or abolish the government to the status of legality dissolves the distinction between constituent power and law that Schmitt attempts to draw. In construing clauses similar to the American right to alter or abolish the government in Germany's Weimar Constitution, Schmitt warned against reading them as statutes.[338] They "are not statutes at all, and consequently, are also not constitutional laws. They are not even framework laws or fundamental principles."[339] Rather, such expressions are "concrete political decisions providing [a] people's form of political existence."[340] To put it differently, they identify the people as the constituent power, recognizing their power to alter the constitution through acclamation, or to abolish it through their sovereign power.[341] The domain of the right is power and will, not norms, procedures, or precedents.

---

who were 'the People,' a 'majority' of whom could lawfully alter or abolish government?"). Amar does recognize the possibility of the people acting beyond the legal order in his discussion of the right of assembly, where he points to "the need to keep open the special channel of the popular convention acting outside of all ordinary government . . . ." AMAR, *supra* note 2, at 27.

[337] AMAR, *supra* note 2, at 112.

[338] SCHMITT, *supra* note 28, at 78.

[339] *Id.*

[340] *Id.*

[341] *Id.*

Reconstrued as a constituent as distinct from a legal power, the right to alter or abolish the government demonstrates that Americans, like Schmitt, conceived of democracy in three moments. This is apparent, first, when we separate "alter" from "abolish." The right to abolish government indicates that the people possess the sovereign power to declare an exception, suspend the existing constitutional order, and create an entirely new constitution. This is the people in their first moment, in their sovereign capacity above and beyond law, as the point of origin of law. To put it in Schmitt's terms, this is "the complete decision over the type and form of the political unity," which "originates from an *act of the constitution-making power*."[342] Schmitt himself points to the American Revolutionary conventions of the 1770s as an "especially" clear example of this first moment of democracy.[343] Amar appears to agree. For instance, he argues that "[p]opular sovereignty is consistent with and may even require special deliberative assemblies at both the proposing and ratification stages."[344] Not much later he makes the claim with less qualification. Instead of "may," he argues that a "popular sovereignty approach champions deliberation in popular and proportionately representative bodies."[345] The argument would have been even more powerful had he replaced "proportionately" with "extraordinarily," as conceived by Sieyes, and lending a basis to an American variation of Schmitt's sovereign dictatorship.

Amar, though, has been more interested in the right to alter the government. He distinguishes this right from specifically identified modes of constitutional change in the text of a constitution, specifically Article V of the U.S. Constitution.[346] This distinction maps on nicely to Schmitt's second and third moments of democracy. Article V is part of the specifically delegated constitutional competencies of the people. This is part of the people's governing power that enables them to act formally according to specific procedures to amend a constitution. But as Schmitt pointed out, the delegation of specific competencies within a constitutional order did not exhaust the people's powers, which seems to be the same point Amar makes about the right to alter or abolish as developed in the Federal Bill of Rights. In the third moment of democracy, the people remain capable of exercising their constituent power through acclamatory practices.[347] In other words, they can make constitutional changes in ways beyond those

---

[342] *Id.* at 75.

[343] *Id.* at 76.

[344] Amar, *Philadelphia Revisited, supra* note 98, at 1101.

[345] *Id*.

[346] *Id*. at 1102.

[347] Ackerman, *supra* note 8, at 468–70.

specifically identified in a constitution. Read this way, Amar's analysis of the Bill of Rights adumbrates American practices of acclamation. For example,

> State legislatures could alert the people to any perceived usurpations by central agents (consider the "sirens" sounded by the Virginia and Kentucky legislatures in 1798, or the Hartford convention in 1814-15); state militias could thwart and thus deter a tyrannical standing army; state common law of trespass could vindicate persons' Fourth Amendment rights and Fifth Amendment takings-clause rights; and so on.[348]

Amar's people do more than vote and acquiesce, they are able to act positively and directly in a variety of ways within though adjacent to the constituted order.

Viewed from a Schmittian lens, the right to alter or abolish the government is not a legal right, as Amar would have it.[349] Rather, it is part of the people's constituent power, which lays beyond law. It is not a specific competency delegated to a constituted people, but the political power that remains within a constituted order even after all legal authority has been delegated. Conceptually, this makes more sense than Amar's attempt to dissolve the constituent power into law. For if the people could only ever act legally, how could they ever found a legal system. This circularity would take us right back to the problem that Schmitt was trying to solve.[350] What the right to alter or abolish the government tells us is that the people can act legally, extra-legally, and a-legally.

### *B. Ackerman and the Exception*

Although Ackerman seeks to distance himself from Schmitt, there are similarities in their work. The most obvious point of connection is Ackerman's grounding of the constitutional moment in illegality. Illegality is reminiscent of Schmitt's concept of the exception. But Ackerman is inconsistent in the way that he uses the term "illegal" in reference to the constitutional moment. Illegal means something different in each moment. Ackerman and Schmitt are closest at the Founding, where the prior constitution was suspended in anticipation of the creation of a new constitution. They also remain close in Reconstruction, where we can also see a suspended constitution. But Ackerman's subsequent moments appear to occur within, or perhaps next to, the constituted order rather than outside

---

[348] AMAR, *supra* note 2, at 123.

[349] Amar, *supra* note 98, at 1102–03.

[350] SCHMITT, *supra* note 28, at 75.

of it. Separating sovereign from acclamatory moments gives more precision to Ackerman's analysis, and also demonstrates the usefulness of Schmitt's works to the popular turn.

Illegality provides the circumstance for the people's appearance in Ackerman's account. For Ackerman's first two constitutional moments, the failure to follow specific constitutional procedures to make constitutional change makes the moment appear illegal.[351] Suspending legal norms calls for reliance upon the constituent power to effect fundamental constitutional changes. At this point, Ackerman seems to be tracking Schmitt's state of exception, on which the sovereign must decide. Sovereignty exists at a point beyond the law; it is superordinate to law. It is in the exception where sovereignty is forged. But the exception is not necessarily synonymous with illegality. As Giorgio Agamben has explained, even Schmitt's concept of the exception was not entirely lawless.[352] Rather it is a space where the distinction between law and politics is erased—it is a "juridical and constitutional vacuum."[353] But while Ackerman's notion of "constitutional moments" at times appears to be similar to Schmitt's exception, ultimately, he hedges. [354] Just as he is about to make the final step into the exception, he explicitly rejects this idea.

There are a couple of different ways to interpret Ackerman's people. One is that the entire process from initiation to ratification constitutes the people. Read this way, ratification equates to the decision. This works best with the Founding, where ratification creates a new constitution. It also works with the ratification of the Reconstruction Amendments following the Civil War. But the way that Ackerman develops this process, it is not "the people" who are deciding, first, on whether an exception exists, and second, how to resolve the exception. Instead, the people appear only at certain junctures in Ackerman's process, in votes for representatives and yes-or-no votes on constitutional changes.[355] Schmitt characterizes such practices as acclamation.[356] This is the second, and I think more accurate, reading of Ackerman's people within the process. The people

---

[351] Ackerman, *supra* note 8, at 456–59.

[352] AGAMBEN, *supra* note 81, at 35–36.

[353] *Id.* at 60.

[354] This is similar to the debate over the state of exception as to whether it should be within the juridical order or external to it. The argument that it is within the juridical order is also a modern development. *See, e.g.*, AGAMBEN, *supra* note 81, at 22–24, 26.

[355] Hulsebosch, *supra* note 91, at 1531.

[356] SCHMITT, *supra* note 28, at 131–32.

are exercising their constituent power even in this account, but it is not in its sovereign, constitution-making mode.

Ackerman's people, even in their most authoritative moments, do not decide, they merely acclaim.[357] They are far more passive and reactive than proactive and decisive. Ackerman's people simply ratify or acquiesce to decisions made by their leaders.[358] These actions may be all they are capable of doing, something that troubled Schmitt about democracy's viability. But if Schmitt is correct that the sovereign is he, or it, who decides on the exception, then Ackerman's account does not lead us to popular sovereignty. In fact, it provides us with a limited account of American democracy. Nor does it provide us with a way to understand how American democracy has changed over time, changes that are implicit in Ackerman's own account as he moves from the first to the last of his constitutional moments.

Bringing the exception into Ackerman's theory helps create more conceptual coherence to his account of the people, and the development of his constitutional moments. It might also help us to identify how the people have changed over time in American constitutional history. Looking for those moments when the constitution was suspended, who made the decision, and how the suspension was resolved either by creating a new constitution or restoring the old could go a long way towards identifying who the people is and the role it plays within the constitutional order. While there have been many exceptions in American history, particularly in the nineteenth century, Ackerman's first two constitutional moments—the Founding and Reconstruction—certainly qualify.[359]

Although the Founding and Reconstruction were exceptions, the experiences were quite distinct, as we might expect from exceptions. Each, however, produced distinct constitutional orders. The Founding began with a commission to an assembly of states to revise the Articles of Confederation.[360] That assembly immediately exceeded that commission (i.e. their legal authority), and drafted an entirely new constitution, which is then submitted to the states for ratification. The justification for exceeding its commission was a threat to the continued existence of the Confederation as constituted. In Reconstruction, by contrast, Congress declared an exception, and it suspended the Federal Constitution as it applied to the

---

[357] Hulsebosch, *supra* note 91, at 1527.

[358] *Id.*

[359] *Id.*

[360] *Id.* at 1528.

states of the former Confederacy.[361] While numerous theories were proffered as to the precise status of the states whose readmission to the Union was dependent upon ratification of what would become Fourteenth Amendment, the upshot was that the Federal Constitution was suspended as it applied to those states. Not only were those states not entitled to full membership within the Union, but the strictures of the amendment procedure under Article V were also suspended.[362] Whether the Fourteenth Amendment was "legal" or "illegal" was a question entirely beside the point. The exception dissolved law into politics. Congress not only declared an exception, but then commissioned itself as the sovereign dictatorship that determined when the exception (i.e. suspended constitution) would come to an end.

This analysis suggests that the people changed during the Reconstruction. Congress, a constituted power, decided whether an exception existed and how to resolve that exception. While the people were given the opportunity to acclaim that decision, that acclamation was watered down because of the way that the vote was posed. As Schmitt warned in *Constitutional Theory*, one of the limits of acclamation is the way that the question is posed; the question is often the decisive question.[363] Moreover, the way the vote was structured, as a condition on such a large number of states to readmission to the Union, made even the acclamation suspect as an exercise of the people's constituent power. Nevertheless, subsequent elections for members of Congress, the President, and the Fifteenth Amendment might serve as further examples of acclamation, as Ackerman himself suggests.[364] This is the acquiescence that consolidates the new regime. But there does seem to be a qualitative difference between the Founding and Reconstruction of the people. The people in Reconstruction seem less able to exercise their sovereign, constitution-making authority directly than they did in the Founding.

While Reconstruction appears to be a genuine exception, the people's relationship to that exception seems different than it was during the Founding. While the people were able to commission a constitution-making body in the Founding, that task was taken over by Congress in Reconstruction. Whether Congress could be conceptualized as the sovereign dictator commissioned by the people, I leave to another time, or to others to take up. It is far too complex an issue to take up here. The point here

---

[361] *Id.* at 1531.

[362] *Id.*

[363] SCHMITT, *supra* note 28, at 278.

[364] Hulsebosch, *supra* note 91, at 1532.

is to identify the importance of the exception in helping us to identify more precisely who the people are, and how they can act in decisive moments. The goal in thinking about the exception should be to identify who made the decision, which might then allow us to consider and identify the sovereign dictator. Using such an approach might find help us to identify the changing nature of sovereignty in America over time, in addition to a re-invigorating the concept of "the people."

### *C. The Popular Turn and Acclamation*

Outside of Ackerman's constitutional moments, the popular turn has worked mostly on the terrain of acclamation, which, interestingly, was the least developed of Schmitt's concepts. The popular turn thus potentially has much to say to scholarship on Schmitt's democratic theory. But here I want to focus on the former. Ackerman, Amar, and Kramer all deal with acclamation at some point in their works. While there are acclamatory elements throughout Ackerman's constitutional moments, they are most apparent in the New Deal and the Civil Rights Revolution, where the people existed next to the constituted order. Acclamation is also apparent in Amar in the ways in which he elaborates the right to alter or abolish government. And Kramer's entire concept of popular constitutionalism can (and should) be understood as acclamation. Kramer's people are not the people in their sovereign mode; they are not "anterior to and above the constitution."[365] They exist and act next to or "compared with" the constitution.[366] Kramer's people do not found a constitutional order, they simply participate in its development.

Ackerman's five-stage process of extraordinary constitutional change can be seen as acclamation. Ackerman's people rarely leave the constituted order, but they nevertheless exercise their constituent power and are not bound by law. Volume 3 of *We the People* is, on one reading, a brilliant analysis of acclamation and the ways in which it is validated through the creation of new constitutional principles, or norms. Ackerman's goal is to demonstrate how certain "landmark" statutes, like the 1964 Civil Rights Act, the 1965 Voting Rights Act, and the 1968 Fair Housing Act, contain new constitutional principles.[367] Because he is dealing with formal procedures involving constitutional change, this may not appear to be acclamation in the sense Schmitt was trying to develop it. But

---

[365] *See generally* KRAMER, *supra* note 2 (referring to the people as not above the Constitution in their sovereign mode).

[366] *See generally* KRAMER, *supra* note 2 (comparing the people with the Constitution).

[367] 3 ACKERMAN, *supra* note 2, at 11.

Ackerman points out that his "central analytic question" is whether "a landmark statute [may] function as *a legitimate alternative to a formal Article V amendment* in expressing the considered judgment of We the People."[368] When the question is posed this way, acclamation becomes clear. The formal method of constitutional change is Article V. Statutory change that occurs outside of Article V can thus serve as acclamation, if conceived of as the power to introduce new constitutional principles in ways other than the formal procedures provided for in a constitution. In this way, Ackerman invites us to view the civil rights statutes as acclamation, though he himself does not use the term. Through these statutes, Congress and the federal courts navigated around "the narrow version of state responsibility inherited from Republican Reconstruction" in the 1860s and 1870s to introduce new norms intended to respond to "the problem of institutionalized humiliation," such as no longer tolerating "exclusionary practices in public accommodations, private employment, and the private housing market."[369]

The main problem with Ackerman's account as acclamation is that it focuses on leaders.[370] While some of those leaders, e.g. M.L. King, would fall within Schmitt's negative definition of the people next to the constitution, in that they are not themselves rulers, Ackerman limits his conception of the people to voters rather than initiators, those people who resisted the denial of their civil rights on a day-to-day basis, who organized, agitated, marched, led, and followed. In other words, he largely ignores the people who made the leaders possible. Shifting focus to and privileging these on-the-ground practices might strengthen Ackerman's claims when understood as acclamation.

---

[368] *Id.*

[369] *Id.* at 13.

[370] Ackerman is explicit about this approach at least:

> The Second Reconstruction, [he writes,] was a product of generations of activism, which began long before *Brown*, and continues onward into the twenty-first century. But this book does not try to contribute directly to this rich history. It focuses instead on the two decades between 1954 and 1974, when ordinary Americans—white as well as black—centrally engaged with their national institutions to confront and resolve fundamental issues of racial justice.

*Id.* at 49. He also expressly fails "to integrate the voice of movement activists, local political leaders, and ordinary Americans into the story." *Id*. at 49, 314. Ackerman thus focuses more on the validation of acclamation. Or we might say that he has developed a way to understand how acclamation is validated over time, something that Schmitt did not develop at all.

Amar and Kramer point the way to understanding acclamatory practices. Amar's reading of the federal Bill of Rights is one of "constitutional regulation," to put it in Schmittian terms.[371] Amar identifies a number of practices and institutions (what he calls "intermediate associations") through which the people could exercise their constituent power alongside the formal constitution, such as petitions and assemblies, and churches, militias, juries, and local governments. Schmitt also pointed to petitions, assemblies, and local governments as acclamatory institutions, so long as they remained political, i.e. public.[372] Once made into individualized rights and legalized, they became more private than public, much like the right to vote.[373] According to Amar, these practices remained political until at least the Fourteenth Amendment, which initiated the legalization process, reformulating the Bill of Rights as "rights" to be protected from state interference.[374]

Amar's reading of the Bill of Rights is further evidence that Americans understood the three moments of democracy. Read through the right to alter or abolish the government, the Federal Bill of Rights (and likely state bills too) adumbrates acclamation as Americans (or at least American leaders) understood it. The practices and institutions were ways in which Americans could "alter" the Federal Constitution beyond making formal textual changes. But the line between popular power and individual right could be slim, as Schmitt taught.[375] Some practices or institutions could die out, or they could have the public nature regulated out of them. But as Schmitt pointed out, no enumeration of rights could identify or exhaust the range of political activities that could become acclamation.[376] Because the people remain unorganized and unformed the key to their political activity is spontaneity, which cannot be controlled or predicted.

Kramer's "popular constitutionalism" is perhaps the fullest examination of acclamation. In some ways, in fact, "popular constitutionalism" is probably a more juridically useful concept. It suggests that new constitutional norms can be introduced and take hold outside of the formal amendment process but without suspending the constitution in an exception.

---

[371] SCHMITT, *supra* note 28, at 203–04.

[372] *See generally* AMAR, *supra* note 2.

[373] *See* SCHMITT, *supra* note 33, at 273; *see also* Abu El-Haj, *supra* note 168, at 40–53 (on the legalization of assembly in America).

[374] *See* AMAR, *supra* note 2, at 133.

[375] *See generally* SCHMITT, *supra* note 33, at 197–215 (discussing the evolution of basic rights throughout history).

[376] *See generally id.*

Popular constitutionalism thus operates in the third moment of democracy next to or alongside a formal constitution. Kramer, like Amar, however, refuses to let go of the primacy of legality. "It was a constitutional system that was self-consciously legal in nature, but in a manner foreign to modern sensibilities about the makeup of legality."[377] But as we have seen, the legal "people" exists within the second moment of democracy. Reconceptualized as acclamation, popular constitutionalism becomes a part of the constituent power, and thus becomes extra-legal rather than legal. This reconstruction of popular constitutionalism can help us to understand Kramer's departmentalism differently, and to draw connections back to Ackerman's regime-centric approach.

Kramer's departmentalism theory of constitutional interpretation, which allows each branch of the federal government to interpret the Federal Constitution itself, is based broadly upon acclamatory practices.[378] In fact, Kramer refers to the people in this theory as constitutional "regulators," much in the way that Schmitt described the people in the third moment of democracy.[379] The "people" in this sense is understood "as a collective body capable of acting independently from within the political system," through "political-legal devices."[380] The specific devices that Kramer identifies contain the public character Schmitt held necessary to bringing the people into being in this moment: juries, mobs, political parties, voluntary associations, partisan press, parades, petition campaigns, conventions, planting of liberty poles, burning effigies, feasts, and public toasts.[381] Fairly early in the history of popular constitutionalism, by the second quarter of the nineteenth century, elections became the primary means by which the people registered their support or opposition to departmental interpretations. But elections had not yet become liberalized and private in the sense that so concerned Schmitt. During this period, elections were still very much a public activity in Schmitt's sense of the term. As Kramer explains, "[a]n election was but the final step in an extended and systematic process of convening the electorate. The process began with what contemporaries referred to as 'primary assemblages of the people,' which is to say local conventions held at the county, township, or ward level."[382] As a final step in an extended process, even a secret

---

[377] KRAMER, *supra* note 2, at 30 ("It was a constitutional system that was self-consciously legal in nature, but in a manner foreign to modern sensibilities about the makeup of legality.").

[378] *Id.* at 91.

[379] *Id.* at 91–92.

[380] *Id.* at 92–93 (inner quotation marks omitted).

[381] *See id.* at 93.

[382] *Id.* at 161.

ballot could maintain the public nature of an election. When Kramer defines "the people" as "a collective body capable of acting independently from within the political system," then, he is defining it as it exists in Schmitt's third moment of democracy; a collective, public body engaged in regulating constitutional norms.[383]

While Kramer's definition of the people could lead to analysis of the people in their sovereign moment, Kramer is entirely unconcerned with the exception and its suspension of the existing constitutional order. As Kramer writes:

> Many, perhaps most, scholars today believe that 'popular sovereignty' is and can be expressed only at rare moments [and] 'the people' are otherwise either absent or present only as an abstraction. Such was the belief of neither our Founding Fathers nor of their children nor of their children's children . . . .[384]

Here again, Kramer makes his intervention clear; he is acknowledging that the people exist in other modes, but that his concern is with the people next to, not outside or within, the constitutional order. Kramer is only concerned with regulation of norms, or constitutional principles, within a constituted order by the people engaged in extra-legal acclamation. His distinction between law and politics strengthens the point:

> In politics, the people rule. But not in law. Law is set aside for a trained elite of judges and lawyers whose professional task is to implement the formal decision produced in and by politics. The Constitution, in this modern reading, is a species of law . . . . Constitutional politics, in which the people have a role, is the process by which new constitutional law is made.[385]

Kramer is actually critical of this distinction. But what he objects to is a modern understanding where constitutional politics "is distinguished from interpreting and enforcing existing constitutional law . . . ."[386] I think what Kramer means by constitutional *law* here should be read as constitutional *order* or system.[387] But if we read *law* to mean specific constitutional laws, the distinction between law and politics makes sense, so long as we realize that they are connected. Thinking of "constitutional politics" as acclamation, we can see that the point of acclamation is to create new norms with respect to an existing constitution. Kramer clearly sees the two as linked and is criticizing modern scholars for maintaining too sharp

---

[383] *Id.* at 92–93.

[384] *Id.* at 15–16.

[385] *Id.* at 15.

[386] *Id.* at 8.

[387] *Id.*

of a distinction in which the two worlds never coincide outside of the exception, or "rare moments." Thinking of "constitutional politics" in juridical terms, as Schmitt does, helps us to see the ways in which law and politics are related, even though they remain distinct.

While Kramer's work goes a long way toward helping us to understand acclamation, at times he seems to collapse the distinction between the people in the second and third moments of democracy. For example, he argues that "republicanism made it easier to think of *the people acting in and through the government*, with different branches responding differently to popular pressure depending on their structure and their relationship to the polity."[388] The "acting in and through the government" suggests that he is talking about the people in the second moment of democracy, where representation and legislatures constitute the people. In fact, his entire departmental theory seems to conflate the second and third moments of democracy. But by reconceptualizing popular constitutionalism as acclamation, we can see Kramer's people more clearly as acting *next to* rather than *within* the constituted order.[389] Viewed this way, departmentalism becomes a form of validation of popular acclamation. As Kramer himself explains, departmentalism is "a self-conscious adjustment by the governing elite to new social, political, and cultural conditions" that results from the practices of acclamation.[390]

### *D. Schmitt, the Popular Turn, and the People*

"By encircling the constitution with multiple, active public assemblies" and identifying a range of acclamatory practices, the popular turn has fostered the Schmittian project of identifying and elaborating "the constituent sovereign during normal times, and the re-animation of democratic legitimacy."[391] The problem with popular constitutionalism is that it

---

[388] *Id.* at 94. (emphasis added). At other points, however, he seems to recognize the distinction: "Constitutional or fundamental law subsisted as an independent modality, distinct from both politics and from the ordinary law interpreted and enforced by courts." *Id*. at 24. He goes on to say that when, "it comes to ordinary law, in other words, the government regulates us. This relationship was, in effect, reversed when it came to fundamental law." *Id*. at 29–30.

[389] *Id.* Kramer seems headed in this direction early in the book when distinguishing between fundamental and ordinary law. With respect to ordinary law, the constitutional officers reign. But in matters of fundamental law, the people reign over their public officials. His focus on fundamental law is not on the power to abolish a constitutional system, only to alter it. This seems to me another way of saying that the people can rely upon their constituent power to introduce new norms, or preserve old ones, through acclamation.

[390] *Id.*

[391] Kalyvas, *supra* note 25, at 1562.

largely ignores the people in their sovereign mode, or perhaps more precisely that it fails to distinguish sovereignty from acclamation.[392] Without seriously engaging the people in all three moments, it is impossible to determine the nature and scope of the popular rule, opening the door to the criticism that the people are both everywhere and nowhere in this turn. By articulating more clearly which moment they are examining, and identifying the connective tissue between moments, the popular turn can make their conceptions of the people more analytically precise, more juridically useful, and more politically radical.

One particular aspect of Schmitt's work missing in the popular turn is his concept of "dictatorship," especially the sovereign dictatorship. Among those writing in the popular turn, there has been no sustained search for institutions that have embodied the people's authority, not just representing it. This is the only way to seriously revivify a popular will and give serious bite to acclamation. The theorists examined here have ignored or otherwise skirted the issue. Ackerman diffuses the people through a lengthy process. His people are able to decide, but only on an often ambiguously-phrased question, diluting the decisiveness of any "decision." Kramer has focused entirely on acclamation. And Amar simply sees all popular action as bound up in legality. Addressing dictatorship (or extraordinary representation), then, is the next step for the popular turn in developing a full juridical conception of the people. The radicalism of popular constitutionalism, its true democratic foundations, can only be sustained if the people can exercise their sovereign authority to make or break a constitution.

The popular turn has, however, placed the question of the people squarely before us. Greater conceptual clarity, which Schmitt's work can provide, should help to flesh out the stakes more clearly: a constitutional order grounded in, not just on, democratic legitimacy, rather than one dominated by legal normativity. Building a "democratic jurisprudence" that takes the question of the people as its core inquiry, rather than judicial review, federalism, or some other issue, is what now remains to be done.[393]

---

[392] The problem with their critics' responses is that they are mostly concerned with the people in the second moment of democracy. *See, e.g.*, Paul Frymer, *Distinguishing Formal From Institutional Democracy*, 65 MD. L. R. 125, 128 (2006) ("[D]emocracy is at its essence the representation of a public's voice.").

[393] Jeremy Waldron has sketched out some preliminary elements of "democratic jurisprudence." While I do not always agree with his definition of democracy, as it conflates liberalism and democracy at times, his sketch is worth pursuing in more detail. His democratic jurisprudence is rooted in Benthamite rather than in analytical positivism and contains three principle

## IV. THE SUSPENDED CONSTITUTION

We have arrived at a point in history where "acceptance that the final interpretive authority rests with the judiciary" has become the defining characteristic of American constitutionalism, and not just constitutional law.[394] The problem, from the perspective of the popular turn, is that "if we allow judges to decide the key questions that the republic faces, then 'the people have ceased to be their own rulers,' having abdicated their authority and their government 'into the hands of that eminent tribunal.'"[395] In other words, the nature and meaning of self-governance is now wide open. This is not simply a question of counter-majoritarianism, which is a dangerously thin conception of the problem. Rather, it goes to the very nature of the state in which we live.

Republic. Democracy. Liberal democracy. These terms seem fanciful today, not descriptive—not even aspirational.[396] Popular sovereignty is perhaps the most romantic concept. As Giorgio Agamben has pointed out:

> Today we behold the overwhelming preponderance of the government and economy over anything you could call popular sovereignty—an expression by now drained of all meaning. Western democracies are perhaps paying the price for a philosophical heritage they haven't bothered to take a close look at in a long time."[397]

I'm not sure that we have a vocabulary to describe the state in which we live. I do believe, however, that the exception should be the starting point for any attempt to grapple with the nature of the contemporary American state.[398] Kramer's polemic against "judicial sovereignty" suggests that we live in a state of a perpetually suspended constitution—a state of exception.

---

elements of law: a democratic institutional provenance, a public nature, and a generality of application. *See* WALDRON, *supra* note 205, at 679.

[394] Larry D. Kramer, *Judicial Supremacy and the End of Judicial Restraint*, 100 CALIF. L. REV. 621, 633 (2012).

[395] Jeremy Waldron, *Judicial Review and Judicial Supremacy* 3 (N.Y. Univ. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 14–57, 2014).

[396] BROWN, *supra* note 38, at 17–18.

[397] GIORGIO AGAMBEN, DEMOCRACY IN WHAT STATE? 4 (2011). *See also, e.g.*, ESPEJO, *supra* note 1, at 34 ("[M]any critics have come to caricaturize the concept of popular sovereignty."). Robert Dahl and Sheldon Wolin seem to be one of the few trying to develop such a vocabulary. *See* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION (1971); *see also* SHELDON S. WOLIN, POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT (expanded ed. 2004).

[398] AGAMBEN, *supra* note 82. *See also* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (1998).

By ceding all interpretive authority of the Constitution to the United States Supreme Court (emphasis on "Supreme"), we have emptied the Federal Constitution of meaning until the Court decides. Constitutional interpretation has become constitutional alteration, and this no matter which interpretive stance toward the Constitution we (or the members of the Court) adopt. This is the real import behind Woodrow Wilson's observation that the U.S. Supreme Court had become a continuing constitutional convention.[399] Constitutional law is now constitutional irruption, and the Supreme Court has become a dictatorship in the Schmittian sense, continuously deciding on the state of exception, if never actually moving us out of it.[400] This is the source of Kramer's (and others') angst.[401] The discursively-identified purpose of constitutional interpretation is to determine or restore the constitution by declaring its meaning. But the line between a restored and a new constitution is razor thin, collapsing Schmitt's distinction between dictatorships;[402] the act of interpretation instead creates a new one.[403] A minimalist approach cannot solve the problem, it merely perpetuates the suspension. The problem is in the commission itself.

---

[399] *Cf.* Kramer, *supra* note 394, at 623–24; Waldron, *supra* note 205, at 24. *See generally* EDWARD CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 3 (1958) (explaining the functions of the different articles of the constitution generally).

[400] *See* AGAMBEN, *supra* note 81, at 4 (discussing the idea of a continuous state of exception).

[401] Jeremy Waldron has made a similar critique of judicial supremacy. There are glimmers of Schmitt in Waldron. Waldron identifies three tightly interrelated problems with "judicial supremacy:" the displacement of self-government, the dissolution of the rule of law into sovereignty, and the usurpation of the *pouvoir constituant* by the judiciary. Waldron, *supra* note 205, at 12–25. In his discussion of the displacement of self-government, Waldron seems to be distinguishing between comprehensive decisions in the state of exception and specific decisions made within the constituted order. For example, he writes that "[i]n Europe, if the courts were to determine whether a country remains inside or outside NATO—then that would amount to judicial supremacy, and not just the practice of judicial review." *Id.* at 14. We could go a step further (which Waldron does) and argue that it would not be supremacy but judicial *sovereignty* if a court were to make such a decision. *Id*. These are first-order decisions reserved to the constituent power in its constitution-making function outside and above the constituted order. This leads directly to the other problems with judicial supremacy for Waldron. It collapses sovereignty into the rule of law and usurps the *pouvoir constituant* otherwise held by the people.

[402] *See* McCormick, *supra* note 227, at 166.

[403] *Cf.* Luca Siliquini-Cinelli, *Imago Veritas Falsa: For a (Post)-Schmittian Decisionist Theory of Law, Legal Reasoning, and Judging*, 39 AUS. J. OF LEG. PHIL. 118, 121–22 (2015) ("[B]ecause law is an invisible and intangible entity (sublime), in approaching the positivistic purview of *the* law, the jurist, among whom stands the judge, who is in charge of *jus-dicere*, that is to tell what the law is, always tries to interpret its *a priori* myth in order to (try to) capture its essence through a *posteriori decisive* act based upon the normative text and his/her personal ideas, beliefs, sentiments, morals.").

Whether the people can reclaim a primary role over constitutional change is a question beyond the scope of my training as a historian, and one I leave for philosophers and constitutional and political theorists. Personally, though, I'm dubious. Our common conceptions of democracy and the people focus on voting and elections. Yet elections only give citizens a bare minimum of control, and a control that is illusory at best. Here, I completely agree with Schmitt that voting has become a private act. To be robust, the people require an institution capable of enacting its will. In the twentieth century (indeed, since Reconstruction), Americans have lost sight of such an institution. The people no longer decide; they are no longer sovereign in any meaningful political way. Rather than willing and enacting through a constitutional convention, we are left with a largely acquiescent electorate, which enacts nothing; it simply delegates that power to a representative. Mobilization of individuals into elections provides the illusion of legitimacy, but none of the substance. So long as the electorate re-elects substantially the same people repeatedly, we could say that it acquiesces to the decisions made. But this is not exactly a vibrant concept of democracy. Too much government goes on between elections and in administrative agencies, committees, councils, lobbies, etc., for elections to be truly meaningful and effective.[404] What is determinative regarding democracy is not voting, but the power to alter, and more so, to abolish a constitution. The forceful rejection of secession, through both violence and law,[405] and the ever-growing monopoly of violence by all levels of the state have essentially foreclosed that option in American politics.[406]

Despite the efforts of the popular turn, then, the moment of the people's sovereignty appears to have passed. Popular political action may still be relevant. Given the emergence of the sovereignty of law, perhaps it is attorneys who offer the most potentially efficacious popular avenues of constitutional development. As private attorneys general, amici, activists, scholars, and teachers, we are perhaps in the best position to translate politics into law. In that sense, litigation is a form of acclamation. But this is akin to a mouse in a maze. The potential for "the people" to make a comprehensive decision on the constitutional order is gone. The people can now make only the simplest of decisions, and only as a collection of

---

[404] *See* SCHMITT, *supra* note 33, at 297–99 (discussing the relationship between democracy and administration).

[405] *See* Roman J. Hoyos, *Peaceful Revolution and Popular Sovereignty: Reassessing the Constitutionality of Secession*, *in* PATRICIA MINTER AND SALLY HADDEN, EDS., SIGNPOSTS: NEW DIRECTIONS IN SOUTHERN LEGAL HISTORY 241–42 (2013).

[406] Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

private individuals rather than as "the people." Moreover, information is fast displacing the body as the salient feature of contemporary political and economic life. As that development continues, the people (and individuals) will become less politically relevant. What is important is not our bodies, but the data our bodies produce. The contest over control of that data will no doubt produce new political subjects.[407]

[407] *Cf.* Tracy B. Strong, *Foreword* to CARL SCHMITT, THE CONCEPT OF THE POLITICAL, at xxix (2007) ("[T]he era of technology and technological progress has no need of individual persons"); BROWN, *supra* note 38, at 182–83 (arguing that a new political subject in the form of "human capital" is emerging as a result of the triumph of neoliberalism).