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## The Original Theory of Constitutionalism

*The Sleeping Sovereign: The Invention of Modern Democracy*

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## BOOK REVIEW CONTENTS

INTRODUCTION: CONSTITUTIONALISM AND DEMOCRATIC AUTHORITY	666
I. THE POLITICAL THEORY OF MODERN CONSTITUTIONALISM	669
A. Premodern Politics	671
B. Thomas Hobbes	673
C. Jean-Jacques Rousseau	675
D. The Revolutionary Generation	677
II. THE CONSTITUTIONAL PARADOX	681
A. Popular Authorship and Present Consent	683
B. Univocal Sovereignty	686
C. Multitudinous Constitutionalism	688
III. LIVING WITH ARTICLE V	691
A. The Curious Twinning of Originalism and Living Constitutionalism	692
B. Governmental Sovereignty	696
C. Democracy Without Sovereignty	698
1. Putting Governmental Democracy First	699
2. An Objection: Does Sovereignty Matter Today?	701
D. Refining Judicial Reason	702
CONCLUSION	704

**INTRODUCTION: CONSTITUTIONALISM AND DEMOCRATIC AUTHORITY**

The conflict between various versions of “originalism” and “living constitutionalism” has defined the landscape of constitutional theory and practice for more than a generation, and it shows no sign of abating. Although each camp has developed a variety of methodological approaches and substantive distinctions, each one also returns to a core concern: the democratic authority of constitutional review. The late Justice Scalia crystallized the originalist concern in his dissent in *Obergefell v. Hodges*: “It is of overwhelming importance . . . who it is that rules me. Today’s decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court.”<sup>1</sup> The concern voiced by Scalia is, in a word, *usurpation* – the arrogation of the right to rule by the judiciary, invoking the authority of the Constitution’s “We the People,”<sup>2</sup> but responding, in fact, to the vicissitudes of present-day party politics, social movements, and what Scalia once famously called “*Kulturkampf*.”<sup>3</sup> On the living-constitutionalist side, the core concern is the Constitution’s legitimacy in the eyes of those it rules today. Here, too, it might be said that the question remains “who it is that rules me.” But living constitutionalism holds that “my Ruler” cannot legitimately be the mummified hand of those who ratified constitutional text long ago, when “the people” was restricted to adult white males (and often to property holders) and formal discrimination on racial and other grounds was widespread. Whatever “equal protection” or a “right of the people” might have meant to their ratifiers, the argument goes, legitimacy requires that they be acceptable to a twenty-first century polity when they are invoked today to weigh the constitutionality of state action.

Usurpation of past lawmaking by present-day interpreters, or the tyranny of the dead over the living: this dilemma has seemed insoluble. In acknowledging the appeal of the contending positions, scholars and judges have staked out and criticized a variety of compromise formations, including “living originalism,”<sup>4</sup> “faint-hearted originalism,”<sup>5</sup> and versions of “democratic constitutionalism” in

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1. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).

2. U.S. CONST. pmb1.

3. *Romer v. Evans*, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting) (emphasis added).

4. See, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* 3-73 (2011) (setting out the basic position of “living originalism”).

5. See, e.g., Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 862 (1989) (describing “faint-hearted originalist[s]” and “moderate” non-originalists).

which the *demos* is conceived of as arguing over the meaning to be given today to the inherited text of fundamental law.<sup>6</sup>

For all the attention to the legal culture and linguistic practices of the Founding Era that has resulted from the prominence of originalism,<sup>7</sup> comparatively few scholars have focused on the original idea of constitutionalism. What legal and political significance did the act of constitution-making have for the drafters and ratifiers of the U.S. Constitution (and, earlier, the state constitutions)? How might that historical understanding illuminate today's debates, not just over the nuances of interpreting the constitutional text, but also over political legitimacy in a constitutional order?

Richard Tuck's *The Sleeping Sovereign* is not a work of constitutional theory, but rather a careful historical reconstruction of the "invention" of modern democracy – including, centrally, a discussion of the authority that popular constitution-making was understood to have at the Founding.<sup>8</sup> Nonetheless, its implications for contemporary constitutional debates are arresting. In a work that contains only a few tentative closing words about the last century-plus of constitutionalism, Tuck shows that today's originalism, for all its talk of fidelity to law's origins, is profoundly unfaithful to the very theory of constitutional self-rule on which it made best sense in the first place.

If today's originalism contradicts its own commitment to constitutional self-rule, though, living constitutionalism fares little better. Tuck's reconstruction shows that the original purpose of constitution-making was to enable the people themselves to author their fundamental law, rather than leaving that legislation to the decisions of government officials and well-connected elites. Tuck's account makes it difficult to avoid the conclusion that today's living constitutionalism fails in both theory and practice to avoid *de facto* constitutional lawmaking by officials and elites, fairly inviting familiar charges of usurpation – just as today's originalism fairly invites charges of upholding the tyranny of the dead.

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6. See, e.g., Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 374-76 (2007) (describing the political and cultural dynamics of "democratic constitutionalism"); Lawrence Solum, *Originalist Methodology*, 84 U. CHI. L. REV. 269 (2017) (offering an exceptionally subtle and nuanced account of originalist interpretation).
  7. On the turn to history that accompanied originalism, see Jack M. Balkin, *The New Originalism and the Uses of History*, 82 FORDHAM L. REV. 641, 655-58 (2013); and Laura Kalman, *Border Patrol: Reflections on the Turn to History in Legal Scholarship*, 66 FORDHAM L. REV. 87, 87-89 (1997).
  8. RICHARD TUCK, *THE SLEEPING SOVEREIGN: THE INVENTION OF MODERN DEMOCRACY* (2016).

This dilemma is not contingent but rather is deeply rooted in the U.S. Constitution. Both originalism and living constitutionalism ultimately fail to reconcile constitutional authority with popular sovereignty, owing to the way in which the Constitution both emerged from the tradition of democratic sovereignty and betrayed it. This produced a political community that is at once committed to ruling itself and unable to do so.<sup>9</sup>

The image of Tuck's title – the “sleeping sovereign” – expresses the crux of this dilemma. Thomas Hobbes argued in *On the Citizen* that, when a sovereign is asleep, his ministers do not take over his sovereignty. Their role is simply to carry out orders he issued before nodding off – a role that would include issuing commands in his name on quotidian matters in line with past commands.<sup>10</sup> By implication, in a democratic regime, the sovereign people can be said to act through plebiscitary initiative and then “go to sleep,” leaving the “government” (which would include, in the United States, the Supreme Court) to administer its fundamental law.<sup>11</sup> But the U.S. Constitution no longer works from the point of view of popular sovereignty. It is now so difficult to amend under Article V that our popular sovereign is hardly able to stir, let alone issue lucid new commands.<sup>12</sup> Government officials must accordingly interpret increasingly remote constitutional text, or else must incorporate changing norms and the demands of social and partisan movements that do not rise to the level of unambiguous sovereign lawmaking (and, to continue with the Hobbesian imagery, amount to no more than the sovereign's drowsy mumblings). American constitutional practice thus emerges as an especially vexed engagement with the fundamental problem of modern democracy: how an intermittently assembled democratic sovereign can both authorize and discipline the government that legislates and otherwise rules on its behalf in the interim.

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9. In advancing this argument, we are in line with earlier diagnosticians of the incapacity of constitutional argument to do what is asked of it without special pleading and bad faith. See SANFORD LEVINSON, *CONSTITUTIONAL FAITH* (1988); David E. Pozen, *Constitutional Bad Faith*, 129 *HARV. L. REV.* 885, 886–90 (2016). We go where those earlier arguments have not in two ways. We ground the possibility of good-faith appeal to a sovereign people in an ongoing practice of specifically sovereign lawmaking, and we root the central dilemma of American constitutionalism in the brief flowering and subsequent disappearance of such lawmaking.

10. TUCK, *supra* note 8, at 89 (citing THOMAS HOBBS, *ON THE CITIZEN* 99–100 (Richard Tuck & Michael Silverthorne, eds., Cambridge Univ. Press, 1998) (1642)).

11. For a discussion of Hobbes's arguments, see *id.* at 86–90, and for a discussion of their implications for democratic constitutionalism, see *id.* at 249–52.

12. As we discuss later, this inhibition may be even worse than it appears on its face, as amendments ratified entirely through the organs of ordinary government, such as state legislatures, would not even count as products of unmediated popular sovereignty on the traditional view. See *infra* note 63 and accompanying text.

This Review proceeds as follows. In Part I, we provide an overview of Tuck's arguments in *The Sleeping Sovereign*. We focus in particular on tracing his theorization of the foundational distinction between "sovereignty" and "government" from premodern conceptions and practices in which the distinction was absent through its development by Hobbes, Rousseau, and others, including the American and French revolutionaries. In Part II, we consider two ways in which the people have been treated as the authors of fundamental law in contemporary constitutional theory. Specifically, we adapt the sovereignty-government distinction at the heart of the theory of the modern democratic state to articulate two interrelated constitutional ontologies implied by the original theory of constitutionalism: the "sleeping sovereign" and the "constitutional multitude." In Part III, we turn to consider several current American constitutional and jurisprudential debates in light of this account.

### I. THE POLITICAL THEORY OF MODERN CONSTITUTIONALISM

To understand the original theory of modern constitutionalism, it is necessary to understand the original problem that constitutionalism was meant to solve: not *whether* but *how* "the people" were understood to participate in government, and specifically whether they could ever make their own laws – that is, rule themselves. Constitutionalism opened a new front in answering this question. Its contribution, Tuck argues, was nothing less than to make democracy conceivable in the modern world.

As medieval and early-modern Europeans understood it, the democracy of the ancient Greek city-states required citizens to be constantly active in making and administering their own laws.<sup>13</sup> This level of active engagement seemed impossible under post-classical conditions. Early-modern Europeans were dispersed across kingdoms that were orders of magnitude larger than the democratic city-states of antiquity, and they were too busy with everyday affairs to replicate Greek self-rule (which was frequently, if erroneously, argued to have

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13. The most famous version of this argument is from Benjamin Constant's speech given at the Athénée Royal in Paris, *The Liberty of the Ancients Compared with That of the Moderns*. Benjamin Constant, *The Liberty of the Ancients Compared with That of the Moderns*, in *POLITICAL WRITINGS* 314 (Biancamaria Fontana ed. & trans., Cambridge Univ. Press 1988) (1819) (arguing that without slavery the Athenian *demos* would not have had time to carry out its self-government: "Without the slave population of Athens, 20,000 Athenians could never have spent every day at the public square in discussions."). *But see* ELLEN MEIKSINS WOOD, *PEASANT-CITIZENS AND SLAVE: THE FOUNDATIONS OF ATHENIAN DEMOCRACY* 1-2, 5-6 (1988) (arguing that, on the contrary, Athenian democracy owed its success to the relative absence of dependent labor).

depended on slavery to liberate the citizen-body for political engagement).<sup>14</sup> Although early-modern monarchies routinely claimed to derive their authority from “the people” (despite the modern stereotype of monarchical absolutism derived from “divine right,” which was in fact a marginal theory mostly absent from political practice<sup>15</sup>), rulers and theorists alike assumed that in modern conditions the people could no longer speak or act collectively—and, thus, could no longer actually rule themselves. In their place, monarchs, parliamentary representatives, and other elites provided virtual representation, popular consultation, and protection of the common good.<sup>16</sup>

Modern constitutionalism, Tuck argues, offered a new way for the whole citizenry to act collectively to make its own law. The key was to set apart from the ordinary business of ruling a special kind of lawmaking, which promulgated the *fundamental law* of a polity.<sup>17</sup> Such fundamental law could be enshrined in a constitution which was approved by a popularly elected convention or, ideally, by a plebiscite in which the majority of the community directly decided its basic norms.<sup>18</sup> In the tradition of thought that Tuck traces, this power to make fundamental law came to be called *sovereignty*, and the concept of sovereignty allowed democracy to be redefined for modern conditions as a polity in which the whole people held sovereign power.<sup>19</sup> This implied a distinction between sovereignty and those lesser acts of ruling that did not create fundamental law but simply represented the everyday activity of politics, called “administration” or *government*.<sup>20</sup> A government, in this latter sense, might be monarchical, parliamentary, or something else, depending on its composition; but, whatever its form, it was itself constituted and authorized by the sovereign, which held ultimate authority.<sup>21</sup> Democratic *government* of the Greek kind might well be impossible in the modern world, but democratic *sovereignty* could be revived in acts of self-rule by the whole people.<sup>22</sup> Within this framing, the U.S. Constitution presents the fundamental law adopted by “We the People,” while the various branches and acts of the government it creates, whatever their own procedural criteria, ultimately derive their legitimacy from a constituent act of democratic sovereignty.

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14. See *supra* note 13 and accompanying text.

15. See *infra* note 28.

16. TUCK, *supra* note 8, at 52-53.

17. See *id.* at 4-9.

18. See *id.* at 181-97.

19. See *id.* at 4-9.

20. See *id.*

21. See *id.* at 89-107.

22. See *id.* at 4-9.

A. *Premodern Politics*

Tuck traces the distinction between sovereignty and government to the sixteenth-century French jurist Jean Bodin, who first argued that a foundational legal order based on the will of the ruler (“sovereignty”) could be kept functionally distinct from the ongoing administrative operations (“government”) that the ruler might authorize.<sup>23</sup> Against the conventional view of Bodin as a royal “absolutist,” Tuck argues that Bodin’s immediate purpose in distinguishing these levels of legislation was to theorize the role of the French *parlements* as legitimate, if subordinate, government or administration alongside the fundamental sovereignty of the king.<sup>24</sup> Yet some of Bodin’s earliest and most radical readers quickly spotted the possibility that an institutional division of the kind he proposed could be flipped around so that the “people” could, theoretically, possess *sovereignty*, even while they would not actively govern.<sup>25</sup>

This revolutionary possibility opposed late medieval notions of political legitimacy in which a different conception of “the people” had long played a significant role. Ancient republics had left a powerful legacy in the language of popular legitimation, which influenced even what we would now consider highly *unpopular* governments from the Roman Principate – itself a kind of quasi-monarchy rationalized on popular grounds<sup>26</sup> – through to the kingdoms that subsumed the Roman Empire in the West. The “popular” basis of these late classical and medieval regimes was both rhetorical and institutional. The very structure of the early medieval kingdoms, for example, showed a variegated pattern of governance that involved extensive power sharing among different elites, with individuated local mandates and responsibilities, which may have been useful in

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23. *Id.* at 10-12; *cf. id.* at 49-56 (discussing the originality of Bodin and his divergence from medieval theories of representation).

24. *Id.* at 9-10. For the conventional view, see *id.* at 30-33; and JULIAN H. FRANKLIN, *JEAN BODIN AND THE RISE OF ABSOLUTIST THEORY* (1973). For an important recent analysis of Bodin’s “constitutional” thought, see DANIEL LEE, *POPULAR SOVEREIGNTY IN EARLY MODERN CONSTITUTIONAL THOUGHT* 187-224 (2016).

25. TUCK, *supra* note 8, at 63-68. As should be clear, in identifying the origins of constitutional thought of a distinctively modern kind in the Bodinian account of sovereignty, we are discounting arguments that imagine various earlier origins, and which see modern constitutionalism as essentially continuous with pre-modern “constitutional” practices of diverse kinds, whether written or customary. On the pre-modern legal sources of modern constitutionalism, see LEE, *supra* note 24.

26. On the exploitation of Republican rhetorical tropes in the early Principate, see CLIFFORD ANDO, *IMPERIAL IDEOLOGY AND PROVINCIAL LOYALTY IN THE ROMAN EMPIRE* 29-30, 138-139, 155-156 (2000).



maintaining control over widely dispersed territory.<sup>27</sup> Later medieval monarchs governed with the help of councils of advisors that introduced a quasi-popular element into governance by representing de facto specific regions or interests of the kingdom. Consultative or deliberative participation occurred frequently as ordinary citizens presented grievances to their rulers, either individually or as part of a corporate group or estate, while monarchs constantly conducted what our politicians would today call “listening tours” through their provinces. Further, monarchs and their publicists might claim popular consent when they secured undoubted collective goods such as peace and order. It is a modern conceit that pre-modern European governments rested on an unargued right to rule alleged to come from God or the mere fact of conquest, without reference to popular will.<sup>28</sup> On the contrary, despotisms that did not lay claim to the mantle of popular legitimacy were exceedingly rare in Western Europe; indeed, it is not clear if there were any. Rather, it is striking what extensive efforts were made in regimes that we would today regard as obviously “undemocratic” to argue that popular representation was present through responsive governors.

But one crucial idea was missing from the various conceptions of “popular” government that were current when Bodin wrote. Up until the early-modern period, observers uniformly considered it inconceivable, a flight of atavistic fancy, that “the people” should ever again be able to legislate for itself as a collective agent. This incredulity was not merely a symptom of elite disdain for ordinary individuals and their capacities. Instead, the mechanisms of popular government described in the recovered texts on ancient politics and history seemed to require a set of favorable circumstances that latter-day Europeans (at least outside the Italian city-states<sup>29</sup>) could no longer count on: most important, a

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27. For an overview, see JOHN WATTS, *THE MAKING OF POLITIES: EUROPE, 1300-1500*, at 68-98 (2009); see also JOSEPH R. STRAYER, *FEUDALISM* 57 (1965) (noting that by the end of the twelfth century most members of the feudal group possessed some political power).

28. For example, the “divine right” argument for monarchical absolutism that is often mistaken as typical of medieval political thought was, in fact, a late and rather desperate Stuart innovation. See, e.g., James I, *A Meditation*, in KING JAMES VI AND I: *POLITICAL WRITINGS* 229-49 (Johann P. Somerville ed., 1994); see also LEE, *supra* note 24, at 273-315 (explaining Stuart ideas of popular sovereignty). The divine right argument for monarchy has loomed large in the American historical imagination (for obvious reasons) but it remains much debated how seriously it was taken, even at the time it was propounded, and whether it functioned as part of a response to claims of Papal supremacy. More generally, it should be noted that pre-modern popular and divine legitimations of monarchy were not incompatible (as in Ullman’s famous analysis of the *ascending* and *descending* theses of medieval monarchy). See WALTER ULLMAN, *A HISTORY OF POLITICAL THOUGHT* 12-14 (1965).

29. Perhaps the most prominent medieval defender of popular participation in government was Marsilius of Padua, who advanced a radical Aristotelian theory. See MARSILIUS OF PADUA, *THE*

*polis* of manageable size, in which a more or less continuously assembled citizen-body could meet to rule itself.<sup>30</sup> In fact, the argument that democracy simply could not work in a modern state (whatever its other merits or demerits) was already well worn by the high middle ages: life had become too busy, the tasks of government too complicated, and states too large to allow for direct popular self-rule.<sup>31</sup> Nevertheless, “the people” of the high middle ages were assured that they were always already represented in the law-abiding regimes of the age, in which a select few ruled over them, even while ruling *for* them.

### B. Thomas Hobbes

The great English philosopher Thomas Hobbes will be much more familiar to contemporary readers than Bodin, though Bodin’s distinction between sovereignty and government was indispensable to Hobbes’s political thought.<sup>32</sup> Hobbes was the founding figure in the theoretical tradition out of which modern constitutionalism would emerge. Although Hobbes is often considered an apologist for monarchical absolutism, it may be more accurate to see him as the first theorist of modern democracy – an argument that Tuck has previously suggested in several works and has now developed fully in *The Sleeping Sovereign*.<sup>33</sup>

Hobbes fiercely attacked the core premise of all *ancien regime* “popular” governments: that it was cogent to speak of a “people” that existed independent of the constructed institutions of politics, and which could in some fashion accede to the arrangements and actions of its ruler. In doing so, he rejected the doctrine of “natural sociability,” which he traced to Aristotle’s characterization of a human

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DEFENDER OF THE PEACE 67-68 (Annabel Brett ed. & trans., 2005) (discussing forms of popular government).

30. For an account that contests that picture of ancient democracy and its limitations, see Daniela Louise Cammack, *Rethinking Athenian Democracy* 94-173 (2013) (unpublished manuscript), [http://dash.harvard.edu/bitstream/handle/1/10423842/cammack\\_gsas.harvard\\_00841\\_10724.pdf](http://dash.harvard.edu/bitstream/handle/1/10423842/cammack_gsas.harvard_00841_10724.pdf) [<http://perma.cc/WQG7-KR68>].
31. TUCK, *supra* note 8, at 6-7.
32. Hobbes’s theory of sovereignty owed a great deal to Bodin’s, as well as to the reworking of the discourse of natural law by the Dutch jurist Hugo Grotius, among others. This theory was imparted to and subsequently adapted by a host of figures, including Samuel Pufendorf, John Locke, Jean-Jacques Rousseau, and Emmanuel Kant. See generally RICHARD TUCK, *THE RIGHTS OF WAR AND PEACE: POLITICAL THOUGHT AND THE INTERNATIONAL ORDER FROM GROTIUS TO KANT* 140-225 (2001) (discussing the impact of Hobbes’s political thought on his successors).
33. See, e.g., Richard Tuck, *Hobbes and Democracy*, in *RETHINKING THE FOUNDATIONS OF MODERN POLITICAL THOUGHT* 171 (Annabel Brett et al. eds., 2006). For a summary of the arguments concerning the “democratic” Hobbes, see David Singh Grewal, *The Domestic Analogy Revisited: Hobbes on International Order*, 125 *YALE L.J.* 618, 636-38 n.86 (2016).

being as *zoon politikon*, an animal whose nature is to be in a polity.<sup>34</sup> Pursuing instead a line of radical political constructivism, he argued that a “people” was an “artificial” entity—though no less capable of acting than a natural one—formed through individual consent to collective self-rule.<sup>35</sup> When the idea of a people is so specified, it becomes clear that to say that a people has consented, spoken, or otherwise acted must mean that certain specified institutional protocols have been satisfied; appeal to “the people” in the familiar consultative fashion, as a brooding *völkisch* omnipresence, was mystification. In any political order, Hobbes argued, sovereignty, or ultimate lawmaking power, must reside somewhere: in the majority of the whole community (democracy), in a subset (aristocracy or oligarchy), or in one person (monarchy).<sup>36</sup> That sovereign, which acts on behalf of all who are subject to it, is all there is, strictly speaking, of a political “people”—hence Hobbes’s otherwise puzzling statement that, in a monarchy, “the King is the people.”<sup>37</sup>

In addition to his rigorous specification of what could count as sovereignty, Hobbes advanced the revival of specifically *democratic* sovereignty by setting out what it would mean to conceive of a people as sovereign. He recognized the possibility of democratic sovereignty coexisting with a government organized along other lines, as long as some ultimate recourse of collective action remained with the whole population.<sup>38</sup> For example, he thought a democratic sovereign could be in power even where government was conducted by a monarch elected for life, so long as the sovereign woke to select a new monarch on the death of the last one.<sup>39</sup> Thus many kinds of government might arise from popular sovereignty and validly claim a mandate from the people—but only if and so long as the people could act in a legally legible and binding way. Without such institutional specification of popular sovereignty, claims to popular legitimation were spurious.

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34. THOMAS HOBBS, ON THE CITIZEN 71 (Richard Tuck & Michael Silverthorne eds. & trans., Cambridge Univ. Press 1998) (1642) (rejecting the Aristotelian conception of man as *zoon politikon*).

35. *Id.* at 72 (describing human society as based on agreement that is “artificial”); see also THOMAS HOBBS, LEVIATHAN 9 (Richard Tuck ed., Cambridge Univ. Press 1991) (1651) (“For by Art is created that great LEVIATHAN called a COMMON-WEALTH, or STATE, (in latine CIVITAS) which is but an Artificiall Man . . .”).

36. HOBBS, *supra* note 34, at 91-92.

37. *Id.* at 137 (emphasis omitted).

38. See *id.* at 94-95.

39. See sources cited *infra* notes 85-87 and accompanying text.

Most fundamentally, Hobbes put democracy at the heart of social contract theory in arguing that all sovereignty was originally democratic.<sup>40</sup> Hobbes argued that, because there was no natural political community, the consent to form a commonwealth must first be reciprocal among all members of the polity-to-be. Having thus mutually agreed to bind themselves to a common will, the people thus constituted are “almost by the very fact that they have met, a Democracy,”<sup>41</sup> recognizing the decision of a majority as their authoritative will. A core and consistent method of the social contract tradition following Hobbes was to trace the legitimacy of political power ultimately to popular consent – or else to find a way around this key presupposition.

Hobbes did argue that the (democratic) sovereign power, once established, might then be transferred to a subset of the population (creating an aristocratic sovereign), or to one ruler (forming a monarchical sovereign).<sup>42</sup> He argued, however, that *this* decision – the foundational sovereign act preceding and setting the terms of all others – must be by majority (and, indeed, might result in a decision to retain democratic sovereignty, taking subsequent decisions by majority vote).<sup>43</sup> Thus, at the base of every “instituted” commonwealth – which he distinguished from those polities resulting from mere “conquest” – was a constituent act of democratic sovereignty, even if, as in most societies that history had known, the subsequent acts of sovereignty took nondemocratic forms.<sup>44</sup>

### C. Jean-Jacques Rousseau

The great eighteenth-century polymath Jean-Jacques Rousseau detonated the democratic dynamite that Hobbes had deeply embedded in his social contract theory. Rousseau insisted that the constituent democratic sovereignty described by Hobbes was nontransferable.<sup>45</sup> (As Tuck points out, Rousseau technically corrected an inconsistency in Hobbes, who elsewhere held that a sovereign ruler could not transfer sovereignty wholesale, for instance, to a foreign monarch.<sup>46</sup>)

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40. See HOBBS, *supra* note 34, at 94; see also Grewal, *supra* note 33, at 635-38 (summarizing Hobbes’s argument concerning the democratic commonwealth). Note that a similar line of argument seems to have been pursued in the early seventeenth century by the Spanish theorist Francisco Suárez. See ANNABEL S. BRETT, CHANGES OF STATE 127 (2011).

41. HOBBS, *supra* note 34, at 94 (emphasis omitted).

42. *Id.* at 95-96.

43. *Id.*

44. See *id.* at 102 (distinguishing a *civitas institutiva* from a *civitas acquisita*). For further discussion, see Grewal, *supra* note 33, at 636-38.

45. See TUCK, *supra* note 8, at 139-41.

46. See *id.* at 139-40.

The consequence was that, for a polity to be governed by law, its fundamental norms must be products of majoritarian decision making. Rousseau was perfectly willing to accept the radical consequences of this principle: most polities, he wrote, had no laws in his strict sense, but were instead governed by the decrees of their rulers.<sup>47</sup>

As Tuck makes clear, Rousseau did not intend an unrealistic call to reconstitute the continually assembled democracies of the ancient world, but rather believed that majoritarian voting across a large and dispersed population could also count as an exercise of democratic will.<sup>48</sup> This view was predicated on the Bodinian distinction between sovereignty and government, and it followed that a sovereign people might create any sort of government it pleased, including a monarchical one; but also that those political acts Rousseau called “legislation,” which set the basic terms of the polity for all its members, must be exercises of sovereignty and hence actually democratic.<sup>49</sup> Otherwise, the exercises of “legislative” power were not self-rule, but rather tyrannical usurpations of the sovereign power by formally subordinate government.<sup>50</sup>

Rousseau’s account thus traces all legitimate political power to democratic consent. As his remark that most polities have no laws suggests, he was both keenly aware of the prospect of governmental usurpation and generally pessimistic about it, seeing it as the major tendency of all states.<sup>51</sup> While, for Hobbes, the chief question was where sovereignty was located (in majority, council, or monarch), for Rousseau it was whether, and on what terms, the ever-sovereign people might maintain collective self-rule rather than accede to governmental usurpation. In Rousseau’s view, the people’s sovereignty could never be surrendered; yet it was at constant risk of neglect, from the popular side, and usurpation, from the governmental side. An urgent question thus emerged: How to check usurpation and enable the people to remain sovereign under conditions of only intermittent assembly.

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47. See *id.* at 131-34.

48. *Id.* at 141-42.

49. *Id.* at 1-9, 129-36 (discussing the sovereignty-government distinction in Rousseau and how it allowed him to advance a modern theory of democracy).

50. As Tuck notes, Rousseau’s definition of “legislation” can prove a bit elusive and does not precisely track other conceptions of what a sovereign act is or would have to be. See *id.* at 133-34.

51. Note that much of Book III of *The Social Contract* is concerned with governmental usurpation, which is how Rousseau thought most states would fall. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* (1762), reprinted in *THE SOCIAL CONTRACT AND THE FIRST AND SECOND DISCOURSES* 149, 209-25 (Susan Dunn ed., 2002). According to Rousseau, laziness, selfishness, and the other ordinary vices tend to lead governments to usurp the proper power of sovereigns, and the people to allow sovereignty to be stripped from them in this fashion. *Id.*

This issue figured in Rousseau's thought as the heart of a radical standard of political legitimacy, one that sought to revive ancient self-rule for the conditions of modernity.<sup>52</sup> Soon enough, it would become the crux of the problem of modern constitutional design: How could the people stand as the authors of their own fundamental law, then step back to permit a designated government to do its work, all the while retaining, within the constitutional framework they had established, the capacity to step forward again and reclaim their political authority? To follow the metaphor, how could the sovereign sleep, as the modern democratic sovereign must mostly do, yet still rule rather than succumb to usurpation? And because in the bright light of post-Hobbesian analysis there is no organic "people," only a set of polity-constituting procedures that unify a multitude, the question must also be put in rigorously institutional terms: What acts does a constitution prospectively recognize as sovereign, so that, if and when they occur, the people will both have spoken and, crucially, have understood themselves to have done so? In light of the social contract tradition, this is the question that modern constitutions must address, in which the program of reviving classical self-rule is partially and problematically reconciled to the features of political modernity.

#### D. *The Revolutionary Generation*

The late-eighteenth-century revolutionaries struck upon an institutional way of putting the sovereignty-government distinction into practice: the constitutional referendum, which allowed for the adoption of fundamental law by majority (or super-majority) vote to establish the subsequent procedures and limitations of regular government. Although Tuck devotes considerable attention to the role that referenda and related mechanisms played in the ideological conflicts and institutional experiments of the French Revolution,<sup>53</sup> here we concentrate for obvious reasons on the earlier and more enduring American instances of this transatlantic constitutional efflorescence. In May 1778, revolutionary Massachusetts held the first constitutional plebiscite in world history. The question put to

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52. See TUCK, *supra* note 8, at 2-9 (discussing several works where Rousseau analyzes the logistical difficulties in renewing ancient democratic *government* under modern conditions, working out instead a conception of democratic *sovereignty*).

53. *Id.* at 149-80. Tuck associates the constitutionalist solution to the problem of popular sovereignty with the Girondin revolutionary faction. By contrast, the Jacobin effort was to achieve direct and continual popular self-rule, i.e., democratic government rather than sovereignty, which indeed proved impossible and resulted in the assumption of political authority by Parisian factions claiming to act on behalf of the national people. See *id.* at 158-60.

its citizens was whether to adopt a proposed constitution.<sup>54</sup> In the pathbreaking decision to submit the draft constitution to a direct vote of the citizenry, the General Court (the state legislature) seemed to agree with radicals in the state who insisted that only a majority of the people could adopt a “fundamental Constitution,” and that a mere “Representative Body” lacked the power to promulgate fundamental law.<sup>55</sup> New Hampshire followed suit with constitutional referenda in 1778, 1781, and 1783, and was the first state to regularize the sovereignty-government distinction by adopting an exclusive provision for constitutional amendment requiring approval by two-thirds of voters.<sup>56</sup>

Beyond these signal instances, Tuck shows that the revolutionary generation was widely familiar with the proposition that a majority of the people, acting in its sovereign capacity, was free to dissolve the government and replace it with a new one.<sup>57</sup> Such a proposition, of course, lay behind the Declaration of Independence, which declared “the Right of the People to alter or to abolish” an unsuitable government and “to institute new Government.”<sup>58</sup> Early state constitutions were replete with pronouncements that “all political power is vested in and derived from the people only,” who have “the sole and exclusive right of regulating the internal government and police thereof;”<sup>59</sup> and that “all power is vested in, and consequently derived from, the people,” and “a majority of the people hath an indubitable, inalienable, and indefeasible right to reform, alter, or abolish” any government that does not conduce “to the public weal.”<sup>60</sup>

In turning from the history of political thought to the history of constitutional promulgation, Tuck scrutinizes a key issue in constitutional design: whether the fundamental law can be altered by the legislature or only by a special appeal to the people. Empowering the legislature to alter the constitution would be governmental usurpation within the Rousseauvian conception, for the constitution established the subordinate government in the first place. The “pure”

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54. *Id.* at 191-92.

55. *Id.* at 192 (quoting a contemporaneous petition of the residents of Pittsfield, Massachusetts). Even John Adams urged this method of constitution-making on his fellow delegates to the Continental Congress in 1775. *Id.* at 194-95.

56. *Id.* at 196.

57. *Id.* at 198-205; see also Mark Somos, *Boston in the State of Nature, 1761-1765: The Birth of an American Constitutional Trope*, 3 *JUS GENTIUM J. INT’L LEGAL HIST.* (forthcoming 2018) (on file with author) (detailing the prevalence of the “state of nature” trope and related social-contract theoretic vocabularies among the colonial Americans, including several prominent revolutionaries).

58. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

59. N.C. CONST. of 1776, arts. I, II.

60. VA. CONST. of 1776, §§ 2, 3.

form of such a popular appeal was the plebiscite or referendum, but it might also take place through a special convention elected to decide a constitutional question. The U.S. Constitution came into being through an act of popular sovereignty, but it only tenuously preserved the possibility of ongoing sovereign legislation by the people.<sup>61</sup> The Constitution's adoption through special state conventions acknowledged its status as an act of democratic sovereignty (though it was hotly debated whether that sovereignty was to be understood as realized through popular ratification in the individual states or whether it was located in a new, national people).<sup>62</sup> At the same time, however, the Article V amendment procedure came perilously close to choking off further sovereign action by the people altogether by making Congress the sole source of proposed amendments (upon prompting by state legislatures or conventions) and state legislatures the default mechanism of adoption.<sup>63</sup> One might question whether the distinction between popular sovereignty (via convention or plebiscite) and governmental amendment (via Congress and state legislatures) matters much once legislatures are themselves popularly elected, as earlier "governments" were generally not.<sup>64</sup> But even if the distinction between popular and governmental modes of amendment counts for less than it once did, Article V makes *any* amendment exceedingly difficult, all but silencing constitutional lawmaking – thus giving rise to the central dilemma of American constitutionalism.<sup>65</sup>

One might also question whether the adoption of the U.S. Constitution relied on the theory of popular sovereignty that Tuck traces. Famously, the intellectual and political debates of the Revolutionary and Founding Eras were marked by a variety of theories of political order and constitutional authority, including Lockean natural law theory and Humean accounts of commercial sociability, while much of the argument over the constitutional design of government drew on Montesquieu's account of the separation of powers. Yet precisely in light of this intellectual diversity and ideological discord, it is important to

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61. See TUCK, *supra* note 8, at 209–12.

62. *Id.* at 205–09. Rhode Island, uniquely, went the plebiscitary route and rejected the proposed Constitution by a margin of more than ten-to-one. See *id.* at 209. On the use of state conventions for ratification, see AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY*, 308–09 (2005). On the ratification debates more generally, see MICHAEL J. KLARMAN, *THE FRAMERS' COUP* 397–546 (2016); and PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION*, 1787–1788 (2010).

63. See TUCK, *supra* note 8, at 209–14. See generally U.S. CONST. art. V (detailing the amendment process for the U.S. Constitution). This issue is discussed further in Part III, *infra*.

64. We address this issue in Part III, *infra*.

65. We address this issue further in Part III, *infra*.



focus on what the Framers *did* in submitting the Constitution to a series of specially convened conventions outside the extant state legislatures. They appealed to a sovereign people distinct from the representative institutions of government, thus locating in the people the power to make fundamental law.<sup>66</sup> This appeal, as Michael Klarman and others have emphasized, was made despite the “antidemocratic” sentiments of the Framers – apparent in notable features of the federal constitution – who nevertheless thought only popular ratification would ensure the legitimacy of the new regime.<sup>67</sup> Accordingly, the people themselves adopted the Constitution, and they did so through a novel institutional form that enabled, in principle, popular legislation outside government.

This mechanism of popular control flourished at the level of the states: within a generation of the Founding, state constitutions moved almost uniformly to a procedure of plebiscitary amendment.<sup>68</sup> Moreover, many states have now gone through multiple rewritings and re-ratifications of their constitutions

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66. The use of state conventions for ratification proved a complicated matter: on the one hand, it established the constitution as the product of constituent sovereign power outside the normal channels of government (state legislatures); on the other hand, the requirement of ratification through conventions kept the decision at a level of removal from the people (as compared to referenda) and arguably favored ratification given the elite class and educational backgrounds of the delegates. See KLARMAN, *supra* note 62, at 406–412.

67. Drawing on the earlier work of Woody Holton and Pauline Maier, Klarman has recently produced a powerful indictment of the “antidemocratic” character of the national government proposed by the Framers, which he argues was constructed as a bulwark against rising economic populism in the states, with their democratic constitutions. See *id.* at 244–246 (discussing the undemocratic federal government compared to the states, and the “contempt” of the Framers for democracy). Klarman argues that this “Framer’s coup” was justified on grounds of “popular sovereignty,” which excused the illegal aspects of the enterprise (which went against the Articles of Confederation) and yet was also a necessity forced on the Framers by the democratic state constitutions. *Id.* at 607–608. He notes that “[i]ronically, [the Framers] were forced to ask ordinary Americans to ratify a constitution, one of the principal objectives of which was to constrain the influence of public opinion upon government.” *Id.* at 406. Popular ratification sealed the legitimacy of the new order, *id.* at 243, 416, and established federal legislative supremacy over the states, even while the Federalists worried that, as Hamilton put it, the “democratical jealousy of the people” would come out against the constitution of an undemocratic federal government, *id.* at 306. For more on the ratification contest and background to what Klarman calls the “coup,” see WOODY HOLTON, *UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION* (2007); and MAIER, *supra* note 62. See also CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913) (arguing that support for the proposed constitution was linked with elite economic interests). Note that for our present purposes, recognition of the undemocratic nature of the constituted government does not alter the fact that the Framers turned to popular sovereignty, however reluctantly, to legitimate the new constitutional order; this fact generates the interpretive puzzle for later generations attempting to read the constitutional text in the light of its legitimating principle where the popular sovereign is in enduring sleep, as we argue in Part II, *infra*.

68. TUCK, *supra* note 8, at 197.

by some combination of drafting convention and adoption by referendum, reflecting the intermittent but sovereign power of the people.<sup>69</sup> However, with the exception of the repeal of Prohibition in 1933, which was adopted by state conventions, formal amendments to the U.S. Constitution have been entirely the work of Congress and state legislatures.<sup>70</sup> From the point of view of the tradition that animated the American Revolution, the popular sovereign has been asleep for most of 240 years while its government has ruled in its stead. Indeed, the Constitution itself may have prevented the people from waking up.

## II. THE CONSTITUTIONAL PARADOX

The Constitution calls “We the People” into being only to constrain sharply the same people’s capacity for ongoing constitutional self-rule.<sup>71</sup> This constraint goes much deeper than the familiar countermajoritarian features of the Constitution.<sup>72</sup> The kind of constitutional lawmaking—whether in initial authorship, revision, or reaffirmation—which in the Founding Era was regarded as the sole possible form of democratic self-rule in the large and complex societies of political modernity, has proven exceedingly difficult under Article V of the Constitution. The consequence is that the very form of popular sovereignty to which constitutional law appeals for its legitimacy is inhibited to the brink of impossibility under the same Constitution. Constitutional theory and practice are both so thoroughly shaped by this paradox that it is fair to characterize them as a series of necessarily unsatisfactory efforts to escape it. In this Part, we parse the terms of this paradox as expressed in the varieties of contemporary American constitutionalism.

First, in Section II.A, we explain that the conception of popular sovereignty underlying a democratic constitution necessarily combines two ideas, one familiar, the other less so. The first is *popular authorship*: that the people can be said

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69. *Id.* at 189-93, 196-204, 245-47, 254.

70. *Id.* at 212.

71. The “constitutional paradox” of the U.S. Constitution that we analyze in this Part may be understood as a signal instance of a more general “paradox of constitutionalism” explored in *THE PARADOX OF CONSTITUTIONALISM* (Martin Loughlin & Neil Walker eds., 2007), centered on the relation of constituent power (in the United States, the sovereign people) to its constituted authority.

72. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-33 (1962) (exploring the “counter-majoritarian difficulty” that plagues judicial review, along with its origins and perplexities). See generally SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* (2006) (arguing that even apart from judicial review, the processes of political decision-making that the Constitution puts in place are pervasively undemocratic).

in a genuine, non-obscurantist way to be the original source of authority for their own fundamental law. The second is *present consent*: that what gives fundamental law its authority is the consent of the people now living under it, who constitute the present sovereign, rather than the fact that it was originally adopted through an earlier sovereign act. Taking these together, popular sovereignty must be on-going and self-renewing, or else fail as a practice of self-rule.

In the original conception of popular sovereignty, both popular authorship and present consent were realized through the majoritarian process of formal constitutional ratification that we have discussed. We call such exercises of popular sovereignty *univocal* constitution-making, because in them a popular majority qualifies as speaking for “the people” as a whole by satisfying certain procedural criteria for proposal and amendment. Under this conception, the people as a whole are always sovereign: either a sleeping sovereign when not assembled for univocal action, or a ruling sovereign during intermittent moments of assembly.

The image of the people as a sleeping sovereign captures the foundational juridico-political ontology of modern constitutionalism. When a group of people understands and organizes itself in line with this self-conception, it reflexively *makes a social world* in which “the people” can act with political consequences, including the promulgation of fundamental law. The emergence of this ontology was the joint achievement of the conceptual innovation of popular sovereignty and the institutional innovation of the democratic constitution. Outside these enabling conditions, it does not make sense to say that the people author their own fundamental law – as, for instance, medieval theorists believed they could not.<sup>73</sup>

We further argue that, under pressure to reconcile the principle of present consent with the fact that univocal acts of sovereignty are all but impossible under Article V, American constitutional practice has produced a second juridico-political ontology, a conception of popular sovereignty as multitudinous that is now increasingly influential in constitutional practice. Here, the people are not assembled in a formally self-constituting capacity, but nevertheless exert influence over constitutional law through other channels such as public argument and social-movement mobilization.<sup>74</sup> Adapting Hobbesian social contract the-

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73. See *supra* Section I.A (discussing the medieval view of classical democracy).

74. Reva Siegel, *The Jurisgenerative Role of Social Movements in United States Law*, [http://law.yale.edu/system/files/documents/pdf/Faculty/Siegel\\_Jurisgenerative\\_Role\\_of\\_Social\\_Movements.pdf](http://law.yale.edu/system/files/documents/pdf/Faculty/Siegel_Jurisgenerative_Role_of_Social_Movements.pdf) [<http://perma.cc/4TD3-WXS9>]. In a seminal study, Robert Cover recognized what he called the “jurisgenerativity” of non-legal actors, such as messianic religious communities. See Robert M. Cover, *The Supreme Court, 1982 Term – Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

ory, we call this second ontology a *constitutional multitude*: the people are conceived here as a subject multitude, but they are subject to a constitutional regime that exists by virtue of their own, earlier univocality.

We argue that when they are not actively engaged in formal constitution-making or amendment, citizens are simultaneously a “sleeping sovereign” and a “constitutional multitude.” But because formal amendment proves exceedingly difficult—and thus the sleeping sovereign cannot readily awaken—constitutional theory and practice now reflect popular sovereignty’s frustration, rather its achievement.

#### A. *Popular Authorship and Present Consent*

Eighteenth-century constitutional thought and practice combined a conceptual innovation with an institutional one to restore both the plausibility and the feasibility of democratic self-rule under modern political conditions. As Tuck has shown, the conceptual innovation was the distinction between *government*, the everyday business of administration, and *sovereignty*, the power to adopt the fundamental law of the polity.<sup>75</sup> The institutional innovation was the referendum (sometimes replaced by the special convention) as a mechanism by which the people could act in a majoritarian fashion to establish, reject, or revise fundamental law—that is, to bring to life the conceptual category of popular sovereignty. Together, these innovations made possible a new practice of *popular authorship* of fundamental law by the political community, thus making it possible to take seriously the idea of popular self-rule in basic matters.

Constitutional lawmaking was not imagined to be a once-and-for-all affair. A sovereign majority held no unalterable authority over later generations. Rather, what gave inherited constitutional law its authority in the present could only be the *present consent* of those now living under it. This present consent was rationalized on the basis of what we might call the “original theory of originalism,” which held unamended text to have been tacitly repromulgated by the current sovereign.

The principle of present consent was taken for granted among the political theorists whose work Tuck examines, and reflected the general practice of legal repromulgation where sovereigns succeeded one another over time.<sup>76</sup> For example, Bodin, in his *Republique* of 1576, claimed that “it is well known that the laws,

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75. See discussion *supra* Part I.

76. Note that such repromulgation was tacit when laws were left unchanged rather than formally reenacted through new legislation. This form of tacit legislation is not the same as the famous discussion of tacit consent in JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED*

ordinances, letters patents, privileges and concessions of princes, have force only during their lifetimes unless they are ratified by the express consent, or at least the sufferance, of a prince who is cognizant of them.”<sup>77</sup> Hobbes argued similarly in *Leviathan*: “[T]he Legislator is he, not by whose authority the Lawes were first made, but by whose authority they now continue to be Lawes.”<sup>78</sup> And Rousseau famously wrote in the *Social Contract*: “Yesterday’s law is not binding today; but silence is taken for tacit consent, and the Sovereign is held to confirm incessantly the laws it does not abrogate as it might.”<sup>79</sup>

As applied to an explicitly popular sovereign, the idea of tacit legislation was familiar to the American revolutionaries and the generation of jurists immediately following. St. George Tucker argued in his edition of *Blackstone’s Commentaries*:

That mankind have a right to bind themselves by their own voluntary acts, can scarcely be questioned: but how far have they a right to enter into engagements to bind their posterity likewise? Are the acts of the dead binding upon their living posterity, to all generations; or has posterity the same natural rights which their ancestors have enjoyed before them? And if they have, what right have any generation of men to establish any particular form of government for succeeding generations?

The answer is not difficult: “Government,” said the congress of the American States, in behalf of their constituents, “derives its just authority from the consent of the governed.” This fundamental principle then may serve as a guide to direct our judgment with respect to the question. To which we may add, in the words of the author of *Common Sense*, a law is not binding upon posterity, merely, because it was made by their ancestors; but, because posterity have not repealed it. It is the acquiescence

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305-09 (John Murray ed., 1832), which discusses theories of tacit consent to the social contract. The latter concerns individual consent to the laws one lives under; the former concerns tacit collective consent to a law that could be changed because it is left unchanged. See also *infra* note 83 for further discussion of contemporary legal theories of tacit legislation.

77. TUCK, *supra* note 8, at 266 (quoting JEAN BODIN, *THE SIX BOOKES OF A COMMONWEALE* 91 (Kenneth Douglas McRae ed., Richard Knolles trans., 1962) (1576)).
78. *Id.* at 266 (quoting HOBBS, *supra* note 35, at 185-86); see also THOMAS HOBBS, *LEVIATHAN, OR, THE MATTER, FORME AND POWER OF A COMMON WEALTH ECCLESIASTICALL AND CIVIL* 139 (London, Green Dragon 1651).
79. TUCK, *supra* note 8, at 267 (quoting JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND DISCOURSES* 78 (Ernest Rhys ed., G.D.H. Cole trans., 1923) (1762)).

of posterity under the law, which continues its obligation upon them, and not any right which their ancestors had to bind them.<sup>80</sup>

Tucker here cites Thomas Paine's *Common Sense* (an enormously influential text during the American Revolution), though Paine is clearest on this point in his later *Rights of Man*, which defends the French revolutionary experiment against Burke:

It requires but a very small glance of thought to perceive, that altho' laws made in one generation often continue in force through succeeding generations, yet that they continue to derive their force from the consent of the living. A law not repealed continues in force, not because it cannot be repealed, but because it is not repealed; and the non-repealing passes for consent.<sup>81</sup>

James Wilson observed a corollary of this point when he insisted around the time of the Constitution's adoption that, "The people may change the constitution . . . whenever and however they please. This is a right of which no positive institution can ever deprive them."<sup>82</sup>

These illustrative examples from the Founding Era and early republic are not, of course, intended to suggest that those who made and interpreted the Constitution generally regarded it as inherently revisable, independently of or outside Article V. What is clear, however, is that, as we argued in Part I, the theory of popular sovereignty makes by far the best sense of the constitution-making of the Founding Era, and those who reflected on that theory consistently assumed that democratic sovereignty would be made ongoing through present consent. Whether the repromulgation of past law is made explicit in political practice or remains implicit in popular self-understanding and judicial interpretation, it nonetheless requires a sovereign that *could* decide not to repromulgate but instead to amend and revise.<sup>83</sup> To the degree that Article V inhibits rather

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80. 1 WILLIAM BLACKSTONE'S COMMENTARIES Note D I.8, App. 172-73 (St. George Tucker ed., 1803).

81. THOMAS PAINE, THE RIGHTS OF MAN 94 (Mark Philp ed., Oxford Univ. Press 1995) (1791) (emphasis omitted).

82. 1 JAMES WILSON, WORKS 191 (Kermit L. Hall & Mark David Hall eds., Liberty Fund, Inc. 2007).

83. As Tuck notes, contemporary interest among legal theorists in the process of tacit legislation (repromulgation of past law by the present sovereign) seems to have waned after H.L.A. Hart argued in his famous *The Concept of Law* that sovereign legislation was not a general feature of all legal systems, particularly those that recognized customary law. See H.L.A. HART, THE CONCEPT OF LAW 60-64 (1961). However, Tuck argues that a theory of tacit legislation is nevertheless specifically required for the account of democratic sovereignty, as was recognized by

than facilitates present consent, it frustrates the very basis of the Constitution's authority.

*B. Univocal Sovereignty*

Constitutional lawmaking by referendum or special convention is what we call a *univocal* mode of political change, because in it a "people," artificially constituted from naturally distinct individuals through an authoritative process, acts with one voice. Univocality is at the heart of social contract theory's juridico-political ontology: it is predicated upon the form of collective consent that turns a mass of individuals (a "multitude" in the "state of nature") into a unified political agent (the "body politic" and cognate terms). Such a unified agent can "speak," and, under the positivist account of law tied to this theory,<sup>84</sup> can issue commands that constitute the law of the polity. In democratic regimes, the fulfillment of an authoritative procedure—victory in a properly posed referendum, for instance—means that, as a matter of constitutional law, "the people" have spoken.

The principle of popular authorship and the principle of present consent fit together in an aspiration to collective self-rule through political univocality. The principle of popular authorship proposes a form of political emancipation: that people should make the fundamental laws that they live under rather than receiving them from custom or from ruling elites. The principle of present consent holds that the people whose authorization of fundamental law counts are those who live under it today. The latter principle amounts to an assurance that, in principle at least, constitutional text should not become a fetishized source of authority for future generations simply because it was adopted by a popular sovereign at an earlier time. Self-rule is a present and continuing project, or it is the rule of the dead.

The possibility of popular self-rule in modernity depends upon an intermittent univocality. As noted earlier, Tuck's study takes its title from the Hobbesian image of this problem: that of the sovereign who sleeps. As Hobbes describes in *On the Citizen*, when an individual sovereign (a king) sleeps, he remains sovereign, even though his ministers may have to make decisions on his behalf. Such decisions are legitimate only if governed by the last relevant orders that the king issued before sleeping.<sup>85</sup>

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its early theorists, who found a way to rationalize customary legal sources within its scope. For further discussion, see TUCK, *supra* note 8, at 266-78.

84. On Hobbes's positivism, see Martin Loughlin, *The Political Jurisprudence of Thomas Hobbes*, in *HOBBS AND THE LAW* 5-21 (Dyzenhaus & Poole eds., 2012).

85. HOBBS, *supra* note 34, at 99-100.

By analogy, when a sovereign people is not assembled, but there exists a “certain time and place”<sup>86</sup> or a definite procedure for its reassembly, it remains sovereign in the polity even though decisions must be taken day-to-day, even year-to-year, by the government it has established. In any polity where the people hold sovereignty, the sovereign will often sleep: the nonassembly of the people under ordinary political circumstances is the necessary accommodation to modern conditions that lent its shape to this entire political ontology. If, however, the sovereign sleeps with no prospect of waking, the matter is very different. Sleep without waking is death, Hobbes wrote, for a man and also for a polity.<sup>87</sup>

In U.S. constitutional history, the sovereign slumber has lasted very long and is difficult to break. The Constitution provides for the reassembly of the people in their sovereign capacity via conventions for both the proposal and the adoption of amendments, though either step may also be taken governmentally, by proposal of Congress and ratification by three-quarters of state legislatures.<sup>88</sup> As we have noted, however, the convention route has been used only once,<sup>89</sup> and even governmental amendment is increasingly infrequent in light of both its multiple supermajority requirements and the various veto-gates that attend legislative action.<sup>90</sup> In such circumstances, it is difficult to say that the sovereign simply sleeps, preparing to wake for a new round of lawmaking, or perhaps to affirm a new generation’s adoption of the fundamental law promulgated by an earlier act of the same polity. The better interpretation would be to say that the sovereign has fallen into a coma, or is imprisoned—and by the same act of constitution-making that brought it into being.

We can also say that the situation created by Article V drains plausibility from the ontology of univocal sovereignty. How, in the absence of any real possibility of revisiting the text of fundamental law, can a living citizen understand her polity as reaffirming an inherited constitution, let alone seek a change in it as the condition of her part in its reaffirmation? The idea of popular sovereignty in the form of univocal constitutional authorship loses vitality to the degree that its institutional form, constitutional amendment, becomes a fictional option. What began in Hobbesian sovereignty declines into Hobson’s choice: enthusiastically live with the inherited constitution or disgruntledly live with the inherited constitution. To be unable to revise an inherited constitution dilutes the meaning of

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86. *Id.*

87. *Id.*

88. See U.S. CONST. art. V.

89. See *supra* note 70 and accompanying text.

90. On the difficulty of amending the Constitution via Article V, see *infra* note 98.



continually accepting it, for the repromulgation that would indicate present consent depends on the possibility that present citizens could withhold that consent.

### C. *Multitudinous Constitutionalism*

How should present-day citizens regard a constitution whose authority is rooted in popular authorship and present consent, but which they have no prospect of revisiting, and hence no real standing to repromulgate?<sup>91</sup> How should jurists and theorists account for the authority of such a constitution or the speech-acts and political strategies of making novel and contested claims under it? How to characterize a constitution that has not been amended but seems, in the hands of judges and politicians and social movements, to change its meaning over time, and how to understand the status of popular self-rule in such circumstances?<sup>92</sup>

Under pressure from these questions, American constitutional practice and theory have advanced an alternative way in which “the people” might be understood as generating their own fundamental laws. We call this second mode *multitudinous* constitution-making. It is in this mode that citizens advance claims about the meaning of constitutional terms and values through multiple and often mutually opposing social movements and other forms of political mobilization. In this mode, the citizenry is not an institutionally unified “people” capable of acting politically but instead a mass of individuals, a “multitude” in the terminology of Hobbesian contract theory, whatever other social relations may link them.

However, unlike the natural multitude that, in Hobbes’s account, preceded civil society in an anarchic “state of nature,” this multitude is a *governed* multitude, existing within an order of positive, not merely natural law. Such a constitutional multitude is generated by a process of *constitutional dispersal*, the disassembling of the popular sovereign, which ceases to exercise univocality and

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91. For a reflection on what constitutional fidelity might mean for African Americans who were excluded in the Constitution’s original terms, see Jamal Greene, *Originalism’s Race Problem*, 88 DENV. U. L. REV. 517 (2011).

92. For accounts of the evolutionary or common-law-like character of constitutional change in the United States—in contrast to the punctuated process of univocal sovereign amendment (and tacit updating)—see Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551 (2006); and David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001).

becomes again a multitude – but this time, under law.<sup>93</sup> Such a possibility is implicit, if unexamined, in Hobbes’s account of sovereignty: unlike a total *dissolution* of the social contract (such that sovereignty is lost and the people returned to a *natural* multitude<sup>94</sup>), and unlike a case in which the people have expressly transferred their sovereignty to a council or monarch (and thus become a permanent subject multitude<sup>95</sup>), the constitutional multitude maintains its sovereignty *in potentio* while living under the laws of its previous constitution-making. Still defined as sovereign by a prior act of univocality – and still actively contesting the meaning of that act, rather than simply consenting to it in its original sense – the *constitutional multitude* shares a constitution and continues, in informal ways, to make claims of a constitutional nature on the government.

In its present dispersal, the American people can be understood as both a sleeping sovereign and a constitutional multitude. When considered as potentially assembled but asleep, the mass of citizens prefigures the sovereign they could become; by contrast, when concurrently considered as subjects of law, the same citizens are ruled as a multitude of individuals by the government that they summoned into being. A severe view of the multitudinous paths to constitutional change, such as some contemporary originalists advance, would understand them simply as varieties of governmental usurpation. Yet precisely because multitudinous change occurs in a constitutional regime founded on an appeal to democratic sovereignty, multitudinous claims have a meaning that can be distinguished from older appeals to a “people” that was regarded as *in principle* incapable of acting, and so was unavoidably the mere construct of the authoritative interpreter (making the government, not the people, sovereign in Hobbes’s terms). Under conditions of constitutional dispersal, it is a prior, sovereign, constitution-making act *of the people* that ultimately authorizes governmental power, and the question the present government (for example, members of the Supreme Court) must ask finds its answer at the intersection of the two questions this

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93. See HOBBS, *supra* note 34, at 75, 94-95 (distinguishing between a multitude and a commonwealth and describing the ways in which a sovereign people may make or fail to make provision for reassembly, in the latter case losing sovereignty by virtue of this failure). The concept of constitutional dispersal is our own, an effort at articulating the implicit ontology of multitudinous constitutionalism in Hobbes’s language.

94. *Id.* at 131-41 (exploring the common internal causes of commonwealth dissolution); see also *id.* at 94 (“But if they [the assembled people] split up, and the convention is dissolved without deciding on a time and place for meeting again, the situation returns to *Anarchy* and to the condition in which they were before they convened, i.e. to the condition of the war of all against all.”).

95. Hobbes explains that in an (instituted) monarchy, “the whole right of the *people* is transferred to him [the king] by a majority of votes . . . . Once this has been done, the *people* is no longer one *person*, but a disorganized crowd, since it was one person only by virtue of its *sovereign power*, which they have transferred from themselves to him.” *Id.* at 96.

tradition makes central: what did the original, sovereign act authorize, and what is the scope of consent of the presently existing people? When there has been no formal amendment, these questions cannot find answers that are beyond dispute, but the reason is not, as it was thought to be before modern constitutionalism, that the people cannot act. It is that they have not yet acted to address the issue before the decision-maker, who thus must act as their minister and trustee. The minister's authority is limited because the people's is not; he is not the sovereign because they are – however muted and baffled their expression of sovereignty.

It bears emphasis, nevertheless, that appeals to the original and continuing constitutional authority of the people, absent univocal sovereign action, suffer problems that are so profound as to question their theoretical credibility. Such multitudinous claims suffer from the same ambiguities as the forms of *ancien regime* consultation that allegedly connected acts of monarchy back to “the people,”<sup>96</sup> weighing against treating them as evidence of sovereign acts. Lacking the imprimatur of any procedure by which the people can be said to have acted in its sovereign capacity, appeals to the constitutional demands of a multitude are always susceptible to charges of opportunism and self-serving interpretation.

As noted earlier, the original ideal of popular sovereignty was predicated on both the conceptual distinction between sovereignty and government and the concrete institutional activity of democratic constitution-making, a new category of collective action aimed at producing fundamental legislation.<sup>97</sup> Multitudinous constitutionalism maintains the conceptual distinction between sovereignty and government, while giving up on the institutional form due to the difficulty of amending the Constitution. A court's or other official's claim to update the meaning of constitutional language, if it is to respect the authority of present consent, depends on its being done in the shadow of actually available formal amendment. To put it differently, multitudinous constitution-making depends, conceptually and practically, on univocal constitution-making, not just once (to adopt the constitution that is later interpreted) but perennially. If the people cannot act univocally to resolve a constitutional dispute, then that dispute becomes a contest among competing multitudinous mobilizations and official interpretations. These come inevitably to resemble the quasi-popular forms of consultative government that claimed warrant in “the people” for centuries before the modern revival of democracy – a tendency that will likely increase the longer multitudinous claims, not univocal acts, remain the sole mode of constitutional change.

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96. See *supra* note 34 and accompanying text.

97. See text accompanying *supra* note 75.

Multitudinous constitutionalism has sometimes seemed a way to honor the principle of present consent, but only because the U.S. Constitution puts univocal popular sovereignty into a slumber that is very difficult to overcome. Multitudinous claims, with unavoidable ambiguity as to whether the people have spoken and, if so, what they have said, offer a substitute for the mumblings of a sovereign that, to amend Hobbes's vivid image, stirs at the edge of a sleep from which it cannot wake. Of course, the substitution is inadequate. In the absence of a real prospect of univocal constitutional change, the question as to what the people have willed must be decided not through sovereign action, but by governmental decision—to wit, usually, the decision of a court that takes cues from movements, commentators, and others who offer themselves as synecdoche for a dispersed and potentially sovereign people. This way of proceeding does not solve the problem that the modern project of popular sovereignty foundationally addressed: how the people may promulgate their own fundamental law, and so rule themselves. Instead, it recapitulates the situation that the project of popular sovereignty sought to overcome: the power to decide the fundamental law lies not with any intelligible act of the people, but with competing official interpreters who make clashing appeals to a “people” that cannot speak for itself, even if it once did, long ago.

### III. LIVING WITH ARTICLE V

The basic divisions in American constitutional theory today are best understood as competing responses to enduring problems set in motion by the interaction between the concept of popular sovereignty, as enshrined in original constitutional authorship, and the ever-elongating period in which such authorship cannot be renewed through univocal sovereign action, due to the difficulty of Article V amendment.<sup>98</sup> In this Part, we set out a typology of the ways in which efforts to theorize the constitutional order produce recurrent forms of dissonance

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98. For current analyses of Article V that address the rarity of its use, see Richard Albert, *Constitutional Disuse or Desuetude: The Case of Article V*, 94 B.U. L. REV. 1029, 1032 (2014) (studying the decline in Article V's use and arguing that Article V may be at risk for informal amendment by constitutional desuetude); and Strauss, *supra* note 92, at 1459 (arguing that constitutional change has so seldom come through the Article V route that American constitutionalism should be understood in an evolutionary lens); see also Sanford Levinson, *Accounting for Constitutional Change (or, How Many Times Has the United States Constitution Been Amended? (A) < 26; (B) 26; (C) > 26; (D) All of the Above)*, 8 CONST. COMMENT. 409, 411 (1991) (questioning what is in or outside the formal amendment process). For a discussion of how “sunrise amendments” might enable constitutional change via the Article V route, and an analysis of how such temporally delayed amendments could remain democratically legitimate, see Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975 (2015).

and frustration, as scholars and jurists attempt to find paths of escape from the constraints in which popular sovereignty is imprisoned. Each major approach to theorizing constitutional law is haunted by the specter of popular sovereignty in one way or another. In some cases, a theory appeals to popular sovereignty while implicitly supposing that it can never actually achieve univocal expression. In others, a theory turns away from the appeal to popular sovereignty only to find itself waylaid by the persistence of the Constitution's original font of authority, an earlier set of appeals to popular sovereignty that continues to shape the present. In short, constitutional theory and practice can neither achieve nor do without univocal popular sovereignty — except through the radical assertion that constitutional law really is about something other than the self-rule of “We the People.” Even this last strategy, playing Hamlet without the Prince, does not escape the spectral hauntings that fill Elsinore and make it impossible to change the subject from the decisive acts of the past.

*A. The Curious Twinning of Originalism and Living Constitutionalism*

Both originalism and living constitutionalism must ultimately appeal to the sovereignty of “We the People.” As interpretive strategies, however, both turn out to be normatively plausible only on the condition that univocal constitution-making remains a live possibility. Without that prospect, they fall into forms of indeterminacy and elite partisanship, which inevitably involve some combination of the dead-hand problem (thwarting the principle of present consent) and governmental usurpation (thwarting the principle of popular authorship).

Originalism has seemed to many scholars and jurists to be the mode of constitutional interpretation uniquely suited to enforcing prior acts of popular sovereignty, because it ostensibly minimizes a judge's capacity to abjure the earlier sovereign act in favor of other values that have not been made fundamental law. Hence the frequent invocation of constitutional fidelity as the special virtue of originalist interpretation. As portrayed by many of its adherents, originalism battles to protect the special authority of popular authorship from “lawless” and “illegitimate” usurpation of popularly ratified fundamental law by judicial interpretation or legislative and executive overreach.<sup>99</sup>

This self-presentation, however, proves implausible for two reasons that have emerged in our discussion. The first pertains specifically to originalism. Once popular sovereignty is understood — as it originally was — to encompass the

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99. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2631 (2015) (Scalia, J., dissenting) (describing the majority's opinion as “unabashedly based not on law”); *United States v. Virginia*, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting) (“Since it is entirely clear that the Constitution of the United States — the old one — takes no sides in this educational debate [concerning the constitutionality of sex-segregated public higher education], I dissent.”).

joint principles of popular authorship and present consent, it becomes clear that originalism is not uniquely suited to maintaining it. On the contrary, judges might seek to synchronize popular authorship with present consent through either an originalist or a nonoriginalist interpretive strategy. Either strategy would necessarily entail an assumption about the meaning of sovereign silence: what content of present consent is indicated by the sovereign's continuing to sleep. Under the most plausible originalist strategy, a judge is to assume that current silence indicates present consent to the best contemporary reconstruction of the original meaning of the fundamental law, and so her task is to achieve an interpretive fusion of horizons with the past, seeking to carry its meaning into the present.<sup>100</sup> Alternatively, under the nonoriginalist strategy, the judge is to assume that sovereign silence tasks her with semantic updating: she treats today's sovereign people as having consented to tacit repromulgation of past law, which would thus require a contemporary rendering of the Constitution's language.<sup>101</sup>

The effort to synchronize popular authorship with present consent might well take either form. Tuck himself ends up tentatively endorsing semantic updating as the most plausible present extension of the original theory, an approach he notes Akhil Reed Amar has developed in his important work on democratic constitutionalism.<sup>102</sup>

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100. On this interpretive goal, see Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997). For an argument that unless Article V has been exercised, it is the responsibility of American judges to seek to achieve this sort of interpretation, see William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349 (2015).

101. See, e.g., BALKIN, *supra* note 4 at 62-74 (arguing for integration of constitutional text with contemporary values in a synthetic interpretive process that makes the Constitution "our law" for the living).

102. As Tuck observes, *supra* note 8, at 280, Amar presents the version of semantic updating that most closely tracks the original account. Indeed, Amar's work best captures what might be called the "original theory of originalism," or perhaps more precisely, the original theory of textualism. From early studies, such as Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994), through AMAR, *supra* note 62, Amar has identified the constituent power in the United States as the sovereign people and examined what this original commitment to univocal sovereignty entails for constitutional law, historically and presently. Semantic updating in line with contemporaneous public understanding, he argues, is not merely the best way to construe the document as a whole. See, e.g., Akhil Reed Amar, *Women and the Constitution*, 18 HARV. J. L. & PUB. POL'Y 465, 469, 472 (1995) (considering semantic updating in the context of the impact of the Fourteenth and Nineteenth Amendments on the Constitution as a whole). He argues very plausibly that it is also indicated in the structure of the amendment process, which proceeds through chronological accrual. See Akhil Reed Amar, *The Supreme Court, 1999 Term – Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 52-53 (2000) (arguing that "[t]he practice of inscribing amendments in chronological order" makes clear the "temporal trajectory of the overall document").

The second problem applies to both originalism and living constitutionalism. Neither approach can remain plausible across time as a technique of instantiating popular sovereignty in the absence of the real possibility of renewed univocal constitution-making. This difficulty is perhaps especially vivid in the case of originalism. Because the constitutionally determined route to amendment is substantially blocked, a commitment to univocal constitution-making implies ever-increasing reliance on long-ago lawmaking, leading conventional originalism toward reaction and antiquarianism<sup>103</sup> – or rendering an emphasis on univocal sovereignty appealing to those who are independently well-disposed toward reaction and antiquarianism. In our present constitutional circumstances, originalism inexorably combines a theoretical championing of univocal sovereignty with a practical defense of the past (or the restoration of an arguably mythic past, as in the establishment of the individual Second Amendment right to gun ownership).<sup>104</sup> These features of originalist adjudication are not, as is often argued, the necessary consequence of fidelity to popular sovereignty; rather, they are symptoms of the breakdown of popular authorship under Article V, which makes indeterminate the meaning of sovereign silence today.

Living constitutionalism fares little better (if at all) than originalism on this point. It represents the other horn of the same interpretive dilemma. Living constitutionalism rejects the rule of the “dead hand” and insists that the ultimate arbiter of fundamental law must be the present political community.<sup>105</sup> (For instance, no understanding of “equal protection” can today presuppose the substantial exclusion of women from politics, the professions, and large parts of the labor market.) The rationale for deriving such an interpretive strategy from a commitment to popular sovereignty ranges from the legal fiction that today’s political community tacitly repromulgates the Constitution with present meaning by failing to amend it, to the more diffuse idea that democratic allegiance

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103. See Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. 356 (2011) (discussing the empirical partisan and ideological affinities of originalism).

104. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) (making the case that the originalist argument for an individual Second Amendment right to possess firearms was a product of contemporary political mobilization).

105. On the “dead hand” problem, see the symposium following Jed Rubenfeld, *The Moment and the Millennium*, 66 GEO. WASH. L. REV. 1085 (1998). On the question of textualism and democratic legitimacy, see in particular Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119 (1998); and Michael W. McConnell, *Textualism and the Dead Hand of the Past*, 66 GEO. WASH. L. REV. 1127 (1998). See also Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606 (2008) (discussing the same).

requires today's citizens to "make the Constitution our own" by giving it meanings, however contested, that "we" can credit as fundamental law.<sup>106</sup> On any account, however, living constitutionalism's claim to maintain popular sovereignty faces the same challenge as originalism: its legitimacy depends on the possibility that the people are ready and able to engage in univocal lawmaking if and when tacit legislation no longer suffices to realize popular will. Where the content of present consent can in principle be expressed decisively and without ambiguity, judicial updating is both empowered and disciplined by the fact that it takes place in the shadow of potential amendment. Where univocal constitution-making is inhibited, however, as it is under Article V, controversial acts of judicial interpretation, and their theoretical elaboration by scholars, will inevitably be drawn into arguments that cannot be resolved in the terms in which they are made. Their claim to authority must be that their respective interpretations are faithful to popular sovereignty as expressed in present consent; but there is no prospect of deciding between competing interpretations by concrete appeal to the popular sovereignty that all invoke. Instead, even as they perennially admit of competing alternatives and yet-more-controversial extensions, clashing constitutional interpretations will be resolved by governmental rather than sovereign decisions: judicial majorities, presidential appointments, Senate confirmations (or delays), and so forth.

It is the substitution of governmental decision-making for popular univocality that invites originalists' charges of usurpation (although, as we have seen, the originalist alternative does not escape these difficulties). Although Justice Scalia's polemical lament that "my Ruler . . . is a majority of the nine lawyers" on the Supreme Court<sup>107</sup> exaggerates the autonomy of courts by ignoring the political factors that enable and constrain successful constitutional argument, it is nonetheless true that living constitutionalism represents a return to the very situation that constitutional popular sovereignty had aimed at escaping—one in which "the people" cannot act directly in politics, and so is instead invoked by a series of motivated interpreters to competing political ends. To satisfactorily reflect popular sovereignty, living constitutionalism needs a viable prospect of popular

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106. See BALKIN, *supra* note 4 at 62-64 (arguing for an interpretive method that would integrate the Constitution with basic commitments to today's moral and political community); TUCK, *supra* note 8, at 266-74 (endorsing the tacit legislation view). For a recent account sympathetic to informal mechanisms of constitutional change, see also DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

107. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting).



amendment just as originalism does. Article V of the Constitution substantially denies it to them both.<sup>108</sup>

This situation presents constitutional interpreters with a stark choice. They can appeal to popular sovereignty, the ostensible basis of the U.S. Constitution; they can appeal to constitutional practice, including both the formal amendment process of Article V and the larger body of constitutional advocacy and interpretation; but they cannot do both without producing various kinds of dissonance and implausibility, because the practice has proven incompatible with the popular sovereignty that is its notional anchor. Because a distinguishing characteristic of constitutional thought is its being a rational reconstruction of a practice rather than an ideal theory, constitutional thought is distorted by the impossibility of doing together the two things that it seeks to join. Its various compromise formations and second-best adaptations must thus be understood not just as the ordinary and honorable adjustment of high theory to rough-hewn practice, but as symptoms of a systemic disorder. American constitutionalism makes best sense by far as an institutional specification of popular sovereignty, but that is precisely what it now signally and pervasively fails to be – and this failure grows more intense with time.

### B. Governmental Sovereignty

An influential approach to constitutional theory developed by Bruce Ackerman seeks to uphold the principle of present consent by imagining popular sovereignty as expressed not only in acts of univocal constitutional law-making, such as conventions and plebiscites, but also in extraordinary acts of governmental politics that constitute “constitutional moments.”<sup>109</sup> This approach, which is neither originalist nor conventionally living-constitutionalist, is appealing in

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108. 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 (2006) (arguing that popular constitutionalism fails to achieve the level of precision that could provide a clear “rule of recognition,” a jurisprudential concept indicating that constitutional amendment or reaffirmation has taken place).

109. This approach was pioneered by Bruce Ackerman across several works, most prominently his *We the People* series on constitutional turning points in American history. See BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* 3-33 (1991) (explaining this strategy under the rubric of “dualist democracy”); see also Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 YALE L.J. 453 (1989) (focusing on the Founding, Reconstruction, and the New Deal); Bruce Ackerman, *Higher Lawmaking*, in *RESPONDING TO IMPERFECTION* (Sanford Levinson, ed., 1995) (discussing his idea of higher lawmaking). For a criticism of Ackerman’s account, see Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments*, 44 STAN. L. REV. 759 (1992).

several respects. It maintains a viable institutional specification of popular sovereignty in the present, rather than allowing it to recede irrecoverably into the past or to mutate into competing multitudinous claims. It also takes advantage of the ways in which governmental practices today are far more democratic than in the early-modern period when the theory of popular sovereignty was first developed and put to work in constitution-making. If constitution-making was distinguished, as Tuck explains, by a relatively inclusive franchise and a then-unusual degree of straight majoritarianism, these qualities are today much more characteristic of our regular elections than of the Article V process.<sup>110</sup> Little wonder that many scholars today argue that popular sovereignty has found its way out of Article V and into more creditably democratic political pathways.

The path of governmental sovereignty, however, does not succeed in overcoming the problems of indeterminacy that plague living constitutionalism in its purer forms, discussed above, for it similarly lacks clear indicia of sovereign law-making. The ascription of popular sovereignty to extraordinary governmental acts faces ambiguity about when “the people” have spoken, and what precisely they have said. Various criteria, such as the intensity of debate around an election or repeated support for a challenged legislative agenda, are plausible suggestions, but they require controversial inferences from past electoral practices. As such, they cannot end debate over whether “the people” have spoken – precisely because they deviate from the constitutionally-indicated mode of sovereign amendment. Thus, for instance, it remains possible to contest the constitutionality of the New Deal (as later twentieth-century conservatives have consistently done) in a way that is not true of the Reconstruction Amendments, because it prevailed by high-stakes and decisive governmental contests involving all three branches of government rather than formal amendments following Article V.

The lack of decisiveness in governmental sovereignty interacts with a parallel lack of explicitness as to what the people affirm when and if they multitudinously “speak.” Returning to the example of the New Deal, there clearly was a sense in which repeated elections indicated that a majority of Americans – the present sovereign on the theory of popular sovereignty – affirmed the program via the elections of the 1930s, and the Supreme Court’s recognition of the new reality ended doctrinal disputes over the New Deal’s constitutionality.<sup>111</sup> But what, precisely, was the scope of this affirmation? Was it with respect to regulation of the economy, of social life generally, or of the administrative state *per se*? Seeking to

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110. See TUCK, *supra* note 8 at 190-205 (describing the development of plebiscitary constitutionalism as the predominant American model).

111. See 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* 255-382 (1998) (presenting the political struggle around the New Deal as a “modern” constitutional amendment).

draw rough-and-ready principles from the legitimation of the New Deal is a perfectly plausible interpretive task, but it is different in kind, and necessarily involves more constructive discretion, than giving meaning to a new piece of constitutional text—even one as broad as the Fourteenth Amendment’s guarantee of “equal protection of the laws.”

The problems of governmental sovereignty highlight a pair of points about univocal sovereign lawmaking. First, it solves an epistemic problem of indeterminacy: the impossibility of resolving diffuse disputes over competing claims about the content of “fundamental law” rooted in acts of “the people.”<sup>112</sup> The concept of popular sovereignty did not solve this problem directly, but did recast it in terms in which it was susceptible to an institutional solution. That solution was the majoritarian appeal to the whole people on certain questions of fundamental law. Absent that appeal—that is, without recourse to univocal sovereign lawmaking—the earlier epistemic uncertainty returns, and with it comes motivated interpretation in both elite networks and social movements, making “the people” again a cipher of indeterminate significance. This problem will follow efforts to reconceive the locus of popular sovereignty in governmental configurations of any sort.

The second, closely related point is that the sovereignty of univocal lawmaking is fundamentally “artificial,” to borrow Hobbes’s terminology again.<sup>113</sup> Through the specification of a majoritarian decision procedure, the multitude becomes a people that can speak, and can understand itself to have done so. (If the multitude also channels the shared values of an empirically existing social community, as it frequently will, this is contingent, and not essential to the political construction of sovereignty.) The appeal to governmental sovereignty—however representative the government—shares with living constitutionalism the problematic lack of a clear rule of recognition for actions of this constructed popular sovereign unmediated by its constituted government.

### C. *Democracy Without Sovereignty*

Up to this point, we have argued that neither leading strategy of constitutional interpretation—that is, neither originalism nor living constitutionalism—can solve the problems of indeterminacy created by a constitution that both rests

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112. See *supra* Section I.A. for a discussion of claims to popular warrant by premodern governments. The problem of epistemic conflict more broadly was central to Hobbes’s articulation of sovereignty, as Tuck has repeatedly emphasized. See Richard Tuck, *Hobbes, Conscience, and Christianity*, in *THE OXFORD HANDBOOK OF HOBBS* 482–483 (A.P. Martinich & Kinch Hoekstra eds., 2016).

113. HOBBS, *supra* note 34, at 9.

its authority on democratic sovereignty and inhibits ongoing exercise of that sovereignty. We have also argued that the problem is not solved by Ackerman's influential proposal to treat extraordinary moments of political life, in sub-constitutional "governmental" institutions, as equivalent to constitutional lawmaking. The problems of indeterminacy remain.

Next, we consider a strategy that rejects specifically constitutional lawmaking as the touchstone of democratic self-rule, and instead focuses on the democratic character *vel non* of ordinary governmental institutions. We argue that although there is appeal in this move to everyday democracy, it does not overcome the problems of Article V.

### 1. *Putting Governmental Democracy First*

Electoral politics is substantially more majoritarian than the constitution-making procedures of Article V, and no less inclusive in terms of suffrage. Why not say, then, that self-rule has lost its special connection with popular constitution-making under the American dispensation, but that its realization in ordinary electoral politics ("government") is good enough to count as self-rule, and might yet be improved? There are two major configurations of this shift in orientation from sovereignty to government as the locus of self-rule. One criticizes the variety of ways in which the Constitution inhibits majoritarianism, such as its disproportionate representation of small states in the Senate and Electoral College. In response, this strategy seeks to rally democratic reform against the Constitution's anti-democratic constraints, even issuing calls to remake "our undemocratic constitution" through a new exercise of popular sovereignty, such as a national constitutional convention or plebiscite.<sup>114</sup> Such calls, however desirable, remain utopian rather than practical precisely because Article V specifies the path to constitutional amendment as supermajoritarian and representative rather than popular.<sup>115</sup>

The second such approach treats electoral democracy as the main goal of the Constitution itself, and orients constitutional interpretation toward clearing the

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114. See LEVINSON, *supra* note 72, at 167-80 (proposing a new act of non-Article V popular sovereignty to reform the Constitution). For an analysis of constituent power outside Article V, see Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988).

115. Although Article V obliges Congress to call a national convention upon the petition of a supermajority of state legislatures, the convention would return its proposals to the legislatures for ratification, keeping the process governmental and representative.

“channels of political change.”<sup>116</sup> Historically speaking, this approach was a rational reconstruction of the New Deal revolution, with its embrace of congressional power and rollback of rights-based brakes on the state, along with the Warren Court’s jurisprudence protecting political speech and advancing voting rights.<sup>117</sup> The move to guaranteeing effective electoral democracy has much to recommend it as a pragmatic, second-best way of institutionally specifying a practice of popular self-rule. However, it is haunted in its own way by the Constitution’s enshrinement and subsequent inhibition of univocal *sovereign* lawmaking. The unamendable allocation of Senate seats, the Electoral College, and other structural barriers to genuine majoritarianism remain. The most acute such barrier is, ironically enough, the practice of majority-limiting constitutional review, conducted in the name of past sovereign lawmaking but, as argued above, inexorably drawn in practice into elite and opportunistic interpretive contests that defy resolution in univocal terms.<sup>118</sup> One need only consider the last decade’s judicial revisions of the Voting Rights Act, the Affordable Care Act, and campaign finance reform to appreciate how thoroughly judicial review hampers democratic government by constantly undermining the finality of major legislative actions.<sup>119</sup> The turn from an inhibited constitutional univocality to simple governmental majoritarianism necessarily fails so long as it takes place within a set of fundamental-law constraints that were created by prior acts of popular sovereignty, and which no current act of popular sovereignty is realistically available either to affirm or to repudiate. So long as this situation persists, and judicial review is available to revisit legislative decisions, partisans will inexorably take their disputes to the courts, and judges (frequently themselves linked with the relevant partisan and social movements) will respond.<sup>120</sup>

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116. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980).

117. See *id.* at 73-134 (discussing the role of courts in ensuring fair political representation and avoiding unfair political entrenchment).

118. Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 *YALE L.J.* 1346 (2005); see also RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004) (exploring judicial review and its political consequences in a range of constitutional democracies).

119. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013) (invalidating portions of the Voting Rights Act); *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012) (invalidating portions of the Affordable Care Act); *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (invalidating certain restrictions on campaign spending by corporations).

120. See, e.g., RANDY E. BARNETT ET AL., *A CONSPIRACY AGAINST OBAMACARE: THE VOLOKH CONSPIRACY AND THE HEALTH CARE CASE* (Trevor Burrus ed., 2013) (setting out the timeline of public legal argumentation from the blog Volokh Conspiracy that brought the Affordable Care Act’s individual mandate to the brink of invalidation); DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* (2016) (discussing instances of this phenomenon, including same-sex marriage and individual gun rights).

2. *An Objection: Does Sovereignty Matter Today?*

A related objection concerns whether the distinction between sovereign and governmental lawmaking should continue to command our interest today. It was developed, after all, in times and places where the quotidian activity of government was far less inclusively representative or continuously accountable than ours. With regular elections at all levels, surely our everyday legislative and executive actions have democratic pedigrees that greatly exceed those of early-modern governments and, indeed, those of early-modern plebiscites and conventions? In one sense, this is clearly right: the sovereignty-government distinction took some of its original force from the fact that actually existing governments were profoundly undemocratic, making an appeal to the people qualitatively different.<sup>121</sup> Today, decisive acts of ordinary representative government more closely conform to voter preferences, and so might plausibly seem rooted in “the people” without need to appeal to the special category of sovereign action.

But we should not be too quick to conclude that governmental institutions – in the United States or elsewhere – have solved the perennial problems of representation that make direct appeal to the people distinctive and important. They have not: the “crisis of representation” remains as acute as ever.<sup>122</sup> The tendency of representatives toward various forms of economic capture, elite consensus, and partisan polarization has hardly disappeared.<sup>123</sup> We thus cannot know what “the people” want without direct appeal to them. In light of powerful and persistent evidence that the priorities of the majority (whose sovereignty notionally authorizes government) diverge from the decisions that elected representatives take, there is no basis for abandoning the distinction between popular sovereignty and representative government, nor for giving up the ultimate priority of popular authority over governmental decision.

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121. See *supra* text accompanying notes 26–28.

122. The much-discussed crisis of representation, also called a “crisis of representative politics” or “crisis of representative democracy,” was analyzed by Antonio Gramsci as the condition in which established political parties lose an organic link to their constituencies, generating crises of authority and introducing the possibility of what he called “Caesarism.” See ANTONIO GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 210, 219 (Quintin Hoare & Geoffrey Nowell Smith eds., 2005).

123. See, e.g., Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12 PERSP. ON POL. 564 (2014) (finding that the opinions of middle- and low-income voters had no meaningful influence on legislative outcomes).

There is another subtler and more controversial reason to regard popular sovereignty as distinct from governmental constitution-making, which motivated some early-modern theorists, most clearly Rousseau.<sup>124</sup> This is the view that the revival of democracy requires more than mere representation: that a majority achieves something qualitatively different from representative government when it directly adopts the law that will govern it. This idea has been subject to a barrage of criticisms intended to show that it relies on implausible theories of agency, such as the hypostatization of a mystical collective agent. Tuck has argued in an earlier work that this is not the case, and that there is in fact a perfectly cogent account of agency in which, upon voting for the winning side in a plebiscite, voters act to bring about the result—that is, legislate for themselves.<sup>125</sup> Crucial to this argument is that theorists of voting and other forms of collective action have been mistaken in holding that only the pivotal voter can be said to have “caused” the result. On the contrary, it is just as natural and intelligible to say that each voter who forms a part of the total count sufficient for a majority has caused the result, and that the people—a majority acting through a stipulated institutional form—has in such instances given itself its own law in an unmediated fashion. While nothing else that we have said depends on this position, accepting it offers an additional reason to put weight on the distinction between government and sovereignty, with the latter enabling direct collective action by the citizens of modern regimes.

#### *D. Refining Judicial Reason*

So far, we have argued that neither living constitutionalism nor originalism resolves the dilemma that Article V creates between the twinned principles of popular authorship and present consent; that treating elections and other political contests as proxies for constitutional lawmaking does not evade the same difficulty; and that shifting emphasis altogether from constitutional lawmaking to enhancing electoral (“governmental”) democracy, although attractive, is recurrently thwarted by the very counter-majoritarian governmental institutions that the U.S. Constitution erects and makes exceedingly difficult to revise or otherwise call to account. We now turn to strategies that accept that the interpretation of fundamental law is lodged persistently, perhaps irremediably, in judicial interpretation, and thus seek to locate criteria of legitimacy in judicial reasoning itself.

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124. TUCK, *supra* note 8, at 1–9.

125. See RICHARD TUCK, *FREE RIDING* (2008).

Two such approaches are influential. The more modest approach seeks a nuanced descriptive account of how judicial craft can generate and sustain normative force for controversial decisions that lack unambiguous warrant from either government or popular sovereign.<sup>126</sup> This is in effect an acknowledgement that constitutional theory cannot solve the problem of justification that is built into a system that establishes the fundamental-law basis of judicial review only to deny it the means for ongoing reconnection with popular sovereignty.<sup>127</sup> In such circumstances, judicial review can be understood only in one of two stylized ways: externally, as just another locus of political power in the landscape of partisan and policy contest, or, internally, as a discursive practice that relies on incomplete theorization, overlapping partial justifications, and potentially inconsistent appeals that may coincide in a given case.<sup>128</sup> This approach might be understood as a sort of tragic deflation of constitutional decisions: reduced to elite interpretive contests, they can be illuminated only by careful attention to their own rules, the moves that are available within the mutually enmeshed language games that judicial review comprises. It has, at the same time, the dignity of realism. If there is no way out of the dilemma of constitutionalism, then one can at least hope to grasp clearly the ways in which this dilemma is made productive in actual governance, and to train lawyers and judges to be self-aware and free of obscurantism in their navigation of a system that defies precisely the kind of normative sense that it purports to express.

The more heroic approach is to identify the correct resolution of cases with some substantive standard whose authority is claimed to be independent of any act of a sovereign (democratic or otherwise), thus escaping from the paradox of

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126. See BICKEL, *supra* note 72 (especially chapters 1-2); PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3-8 (1982) (setting out “modalities” of constitutional argument); JED RUBENFELD, *REVOLUTION BY JUDICIARY* 15-19 (2005) (arguing that American constitutional law can be understood as grounded in the preservation of original understandings about where the law was to be applied, along with an evolving repudiation of original understandings about where it was *not* to be applied, and that this account of constitutional change is compatible with a view of the Constitution as deriving from popular sovereignty).

127. For a sophisticated account that analyzes democratic constitutionalism as creating self-binding commitments over time, which prove available for principled judicial interpretation, see RUBENFELD, *supra* note 126. This account must, however, rely at least implicitly on the possibility of future univocal lawmaking, lest it become impossible to distinguish constitutional self-binding from the suppression of sovereignty altogether, which would remove the agent whose commitment grounds and legitimates the regime.

128. See BOBBITT, *supra* note 126, at 3-119 (taking the internal perspective in describing the doctrinal elements of judging); LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 1-18 (1998) (taking the external perspective in treating judicial behavior as a species of strategic political behavior).



democratic constitutionalism by changing its legitimating criteria from procedural commitments to substantive outcomes. The most familiar of these standards is a rights-based conception of constitutional review that looks to a free-standing idea of legitimate power and/or core human interests for the source of the rights that constitutional review should protect.<sup>129</sup> Although rights-based considerations have generally held sway in constitutional review, in principle, outcome-based legitimacy could rest on a different standard, such as some conception of economic efficiency. Such a standard could readily be applied to, and implemented by, all branches of government, including independent agencies such as the Federal Reserve.<sup>130</sup>

Any such outcome-based conception of legitimacy requires setting aside the idea that fundamental law should be the product of democratic self-rule, either from the popular-sovereign font of political authority or even from the ongoing governmental process of elections and legislation. Instead of putting the processes of democracy at its core, an outcome-based approach shifts the ground entirely, focusing on the results that government should produce and the kinds of actions it accordingly must and may not take. An outcome-based approach implicitly asserts that political modernity should be normatively centered not on the revival of democracy, but on something else altogether. Whether it is offered as a counsel of despair or as an advance of reason, this would be a drastic shift in the ground of constitutionalism, a surrender of the idea that a people can and should rule itself.

## CONCLUSION

The original theory of constitutionalism provided an account of the concepts and institutions that could make possible a revival of democratic self-rule in political modernity. It held that, although the direct and continuous democracy of the classical *polis* was irrecoverable, a people could nonetheless author its own fundamental law in acts of popular sovereignty and continue to authorize or revise that law through the granting or withholding of present consent. The U.S.

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129. See, e.g., RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1-38 (1996) (making the case for a moral view of the Constitution); RONALD DWORKIN, *LAW'S EMPIRE* 355-413 (1986) (discussing constitutional interpretation and the vision of a morally legitimate political community).

130. Such a standard would, in effect, serve as a substitute for univocal sovereign action, and take the place of the sovereign in constituting, guiding, and limiting the whole government; nothing in the concept implies that courts should be its exclusive or primary enforcers. For a critical analysis of recent American law as evolving under such a dispensation, see David Singh Grewal & Jedediah Purdy, *Introduction: Law and Neoliberalism*, 77 *L. & CONTEMP. PROBS.* 1, 1-2 (2014).

Constitution was established through such an act of popular sovereignty, but the Constitution itself severely inhibited subsequent exercises of popular sovereignty through formal amendment. Our constitutional debates continue to unfold within the political ontology created by modern constitutionalism, seeking to navigate the poles of popular authorship on the one hand and, on the other, the need for present consent, now primarily available through the jurisgenerativity of the constitutional multitude. Although mainstream originalism has returned attention to the popular authorship possible through univocal constitutional lawmaking, its relative indifference to present consent makes it at most a partial realization of the original conception of constitutionalism as ongoing collective self-rule. Living constitutionalism, by contrast, takes present consent seriously, but not popular authorship, because it fails to locate an institutional site where collective assent to constitutional change could be registered decisively. For those of us who remain committed to popular sovereignty as the basis of the constitutional order, the puzzle thus remains how to achieve collective self-rule under present circumstances of enduring constitutional dispersal.