

# “The People” and “The People”: Disaggregating Citizen Lawmaking from Popular Constitutionalism

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“Before being entombed in a glass case, constitutional history  
lived among people, in action.”<sup>1</sup>

## Introduction

Affirmative action is under attack. Across the country, and state by state, activist groups have proposed ballot initiatives seeking to amend state constitutions to bar race consciousness in school admissions policies, municipal contracting, and elsewhere.<sup>2</sup> After a Michigan-based group funded by Ward Connerly, the executive director of the anti-Affirmative action umbrella group American Civil Rights Institute,<sup>3</sup> successfully dismantled the policy in Michigan in 2006, Connerly announced he would spearhead similar attempts in Arizona, Colorado, Missouri and Nebraska.<sup>4</sup>

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1. Daniel J. Hulsebosch, *The Constitution in the Glass Case and Constitutions in Action*, 16 LAW & HIST. REV. 397, 401 (1998).

2. See Tamar Lewin, *Michigan Rejects Affirmative Action, and Backers Sue*, N.Y. TIMES, Nov. 9, 2006, at P16.

3. See American Civil Rights Institute, <http://www.acri.org> (last visited Oct. 29, 2008).

4. See Timothy Egan, *Little Asia On the Hill*, N.Y. TIMES, Jan. 7, 2007, at Ed. Life Supp. 24; Lewin, *supra* note 2. In November 2008, American Civil Rights Institute-backed anti-affirmative action measures were on the ballots in Nebraska (Initiative 424) and Colorado (Amendment 46). Voters in Colorado narrowly rejected Amendment 46 by a 50.8–49.2 percent margin, but those in Nebraska approved Initiative 424 by a 58–42 percent margin. See Dan Frosch, *Vote Results Are Mixed on a Ban on Preference*, N.Y. TIMES, Nov. 7, 2008, at A19; Colorado Secretary of State, *Canvass Results (Cumulative)*, <http://coreports.ezvotetally.com/CanvassReportCumulative/tabid/59/Default.aspx> (last visited Jan. 6, 2009) (listing 1,138,083 voters, or 50.8 percent, as voting against Amendment 46 and 1,102,090 voters, or 49.2 percent, voting for it); Nebraska Secretary of State, 2008 Unofficial Election Results,

This Article bypasses the debate over the merits of affirmative action as well as questions about the policy's constitutionality under the Equal Protection Clause.<sup>5</sup> Instead, it examines the relationship between popular constitutionalism and ballot initiatives like the anti-affirmative action Michigan Civil Rights Initiative (MCRI). This Article does this not to avoid the merits of the debate,<sup>6</sup> but to contextualize it so as to free that debate from the risk of confusing the MCRI with other exaltations of "popular will."

At the risk of stripping an historical observation of its historical context,<sup>7</sup> this Article suggests that Dan Hulsebosch's description of constitutionalism in the British imperial and American colonial eras provides a useful analytic leitmotif with which to understand and define popular constitutionalism today. It argues that dominant theories of popular constitutionalism can be understood—and the borders they share with the wider corpus of studies on constitutional change can be demarcated—by reference to the "glass case"/"among people" distinction that Dan Hulsebosch draws in the epigram above.<sup>8</sup> This Article does not

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<http://www.sos.ne.gov/elec/2008/ElectNight/general.htm> (last visited Nov. 5, 2008) (listing 389,372 voters, or 58 percent, as voting for Initiative 424 and 287,233 voters, or 42 percent, voting against it).

5. Several scholars have provided particularly illuminating discussions of the development of a social agenda that equates (or conflates) affirmative action programs intended to help subordinated racial groups with racial subordination itself. See Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470 (2004) [hereinafter Siegel, *Equality Talk*]; Reva B. Siegel & Jack M. Balkin, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9 (2003); see also Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1 (1978) (arguing that on issues such as affirmative action, lawmaking by initiative will always harm racial minorities); Kevin R. Johnson, *A Handicapped, Not "Sleeping," Giant: The Devastating Impact of the Initiative Process on Latina/o and Immigrant Communities*, 96 CAL. L. REV. 1259 (2008) (making an argument similar to Derrick Bell's, with respect to Latina/o and immigrant populations, and making specific reference to the anti-affirmative-action California Civil Rights Initiative whose passage was organized by Ward Connerly).

6. Indeed, I agree that "[t]he legal profession should be ashamed that the short 30-year history of affirmative action programs . . . has created more uproar within the legal community than the 300 years of racial animus and discrimination before it." Adam Blumenkrantz, et al., *Affirming Michigan's Action: The Michigan Journal of Race & Law's Response to Dr. Carcieri's "Grutter v. Bollinger and Civil Disobedience,"* 31 U. DAYTON L. REV. 381, 385 (2006).

7. On "law office history," see John Phillip Reid, *Law and History*, 27 LOY. L.A. L. REV. 193, 197–204 (1993), which explains that lawyers often cherry-pick and decontextualize historical facts to support preexisting arguments rather than drawing lessons and arguments from a full picture of the historical record.

8. See *supra* note 1 and accompanying text. Indeed, Kramer also uses this historical distinction. See *infra* notes 29–34 and accompanying text. It is in large

revisit the history or historiography that gave rise to this distinction. Rather, it employs the distinction only as shorthand to categorize forms of constitutional change into two models.<sup>9</sup>

This analysis distinguishes between popular constitutionalism and a ballot initiative-oriented notion of constitutional change, which will be referred to as "initiative constitutionalism." This Article argues that under an "among people" definition of popular constitutionalism, the MCRI cannot be understood as an expression of popular constitutionalism. Important consequences flow from this distinction. The distinction of initiative constitutionalism from popular constitutionalism is important because the categories' coherence is a prerequisite to examining the MCRI's merits. Without disaggregating these models, we risk collapsing the MCRI's effects into the analytic black hole of "what the people want." Instead, the changes wrought by the MCRI must be debated on their own terms so that their consequences can be understood, minimized, and eventually reversed.

Imbuing the MCRI with the air of popular constitutionalism makes it more difficult to make this criticism because democratic sensibilities render Americans hesitant to question expressions of "popular will." There is a tension between these democratic sensibilities and what people generally presume the function of constitutions to be, namely, to lay down basic law dictating how government will work and to protect basic fundamental rights from majoritarian tendencies. Americans care about "popular will" and constitutionalisms, but cannot escape the tension that results. The challenge is to balance them.<sup>10</sup>

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part because Kramer's version of popular constitutionalism is grounded in this history that it makes sense to characterize his modern-era popular constitutionalism as about being "among people." See *infra* Part I.

9. I understand this use of historical scholarship not to run aground of the very persuasive criticisms that Reid and others raise against "law office history." See, e.g., Reid, *supra* note 7, at 197–204. I base this understanding on the fact that I ground my analogical analysis and normative claims not on Hulsebosch's (decontextualized) historical material, but on his language. See Hulsebosch, *supra* note 1 and accompanying text.

10. As Richard Primus has argued: "Taking constitutionalism seriously entails the willingness to temper simple democracy with other fundamental values. We love our Constitution, and we love democracy. But we cannot square the circle." Richard Primus, *In the Beginnings*, NEW REPUBLIC, Apr. 24, 2006, at 33 (reviewing AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005)). To be clear, however, Primus views as "a romantic obfuscation" popular constitutionalism's attempt to dissolve the problem that "democratic legitimacy" is incompatible with the fact that people no longer living ratified the United States Constitution and all but a few of its amendments. See *id.* at 30.

Americans are notably proud of their Federal Constitution and proud of the fact that they live in a constitutional democracy. We think of constitutions as sacrosanct founding documents that tell us who we are; we place ours at the center of our founding narrative and use it to justify our American exceptionalism.<sup>11</sup> We are proud that we are a nation that both operates under law and order, and that also protects individual liberties.

Popular constitutionalism and initiative constitutionalism advance substantially different models for tempering democracy and other fundamental values. To conflate these models is to eliminate the chance to debate their merits, and instead to assume that the products of each one has balanced democracy and other fundamental values in the same (and proper) way. This assumption is worth questioning. In bypassing the affirmative action debate, then, this Article seeks not to avoid it, but to clarify the context in which scholars place it. Such a project is especially important today, because popular constitutionalism is the legal academy's "theory *du jour*."<sup>12</sup>

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11. Consider the introduction to the first of the *Federalist Papers*, which equates the United States Constitution and the American empire:

AFTER an unequivocal experience of the inefficiency of the subsisting federal government, you are called upon to deliberate on a new Constitution for the United States of America. The subject speaks its own importance; comprehending in its consequences nothing less than the existence of the UNION, the safety and welfare of the parts of which it is composed, the fate of an empire in many respects the most interesting in the world.

THE FEDERALIST NO. 1, at 1 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

12. See Larry Alexander & Lawrence B. Solum, *Popular? Constitutionalism?*, 118 HARV. L. REV. 1594, 1594 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

Hulsebosch has described as a "jurisprudential revolution" the academic project "in which judicial review is being removed from the center of American constitutionalism and realigned with the many devices of popular constitutionalism that the people can use to shape constitutional meaning." Daniel J. Hulsebosch, *A Discrete and Cosmopolitan Minority: The Loyalists, the Atlantic World, and the Origins of Judicial Review*, 81 CHI.-KENT L. REV. 825, 825 (2006).

Indeed, a proliferation of recent scholarship has addressed popular constitutionalism. See, e.g., BRUCE ACKERMAN, 1 *WE THE PEOPLE: FOUNDATIONS* (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; BRUCE ACKERMAN, 2 *WE THE PEOPLE: TRANSFORMATIONS* (1998); AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005); LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004) [hereinafter KRAMER, *PEOPLE THEMSELVES*]; Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CAL. L. REV. 959 (2004) [hereinafter Kramer, *Circa 2004*]; Larry D. Kramer, *The Supreme Court, 2000 Term—Foreword: We The Court*, 115 HARV. L. REV. 4 (2001) [hereinafter Kramer, *We The Court*]; Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003) [hereinafter Post & Siegel, *Policentric*]; Douglas S. Reed, *Popular Constitutionalism: Toward a Theory of State*

To this end, Part I of this Article examines two scholarly elaborations of popular constitutionalism and argues that, despite differences between them, they share an appreciation for and are defined by constitutions that "live among people." Part II turns to the MCRI, focusing in particular on the claims its proponents made to justify its placement on the ballot and also articulates a definition of "initiative constitutionalism." Part III compares initiative constitutionalism with the definition of popular constitutionalism discussed in Part I, and argues that initiative constitutionalism does not and cannot entail constitutions that live among people. This Article concludes by cautioning against identifying all democratic activism with the project of popular constitutionalism, especially now that popular constitutionalism is ascendant in the legal academy.

### I. Popular Constitutionalism: Living Among People

Exploring constitutionalism and sovereignty in the context of the British Empire and colonial America, Hulsebosch observes that "it is helpful to think of constitutions not as documents but rather as relationships among jurisdictions and people mediated through highly charged legal terms."<sup>13</sup> These relationships were forged not in constitutional texts, but in interactions among people. "Not a thing," he writes, "the constitution was what people in concrete places and at specific times made of those legal traditions."<sup>14</sup> Contrast this kind of constitution—dynamically produced and reproduced, made and revised, by daily interaction in the "demos"<sup>15</sup>—with one that fetishizes the writtenness and resultant constancy of a particular document: in the latter, institutionally-imposed order is expected to protect popular sovereignty; in the former, fidelity to social practice guarantees

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*Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999) [hereinafter Reed, *Popular Constitutionalism*]; Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323 (2006) [hereinafter Siegel, *Social Movement Conflict*]; Symposium, *The People Themselves: Popular Constitutionalism and Judicial Review*, 81 CHI.-KENT L. REV. 809 (2006).

13. DANIEL J. HULSEBOSCH, *CONSTITUTING EMPIRE: NEW YORK AND THE TRANSFORMATION OF CONSTITUTIONALISM IN THE ATLANTIC WORLD, 1664–1830*, at 7 (2005) [hereinafter HULSEBOSCH, *CONSTITUTING EMPIRE*].

14. Daniel J. Hulsebosch, *Imperia in Imperio: The Multiple Constitutions of Empire in New York, 1750–1777*, 16 LAW & HIST. REV. 319, 325 (1998).

15. See Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTL. J. LEG. PHIL. 185, 185 (2000) [hereinafter Post, *Cultural Heterogeneity*] ("The collective agency of the people constitutes a 'demos' capable of 'bestowing . . . democratic authority on a polity.'" (citations omitted)).

it.<sup>16</sup>

Hulsebosch's descriptive language helps us understand popular constitutionalism today. Broadly understood as exploring "the mechanism that mediates between constitutional law and culture,"<sup>17</sup> the project of popular constitutionalism is to situate The People at the center of the universe of forces making constitutional change.<sup>18</sup> It distinguishes pronouncements about constitutional meaning imposed by officialdom from meanings that develop organically through forms of civic activism by ordinary citizens.<sup>19</sup> Though a single project, there are real and substantial differences among its explicators that should not be obscured.<sup>20</sup> Nonetheless, they agree more than they disagree, because these scholars share a commitment to constitutions among people: so long as ours is a country of popular sovereignty, they assert, the basic law under which government functions must derive its force and meaning from The People. This assertion assumes more than mere passive acceptance of the extant constitutional order, and requires citizens' engagement as the hallmark of democratic legitimacy.

#### A. *Establishing Popular Constitutionalism*

This Article grounds its discussion of popular constitutionalism in the scholarship of two authors whose work can fairly be described as dominant in this project: Larry Kramer and Reva Siegel.<sup>21</sup> Kramer and Siegel approach their work in

16. See HULSEBOSCH, *CONSTITUTING EMPIRE*, *supra* note 13, at 7–8; cf. Richard H. Pildes, *Democracy and Disorder*, 68 U. CHI. L. REV. 695, 714 (2001) ("[D]emocracy requires a mix of both order (law, structure, and constraint) and openness (politics, fluidity, and receptivity to novel forms).").

17. Kramer, *Circa 2004*, *supra* note 12, at 983.

18. *Id.*

19. See Siegel, *Social Movement Conflict*, *supra* note 12, at 1324 n.5.

20. See *infra* notes 29–70 86 and accompanying text.

21. Until recently, Siegel had not aligned herself explicitly with the popular constitutionalist project; she does not use the term in any of her scholarship from which I draw, with the exception of one work, in which she and Robert Post respond to a lecture given by Kramer. Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004) [hereinafter Post & Siegel, *Popular Constitutionalism*]. Under Kramer's broad definition of popular constitutionalism, however, Siegel is a popular constitutionalist because her scholarship explores the relationship between actions by nonofficial citizens and the development of constitutional meaning. See *supra* text accompanying note 17; see also Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 998 (2006) (suggesting that Robert Post and Reva Siegel offer a form of popular constitutionalism).

Indeed, in a very recent article Siegel makes an argument about the

distinctly different ways. Where Kramer grounds his work in a history of 19th Century constitutional practices but presents an aspirational and normative vision of modern popular constitutionalism, Siegel draws her conclusions from empirical research into modern constitutional practice.<sup>22</sup> Where Kramer writes with an agenda critical of judicial review, Siegel accommodates a culture in which judicial review operates.<sup>23</sup> Despite these differences, Kramer and Siegel arrive at similar understandings of the complex ways in which The People should or do produce constitutional meaning. Both scholars envision worlds of serious popular engagement: surely The People vote, but they do not pay attention to politics only in the first weeks in November, otherwise living purely private, apolitical lives.<sup>24</sup> Instead, The People are often engaged.<sup>25</sup> For popular constitutionalism it is this constancy of engagement and constitutional law's accounting for it—for practices of activism producing and "resting on a shared commitment to the society that [its] constitution serves"<sup>26</sup>—that underpins functional popular

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relationship between social movements' debate over gun control laws in the 1970s through the 2000s, on the one hand, and the form and reasoning of the Supreme Court's decision in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008), which invalidated the District of Columbia's ban on handguns, on the other. See Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008) [hereinafter Siegel, *Dead or Alive*]. Her argument in *Dead or Alive* runs parallel to her argument about debates over the proposed Equal Rights Amendment, on the one hand, and the form and reasoning of what she calls the "de facto ERA," on the other, in a 2006 article. See *infra* notes 81–85 (discussing the argument in Siegel, *Social Movement Conflict, supra* note 12); Siegel, *Dead or Alive, supra*, at 193 n.10 (noting that this work "builds on earlier work exploring how movement conflict helps guide the Constitution's development and how responsive interpretation helps sustain its democratic authority," and citing Siegel, *Social Movement Conflict, supra* note 12). Siegel argues that both *Heller* itself, and her analyses in Siegel, *Dead or Alive* and Siegel, *Social Movement Conflict* of the role of popular debates and social movements in forming constitutional meaning, reflect popular constitutionalism. See Siegel, *Dead or Alive, supra* at 192 (describing constitutional "understandings" based on social movements' debates as being "forged . . . through popular constitutionalism"); *id.* at 201 (arguing that *Heller* "is responsive to popular constitutionalism" and that one "mode of reasoning" in *Heller* "sounds in popular constitutionalism").

22. See *infra* notes 29–80 and accompanying text.

23. *Id.*

24. See KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 228 (noting that generations of Americans have envisaged an active role for themselves as republican citizens). *But see* Neal Devins, *Tom DeLay: Popular Constitutionalist?*, 81 CHI.-KENT L. REV. 1055, 1056 (2006) ("[T]he American people have little or no interest in constitutional interpretation.").

25. KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 228. *But see infra* note 93 and accompanying text (noting scholars' questioning of Kramer's fundamental imputation of agency to The People).

26. HULSEBOSCH, CONSTITUTING EMPIRE, *supra* note 13, at 7. Again, reference

sovereignty.

In the popular constitutionalist model, the line between constitutional law and mere political law blurs. Indeed, the essential point of popular constitutionalism is its recognition of distinctly *constitutional* value in citizens' activity too often understood as having none.<sup>27</sup> As the gap between The People and the Constitution narrows, conventional pathologies preventing us from linking politics and the Constitution will also fade.<sup>28</sup>

Kramer grounds his popular constitutionalism in the Founding Era.<sup>29</sup> He valorizes citizens who acted in a manner that tangibly embodied—and produced—their Constitution, a legal instrument whose “day-to-day enforcement” and meaning The People effected with their daily actions.<sup>30</sup> In the Founding Era, “[m]eans of correction and forms of resistance were well established and highly structured” and included voting, assembling, petitioning, and public denouncement.<sup>31</sup> When public dissatisfaction with officialdom did not find sufficient outlet in pamphlets and the voting booth, the public could utilize “more aggressive forms of resistance.”<sup>32</sup> Mere disobedience or explicit rejection of local authorities often sufficed when, for example, a prosecutor sought to indict and convict an individual whom the community thought should not be punished.<sup>33</sup> The People could raise the stakes even higher: “more coercive means of popular

to Hulsebosch should not suggest that he is a popular constitutionalist; his scholarship is oriented historically, not normatively, on these questions. See discussion *supra* note 9.

27. HULSEBOSCH, *CONSTITUTING EMPIRE*, *supra* note 13, at 9.

28. See KRAMER, *PEOPLE THEMSELVES*, *supra* note 12, at 30–34; Tushnet, *supra* note 21 at 998 (discussing constitutional law as political law); *infra* notes 97–100 and accompanying text.

29. See KRAMER, *PEOPLE THEMSELVES*, *supra* note 12, at 9–34. Hulsebosch discusses the soundness of Kramer's historical account, and its distinction from “law office history” or “law review history.” See Daniel J. Hulsebosch, *Bringing The People Back In*, 80 N.Y.U. L. REV. 653, 663–87 (2005) [hereinafter Hulsebosch, *Bringing*] (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)); see also Christopher Tomlins, *Politics, Police, Past and Present: Larry Kramer's The People Themselves*, 81 CHI.-KENT L. REV. 1007, 1007–10 (2006) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

30. See KRAMER, *PEOPLE THEMSELVES*, *supra* note 12, at 9–34.

31. *Id.* at 25.

32. *Id.*

33. *Id.* at 26. One extreme form of this phenomenon was jury nullification, but sometimes grand juries declined to indict. *Id.* (“[J]uries could become a potent weapon with which to frustrate any local official foolish enough to enforce laws the community deemed unconstitutional.”); see also Kramer, *We The Court*, *supra* note 12, at 100–01 (“[T]he jury . . . used its power to retain control over substantive law.”).



opposition were available,"<sup>34</sup> such as boycotts and mobbing.<sup>35</sup>

As Kramer repeatedly stresses, The People was not a rhetorical abstraction. It was "a collective body capable of independent action and expression" that would "direct[ly] supervis[e] and correct[]" its government.<sup>36</sup> This collective body demonstrated such power constantly, in physical, political, and intellectual ways.<sup>37</sup> These methods of control were not only theoretic possibilities. People wrote pamphlets and articles,<sup>38</sup> juries nullified verdicts,<sup>39</sup> groups organized boycotts<sup>40</sup> and mobs dumped tea into the Boston harbor.<sup>41</sup> In Kramer's view, both before and after the founding, The People voiced their disagreement with government through *action*.<sup>42</sup>

The People's goal was to effect changes in "fundamental law."<sup>43</sup> Unlike "ordinary law" passed by duly constituted governmental bodies (i.e., legislatures) to regulate people, "fundamental law" was the law governing the governors.<sup>44</sup> Under the theory of popular sovereignty on which the United States Constitution was written and ratified, Kramer argues, it was "fundamental law" that The People owned, and whose meaning The People had the power to make.<sup>45</sup> In the Founding Era, "fundamental law" lived among people.

Kramer argues that the Constitution's character as "fundamental law" was lost when "the critical linguistic difference between [the Constitution] and ordinary law blurred" under the weight of Supreme Court cases treating the Constitution as

34. KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 26–27.

35. *Id.* (noting that "mobbing was an accepted . . . form of political action"); see also HULSEBOSCH, CONSTITUTING EMPIRE, *supra* note 13, at 7 ("The English remedy [for constitutional violations] was the right of resistance, with its graduated steps of petition, riot, rebellion, and finally revolution.").

36. KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 30.

37. *Id.* at 27–30.

38. *Id.* at 25 ("The first phase of American resistance to the Stamp Act consisted of petitions beseeching Parliament to reject the offending legislation."). Consider that the *Federalist Papers* were newspaper op-eds published in New York newspapers. See *Introduction* to THE FEDERALIST, at viii (Clinton Rossiter ed., 1961).

39. KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 26.

40. *Id.* (noting that citizens would boycott assisting the local sheriff who depended on local community support to arrest law breakers).

41. See KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 3–5, 18, 24–29.

42. See *id.*; Kramer, *We The Court*, *supra* note 12, at 11–12.

43. KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 30.

44. *Id.* (quoting Judge William Nelson). The phrase "governing the governors" paraphrases Judge William Nelson. See *id.*

45. See KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 30.

ordinary law.<sup>46</sup> Over time, “the Constitution at last came to *seem* like ordinary law.”<sup>47</sup> At the same time, “popular politics” was absorbed “into the party system,” so that legislatures came to be seen as the embodiment of “the ‘voice of the people’” and it became “hardly comprehensible to speak of ‘the people’ as a corporate entity capable of independent action.”<sup>48</sup> As a result, Kramer’s argument for modern popular constitutionalism is at times dependent on legislators faithfully representing the voice of the

46. Kramer, *We the Court*, *supra* note 12, at 99.

47. *Id.*; see also KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 148–56 (discussing “the assimilation of constitutional law into ordinary law”).

48. Kramer, *We The Court*, *supra* note 12, at 99–104. Kramer further explains:

As the new politics settled and became normalized, the role of “the people” in it slowly changed. By serving as mediating institutions between governed and governors, parties obscured the formerly sharp theoretical distinction that had existed between them . . . . [A]nd because party politics was all about winning office, popular politics ceased to be something that operated from outside the formal system as a check on its political institutions. The “voice of the people,” as such, was now expressed by elected representatives responding to political signals and popular movements.

*Id.* at 103–04; see also KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 37. The history of voting methods tracked this move from the street (where, when voting was done publicly, citizens faced violence and resistance when casting unpopular votes) to the ballot box (where votes are cast in secret). See Jill Lepore, *Annals of Democracy: Rock, Paper, Scissors: How We Used to Vote*, THE NEW YORKER, Oct. 13, 2008, at 90, 92, 96 (noting that “Americans used to vote with their voices—viva voce—or with their hands or with their feet. . . . In the colonies, as in the mother country, casting a vote rarely required paper and pen.” With today’s secret ballots, by contrast,

[a voter will] enter a booth built on a frame of aluminum poles, tug shut behind [her] a red-white-and-blue striped curtain, and, with a black marker tied to a string, [will] mark [her] ballot, awed, as always, by the gravity, the sovereignty, of the moment. With the stroke of a pen, we, mere citizens, become We the People.

*Id.*

Daryl Levinson and Rick Pildes also chronicle the rise of the political parties vis-à-vis constitutional structure. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2316–29 (2006). Levinson and Pildes argue that the fact that the Founding Fathers did not anticipate and would not approve of the parties’ domination of American politics renders the Madisonian compromise-based theory underpinning the Supreme Court’s separation of powers jurisprudence anachronistic. *Id.*

Separation of powers is sometimes understood as serving to protect both individual liberties and democratic accountability. See *Clinton v. City of N.Y.*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (“[The Framers] used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts.”); *infra* notes 88–90 and accompanying text (discussing the role of judicial review in popular constitutionalism). To the extent that separation of powers actually fosters democratic accountability, Levinson and Pildes raise important questions about the relationship between political parties’ domination of politics, and the people’s ability to govern themselves and shape their Constitution’s meaning effectively. See Levinson & Pildes, *supra*, at 2316–29.

people and willing to assert the power to interpret the Constitution.<sup>49</sup>

In the abstract, Kramer clearly wants to return to an intimate and responsive relationship between the Constitution and The People.<sup>50</sup> He insists that that we "pay[] careful attention to constitutional visions generated outside the official organs of the state,"<sup>51</sup> and that we must "lay claim to the Constitution ourselves."<sup>52</sup> But Kramer's suggestions are unhelpful to those seeking particular examples of popular action's constitutional valence today. He says only that popular constitutionalists must "control the Supreme Court" by "deflect[ing] . . . arguments that constitutional law is too complex or difficult for ordinary citizens."<sup>53</sup>

As Kramer gets less abstract about the relationship between The People and the Constitution, his suggestions for how such a relationship would function become vaguer. He is horrified to observe that when the Supreme Court ended Florida's vote recount and effectively declared George W. Bush the winner of the 2000 presidential election,<sup>54</sup> people upset with the decision did nothing.<sup>55</sup> Drawing on historical examples, he insists they might have "attempted to impeach the Justices" or "moved to slash the Court's budget" or "tried to pack the Court with new members."<sup>56</sup> Kramer's hope for modern-era popular constitutionalism is that we rediscover and assert with force our role as authoritative constitutional interpreters.<sup>57</sup>

It is surprising that Kramer does not observe that political

49. See KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 213–26 (discussing the "New Deal settlement," which entails a judicial review deferential to political (read: legislative) assertions of constitutionality). *But see* Alexander & Solum, *supra* note 12, at 1600–01 (describing Kramer's argument with skepticism and observing that "when a strong President ignores the Constitution, or a strong Congress attempts to institute rump parliamentary democracy, it is institutions and not 'We the People' who are acting." (citations omitted)).

50. See KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 7–8.

51. Kramer, *Circa 2004*, *supra* note 12, at 980. According to Kramer, doing so "is important, if for no other reason than the certainty that our own sense of the good will be improved by a more catholic sense of the possible." *Id.* On this "catholic sense," see SANFORD LEVINSON, CONSTITUTIONAL FAITH 18–51 (1988).

52. KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 247.

53. *Id.* at 247–48; *see also* Kramer, *We The Court*, *supra* note 12, at 153–58.

54. *See* Bush v. Gore, 531 U.S. 98 (2000).

55. See KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 231.

56. *Id.*

57. *Cf. id.* at 228 ("Neither the Founding generation nor their children nor their children's children, right on down to our grandparents' generation, were so passive about their role as republican citizens.").

and constitutional change actually often does happen by methods of which it seems he would approve. Indeed, today we still exercise some of the same basic forms of resistance as our colonial forebears: we still vote, exercise the right to petition and assemble, and make public denunciations.<sup>58</sup> Community mores still mark the limits of official action in other informal ways, even outside the First Amendment, whose jurisprudence explicitly invokes “community standards of decency.”<sup>59</sup> Juries still nullify convictions.<sup>60</sup> Activists still organize boycotts.<sup>61</sup> Organized groups still gather in the streets to protest and oppose presidential action.<sup>62</sup>

Moreover, as Siegel argues in her pathbreaking article *Text in Contest: Gender and the Constitution from a Social Movement Perspective* (“*Text in Contest*”),<sup>63</sup> the United States Constitution already is a document whose meaning is derived from these popularly negotiated solutions.<sup>64</sup> Siegel posits that constitutional meanings flow from the dialectic between movements and countermovements.<sup>65</sup> Instead of providing a purely normative

58. See *supra* note 31 and accompanying text (discussing the use of these tactics in the Founding Era).

59. See, e.g., *Miller v. California*, 413 U.S. 15, 31 (1973) (defining obscenity by reference to community standards).

60. See, e.g., Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 BUFF. L. REV. 717, 752 (2006) (reviewing empirical studies of the jury, and observing that “even if it is rare, explicit jury nullification of the application of the law plays a central role in conceptions of the jury and has been a source of extensive debate”); see also Paul Butler, *Racially Based Jury Nullification*, 105 YALE L.J. 677 (1995) (arguing that race-based jury nullification is appropriate in some cases).

61. See, e.g., Dolores Huerta & Peter Edelman, Keynote Address, *Symposium on Economic Justice and Growing Inequality in America*, 3 HASTINGS RACE & POVERTY L.J. 203, 205, 210 (2006) (“[T]he thing that really helped farm workers was . . . when we had that famous grape boycott, when we had fourteen million Americans who would not eat grapes. . . . In the grape boycott, fourteen million Americans stopped eating grapes. So we know that we can do this.”).

62. Consider, for example, the massive anti-war protests in the month before President Bush launched the war in Iraq. See Jodi Wilgoren, *In Word, Song and Sign, Demonstrators Across the United States Say No to an Invasion of Iraq*, N.Y. TIMES, Feb. 16, 2003, at 21. It is interesting to note that in the index to *The People Themselves: Popular Constitutionalism and Judicial Review*, under “popular will,” Kramer lists only: “See protests.” KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 357.

63. Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297 (2001) [hereinafter Siegel, *Text in Contest*].

64. *Id.* at 299.

65. *Id.* at 303; see also Siegel, *Social Movement Conflict*, *supra* note 12 (arguing that the “de facto ERA,” a series of cases in which the Supreme Court came to understand gender discrimination as violative of the Equal Protection Clause, was produced not solely by judicial review or by ambient and amorphous “culture,” but

account of how The People should participate in the making of constitutional meaning, Siegel instead takes a positive approach, arguing that meaning simply *is* made by social movement-counter movement interactions.<sup>66</sup> In her account, "[c]laims on the text of the Constitution made by mobilized groups of Americans *outside the courthouse* helped bring into being the understandings that judges then read into the text of the Constitution."<sup>67</sup> Because "pathways of meaning" allow both "law [to] structure social life" and "social actors [to] shape law," the boundaries between law and society are unfixed.<sup>68</sup> Like Kramer, Siegel aims to blur the strict politics/constitutional law divide. Because there is little "normative coherence within law and society . . . [or] between them,"<sup>69</sup> we cannot determine that particular actions do not have constitutional value based solely on the forum in which they occur.<sup>70</sup>

Siegel has extensively studied politics and social movements, and has located such movements on the frontier between law and society.<sup>71</sup> Examining the nature of the claims that social movements make, she suggests that their arguments often sound in constitutional law because citizens understand the Constitution to allow them to make such arguments: the first three words of that document—"We the People"<sup>72</sup>—reflect a theory of popular sovereignty and suggest an authorship that citizens reasonably believe to include themselves.<sup>73</sup>

by a dialectic of claims on constitutional meaning between feminist and anti-feminist social movements from the late 1960s until the early 1980s).

66. See Siegel, *Text in Contest*, *supra* note 63, at 303 ("[D]ialogue between citizenry and judiciary about constitutional meaning is far more commonplace in our constitutional order than constitutional theory commonly acknowledges.")

67. *Id.* at 312–13 (emphasis added).

68. *Id.* at 316–18.

69. *Id.* at 316–17. Siegel makes this argument while characterizing an article that distinguishes between law and society as offering a "high degree of normative coherence." *Id.* (discussing David A. Strauss, *The Irrelevance of Constitutional Amendments*, 144 HARV. L. REV. 1457 (2001)).

70. See Siegel, *Text in Contest*, *supra* note 63, at 316–17. In other words, for popular constitutionalists, the fact that an argument takes place outside of a federal courthouse does not, and should not, render it invisible or meaningless to the Constitution.

71. See, e.g., Siegel, *Social Movement Conflict*, *supra* note 12, at 1323–24 (noting that the 1970s feminist movement's push for the Equal Rights Amendment likely influenced the Supreme Court's subsequent interpretation of the Fourteenth Amendment prohibiting sex discrimination).

72. U.S. CONST. pmbl.

73. See Siegel, *Text in Contest*, *supra* note 63, at 322; see also Tomlins, *supra* note 29, at 1012 ("The Preamble is indubitably the best claim the people can make that the Constitution is 'theirs.'").

In this way Siegel contests Kramer's argument that The People have lost sight of their obligations as sovereign. If "mobilized groups of citizens" make claims on constitutional meaning "with the expectation that [court-exposed] law might in fact change by reason of their claims,"<sup>74</sup> they cannot also fulfill Kramer's caricature of them being "passive about their role as republican citizens."<sup>75</sup> If The People already "elaborate the Constitution's meaning with respect to different institutions and practices" by "mak[ing] claims that the Constitution, as foundational law, speaks to various controversies,"<sup>76</sup> then the informal processes that Kramer hopes will "challenge[], reinterpret[], and renew[]" constitutional understandings,<sup>77</sup> already "continually refresh the text's normative ambit."<sup>78</sup> In other words, Kramer and Siegel disagree about the extent to which The People already develop constitutional meaning.<sup>79</sup> Nevertheless, they share an understanding, whether aspirational or empirical, of constitutional law based on continual popular involvement.<sup>80</sup>

This Article embraces an understanding of popular constitutionalism based on these studies and the project of dismantling the politics/constitutional law distinction. Because the United States Constitution invokes and is grounded in popular sovereignty, we must give constitutional weight to social or political actions based on their democratic pedigree. As popular activity—The People's politics—demands constitutional significance, the Constitution moves toward, and eventually "lives among," The People. The goal, and this Article's normative orientation, is to acknowledge that political engagement and socio-political pressures by which personal and group relationships form and negotiate solutions to conflict are indeed matters of constitutional import.

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74. Siegel, *Text in Contest*, *supra* note 63, at 322.

75. KRAMER, *PEOPLE THEMSELVES*, *supra* note 12, at 228.

76. Siegel, *Text in Contest*, *supra* note 63, at 324.

77. Kramer, *We The Court*, *supra* note 12, at 15–16.

78. Siegel, *Text in Contest*, *supra* note 63, at 324.

79. Cf. Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993) [hereinafter Friedman, *Dialogue*] (arguing that factual premises underpinning the countermajoritarian difficulty may be untrue or overstated).

80. See, e.g., KRAMER, *PEOPLE THEMSELVES*, *supra* note 12; Kramer, *Circa 2004*, *supra* note 12; Siegel, *Social Movement Conflict*, *supra* note 12; Siegel, *Text in Contest*, *supra* note 63.

### B. Law, The Constitution, and Politics

Siegel's insight is well grounded in a history that dictates and corresponds to her description of constitutional change.<sup>81</sup> In the late 1960s through the early 1980s, Siegel explains, proponents and opponents of the Equal Rights Amendment (ERA) wrote op-eds and books, litigated constitutional claims, lobbied legislatures, started newsletters, testified before Congress, and protested in the streets.<sup>82</sup> By adjusting their arguments in response to the ongoing debate, both sides produced as their shared legacy the "de facto ERA"<sup>83</sup>—the Supreme Court's post-*Reed v. Reed*<sup>84</sup> Equal Protection Clause gender discrimination jurisprudence, which Justice Ginsburg has described as having "no practical difference" from the ERA as originally proposed.<sup>85</sup>

Under Siegel's nuanced conception of popular constitutionalism, there is no problem making room for some form of judicial review, because it occurs within a particular context.<sup>86</sup> Social contest creates a framework for judicial decision-making

81. See Siegel, *Text in Contest*, *supra* note 63, at 306 ("One needs a positive account of the roles that different institutions and actors have played in shaping the Constitution's meaning before one can build a normative theory that defines relationships among institutions and actors who make conflicting claims about the Constitution's meaning."); see also Siegel, *Social Movement Conflict*, *supra* note 12, at 1340 ("I offer this account as an interpretation of an ongoing practice, rather than a justification of it.")

82. See Siegel, *Social Movement Conflict*, *supra* note 12, at 1366–1418.

83. See *id.* at 1332–34.

84. *Reed v. Reed*, 404 U.S. 71 (1971).

85. See Siegel, *Social Movement Conflict*, *supra* note 12, at 1334 (quoting Justice Ginsburg in Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES, Oct. 5, 1997, § 6 (Magazine), at 60). A particularly important case in the development of the "de facto ERA" is *United States v. Virginia*, which explained that "[p]arties who seek to defend gender-based government action must demonstrate an 'exceedingly persuasive justification' for that action," and described judicial review of gender-based state action as "skeptical scrutiny." *United States v. Virginia*, 518 U.S. 51, 531 (1996) (citations omitted).

86. This conception is in contradistinction to Kramer, who seems hostile to judicial review, at least insofar as it has led to "judicial supremacy," in which the Supreme Court dictates constitutional meaning without regard to others' preferences. See KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 93–226; Kramer, *We The Court*, *supra* note 12, at 14–15, 74–158. In two recent articles Robert Post and Reva Siegel argue that the Supreme Court's recent jurisprudence regarding Congress's power under section 5 of the Fourteenth Amendment demonstrates that the Court has recently departed from a "policentric" model of judicial review prevalent in the 1960s, which explicitly leaves room for nonjudicial constitutional interpretations, and instead has adopted a "juricentric" model of judicial supremacy in which the Court is the only expositor of constitutional meaning. See Post & Siegel, *Policentric*, *supra* note 12; see also Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, *Juricentric*].

that renders either moot or overstated the countermajoritarian difficulty<sup>87</sup> with which Kramer seems so concerned.<sup>88</sup> Moreover, judicial review affirmatively serves an important purpose for popular constitutionalism: it produces finality in specific cases about individual litigants' rights vis-à-vis each other and all individuals' rights vis-à-vis the government. This judicial function spurs societal dialogue on constitutional meaning by protecting a perimeter of freedom in which citizens can exercise their "democracy enhancing" rights.<sup>89</sup> As Post and Siegel write, "judicial supremacy and popular constitutionalism . . . are in fact dialectically interconnected and have long coexisted."<sup>90</sup>

Commentators have questioned the nature of The People that is portrayed in Kramer's version of popular constitutionalism.<sup>91</sup> One review suggests that despite his "fine rhetoric," Kramer leaves unclear exactly what The People do and whether they "make," "enforce," or "interpret" the Constitution—or do something else entirely.<sup>92</sup> Furthermore, it also calls into question Kramer's fundamental imputation of agency to The People, arguing that in Kramer's scheme, "it is institutions and not 'We the People' who are acting."<sup>93</sup> Even though, in Kramer's regime, popular activity enjoys a presumption of constitutional valence, he is unclear about when, exactly, constitutional law must (or should) acknowledge

87. See Siegel, *Social Movement Conflict*, *supra* note 12, at 1327 ("[C]onstitutional culture . . . giv[es] rise to conflict that can discipline constitutional advocacy into understandings that officials can enforce and the public will recognize as the Constitution."); cf. Friedman, *Dialogue*, *supra* note 79, at 581 ("All segments of society participate in this constitutional interpretive dialogue, but . . . [c]ourts serve to facilitate and mold the national dialogue concerning the meaning of the Constitution.")

88. See, e.g., KRAMER, *PEOPLE THEMSELVES*, *supra* note 12, at 93–226.

89. Post & Siegel, *Popular Constitutionalism*, *supra* note 21, at 1036; see also *id.* ("Constitutional rights may instantiate the very values that democracy seeks to establish, and they may also be necessary to the discursive formation of popular will upon which democracy is based . . . . [I]n some circumstances popular constitutionalism may actually require constitutional rights for its realization."); Friedman, *Dialogue*, *supra* note 79, at 652 ("In reality, the process of constitutional interpretation is dynamic, not static.")

90. Post & Siegel, *Popular Constitutionalism*, *supra* note 21, at 1029.

91. See, e.g., Alexander & Solum, *supra* note 12.

92. *Id.* at 1598, 1600–02, 1616–19.

93. *Id.* at 1600–01; see also *id.* at 1606–07 (discussing "methodological individualism"); Devins, *supra* note 24, at 1056 (suggesting "practical problems associated with implementing" popular constitutionalism through legislatures, including interest divergence of legislators from the people); David L. Franklin, *Popular Constitutionalism as Presidential Constitutionalism?*, 81 CHI.-KENT L. REV. 1069 (2006) (suggesting that Kramer's argument for non-judicial, institutional constitutionalism likely entails ascension of presidential, not congressional, constitutional interpretation).



collective action.<sup>94</sup> Though Kramer's project seems to be to question "how to recover [The People's] agentive capacity,"<sup>95</sup> he provides little guidance to scholars looking for specific evidence of that agency.<sup>96</sup>

These ambiguities largely stem from disagreement about the constitution's "political law" and "basic law" qualities.<sup>97</sup> As Mark Tushnet observes, Kramer emphasizes constitutional law's "political law" component via its "typically . . . different rhetoric from normal politics, even though it takes the same form that normal politics does."<sup>98</sup> Commentators concerned with the practicalities of implementing popular constitutionalism worry that blurring the constitutional-political line will destroy constitutional law's special role in governing the governors.<sup>99</sup> Today we may be confused and concerned by the blurring of lines between "mere politics" and constitutional law, but this blur is exactly what Kramer and Siegel suggest either should or does happen.<sup>100</sup>

On this point, Siegel is in clarifying juxtaposition to Kramer. Both clearly place constitutional weight on popular activity—even outside election-related contexts.<sup>101</sup> For instance, as Siegel notes, ERA opponent Phyllis Schlafly did not organize only around elections;<sup>102</sup> when Kramer's activists "publicly repudiat[e] Justices," they too engage in activity expressly *not* centered on election day.<sup>103</sup> Read together, Siegel and Kramer make clear that for popular constitutionalism, The People define the constitution to the extent their daily and constant engagement with politics demands that power.

Siegel is explicit in describing the times during which citizen engagement guides constitutional change: always.<sup>104</sup> "Such

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94. See Alexander & Solum, *supra* note 12, at 1616–19.

95. Tomlins, *supra* note 29, at 1014.

96. See Alexander & Solum, *supra* note 12, at 1618–19.

97. See Tushnet, *supra* note 21, at 991–93 & 992 n.3.

98. *Id.* at 996.

99. See *id.* at 999–1000.

100. See Tushnet, *supra* note 21.

101. See *supra* notes 21–26 and accompanying text.

102. See Siegel, *Social Movement Conflict*, *supra* note 12, at 1391–1403 (chronicling Schlafly's activism).

103. See KRAMER, PEOPLE THEMSELVES, *supra* note 12, at 247; see generally U.S. CONST. art. III, § 1 (granting federal judges life tenure and thus keeping them at a remove from electoral politics).

104. See, e.g., Siegel, *Text in Contest*, *supra* note 63, at 308–09 (noting that during the decade leading up to the "de facto ERA," "practices of litigation, lobbying, and legislation; techniques of mass mobilization and protest; and

interactions,” she writes, “include but are not limited to lawmaking and adjudication; confirmation hearings, ordinary legislation, failed amendments, campaigns for elective office, and protest marches all may provide occasion for citizen deliberation and mobilization and for official action in response to constitutional claims.”<sup>105</sup> Constitutional argument—that is, constitutional politics—occurs in legislative settings, in the streets, and elsewhere.

It is precisely this kind of constant activism and engagement that places The People, not judges, at the center of constitutional meaning. For popular constitutionalists, The People and the constitution inhabit the same analytic and social spaces. This, in other words, is why we can understand and define popular constitutionalism by its insistence that constitutions live among people.

Part III returns to this “among people” definition of popular constitutionalism to assess its effects on our understanding of initiative constitutionalism and thus of the MCRI. But first, Part II introduces the MCRI and addresses the forms of citizen engagement imagined by initiative constitutionalism.

## II. Initiative Constitutionalism: Fetishizing Texts

In 1995, Jennifer Gratz was waitlisted and ultimately denied admission by the University of Michigan.<sup>106</sup> Her rejection from the flagship Ann Arbor campus sparked eleven years of activism in fighting race-based affirmative action programs.<sup>107</sup> She became the lead plaintiff in an attack on the University of Michigan’s affirmative action program used for undergraduate admissions.<sup>108</sup> In deciding her claim, the United States Supreme Court held that the program violated the Equal Protection Clause.<sup>109</sup> The Court, however, did not find affirmative action programs *per se*

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strategies of communication” were instrumental in the Supreme Court’s interpretation of the Fourteenth Amendment).

105. Siegel, *Social Movement Conflict*, *supra* note 12, at 1324–25.

106. See *Gratz v. Bollinger*, 539 U.S. 244, 251 (2003).

107. See generally Dawson Bell, *Election 2006: Affirmative Action: Iron Will Drives Leader for Ban: Gratz Hated, Praised for Pushing Prop 2*, DETROIT FREE PRESS, Oct. 30, 2006, at 1A. [hereinafter Bell, *Iron Will*] (providing a brief profile of Gratz); Mich. Civil Rights Initiative, *Biography of Jennifer Gratz – Executive Director*, <http://www.michigancivilrights.org/jengratzbio.html> (last visited Sept. 20, 2008) (providing a brief profile of Gratz).

108. *Gratz*, 539 U.S. at 252.

109. See *id.* at 275 (invalidating the undergraduate school’s affirmative action policy).

unconstitutional.<sup>110</sup> The ambiguity of the Court's decisions in *Gratz* and an accompanying case, *Grutter v. Bollinger*,<sup>111</sup> led Gratz to organize and direct a group that sought to pass the MCRI,<sup>112</sup> which would (and did) amend the text of the Michigan Constitution to bar the State from "discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin . . ." <sup>113</sup> This group was not alone in urging amendment to state constitutions; Ward Connerly, the chairman of the American Civil Rights Institute, had previously organized a ballot initiative in California that successfully sought to add almost exactly the same text to that state's constitution<sup>114</sup> as the MCRI has now added to Michigan's.<sup>115</sup>

In the months leading up to the November 2006 election in which Michiganders passed the MCRI, debate over the MCRI was fierce.<sup>116</sup> One United Michigan, a massive coalition of community, business, and political leaders, was formed to defeat the initiative,<sup>117</sup> and Gratz appeared in national media to advocate for it.<sup>118</sup> Much of the debate focused on the merits of affirmative action and on the scope of the proposed amendment, as well as the

110. *See id.*; *see also* *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's affirmative action policy).

111. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

112. Mich. Civil Rights Initiative, *supra* note 107.

113. MICH. CONST. art. I, § 26.

114. Proposition 209, known also as the California Civil Rights Initiative, was adopted into the California Constitution by ballot initiative in November of 1996. *Compare* CAL. CONST. art. 1, § 31(a) ("The state shall not discriminate against, or grant preferential treatment to . . . in the operation of public employment, public education, or public contracting.") *with* MICH. CONST. art. I, § 26(2) ("The state shall not discriminate against, or grant preferential treatment to . . . in the operation of public employment, public education, or public contracting."); *see also* American Civil Rights Institute, *States & Legislation*, <http://www.acri.org/legislation.html> (last visited Oct. 19, 2008) (discussing similar ballot initiatives throughout the country).

115. *See* Egan, *supra* note 4.

116. *See generally* Tamar Lewin, *Campaign to End Race Preferences Splits Michigan*, N.Y. TIMES, Oct. 31, 2006, at A1 [hereinafter Lewin, *Campaign Splits Michigan*] (discussing the debate over the MCRI).

117. *Id.*; *see also* One United Michigan, About Us, <http://www.oneunitedmichigan.org/About/index.html> (last visited Feb. 19, 2007); Detroit Regional Chamber, One United Michigan Coalition, [http://www.detroitchamber.com/public\\_affairs/index.asp?cid=4&rcid=1141](http://www.detroitchamber.com/public_affairs/index.asp?cid=4&rcid=1141) (last visited Oct. 29, 2008) (listing members of One United Michigan); Ward Connerly, *It is Time to End Race-Based "Affirmative Action,"* 1 U. ST. THOMAS J. LAW & PUB. POL. 56, 61 (2007) ("Michigan's entire political, business, and labor establishment has united in opposition to MCRI and to support preferences [in a] broad coalition of elites operating under the name of 'One United Michigan.'").

118. *See* Mich. Civil Rights Initiative, *supra* note 107.

effects the MCRI would have on higher education and the state's economy.<sup>119</sup> A notable portion of the rhetoric was also shaped by the form in which this particular constitutional change would happen: by a "direct democracy" ballot initiative on which Michiganders would vote directly, and with which they could change the constitution's text.<sup>120</sup> The MCRI passed by a 58–42 percent margin.<sup>121</sup>

My purpose here is not to criticize Gratz or those who rose up in opposition to the MCRI, or to engage in the merits of their disagreement.<sup>122</sup> Their passion was not misplaced: the textual changes wrought by the MCRI have had, and will continue to have, substantial effects on universities and university applicants, business owners contracting with the city, and many others.<sup>123</sup> So too will the passage of the MCRI have a substantial impact on the discourse of affirmative action both in Michigan and nationwide. This Article also declines to criticize their election-day focus. It was not irrational for the MCRI's proponents and opponents to focus on ballot initiative elections as moments of constitutional change or on constitutional texts as sites of that change. The text of Michigan's Constitution, as well as the kind of state action it had been understood to allow, both changed drastically because of

119. See Lewin, *Campaign Splits Michigan*, *supra* note 116, at A1; Editorial, *All of Michigan Loses with Prop 06-2*, DETROIT FREE PRESS, Oct. 31, 2006, at 8A; Letter from Ward Connerly to Jennifer M. Granholm, Governor of Michigan (Mar. 17, 2006), <http://www.michigancivilrights.org/media/connerly-letter-03172006.pdf>.

120. See, e.g., Associated Press, *Bouchard Opposes Affirmative Action Ballot Issue*, Nov. 8, 2005, <http://www.westlaw.com> (follow "News" hyperlink; then follow "Wires" hyperlink; then search "Bouchard opposes affirmative action ballot") ("We are voting for a specific amendment to our state constitution . . . [i]t is important that we get it right . . ."(citation omitted)).

121. Of the 3,696,701 votes cast, 2,141,010 supported the MCRI, and 1,555,691 opposed it. Michigan Department of State, *2006 Official Michigan General Election Results - State Proposal - 06-2: Constitutional Amendment: Ban Affirmative Action Programs*, <http://miboecfr.nictusa.com/election/results/06GEN/90000002.html> (last visited Nov. 7, 2008). The margin in Nebraska (58–42%) was even larger, and the margin by which voters in Colorado rejected a similar measure was exceedingly small (50.8%–49.2%). *Supra* note 4.

122. See *supra* notes 5, 6 and accompanying text.

123. See, e.g., Khaled Ali Beydoun, *Without Color of Law: The Losing Race Against Colorblindness in Michigan*, 12 MICH. J. RACE & L. 465, 506 (2007) ("In addition to abolishing affirmative action and ancillary programs, the MCRI will levy a chilling effect on even the investigation of patently legal strategies to increase create [sic] campus diversity."); accord Brian T. Fitzpatrick, *Can Michigan Universities Use Proxies for Race After the Ban on Racial Preferences?*, 13 MICH. J. RACE & L. 277 (2007) [hereinafter Fitzpatrick, *After the Ban*] (discussing the potential effects of the MCRI). But see Eryn Hadley, *Did the Sky Really Fall? Ten Years After California's Proposition 209*, 20 BYU J. PUB. L. 103, 117–35 (2005) (arguing that Proposition 209 in California, which contains phrasing identical to the MCRI, has not had substantial negative effects on women or people of color).

votes cast on November 7, 2006. Nor does this Article seek to attack ballot initiatives *per se*.

Instead, this Article employs Gratz's and others' words to explore notions of constitutional change underpinning ballot initiatives, the mechanism with which these advocates were all immediately concerned. It calls these notions "initiative constitutionalism." The nature of initiative constitutionalism underpins this Article's argument that ballot initiatives are not popular constitutionalist enterprises. The subset of the debate over the MCRI that addresses and/or implicates initiative constitutionalism reflects those characteristics of initiative constitutionalism that put it at odds with the definition of popular constitutionalism elaborated in Part I. By focusing so heavily on an initiative's potential to modify a constitution's *text*, initiative constitutionalism obstinately fails to accord popular action itself any independent, constitutionally relevant weight.

#### A. *Debating the MCRI*

For both proponents and opponents of the MCRI, November 7, 2006 was an important day. "With the Nov. 7 election drawing near, both sides in the affirmative-action debate are ramping up their efforts to convince undecided Michiganders how they should vote on Proposal 2[,]” observed one news report in late October.<sup>124</sup> The month before, one commentator wrote, "This November, we face a critical decision which has huge implications for women."<sup>125</sup> Reacting to poll numbers indicating declining support for the MCRI, Gratz said, "Until people sit down and read the language, the numbers will bounce around . . . . I think people will pay more attention as the election gets closer."<sup>126</sup> David Waymire, a spokesman for One United Michigan, said before the election that organizing to defeat the proposal "[i]s tough. Two years ago, the initial polling found more than two-thirds supported the proposition. The miracle is that we've gotten it into a winnable range."<sup>127</sup>

This focus on the election was entirely understandable. With the initiative on the ballot, the election results would (and did)

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124. Suzette Hackney & Peggy Walsh-Sarnecki, *Affirmative Action: Battle Heats Up as Election Nears*, DETROIT FREE PRESS, Oct. 17, 2006, at 1B.

125. Anne Doyle, *Other Voices: Affirmative Action a Step Forward*, CRAIN'S DETROIT BUSINESS, Sept. 25, 2006, at 9 (arguing against passage of the MCRI).

126. Dawson Bell, *Affirmative Action Proposal Loses Support: Poll Shows Ban Faces Challenge*, DETROIT FREE PRESS, July 18, 2006, at 3A.

127. Lewin, *Campaign Splits Michigan*, *supra* note 116, at A20.

change the text of the state's constitution. Its outcome would (and does) affect a number of important issues, including whether the University of Michigan's undergraduate admissions affirmative action programs would be left intact and whether municipalities could seek to contract specifically with minority- and women-owned businesses.<sup>128</sup>

The outcome of the election effected a change in the text of Michigan's Constitution,<sup>129</sup> the legal instrument granting the government the power to constitute itself and to govern the state's citizens.<sup>130</sup> Gratz recognized the "basic law" nature of the document whose text she sought to change; she explained the initiative in terms referencing "the people" and thus sounding in popular sovereignty.<sup>131</sup> When a federal court ruled against plaintiffs who had alleged fraud in MCRI's collection of signatures on a petition to get the initiative on the ballot,<sup>132</sup> Gratz said, "We are happy that [the judge] ruled that *the people* are allowed to decide this issue . . ." <sup>133</sup> After the election she again invoked this terminology, saying, "*The people of Michigan* have spoken."<sup>134</sup> And she was not the only one. The *Detroit Free Press*, which opposed the MCRI, editorialized that the election "will afford a chance for *the people of Michigan* to assess some pretty basic values and decide whether the painful social progress made to date—with imperfect results—will continue or be set back in the decades to come."<sup>135</sup>

For those who organized around the MCRI, the focus on

128. See Dawson Bell, *What Stays, Goes is Decided in Court*, DETROIT FREE PRESS, Sept. 5, 2006, at 9A.

129. See MICH. CONST. art. I, § 26.

130. See *id.* art. III.

131. See *e.g.*, Press Release, Mich. Civil Rights Initiative, Remarks of Jennifer Gratz, Executive Director, Mich. Civil Rights Initiative Comm'n. (Jan. 6, 2005), <http://www.michigancivilrights.org/media/JG-10605-remarks.pdf> [hereinafter Gratz Remarks] ("Michiganders will say no to dividing people . . . Michiganders will say no to discrimination . . .").

132. See *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115, at \*1 (E.D. Mich. Aug. 29, 2006) (finding that MCRI proponents had not violated the Voting Rights Act, but describing their actions as "unprincipled"), *aff'd* 501 F.3d 584 (6th Cir. 2007).

133. Jim Irwin, *Judge Rules Anti-Affirmative-Action Proposal Can Stay on Ballot*, Aug. 30, 2006, <http://www.westlaw.com> (follow "News" hyperlink; then follow "Wires" hyperlink; then search "anti-affirmative action proposal") (emphasis added).

134. *All Things Considered* (National Public Radio radio broadcast Nov. 10, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=6469307> (emphasis added).

135. Editorial, *On the Ballot: Focus the MCRI Debate on Injustice, Not Signatures*, DETROIT FREE PRESS, Mar. 31, 2006, at 12A (emphasis added).

popular sovereignty was also a focus on elections as the paradigmatic moment when The People speak, and thus as the moment when constitutional commitments can change. A speech Gratz gave after securing the requisite number of petition signatures to place the MCRI on the ballot—twenty-two months before the November 2006 vote—demonstrates this focus particularly well.<sup>136</sup> She began by saying, "A year and a half ago, . . . we announced that an effort would be organized to amend the state constitution to guarantee all people, regardless of skin color, equal treatment under the law."<sup>137</sup> Of course, this implied that the state's constitution as it then stood did not guarantee equal treatment.<sup>138</sup> But the logic of her statement entails more; as Gratz framed the issue, the proper way to produce the guarantee of equal treatment the constitution then lacked was to amend its text.<sup>139</sup> She continued: "The [MCRI] proposes to make it unconstitutional for the State to discriminate."<sup>140</sup> Here, Gratz's use of the word "proposes" implicates a starkly document-based understanding of constitutions. Her statement assumes that Michigan's constitutional commitment to nondiscrimination hinged on the outcome of the election; Michigan *might* commit to it, but only if the ballot initiative was enacted. For her, there was no way to commit to nondiscrimination *without* a change to the constitutional text. Gratz then said, "In November 2006, Michiganders will . . . say no to discrimination based on race and gender and Michiganders will say Yes to the [MCRI]."<sup>141</sup> Here Gratz's equation of constitutional change and textual amendment is clearest. In a single moment Michiganders would vote, have their sovereign voices heard, amend their constitution's text, and "say no to discrimination."

The result of equating constitutional text with constitutional meaning, as Gratz does, is a regime in which constitutional change occurs in a start-and-stop fashion—in (iterated) fits and starts. There are two ways to think of this consequence. The first is related to elections and the second is related to constitutional change. First, when initiatives are on the ballot, constitutional meaning may change on Election Day; but when they are not,

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136. See Gratz Remarks, *supra* note 131.

137. *Id.* at 1.

138. See *id.* (describing the MCRI's efforts as a "huge step forward"). But see Mich. Const. art. I, § 2 ("No person shall be denied the equal protection of the laws . . .").

139. See Gratz Remarks, *supra* note 131, at 1–2.

140. *Id.*

141. *Id.*

constitutions remain constant. Second, while voters may change constitutions by voting on ballot initiatives, they do not change constitutions at other times. In short, constitutional change requires textual change, textual change requires citizen participation, and citizens participate only during elections.

Consider an article in the *National Review* in which Gratz elaborated on this perspective: “[H]owever fervently I may have disagreed with a particular ballot initiative,” she wrote, “I always recognized that if the people petitioned their government and presented enough valid signatures . . . the people were then *entitled* to a full debate and a vote.”<sup>142</sup> Gratz here displays both consequences of the logic of fits-and-starts constitutional change. Her fervent disagreement with the policies of a proposed constitutional change were constitutionally relevant *not* in and of themselves, but *only* inasmuch as they would lead her to vote against that proposal.

Simultaneously, while popular sovereignty entails that The People are “entitled” to produce constitutional changes, they are to do this through “a full debate and a vote[.]”<sup>143</sup> not through protest and contestation, which are valuable only if used to convince voters to vote for or against proposed changes. In other words, the protest itself holds no value for constitutional meaning; it *only* holds value in a war for votes. These ideas follow logically from a theory which asserts that constitutional change results only from election results.

### B. Initiative Constitutionalism and The Political Imagination

Gratz was not alone in equating constitutional law with the Constitution—that is, equating constitutional meaning with constitutional text. Michigan Governor Jennifer M. Granholm joined in a suit seeking to remove the MCRI from the November 2006 ballot,<sup>144</sup> arguing that “[t]o allow this initiative to remain on the ballot pollutes our voting system and undermines the freedom of political choice . . . .”<sup>145</sup> Like Gratz, Granholm expressed ideas

142. Jennifer Gratz, “End Race Preferences:” *The Fight Continues in Michigan*, NATIONAL REVIEW ONLINE, Aug. 18, 2005, <http://www.nationalreview.com/comment/gratz200508180819.asp> (emphasis in original).

143. *Id.*

144. Kathleen Gray, *Granholm Joins Civil Rights Ballot Suit: Critics Say Move is Ploy to Get Votes*, DETROIT FREE PRESS, Aug. 16, 2006, at 2B.

145. Brief for Jennifer Granholm as Amici Curiae Supporting Petitioners, *Operation King’s Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006), *aff’d* 501 F.3d 584 (6th Cir. 2007).



about the merits of the MCRI, but at the same time provided a glimpse of the form of engagement that initiative constitutionalism demands. By linking "our voting system" and "freedom of political choice," Granholm suggests that citizens express their political choices through voting systems.<sup>146</sup> We certainly do think that our votes send messages to those who govern us,<sup>147</sup> so her suggestion is certainly true, as far as it goes.<sup>148</sup> But her statement also suggests a constraint that initiative constitutionalism invidiously works on our imagination of how citizens express political and constitutional choices.

By thinking of constitutional text as the only site of constitutional meaning, however, ballot initiative-based models of constitutional change actually embrace and reify the judiciary as the primary expositor of constitutional meaning. This may seem counterintuitive, but it follows from initiative constitutionalism's focus on constitutional text. In initiative constitutionalism, The People make constitutional change during elections by voting on ballot initiatives that change constitutional texts; during other times The People are not involved in creating constitutional meaning. As a result, it leaves to actors other than the sovereign people—i.e., judges—the task of interpreting and understanding the application of constitutional dictates to particular cases.

The judicial referent that inheres to initiative constitutionalism is visible in the words used in the debate over the MCRI and the media coverage of it. Two months before the election, the *Detroit Free Press*—the highest-circulating newspaper in Michigan<sup>149</sup>—began a report:

The Michigan Civil Rights Initiative, if approved by voters in November, would spell the end for many programs and practices used by government agencies, universities and public schools that provide targeted help for women and minorities in hiring, contracting and admissions.

*But judges will decide which programs and practices end.*<sup>150</sup>

This *Detroit Free Press* news desk was not alone in its conclusion. One of the newspaper's columnists said, "[n]ot only will [the MCRI] be challenged [in court], but it will be challenged multiple

146. *Id.*

147. Consider the headline that the *New York Times* ran over a news analysis of the 2006 midterm election results. See Robin Toner, *A Loud Message for Bush*, N.Y. TIMES, Nov. 8, 2006, at A1.

148. See *infra* note 224 and accompanying text.

149. See Refdesk.com, Top One Hundred U.S. Newspapers (Mar. 31, 2006), <http://www.refdesk.com/top100pap.html> (listing the top 100 circulating newspapers in the U.S., with the *Detroit Free Press* the only Michigan paper to make the list).

150. Bell, *supra* note 128, at 9A (emphasis added).

times, so millions of dollars that could have gone to other things will have to be spent defending this initiative.”<sup>151</sup> Another reporter noted, “A similar proposal [to the MCRI] passed in California in 1996. *Courts had to sort out* how the proposal related to several programs, and the same is likely to happen in Michigan if the measure passes.”<sup>152</sup>

Although Republican U.S. Senate candidate Michael Bouchard disdained judicial imposition of constitutional meaning, his understanding of constitutional law as judge-made is precisely what led him to support the initiative and to stress the nature of the MCRI’s text: “We are voting for a specific amendment to our state constitution,” he said, continuing:

It is important that we get it right, *so we don’t leave it up to judges to fill in the blanks if any questions arise* once it is woven into the fabric of our state’s constitution. Therefore I feel we must be vigilant from the outset that the language we choose to address a problem does not open the door to the creation of another problem.<sup>153</sup>

Two opponents of the measure agreed with Bouchard’s assumptions, asserting “that the broad language of the ballot proposal will likely lead to court challenges from both critics and supporters of the measure.”<sup>154</sup> Nor was this assumption limited to the news press.

Indeed, scholars sometimes conflate constitutional meaning

151. *News & Notes* (National Public Radio radio broadcast Nov. 17, 2006), available at

<http://www.npr.org/templates/story/story.php?storyId=6502104>

(quoting *Detroit Free Press* columnist Rochelle Riley). These predicted challenges came to pass. See *Coal. to Defend Affirmative Action v. Regents of the Univ. of Mich.*, 539 F. Supp. 2d 924, 933–34 (E.D. Mich. 2008) (describing the political-burden-based claim made by one set of plaintiffs, rejected by the court, that the MCRI violates the Equal Protection Clause of the United States Constitution because it “imposes a ‘substantial and unique burden on racial minorities’” and thus “it ‘disadvantage(s) [a] particular group by making it more difficult to enact legislation in its behalf’” (citation omitted)); *id.* at 934 (describing the claim by a second set of plaintiffs, also rejected by the court, that the MCRI violates the Equal Protection Clause “because ‘Proposal 2 has as its primary aim reducing the admission of black, Latino, and Native American students and of women students into some programs’” which it seeks to accomplish “by eliminating the ‘desegregation plans that have resulted in the admission of significant numbers’ of such students” (citation omitted)).

152. Tim Martin, *Anti-Affirmative Action Ballot Proposal Stirs up Debate*, ASSOCIATED PRESS, Oct. 3, 2006, available at <http://www.westlaw.com> (follow “News” hyperlink; then follow “Wires” hyperlink; then search “ballot proposal stirs up debate”) (emphasis added).

153. Associated Press, *supra* note 120 (emphasis added).

154. Robert Ankeny, *Prop 2 Not Likely to Change Many Detroit Contracts, Officials Say*, CRAIN’S DETROIT BUS., Oct. 9, 2006, at 24 (characterizing the views of a business and legal/community leader); see also *supra* note 151.

with judicial interpretations of text. One commentator has written:

The MCRI, now a part of the Michigan Constitution, provides that, "The University of Michigan, Michigan State University, Wayne State University, and any other public college or university . . . shall not discriminate against or grant preferential treatment to, any individual or group on the basis of race . . ." Does "discrimination" or "preferential treatment" on "the basis of race" include the use of proxies for race? *The answer to that question depends on how courts in Michigan interpret ballot language.*<sup>155</sup>

Minimized agentive capacity for The People in governance and constitutional decision-making is not the only unfortunate consequence of initiative constitutionalism. More fundamentally, initiative constitutionalism instructs individuals to limit their political and constitutional imaginations and to merely accept the binary, prepackaged choices presented on election-day ballots.<sup>156</sup> It does this because it flows from a theory of political change that requires powerful individuals and faceless institutions and bureaucracies to frame and present political and constitutional choices. Under initiative constitutionalism, The People are told to hold off on thinking about issues or making decisions until Election Day.

The range of possibilities for dialogue between The People and the law—including constitutional law—is, however, much broader than what initiative constitutionalism might suggest. A society's basic law is far more likely to reflect its populace if it is the product of the populace's substantial engagement. Simply put, popular constitutionalism demands and expects more of The People than initiative constitutionalism.

As Robert Post has argued, one function of law is "to instantiate community," by which he means the normative use of law "to realize a form of social life in which we may share common 'commitments and identifications' that will enable us 'to determine from case to case what is good, or valuable, or what ought to be done.'"<sup>157</sup> This is true even though "communities are [not] static and unchanging. Social norms are typically contestable, subject to interpretation and reinterpretation."<sup>158</sup>

For popular constitutionalism, community is instantiated by

155. Fitzpatrick, *After the Ban*, *supra* note 123, at 292–93 (citations omitted) (emphasis added).

156. See *infra* note 194 and accompanying text.

157. See ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 3–4 (1995).

158. *Id.* at 183.

the social, political, and legal debates that take place daily: these debates are assumed to have constitutional valence.<sup>159</sup> It is the “constitutional culture” produced by this constant engagement more than any single or particular constitutional rule, which is at the core of popular constitutionalism.<sup>160</sup>

Under initiative constitutionalism, a society’s laws are merely a set of rules—dictates, the disobedience of which results in imprisonment, fines, or social ostracism but has no political or legal valence. Under popular constitutionalism, by contrast, a society’s laws are remarkable primarily for the engaging, genuinely reflective process through which they are produced. The appeal of popular constitutionalism, therefore, is in the society it promises, rather than merely in the particular rules under which its members may choose to live. Issues remain live and up for debate all the time. To live in a popular constitutionalist society, citizens must have the energy and imagination to conceive and reconceive, continually, the rules under which they live.<sup>161</sup>

These systems leave judicial review in two very different places. As we have seen, a theory that commits to judicial actors primary responsibility for and authority over constitutional change—even one in which The People themselves have the power to modify their constitution at isolated and distinct moments—is fundamentally *not* popular constitutionalism. Though as concepts, judicial review and popular control over constitutional meaning need not be mutually exclusive, neither are they fully compatible.<sup>162</sup> We must compromise between them.<sup>163</sup> Popular

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159. See *supra* notes 27–80 and accompanying text; see also POST, *supra* note 157, at 183 (describing the competing functions of constitutional law in a democratic society).

160. See POST, *supra* note 157, at 183; Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Post, *Cultural Heterogeneity*, *supra* note 15; Robert Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 429 (1998).

161. Cf. HULSEBOSCH, *supra* note 13, at 74 (describing constitutional debates in colonial-era New York in the following way: “Constitutional discourse was the site where all these social groups, from the elite to the popular, interacted to assert their interests and make sense of their shared colonial world.”).

162. See Post & Siegel, *Policentric*, *supra* note 12.

163. See *supra* note 49; see also *supra* note 10 and accompanying text (discussing the conflict between simple democracy and other fundamental values). The need for compromise at a theoretical or systemic level is especially acute in light of the fact that while the arguments themselves in favor of textual and non-textual approaches to constitutional change may not change, the organizations which make those arguments can switch sides when the prevailing political winds of judicial (and nonjudicial) governmental institutions change. For example, the American Civil Liberties Union, founded as an organization dedicated to extrajudicial constitutionalism, soon recast itself in judicial—that is, litigative—terms when its

constitutionalism and initiative constitutionalism balance judicial review and popular expression in vastly different ways. In the former, judicial review is generally subordinated to a multitude of popular political expressions so that the constitution can live among people; the latter leaves to The People a role in making constitutional meaning far too circumscribed to be considered a species of popular constitutionalism.

Pursuing this logic, Part III compares popular and initiative constitutionalisms in terms of the agentive capacity each gives to the people in making constitutional meaning.

### III. Disaggregating "The People" from "The People"

Kramer and Siegel, of course, are not alone in writing about popular constitutionalism.<sup>164</sup> In an article entitled *Popular Constitutionalism*,<sup>165</sup> Douglas Reed describes as "popular constitutionalism" all systems in which judges do not alone produce constitutional meaning.<sup>166</sup> He argues that the ballot initiative, when employed as a constitution-amending device, produces "meanings of state constitutions—in both legal and political senses—[that] are defined through both extra-judicial and judicial mechanisms."<sup>167</sup> In such a system, he argues, "[t]he interpreter of state constitutions[] . . . is less likely to be a judge and more likely to be a mobilized and politically active citizenry."<sup>168</sup>

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extrajudicial approach proved inefficacious. See generally Emily Zackin, *Popular Constitutionalism's Hard When You're Not Very Popular: Why the ACLU Turned to the Courts*, 52 LAW & SOC. REV. 367, 382–83 (2008) (arguing that that ACLU shifted to a litigative approach upon experiencing "extremely violent responses . . . while trying to enact their vision of the Constitution through public meetings, speeches, and strikes" and "the failure of its attempts to promote its vision of the Constitution among members of the government").

164. See generally *supra* note 12 and accompanying text.

165. Reed, *Popular Constitutionalism*, *supra* note 12.

166. See *id.*

167. *Id.* at 875.

168. *Id.* Others agree that state constitutional meaning is produced in ways that renders moot the worst claims of the countermajoritarian objection. See, e.g., Helen Hershkoff, *State Courts and the Passive Virtues: Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1918 (2001) [hereinafter Hershkoff, *Passive Virtues*] ("The countermajoritarian objection[] . . . lacks salience in the state court context, in which many judges are elected, enjoy broad common law lawmaking powers, and are subject to popular revision, reversal, and recall."); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1169 (1999) ("[T]he countermajoritarian difficulty, and attendant concerns about the democratic basis of judicial discretion, carry less force in state systems."); see also Marc L. Miller & Ronald F. Wright, *Leaky Floors: State Law Below Federal Constitutional Limits*, 50 ARIZ. L. REV. 227, 254 (2008) (noting that state supreme courts "do not have the same obligations as members of a

For purposes of this Article, what is interesting about Reed's argument is its grounding in the ballot initiative.<sup>169</sup> He explains: "state-based constitutional amendments and ballot initiatives demonstrate that leading political issues are finding expression or resolution within the texts of state constitutions."<sup>170</sup> It is through these processes that state constitutions "exhibit[] a vitality and responsiveness" to the citizenry's political concerns.<sup>171</sup> Reed is not alone in linking the ballot initiative to direct democracy,<sup>172</sup> and from there to popular constitutionalism. Indeed, citizen lawmaking mechanisms like the initiative and the referendum seem, at first glance, to be considered the paradigmatic tool of the popular constitutionalist. Their proponents argue that "direct democratic processes are at some level more democratic, more legitimate, than representative institutions, because they are more directly responsive to the people."<sup>173</sup> One commentator calls them "a model for voter sovereignty."<sup>174</sup>

The Supreme Court has endorsed this view, agreeing that tools of direct democracy such as the initiative and the referendum allow the deployment of popular sovereignty.<sup>175</sup> Observing that "[u]nder our constitutional assumptions, all power derives from the people," the Court has held that mechanisms like the initiative must be understood as "means for direct political participation" rather than incursions into legislative power.<sup>176</sup>

In this context, the MCRI seems to fit nicely into the picture

unified judiciary. State high courts sit atop their own culture, with a different set of legal texts and principles to harmonize, and a different social reality that exerts some gravitational pull on the meaning of legal requirements.").

169. Hershkoff, by contrast, does not focus on the initiative or other mechanisms of citizen law-making, but rather examines the political and institutional contexts in which state courts operate. See Hershkoff, *Passive Virtues*, *supra* note 168.

170. Reed, *Popular Constitutionalism*, *supra* note 12, at 874.

171. *Id.*

172. See, e.g., BLACK'S LAW DICTIONARY 799-800 (Bryan A. Garner ed., 8th ed. 2004) (defining direct democracy). An enormous scholarly literature also makes this link. See generally THE BATTLE OVER CITIZEN LAWMAKING: AN IN-DEPTH REVIEW OF THE GROWING TREND TO REGULATE THE PEOPLE'S TOOL OF SELF-GOVERNMENT: THE INITIATIVE AND REFERENDUM PROCESS (M. Dane Waters ed., 2001) (linking the ballot initiative to direct democracy); JOSEPH F. ZIMMERMAN, THE INITIATIVE: CITIZEN LAW-MAKING (1999) (linking the ballot initiative to direct democracy).

173. See Sherman J. Clark, Commentary, *A Populist Critique of Direct Democracy*, 112 HARV. L. REV. 434, 437 (1998) (characterizing, but not endorsing, this view).

174. JOSEPH F. ZIMMERMAN, THE REFERENDUM: THE PEOPLE DECIDE PUBLIC POLICY 267-84 (2001).

175. *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 672-73 (1976).

176. *Id.*

of popular constitutionalism sketched in Part I. A small group of citizens, unhappy with federal and state equal protection law regarding affirmative action, placed a ballot initiative before voters. After a year of debate, Michiganders voted, passed the measure, and thereby amended their state constitution.

Ballot initiatives, however, are not without their problems. Many scholars have documented the public choice problems that inhere to procedures by which ballot initiatives amend state constitutions.<sup>177</sup> Perhaps the most common of these critiques are that initiatives promote undeliberative or uneducated decision-making;<sup>178</sup> are prone to control by wealthy individuals;<sup>179</sup> contain unclear or obfuscatory language;<sup>180</sup> and effect insubstantial or bad changes.<sup>181</sup> The MCRI is not immune to these critiques.<sup>182</sup>

177. The literature on public choice and direct citizen lawmaking is extensive. For a basic introduction, see generally FREDERICK J. BOEHMKE, *THE INDIRECT EFFECT OF DIRECT LEGISLATION: HOW INSTITUTIONS SHAPE INTEREST GROUP SYSTEMS* (2005) (applying a public choice-style critique to direct legislation); JOHN G. MATSUSAKA, *FOR THE MANY OR THE FEW: THE INITIATIVE, PUBLIC POLICY, AND AMERICAN DEMOCRACY* (2004) (providing an extensive overview of the initiative process); Richard B. Collins & Dale Oesterle, *Structuring the Ballot Initiative: Procedures That Do and Don't Work*, 66 U. COLO. L. REV. 47 (1995) (exploring the procedural differences among forms of state-wide ballot initiatives and reviewing common critiques of these initiatives); Clark, *supra* note 173, at 439 nn.14–16 (collecting additional sources which make many public choice arguments); see also Hans A. Linde, *When Initiative Lawmaking is not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19 (1993) (describing the relationship between ballot initiatives and republican government).

178. See, e.g., JOSEPH F. ZIMMERMAN, *THE INITIATIVE: CITIZEN LAW-MAKING*, 138–48 (1999) (listing the major arguments in opposition to ballot initiatives).

179. See DAVID S. BRODER, *DEMOCRACY DERAILED: INITIATIVE CAMPAIGNS AND THE POWER OF MONEY* (2000).

180. See *Taxpayers To Limit Camp. Spending v. Fair Pol. Pract. Comm'n*, 799 P.2d 1220, 1236 (Cal. 1990) ("Often voters rely solely on the title and summary of the proposed initiative and never examine the actual wording of the proposal." (citation omitted)); Candace McCoy, *Crime as a Boogeyman: Why Californians Changed Their Constitution to Include a "Victims' Bill of Rights" (and What It Really Did)*, in *CONSTITUTIONAL POLITICS IN THE STATES: CONTEMPORARY CONTROVERSIES AND HISTORICAL PATTERNS* 128–46 (G. Alan Tarr ed., 1996) (discussing the passage of the "Victim's Bill of Rights" in California in 1992).

181. See Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627, 1637 (1999) ("The initiative and referendum operate in only some states, decide relatively few questions in them, and oftentimes produce results of truly questionable value."); see generally Clark, *supra* note 173, at 439 nn.14–16 (collecting sources making many of these arguments).

182. For example, Ward Connerly is a wealthy non-Michigander, and without his \$500,000 contribution and other help, the MCRI would not have been able to get onto the ballot. See Lewin, *Campaign Splits Michigan*, *supra* note 116; Gratz Remarks, *supra* note 131 ("Ward Connerly has been a great supporter, our mentor, and our friend . . ."). Some groups alleged that Gratz's group engaged in fraud in collecting signatures on a petition that would place the MCRI on the ballot. See *Operation King's Dream v. Connerly*, No. 06-12773, 2006 WL 2514115 (E.D. Mich. Aug. 29, 2006), *aff'd* 501 F.3d 584 (6th Cir. 2007); cf. Dan Frosch, *Colorado Petition*

Nonetheless, this Article bypasses these public choice critiques and fastens instead upon a “populist critique” of citizen lawmaking mechanisms to explain why ballot initiatives like the MCRI are not—for whatever else they might be—tools that let constitutions “live[] among people”<sup>183</sup> in the way popular constitutionalism envisions. In *A Populist Critique of Direct Democracy*,<sup>184</sup> Sherman Clark lays out a simple but profound observation about the nature of initiatives: they ask voters to decide one question of public policy at a time.<sup>185</sup> The consequence is a far-reaching condemnation of “direct democracy” that is untethered from public choice theory critiques that attach to specific processes by which particular initiatives become law.

In Clark’s account, by producing isolated moments of citizen lawmaking, ballot initiatives are able to capture a polity’s preferences, but not its priorities. For Clark, the term “priority” captures two ideas: 1) the intensity of a voter’s preference for a given outcome; 2) the relationship between *A* and *B*, where a voter is less willing to accept outcome *not-B* than *not-A*, and may therefore be willing to accept outcome *not-A* in order to gain outcome *B*, even though she wants outcome *A*.<sup>186</sup> These problems result because each member of the polity gets a single vote with which to approve or reject an initiative addressing a single issue, but however she votes, she need not consider what she may want in another public policy choice that the initiative presents as unrelated.<sup>187</sup>

There are two consequences to this fact. First, in a ballot initiative regime, a citizen is unable to choose from among a *set* of outcomes the one which reflects her preferred, yet not ideal, policy positions.<sup>188</sup> Because “non-congruent majorities” will pass (or

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*Draws Charges of Deception*, N.Y. TIMES, Apr. 1, 2008, at A16 (describing alleged fraud in Ward Connerly’s organization to pass a ballot initiative similar to the MCRI in Colorado). And there was substantial debate over the language that would appear on the November 2006 ballot describing the MCRI. See Dawson Bell, *Both Sides on Rights Issue Call New Ballot Wording Fair—and Crucial*, DETROIT FREE PRESS, Jan. 7, 2006, at 6A; see also Jocelyn Friedrichs Benson, *Election Fraud and the Initiative Process: A Study of the 2006 Michigan Civil Rights Initiative*, 34 FORDHAM URB. L.J. 889 (2007) (discussing the commission of election fraud by proponents of the MCRI).

183. Hulsebosch, *supra* note 1, at 401.

184. Clark, *supra* note 173.

185. *Id.* at 467–73.

186. *See id.* at 450–56.

187. *See id.*

188. *See id.* at 482 (describing the result of ballot initiatives as demonstrating “what the most people want, but . . . not . . . what the people want most”). *But cf.* *City of Eastlake v. Forest City Enters.*, 426 U.S. 688, 673 (1976) (equating ballot



reject) different initiatives, a lawmaking regime should not account for majoritarian preferences on a distinct issue as though it were the only issue to be decided by the polity.<sup>189</sup> Instead, a regime should also account for the intensity of polity members' preferences by

allow[ing] each person, who knows that his or her perfect world will not be enacted—who knows that he or she will win some and lose some—to speak most clearly about the world as a whole by telling us what he or she most wants to win and what he or she is most willing to lose.<sup>190</sup>

Second, a ballot initiative regime obscures voters' prioritization among issues.<sup>191</sup> These mechanisms eliminate the negotiations that go on between members of a polity in a regime of dynamic lawmaking.<sup>192</sup> As Clark explains, "a referendum can obscure the voice of the people by precluding them from trading outcome A in return for higher priority outcomes."<sup>193</sup>

Another way to characterize Clark's argument is to say that ballot initiatives fail to account for the nuances and contradictions that inhere in modern political and policy goals. The ballot initiative presents voters with a single, simple binary decision that serves to obscure these nuances.<sup>194</sup> If the goal of democracy is to measure the "voice of the people,"<sup>195</sup> then representative democracy is preferable to ballot initiatives because it accounts, through phenomena like logrolling, for the practical complexities of modern politics.<sup>196</sup>

The principles animating Clark's critique are relevant to understanding why an initiative constitutionalist regime cannot simultaneously be a popular constitutionalist regime. As defined in Part I, popular constitutionalism declares that The People must

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initiatives to a "citizen[s] voice on questions of public policy" (quoting *James v. Valtierra*, 402 U.S. 137, 141 (1971)); *Coal. For Econ. Equity v. Wilson*, 122 F.3d 692, 699 (9th Cir. 1997) (discussing the interference of the judicial process with the "will of the people" determined by referendums).

189. Clark, *supra* note 173, at 482.

190. *Id.* at 448–50.

191. *See id.* at 450–54.

192. *See id.* at 467.

193. *Id.* at 451.

194. *See id.* at 467. Erwin Chemerinsky also criticizes ballot initiatives as presenting "binary" choices which strip complex policy choices of their "nuance" and eliminate the possibility of "compromise positions that reflect the majority of the voters." *See* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 299–300 (2007).

195. *See* Clark, *supra* note 173, at 437–50.

196. *See id.* at 456–78.

negotiate the contradictions and nuances of their world.<sup>197</sup> On the ground, when faced with specific policy choices, however, The People must deal with the fact that different majorities want different and mutually exclusive sets of outcomes.<sup>198</sup> Legislators' repeat player status allows them to account for both voters' preferences and priorities in passing ordinary legislation.<sup>199</sup> Where the nuances of modern politics play out on the constitutional stage, the repeat players—the makers of legal meaning—are The People themselves.<sup>200</sup>

Repeated and frequent citizen engagement is popular constitutionalism's analogue to Clark's legislative solution.<sup>201</sup> Two interrelated features of popular constitutionalism's constancy of engagement justify this analogy. First, in a popular constitutionalist environment, decisions about constitutional meaning are made dynamically by individuals constantly observing the consequences of their actions.<sup>202</sup> Constitutional meaning develops in the dialectic among social movements,<sup>203</sup> or in the struggle for power between individual activists and government actors.<sup>204</sup> This phenomenon is similar to Clark's observation about multi-issue decision-making: because popular constitutionalist activists push many different agendas, their constitutional claims must adapt to each other.<sup>205</sup> Second, any given person, even one who devotes all her time to political activism, cannot engage in every social movement in which she might wish to engage. This limit serves a role similar to intensity or priority of preferences: like the legislator Clark imagines representing her, the constitutional activist herself must make choices among political commitments.

Like members of Clark's non-congruent majorities, each of

197. See *supra* text accompanying notes 17–26.

198. See *infra* notes 206–208 and accompanying text.

199. See Clark, *supra* note 173, at 456.

200. See *supra* notes 81–90 and accompanying text.

201. Though, as both Kramer and his critics envision it, popular constitutionalism can be practiced through legislative action. See *supra* notes 48, 49 and accompanying text. Kramer also envisions that popular constitutionalism can be practiced through unadulterated popular action. See *supra* notes 91–100 and accompanying text.

202. See *supra* Part I.

203. See *supra* text accompanying notes 63–68 (describing Siegel's version of popular constitutionalism).

204. See *supra* notes 29–42 and accompanying text (describing Kramer's version of popular constitutionalism).

205. See Clark, *supra* note 173, at 450 (“[W]hat is needed is a method of allowing people to tell us, given that they will not get everything they want, which outcomes they want most.”).

popular constitutionalism's engaged citizens must deal with the fact that her "perfect world will not be enacted."<sup>206</sup> Just as legislators make legislative choices, citizens make constitutional choices all the time. Popular constitutionalist activist *A* must confront activist *B* pushing a constitutional understanding different from (and perhaps directly opposed to) her own, and because there is no end to their struggle, *A* must compromise with *B* in the hope that *B* will compromise with her.<sup>207</sup> Or as Siegel describes it, social movements modify their constitutional claims in response to claims by countermovements.<sup>208</sup>

Clark's point about voter priorities is also illustrative of popular constitutionalism.<sup>209</sup> Individual activists' engagement in social movements and other moments of popular political expression demonstrate that citizens cannot engage in all actions, at all the times, which their political commitments would demand.<sup>210</sup> Any social movement, for example, is driven by those who care so much about the movement's issue that they are willing either to dedicate all of their money or free time, or to quit their jobs and join full-time, the struggles in which that movement is engaged.<sup>211</sup>

The movement to pass the MCRI in Michigan demonstrates this point as well as any other. Those engaged full-time in advocacy over the MCRI chose this course because their commitment to their position was extremely intense. When asked when he would retire from backing initiatives like the MCRI, Ward Connerly replied: "When my toes turn up, that's when I'll stop fighting [affirmative action]."<sup>212</sup> One reporter described

206. *Id.* at 448.

207. *See id.* at 466 ("No one will see all of his or her judgments enacted. So they must prioritize, come to the table, and deal.")

208. *See Siegel, Social Movement Conflict, supra* note 12, at 1362–66 (arguing that when a movement advances "transformative claims about constitutional meaning that are sufficiently persuasive that they are candidates for official ratification, movement advocacy often prompts the organization of a counter-movement dedicated to defending the status quo . . . . This struggle to win the public's confidence often has a moderating influence on the claims movements advance.").

209. *See Clark, supra* note 173, at 450–54.

210. *See id.* at 456 n. 150.

211. *See Akhil Reed Amar & Vik Amar, President Quayle?, 78 VA. L. REV.* 913, 930–32 (1992) (observing and explaining the import of the fact that voters at the extreme ends of the political spectrum, whose political preferences are most intensely held, "may be more likely to contribute time and money [to political campaigns] than the middle-of-the-roaders, some of whom may simply care less about politics").

212. Lewin, *Campaign Splits Michigan, supra* note 116, at A1.

Jennifer Gratz in these terms: “[H]er personal commitment to ending what she considers discrimination appears resolute.”<sup>213</sup> Or, consider one group working to defeat the MCRI, whose very name communicates the intensity of its preference: By Any Means Necessary.<sup>214</sup>

Surely not all Michiganders fit this description, however. One Michigan resident said: “I don’t know a lot about Proposition 2, but I do know a neighbor kid, a good kid, a local kid with a 3.7-3.8 average, who didn’t get into the [U]niversity [of Michigan] and he should have. . . . I do think there’s something wrong with their admissions.”<sup>215</sup> This resident had an opinion on the University’s undergraduate admissions policy, but did not exhibit the intensity of some of her fellow citizens. Michiganders certainly voted on the MCRI, but they were also concerned with the war in Iraq, health care policy, the economy, and a multitude of other issues on which Americans around the country cast their votes in November 2006.<sup>216</sup> Michiganders who intensely held their preferences regarding the MCRI founded or joined groups, and those whose preferences were less intense simply voted.

I intentionally employ Gratz and Connerly to demonstrate this intensity-of-preferences-accommodating feature of social movements and other moments of popular political expression; that they fit into both the popular constitutionalism and initiative constitutionalism models indicates a patch of overlap between the models, at least to the extent that movements to enact (or defeat) a particular ballot initiative is a “social movement” in the sense that popular constitutionalism employs that term. To be sure, movements to amend constitutions by initiatives (or Article V processes) and popular constitutionalism are not mutually exclusive.<sup>217</sup> Indeed, the historical evidence on which Siegel relies

213. Bell, *Iron Will*, *supra* note 107, at 1A.

214. See generally *By Any Means Necessary*, <http://www.bamn.com> (last visited Feb. 19, 2007) (providing information on a coalition whose goal is to defend affirmative action).

215. Lewin, *Campaign Splits Michigan*, *supra* note 116, at A1 (quoting Brighton, Michigan resident, Vicki Smith).

216. See CNN.com, *Exit Polls: Ballot Measures/Michigan Proposition 2/Exit Poll*, <http://www.cnn.com/ELECTION/2006/pages/results/states/MI/01/epolls.0/html> (last visited Sept. 28, 2008) (listing opinions of Michigan citizens voting on the MCRI regarding the war in Iraq, health care, “values issues,” the economy, terrorism, and presidential approval).

217. Cf. Siegel, *Social Movement Conflict*, *supra* note 12, at 1327 (“Partisan advocacy that changes the Constitution without amending it is often understood to threaten the Constitution’s democratic authority, yet the sex discrimination cases are widely accepted as constitutional law, despite their roots in a failed Article V amendment.”).

when making her argument about social movements and constitutional change demonstrates the interrelationship between popular constitutionalism and text-based changes to constitutions.<sup>218</sup> Consider the name that she chooses to reference the set of precedents under which the United States Supreme Court uses the Equal Protection Clause to prohibit gender discrimination: "the de facto ERA."<sup>219</sup> By so describing it, Siegel invokes an (unratified) constitutional amendment around which the feminist and antifeminist movements organized in order to name the nontextual constitutional change that these movements effected.<sup>220</sup> A coherent theory of constitutional change must embrace moves to change the document's text; otherwise we would be led to conclude that textual amendments are "irrelevant," the very assertion against which Siegel wrote *Text in Contest*.<sup>221</sup> Popular constitutionalists do not claim that text has no independent role to play in establishing and nurturing constitutional norms and values.<sup>222</sup> Texts cannot be irrelevant to popular constitutionalism; they are sites of contestation around which social movements mobilize, and they thus dictate the lines along which people engaging in popular activism articulate their constitutional claims.<sup>223</sup>

But to say that these two models are not mutually exclusive—to concede that text does matter—should not obscure the models' very real differences and, indeed, their fundamental inconsistency. Initiative constitutionalism does not, and cannot, account for the dynamism and constancy of engagement that

218. See *supra* notes 82–84 and accompanying text.

219. Siegel, *Social Movement Conflict*, *supra* note 12, at 1324.

220. See *id.* at 1366–69.

221. See Siegel, *Text in Contest*, *supra* note 63, at 297–98 (writing in response to David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001), and arguing that "the Constitution's text plays a more significant role in our constitutional tradition than Strauss contends").

222. See *supra* notes 89–90 and accompanying text.

223. In fact, popular constitutionalists do not claim that text has no independent role to play in establishing and nurturing constitutional norms and texts. See, e.g., Siegel, *Text in Contest*, *supra* note 63, at 308–09 (explaining how sex-based activists in the ERA era made claims to amend and to reinterpret the Constitution).

And conversely, even popular constitutionalism's critics concede, that writtenness alone is of little import:

[O]urs is a written constitution, but nothing important hangs on that. An unwritten constitution, constituted by a set of customary norms, can also be interpreted or changed. The customary norms that make up an unwritten constitution can be quite hard-edged and very particular in content. Written constitutions, in contrast, may contain very soft and general provisions.

Alexander & Solum, *supra* note 12, at 1603 n.20.

defines popular constitutionalism because its model is too focused on the constitutional text that its protagonists wish to change. Proponents of citizen lawmaking focus on the elections in which ballot initiatives are approved or rejected, and imagine popular sovereignty as occurring at particular times and places. This understanding of popular sovereignty inheres to all election-centric understandings of popular political expression. Statements by Gratz, who defended the placement of the MCRI on the ballot as being an opportunity for "The People" to speak, also belie an understanding of civic engagement—and of the expression of popular sovereignty—that begins *and ends* with the ballot box. They indicate that initiative constitutionalism's understanding of constitutional change is far narrower than that of popular constitutionalism's.

In other words, initiative constitutionalism fetishizes constitutional texts, and by doing so, it encourages us to entomb constitutions in glass cases. Because it is so sacred, constitutional text can be changed only in extraordinary moments like elections.<sup>224</sup> And once a constitution is changed, the (judicial) query into constitutional meaning begins anew. By contrast, from the vantage point of the popular constitutionalism project, popular sovereignty—the engagement with and acknowledgement of social movements and moments of activism in producing constitutional meaning, interpretation, and enforcement—is not tied so closely to constitutional text, and so this model does not fetishize constitutional texts. Rather, it understands that constitutional change may occur both on and off the books.<sup>225</sup>

Textual changes are certainly fundamental modifications of constitutional meaning, but so too are the nontextual changes that The People can effect when a theory and practice of constitutional change gives them room to act. People must make choices, but they do so *all the time*, not only (or even especially) on Election Day. They choose the organizations to which they will send annual contributions, and which ones they will join; they choose which op-eds or letters-to-the-editor they will write; they choose the candidates for whom to vote, or, perhaps, for whom to

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224. Certainly, elections are far less extraordinary than are the "constitutional moments" that Bruce Ackerman describes, in which constitutional meaning is fundamentally changed by the mobilization of a tangible popular sovereignty. See ACKERMAN, FOUNDATIONS, *supra* note 12, at 266–94. But the changes that ballot initiatives visit on constitutions are also narrower in scope than Ackerman's constitutional moments: they apply only to a single state and thus cannot violate the United States Constitution's strictures.

225. See *supra* notes 217, 223 and accompanying text.

volunteer; and they choose whether to express outrage at particular prosecutions, or at particular police actions. Popular constitutionalism gives The People room to act in these kinds of major and minor ways. Popular constitutionalism recognizes constitutional value in these daily actions and interactions, and thus blurs the distinction between politics and constitutional law.<sup>226</sup> This is how the movement locates constitutional change on the ground<sup>227</sup> and lets the Constitution live among people. Initiative constitutionalism cannot make this recognition, which is why initiative constitutionalism is not, and cannot be, popular constitutionalism.

### Conclusion: Recovering Categories

Claims on constitutional meaning characterize much of modern American political discourse. In part this is true because the Constitution explicitly invokes popular sovereignty in its preamble and invites these claims, and The People take the Constitution up on this invitation. But it is also true because Americans fetishize constitutions, holding their texts sacred and not allowing ordinary politics to change their meanings. Because of the former, social movements coalesce around constitutional politics and citizen-activists constantly make claims on constitutional meaning. But because of the latter, Americans focus on events like ballot initiatives and elections as rare moments of proper constitutional change, and thus as paradigmatic moments during which The People speak.<sup>228</sup>

The task of this Article has been to disaggregate these two reasons for the proliferation of constitutional language in political discourse. It has done so by suggesting a way to define the popular constitutionalist project in relation to constitutional claims; that is, not in broad generalities but rather with respect to the daily social and political practices in which the project imagines citizens engaging. Unlike initiative constitutionalism, popular constitutionalism engages the Constitution as it is lived

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226. See *supra* notes 94–99 and accompanying text.

227. Cf. George Fisher, *Historian in the Cellar*, 59 STAN. L. REV. 1 (2006) (revisiting LAWRENCE M. FRIEDMAN & ROBERT V. PERCIVAL, *THE ROOTS OF JUSTICE: CRIME AND PUNISHMENT IN ALAMEDA COUNTY, CALIFORNIA 1870–1910* (1981), and urging, in the context of legal history, the locating of legal meaning in the lived experiences of citizens subject to laws, not only in the official pronouncements about those laws).

228. Cf. Clark, *supra* note 173, at 434–35 (critiquing Governor Pete Wilson's response to the passage of Proposition 209 in California, which was to say, "The People of California have spoken." (citation omitted)).

and experienced “among people” and “in action,” not as it has been “entombed in a glass case.”<sup>229</sup>

This distinction may be important for a number of reasons; paramount among them is that to understand our actions as citizens, we must properly contextualize those actions in particular theories of democracy and popular sovereignty. By conflating multiple forms of nonjudicial constitutional change within the single category “popular constitutionalism,” we strip that category of its meaning and let the act of categorizing do the work we should instead reserve for a debate on an initiative’s merits. In this instance, removing ballot initiatives like the MCRI from the “popular constitutionalism” basket allows us to understand and critique them from a clearer vantage point, divorced from the basic rubrics by which we might judge popular constitutionalism’s products. So situated, we might criticize the MCRI on the merits of its effects, or the motivations of its advocates, or the specific procedures by which it was proposed and passed. The object now is to study it on its own terms without letting the glow of popular constitutionalism, now a fashionable academic project, become an obscuring glare.

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229. *Supra* notes 8–9 and accompanying text.