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"The People" and "The People": Disaggregating Citizen Lawmaking from Popular Constitutionalism

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“THE PEOPLE” AND “THE PEOPLE”:
DISAGGREGATING CITIZEN LAWMAKING FROM POPULAR CONSTITUTIONALISM

“Before being entombed in a glass case, constitutional history lived among people, in action.”

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. After a Michigan-based group funded by Ward Connerly, the executive director of an anti-Affirmative Action umbrella group, successfully dismantled the policy in Michigan in 2006, Connerly announced he would spearhead similar attempts in Arizona, Colorado, Missouri and Nebraska.

This Essay bypasses the debate over the merits of affirmative action as well as questions about the policy’s constitutionality under the Equal Protection Clause. Instead, it examines the relationship between popular constitutionalism and ballot initiatives like the anti-Affirmative Action Michigan Civil Rights Initiative (MCRI). It does this not to avoid the merits of the debate, but to contextualize it so as to free it from the risk of confusing the MCRI with other exaltations of “popular will.”

5 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
At the risk of stripping an historical observation of its historical context, this Essay suggests that a 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. I argue that dominant theories of popular constitutionalism today 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 Dan Hulsebosch draws in the epigram above. I do not revisit the history or historiography that gave rise to this distinction. Rather, I employ the distinction only as shorthand to categorize forms of constitutional change into two models.

This analysis distinguishes between popular constitutionalism and a ballot initiative-oriented notion of constitutional change that I call “initiative constitutionalism.” This Essay argues that under an “among people” definition of popular constitutionalism, however else the MCRI might be understood, it should not 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 their consequences can be understood, minimized, and eventually reversed.

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7 Indeed, Kramer also uses this historical distinction. It is in large 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.

8 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,” supra note 6, because I base my analogical analysis on Hulsebosch’s language, not on any normative claims grounded on his (decontextualized) historical material.
Imbuing the MCRI with the air of popular constitutionalism makes it more difficult to make this criticism because our democratic sensibilities render us hesitant to question expressions of “popular will.” There is a tension between these democratic sensibilities and what we 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. We care about both of these issues, but we cannot escape the tension that results. Our challenge is to balance them.⁹

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 them at the center of our founding narrative and use them to justify our American exceptionalism.¹⁰ 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 our chance to debate the merits of each, and instead to assume that each of their products 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, I seek

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⁹ 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, Book Review, In the Beginnings, 234 NEW REPUBLIC 27, 33 (Apr. 24, 2006) (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 people no longer living ratified the U.S. Constitution and all but a few of its amendments. See id. at 30.

¹⁰ Consider the introduction to the first of the Federalist Papers, which equates the U.S. 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) (1999).
not to *avoid* it, but to clarify the context in which we place it. Such a project is especially important today, because popular constitutionalism is the legal academy’s “theory *du jour*.”¹¹

To this end, Part I 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. Part III compares initiative constitutionalism with Part I’s definition of popular constitutionalism. It argues that initiative constitutionalism does not and cannot entail constitutions that live among people. The Essay concludes in Part IV by cautioning against identifying all democratic activism with popular constitutionalism now that that project 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: “[I]t is helpful to think of constitutions not as documents but rather as relationships among jurisdictions and people mediated through highly charged legal terms.”¹² 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.”¹³ Contrast this kind of constitution--dynamically produced and reproduced, made and revised, by daily interaction in the demos¹⁴--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 it.¹⁵

Hulsebosch’s descriptive language helps us understand popular constitutionalism today. Broadly understood as exploring “the mechanism that mediates between constitutional law and culture,”¹⁶ the project of popular constitutionalism is to situate The People in the universe of forces making constitutional change. It distinguishes pronouncements about constitutional meaning imposed by officialdom from meanings that develop organically through forms of civic activism by ordinary citizens.¹⁷ Though a single project, there are real and substantial differences among its scholars that should not be obscured. Nonetheless, they agree more than

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¹⁶ Kramer, Circa 2004, supra note 11, at 983.
¹⁷ See Siegel, Social Movement Conflict, supra note 11, at 1324 n.5.
they disagree, because they share a commitment to constitutions among people: So long 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 requires 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 Essay 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. They approach their work in distinctly different ways. Where Kramer grounds his work in a history of 19th century constitutional practices but presents a normative vision of modern popular constitutionalism, Siegel draws her conclusions from empirical research into modern constitutional practice. Where Kramer writes with an agenda critical of judicial review, Siegel accommodates a culture in which judicial review operates. Despite these differences, they arrive at similar understandings of the complex ways in which The People should or do produce constitutional meaning. They 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. Instead, The People are often engaged. For

18 Siegel does not align 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 Robert Post & Reva Siegel, Popular Constitutionalism, Departmentalism, and Judicial Supremacy, 92 CAL. L. REV. 1027 (2004), in which she and Robert Post respond to a lecture by Kramer. But under Kramer’s broad definition of popular constitutionalism, see supra text accompanying note 16, Siegel is a popular constitutionalist because her scholarship explores the relationship between actions by nonofficial citizens and the development of constitutional meaning. See also Mark Tushnet, Popular Constitutionalism as Political Law, 81 CH.-KENT L. REV. 991, 998 & n.27 (2006) [hereinafter Tushnet, Political Law] (suggesting that Robert Post and Reva Siegel offer a form of popular constitutionalism).


20 But see infra note 73 and accompanying text.
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”\textsuperscript{21}—that underpins functional popular sovereignty.

In this model, the line between constitutional law and mere political law blurs. Indeed, the essential point of popular constitutionalism is its recognition of distinctly \textit{constitutional} value in activity too often understood as having none. As the gap between The People and the Constitution narrows, conventional pathologies preventing us from linking politics and the Constitution will also fade.\textsuperscript{22}

Kramer grounds his popular constitutionalism in the Founding era.\textsuperscript{23} He valorizes citizens who acted in a manner that embodied—tangibly—their constitution, a legal instrument whose “day-to-day enforcement” and meaning The People effected with their daily actions.\textsuperscript{24} In that era, “[m]eans of correction and forms of resistance were well established and highly structured,” and included voting, assembling and petitioning, and public denouncement.\textsuperscript{25} When public dissatisfaction did not find sufficient outlet in pamphlets and the voting booth, there were “more assertive forms of resistance.” Mere disobedience or explicit rejection of local authorities often sufficed when, for example, a prosecutor sought to indict and convict an individual the community thought should not be punished.\textsuperscript{26} And The People could raise the stakes even

\textsuperscript{21} HULSEBOSCH, CONSTITUTING EMPIRE, \textit{supra} note 12, at 7. Again, this is not to suggest that Hulsebosch is a popular constitutionalist; his scholarship is oriented historically, not normatively, on these questions. \textit{Supra} note 8.

\textsuperscript{22} \textit{See infra} notes 76–78 and accompanying text; KRAMER, PEOPLE THEMSELVES, \textit{supra} note 11, at 30–34. \textit{See generally} Tushnet, \textit{Political Law}, \textit{supra} note 18.


\textsuperscript{24} \textit{See KRAMER, PEOPLE THEMSELVES, supra} note 11, at 9–34.

\textsuperscript{25} \textit{Id.} at 25.

\textsuperscript{26} \textit{Id.} at 26. One extreme form of this phenomenon was jury nullification, but sometimes grand juries declined to indict. \textit{Id.} (“[J]uries could become a potent weapon with which to frustrate any local official foolish enough to
higher: “more coercive means of popular opposition were available,” like boycotts and mobbing.\textsuperscript{27}

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.\textsuperscript{28} It did this constantly in ways physical, political, intellectual. And these methods of control were not only theoretic possibilities. People wrote pamphlets and articles all the time.\textsuperscript{29} Juries nullified verdicts, groups organized boycotts, and mobs dumped tea into the Boston harbor.\textsuperscript{30} In Kramer’s view, both before and after the founding, The People voiced with action their disagreement with government.\textsuperscript{31}

These activists’ goal was to effect changes in “fundamental law.” Unlike “ordinary law” passed by duly constituted governmental bodies (legislatures) to regulate people, “fundamental law” was the law governing the governors.\textsuperscript{32} Under the theory of popular sovereignty on which the American Constitution was written and ratified, Kramer argues, it was this “fundamental law” that The People owned, and whose meaning The People had the power to make.\textsuperscript{33} In this era, this “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 ordinary law. Over time, “the Constitution at last came to seem like ordinary law.” 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.” As a result, Kramer’s argument for modern popular constitutionalism is at times dependent on faithfully representative legislators willing to assert the power to interpret the Constitution.

In the abstract, Kramer clearly wants to return to an intimate and responsive relationship between the Constitution and The People. He insists that that we “pay[] careful attention to constitutional visions generated outside the official organs of the state,” and that we must “lay claim to the Constitution ourselves.” But his suggestions are unhelpful to those seeking particular examples of popular action’s constitutional valence today. He says only that popular

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34 Kramer, We The Court, supra note 11, at 99. See also KRAMER, PEOPLE THEMSELVES, supra note 11, at 148–56 (discussing “conceptual absorption of the Constitution into ordinary law”).

35 Kramer, We The Court, supra note 11, at 99–104. He 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 11, at 37.

Rick Pildes and Daryl Levinson also chronicle the rise of the political parties. They argue that the fact that the Founding Fathers did not anticipate and would not approve of the parties’ domination of American politics renders anachronistic the Madisonian compromise-based theory underpinning the Supreme Court’s separation of powers jurisprudence. See Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 HARV. L. REV. 2311, 2316–29 (2006). To the extent that separation of powers is understood as serving to protect both individual liberties and democratic accountability, see Clinton v. City of New York, 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 68–70 and accompanying text, Pildes and Levinson 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.

36 See KRAMER, PEOPLE THEMSELVES, supra note 11, at 213–26 (discussing the “New Deal settlement,” which entails a judicial review deferential to political (read: legislative) assertions of constitutionality). See also Alexander & Solum, Popular?, supra note 11, at 1600–02.

37 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.” Kramer, Circa 2004, supra note 11, at 980. On this “catholic sense,” see SANFORD LEVINSON, CONSTITUTIONAL FAITH 18–51 (1988).

38 Id.
constitutionalists must “control the Supreme Court” by “deflecting . . . arguments that constitutional law is too complex or difficult for ordinary citizens.”

As Kramer gets less abstract, his suggestions for incorporating popular sentiment into constitutional meaning become more vague. 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, people upset with the decision did nothing. Drawing on historical examples, Kramer 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.”

His hope for modern-era popular constitutionalism, however, is that we rediscover and assert with force our role as authoritative constitutional interpreters.

It is surprising that he does not observe some of the ways in which political and constitutional change actually happens in ways of which he would approve. We still exercise today some of the same basic forms of resistance as did our colonial forebears: We still vote, exercise the right to petition and assemble, and make public denouncements. But so too do 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.” Juries still nullify convictions, activists still organize boycotts, and organized groups still gather in the streets to protest and oppose presidential action.

39 Id. at 247–48. See also Kramer, We The Court, supra note 11, at 153–58.
41 KRAMER, PEOPLE THEMSELVES, supra note 11, at 231.
42 Id. at 227 (“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.”).
44 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.”); Paul Butler, Racially Based Jury Nullification, 105 YALE L.J. 677 (1995) (arguing that race-based jury nullification is appropriate in some cases).
Moreover, as Siegel argues in her groundbreaking article *Text in Contest*, the U.S. Constitution already *is* a document whose meaning is derived from these popularly negotiated solutions. She posits that constitutional meanings flow from the dialectic between movements and countermovements. Instead of providing a purely normative 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-countermovement interactions. 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.” 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. Like Kramer, Siegel aims to blur the strict politics/constitutional law divide. Because there is little “normative coherence within law and society [or] between

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45 *See*, e.g., Dolores Huerta & Peter Edelman, Symposium on Economic Justice and Growing Inequality in America, *Keynote Address*, 3 HASTINGS RACE & POVERTY L.J. 203, 205, 210 (2006) (reproducing remarks of Dolores Huerta, organizing member of United Farm Workers) (“[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.”).

46 Consider the massive anti-war protests in the month before 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*, under “popular will,” Kramer lists only: “See protests.” KRAMER, PEOPLE THEMSELVES, supra note 11, at 357 (index).


48 *See also* Siegel, *Social Movement Conflict*, supra note 11 (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 by a dialectic of claims on constitutional meaning by feminist and anti-feminist social movements between the late 1960s and early 1980s).

49 Siegel, *Text in Contest*, supra note 47, at 303 (“[D]ialogue between citizenry and judiciary about constitutional meaning is far more commonplace in our constitutional order than constitutional theory commonly acknowledges.”).

50 *Id.* at 312–13.

51 *Id.* at 316–18 (characterizing an article against whose argument she is writing as offering a “high degree of normative coherence”).
them,” we cannot determine that particular actions do not have constitutional value based solely on the forum in which they occur.

Siegel has done much in studying politics and social movements and locating them on the frontier between law and society. 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 do so: The first three words of that document—“We the People”—reflect a theory of popular sovereignty and suggest an authorship that citizens reasonably believe to include them.

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,” after all, they cannot also fulfill Kramer’s caricature of them being “passive about their role as republican citizens.” If, by “mak[ing] claims that the Constitution, as foundational law, speaks to various controversies,” the people thereby “elaborate the Constitution’s meaning with respect to different institutions and practices,” then the informal processes that Kramer hopes will “challenge[, re]interpret[, and re]new[]” constitutional understandings, already “continually refresh the text’s normative ambit.” In other words, Kramer and Siegel disagree

52 Id.
53 In other words, for popular constitutionalists, that an argument takes place outside of a federal courthouse does not, and should not, render it invisible or meaningless to the Constitution.
54 U.S. CONST. pmbl.
55 See Siegel, Text in Contest, supra note 47, at 322. Cf. Tomlins, Past and Present, supra note 23, at 1012 (“The Preamble is indubitably the best claim the people can make that the Constitution is ‘theirs.’”).
56 Id. at 322.
57 Kramer, PEOPLE THEMSELVES, supra note 11, at 227.
58 Siegel, Text in Contest, supra note 47, at 324.
59 Kramer, We The Court, supra note 11, at 15–16.
60 Siegel, Text in Contest, supra note 47, at 324.
about the extent to which The People already develop constitutional meaning. But they share an understanding, whether aspirational or empirical, of constitutional law based on continual popular involvement.

This Essay embraces an understanding of popular constitutionalism based on these studies, and the project of dismantling the politics/constitutional law distinction. Because the Constitution invokes, and is grounded in, popular sovereignty, we must give constitutional weight to these actions based on their democratic pedigree. As popular activity--The People’s politics--demands on constitutional significance, the Constitution moves toward, and eventually “lives among,” The People. The goal, and this Essay’s normative orientation, is the acknowledgement of constitutional import in the political engagement and socio-political pressures by which personal and group relationships form, and solutions to conflicts are negotiated.

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. In the late 1960s through 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. As they adjusted their arguments in response to each other, their

62 Siegel, Text in Contest, supra note 47, 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.”); Siegel, Social Movement Conflict, supra note 11, at 1340 (“I offer this account as an interpretation of an ongoing practice, rather than a justification of it.”).
63 See Siegel, Social Movement Conflict, supra note 11, at 1366–1418.
shared legacy became the “de facto ERA”\textsuperscript{64}--the Supreme Court’s post-\textit{Reed v. Reed}\textsuperscript{65} Equal Protection Clause gender discrimination jurisprudence that Justice Ginsburg has described as having “no practical difference” from the ERA as originally proposed.\textsuperscript{66}

Under Siegel’s nuanced conception of popular constitutionalism, then, there is no problem making room for some form of judicial review, because it occurs within a particular context.\textsuperscript{67} Social contest creates frameworks for judicial decisionmaking that renders either moot or overstated the countermajoritarian difficulty with which Kramer seems so concerned.\textsuperscript{68} Moreover, judicial review affirmatively serves a purpose important for popular constitutionalism itself: 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.\textsuperscript{69} As Post and Siegel write, “judicial supremacy

\textsuperscript{64} See id. at 1332–34.
\textsuperscript{65} 404 U.S. 71 (1971).
\textsuperscript{67} This 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. \textit{Kramer, People Themselves}, supra note 11, at 93–226; Kramer, \textit{We The Court}, supra note 11, 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 Five 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, \textit{Policentric}, supra note 11, and Robert C. Post & Reva B. Siegel, \textit{Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power}, 78 IND. L.J. 1 (2003) [hereinafter Post & Siegel, \textit{Juricentric}].

\textsuperscript{68} Siegel, \textit{Social Movement Conflict}, supra note 11, at 1327 (“constitutional 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, \textit{Dialogue}, supra note 61.
\textsuperscript{69} Post & Siegel, \textit{Popular Constitutionalism}, supra note 18, at 1035. See also id. at 1036 (“in some circumstances popular constitutionalism may actually require constitutional rights for its realization”).
and popular constitutionalism . . . are in fact dialectically interconnected and have long coexisted. 70

Commentators have questioned the nature of “The People” in Kramer’s version of popular constitutionalism. 71 One review suggests that despite his “fine rhetoric,” Kramer leaves unclear what exactly The People do and whether they “make,” “enforce,” or “interpret” the Constitution—or do something else entirely. 72 It further challenges Kramer’s imputation of agency to The People. 73 Even though in his regime popular activity enjoys a presumption of constitutional valence, 74 Kramer is unclear about when, exactly, constitutional law must (or should) acknowledge collective action. Though Kramer’s project seems to be to question “how to recover [The People’s] agentive capacity,” 75 he provides little guidance to scholars looking for specific evidence of that agency.

These ambiguities largely stem from disagreement about the Constitution’s “political law” and “basic law” qualities. 76 As Mark Tushnet observes, Kramer emphasizes constitutional law’s “political law” component from normal politics via its “typically . . . different rhetoric from normal politics, even though it takes the same form that normal politics does.” 77 Many commentators concerned with the practicalities of implementing popular constitutionalism worry that blurring the constitutional-political line will destroy constitutional law’s special role in

70 Id. at 1029.
71 See, e.g., Alexander & Solum, Popular?, supra note 11.
72 Id. at 1598, 1600–02, 1616–19.
73 Id. at 1606–07 (discussing “methodological individualism”), 1600–01 (arguing that in Kramer’s scheme, “it is institutions and not ‘We the People’ who are acting”). See also Devins, Tom DeLay, supra note 19, at 1056 (suggesting “practical problems 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).
74 See Alexander & Solum, Popular?, supra note 11, at 1616–19.
75 This is how Christopher Tomlins describes Kramer’s agenda. Tomlins, Past and Present, supra note 23, at 1014.
76 See Tushnet, Political Law, supra note 18, at 991–93 & n.3.
77 Id. at 996.
governing the governors. 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.\textsuperscript{78}

Here, Siegel is in clarifying juxtaposition to Kramer. Both clearly place constitutional weight on popular activity--even outside election-related contexts. For instance, ERA opponent Phyllis Schlafly did not organize only around elections; when Kramer’s activists “publicly repudiat[e] Justices,” they too engage in activity expressly \textit{not} centered on election day.\textsuperscript{79} 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 for itself that power.

Siegel is explicit in describing the times during which citizen engagement guides constitutional change: Always. “Such 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.”\textsuperscript{80} 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, why we can

\textsuperscript{78} See generally Tushnet, \textit{Political Law}, supra note 18.
\textsuperscript{79} See U.S. CONST. art. III, § 1 (granting federal judges life tenure); KRAMER, PEOPLE THEMSELVES, \textit{supra} note 11, at 247; Siegel, \textit{Social Movement Conflict, supra} note 11, at 1391–1403 (chronicling Schlafly’s activism);
\textsuperscript{80} Siegel, \textit{Social Movement Conflict, supra} note 11, at 1324–25.
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. 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 for admission by the University of Michigan—the only institution of higher education to which she had applied. Her rejection from the flagship Ann Arbor campus sparked eleven years of activism in fighting race-based affirmative action programs.\(^{81}\) She became the lead plaintiff in *Gratz v. Bollinger*, an attack on the University’s affirmative action program that culminated in the Supreme Court’s finding that that program violated the Equal Protection Clause.\(^{82}\) When the Court did not find affirmative action programs *per se* unconstitutional,\(^{83}\) the ambiguity of the Court’s decisions led Gratz to direct and organize the group seeking to pass the MCRI, 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.”\(^{84}\) This group was not alone in urging amendment to the state constitution: Ward Connerly, the chairman of the American Civil Rights Institute, had previously organized a ballot initiative in California.

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\(^{84}\) MICH. CONST. art. I, § 26.
that successfully sought to add almost exactly the same text to that state’s constitution as the MCRI has now added to Michigan’s.  

In the months leading up to the November 2006 election in which Michiganders passed the MCRI, debate over the MCRI was fierce. One United Michigan, a massive coalition of community, business, and political leaders, was formed to defeat the initiative, and Gratz appeared in national media to advocate for the initiative. Much of the debate focused on the merits of affirmative action and on the scope of the proposed amendment, as well as the effects the MCRI would have on higher education and the state’s economy. A notable portion of the rhetoric, however, 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. The MCRI passed by a 58–42 percent margin.

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. Their passion was not misplaced: The textual changes wrought by the MCRI has, and will continue to have, substantial effects on universities and university applicants, business owners contracting with the city, and many others. So too

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86 This coalition included labor leaders, business executives, political figures, and social justice organizations. See One United Michigan, About Us, http://www.oneunitedmichigan.org/About/index.html (last visited Feb. 19, 2007).
89 See supra notes 4 & 9–11 and accompanying text.
will the passage of the MCRI have a substantial impact on the discourse of affirmative action both in Michigan and nationwide. This Essay 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. After all, 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 votes cast on November 7. Nor does this Essay seek to attack ballot initiatives per se.

Instead, I employ Gratz’s and others’ words to explore notions of constitutional change underpinning ballot initiatives, the mechanism with which these advocates were all immediately concerned. I call these notions “initiative constitutionalism”; its nature underpins this Essay’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 puts 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

(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 campus diversity.”). 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).
2,” observed one news report in late October.\textsuperscript{91} The month before, one commentator wrote, “This November, we face a critical decision which has huge implications for women.”\textsuperscript{92} 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.”\textsuperscript{93} And a spokesman for One United Michigan said before the election that organizing to defeat the proposal “is 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.”\textsuperscript{94}

This focus on the election was entirely understandable. With the initiative on the ballot, the election results would (and did) 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 affirmative action programs would be left intact and whether municipalities could seek to contract specifically with minority- and women-owned businesses.\textsuperscript{95}

The outcome of the election effected a change in the text of Michigan’s constitution, the legal instrument granting the government the power to constitute itself and to govern the state’s citizens. 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. When a federal court ruled against plaintiffs who had alleged fraud in

\textsuperscript{92} Anne Doyle, \textit{Other Voices: Affirmative Action a Step Forward}, \textit{CRAIN’S DETROIT BUSINESS}, Sept. 25, 2006, at 9 (arguing against passage of the MCRI).
\textsuperscript{94} Lewin, \textit{Campaign Splits Michigan}, supra note 87 (quoting David Waymire, spokesman for One United Michigan).
\textsuperscript{95} See Dawson Bell, \textit{What Stays, Goes is Decided in Court}, \textit{DETROIT FREE PRESS}, Sept. 5, 2006, at np.
MCRI’s collection of signatures on a petition to get the initiative on the ballot, 96 Gratz said, “We are happy that [the judge] ruled that the people are allowed to decide this issue.” 97 After the election she again invoked this terminology, saying, “The people of Michigan have spoken.” 98 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.” 99

For those who organized around the MCRI, the focus on 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 demonstrates this focus particularly well. 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.” 100 Of course, she implied that the state’s constitution as it then stood did not guarantee equal treatment. But the logic of her statement entails more; as she framed the issue, the proper way to produce the guarantee of equal treatment the constitution then lacked was to amend its text. Gratz continued: “The [MCRI] proposes to make it unconstitutional for the State to discriminate.” 101 Here, Gratz’s use of the word “proposes” implicates a starkly document-based understanding of constitutions. Her statement assumes that

96 Operation King’s Dream v. Connerly, 2006 WL 2514115 (E.D. Mich.).
99 Id.
101 Id.
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].” 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 consequence of equating constitutional text with constitutional meaning 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 related to elections and the second related to constitutional change. First, when initiatives are on the ballot, constitutional meaning may change on election day; but when they are not, constitutions remain constant. And conversely, 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 vote.” 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

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102 Id.
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 vote,” not through protest and contestation, which is 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 where constitutional change results only from election results.

B. Initiative Constitutionalism and The Political Imagination

Gratz was not alone in equating constitutional law and 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, arguing that “[t]o allow this initiative to remain on the ballot pollutes our voting system and undermines the freedom of political choice.”104 Like Gratz, Granholm expressed ideas about the merits of the MCRI, but at the same time provided a glimpse of the form of engagement initiative constitutionalism demands. By linking “our voting system” and “freedom of political choice,” Granholm suggests that citizens express their political choices through voting systems. We certainly do think our votes send messages to those who govern us,105 so her suggestion is certainly true, as far as it goes.106 But her statement also suggests a constraint that initiative

104 Kathleen Gray, Granholm Joins Civil Rights Ballot Suit: Critics Say Move is Ploy to Get Votes, DETROIT FREE PRESS, Aug. 16, 2006, at np. (quoting brief filed by Granholm in lawsuit that later resulted in Operation King’s Dream v. Connerly, 2006 WL 2514115 (E.D. Mich.)).
106 See infra text accompanying note 147.
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 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 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\textsuperscript{107}--began a report thus:

\begin{quote}
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. \textit{But judges will decide which programs and practices end.}\textsuperscript{108}
\end{quote}

This \textit{Free Press} news report was not alone in its conclusion. One columnist said, “[n]ot only will [the MCRI] be challenged [in court], but it will be challenged multiple times, so millions of dollars that could have gone to other things will have to be spent defending this initiative.”\textsuperscript{109}

Another reporter noted, “A similar proposal [to the MCRI] passed in California in 1996. Courts


\textsuperscript{108} Bell, \textit{Decided in Court}, supra note 95 (emphasis added).

had to sort out how the proposal related to several programs, and the same is likely to happen in Michigan if the measure passes.”

And though one Republican candidate 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.

Two opponents of the measure agreed with that candidate’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.” Nor was this assumption limited to the news press.

Scholars sometimes constitutional meaning 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.

Minimized agentive capacity for The People in governance and constitutional decisionmaking is not the only unfortunate consequence of initiative constitutionalism. More fundamentally, initiative constitutionalism instructs individuals to limit their political and

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111 Bouchard Opposes Affirmative Action Ballot Issue, ASSOC. PRESS, Nov. 8, 2005 (quoting then-U.S. Senate candidate Michael Bouchard) (emphasis added).
113 Fitzpatrick, After the Ban, supra note 90, at 292–93 (citations omitted, emphasis added).
constitutional imaginations and merely to accept the choices presented on election-day ballots. 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.’” This is true even though “communities are [not] static and unchanging. Social norms are typically contestable, subject to interpretation and reinterpretation.”

For popular constitutionalism, community is “instantiated” by the social, political, and legal debates that take place daily because these debates are assumed to have constitutional valence. It is the “constitutional culture” produced by this constant engagement, rather than any single or particular constitutional rule, that is at the core of popular constitutionalism.

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115 See generally Post, Constitutional Domains, supra note 114.
Under initiative constitutionalism, a society’s laws are merely a set of rules. 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 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.\textsuperscript{117}

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 \textit{not} popular constitutionalism. Though as concepts judicial review and popular control over constitutional meaning need not be mutually exclusive, neither are they fully compatible.\textsuperscript{118} We must compromise between them.\textsuperscript{119} Popular constitutionalism and initiative constitutionalism balance between 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 the former.

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.

\textsuperscript{117} \textit{Cf.} HULSEBOSCH, CONSTITUTING EMPIRE, supra note 12, at 74 (describing constitutional debates in colonial-era New York thus: “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.”).
\textsuperscript{118} See Post & Siegel, \textit{Popular Constitutionalism}, supra note 18.
\textsuperscript{119} See supra note 36 (noting “New Deal settlement” in KRAMER, PEOPLE THEMSELVES, supra note 11). See also supra note 9 and accompanying text.
III. DISAGGREGATING “THE PEOPLE” FROM “THE PEOPLE”

Kramer and Siegel, of course, are not alone in writing about popular constitutionalism. In an article called (conveniently enough) *Popular Constitutionalism*, Douglas Reed describes as “popular constitutionalism” all systems in which judges do not alone produce constitutional meaning. 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.” 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.”

For purposes of this Essay, what is interesting about Reed’s argument is its grounding in the ballot initiative. He explains: “[S]tate-based constitutional amendments and ballot initiatives demonstrate that leading political issues are finding expression or resolution within the texts of state constitutions.” It is through these processes that state constitutions “exhibit[] a vitality and responsiveness” to the citizenry’s political concerns. And he is not alone in linking the ballot initiative to direct democracy, and from there to popular constitutionalism. Indeed, citizen lawmaking mechanisms like the initiative and referendum seem, at first glance, to be considered the paradigmatic tool of the popular constitutionalist. Their proponents argue that

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120 Reed, *Popular Constitutionalism*, supra note 11.

121 Id. at 875.

122 Id. at 875.

123 Id. at 875.

124 Not only does *Black’s Law Dictionary* define the initiative in terms of direct democracy, see *BLACK’S LAW DICTIONARY* 799–800 (8th ed. 2004), but so too does a literature far too large to adequately cite here. Two basic sources with which to start might be *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), and *Joseph F. Zimmerman, The Initiative: Citizen Law-Making* (1999).
“direct democratic processes are at some level more democratic, more legitimate, than representative institutions, because they are more directly responsive to the people.” One commentator calls them “a model for voter sovereignty.”

The Supreme Court has endorsed this view, agreeing that tools of direct democracy like the initiative and referendum allow the deployment of popular sovereignty: 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.

In this context the MCRI seems to fit nicely into the picture 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 are not without their problems, however. Many scholars have documented the public choice problems that inhere to procedures by which ballot initiatives amend state constitutions. Perhaps the most common of these critiques are that initiatives promote undeliberative or uneducated decisionmaking; they are prone to control by wealthy

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individuals; their language is often unclear or obfuscatory; and they effect insubstantial or bad changes. The MCRI is not immune to these critiques.

Nonetheless, this Essay 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--for whatever else they might be--not tools that let constitutions “live[] among people” in the way popular constitutionalism means them to. In A Populist Critique of Direct Democracy, 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. The consequence is a far-reaching condemnation of “direct democracy” that is untethered from public choice theory critiques attaching 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: One, the intensity of a voter’s preference for a given outcome; and

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129 On control by wealthy individuals, see, for example, David S. Broder, Democracy Derailed: Initiative Campaigns and the Power of Money (2000). On obfuscatory language, see, for example, Taxpayers To Limit Campaign Spending v. Fair Pol. Practices 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 128–146 (G. Alan Tarr ed., 1996) (studying passage of “Victim’s Bill of Rights” in California in 1992). On insubstantial or bad changes, see, for example, 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, Populist Critique, supra note 125, at 439 nn.14–16 (collecting sources making many of these arguments).

130 For example, Ward Connerly is a wealthy non-Michigander without whose $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 87; Michigan Civil Rights Initiative, Press Release, Jan. 6, 2005, at http://www.michigancivilrights.org/media/JG-10605-remarks.pdf (“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, 2006 WL 2514115 (E.D. Mich.). And there was substantial debate over the language that would appear on the November 2006 ballot describing the MCRI. Dawson Bell, Both Sides on Rights Issue Call New Ballot Wording Fair--and Crucial, DETROIT FREE PRESS, Jan. 7, 2006, at np. 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 commission of election fraud by proponents of the MCRI).

131 Clark, Populist Critique, supra note 125.
two, the relationship between $A$ and $B$, where a voter is less willing to accept outcome $\text{not-}B$ than $\text{not-}A$, and may therefore be willing to accept outcome $\text{not-}A$ in order to gain outcome $B$, even though she wants outcome $A$. 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.

There are two consequences to this fact. First, in a ballot initiative regime, a citizen is unable to choose among a set of outcomes the one that is her preferred, but not ideal, one. Because “non-congruent majorities” will pass 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. Instead, it should also account for the intensity of polity members’ preferences by “allow[ing] each person . . . to tell[,] us what he or she most wants to win and what he or she is most willing to lose.”

Second, voters’ prioritization among issues is obscured in a regime of ballot initiatives. These mechanisms eliminate the negotiations that go on between members of a polity in a regime of dynamic lawmaking. 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.”

Another way to characterize Clark’s argument is to say that ballot initiatives fail to account for the nuances and contradictions that inhere to modern political and policy goals. The ballot initiative presents to voters a single, simple binary decision that serves to obscure these nuances. So if the goal of democracy is to measure the “voice of the people,” then

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132 See id. at 450–56.
133 Id. at 448–50.
134 Id. at 451.
135 See id. at 437–50.
representative democracy is preferable to ballot initiatives because it accounts, through phenomena like logrolling, for the practical complexities of modern politics.\(^{136}\)

For this Essay’s purpose it is the principles animating Clark’s critique that are relevant for understanding why an initiative constitutionalist regime cannot simultaneously be a popular constitutionalist regime. As defined in Part I, what popular constitutionalism does is declare it to be The People who must negotiate the contradictions and nuance of their world, and who must deal with the fact that different majorities want different and mutually exclusive sets of outcomes. Legislators’ repeat player status allow them to account for both voters’ preferences and priorities in passing ordinary legislation. But where the nuances of modern politics play out on the constitutional stage, the repeat players—the makers of legal meaning—are The People themselves.

Repeated and frequent citizen engagement is popular constitutionalism’s analogue to Clark’s legislative solution.\(^{137}\) 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 watching for the consequences of their actions.\(^{138}\) Constitutional meaning is made in the dialectic among social movements,\(^{139}\) or the struggle for power between individual activists and government actors.\(^{140}\) This phenomenon is like Clark’s observation about multi-issue decisionmaking: Because popular constitutionalist activists push many different agendas, their constitutional claims must adapt to each other. Second, any given person, even one who devotes all her time to

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\(^{136}\) Clark, *Populist Critique*, supra note 125, at 456–78.

\(^{137}\) Though, as both Kramer and his critics envision it, popular constitutionalism can be practiced through legislative action as well as unadulterated popular action. *See supra* notes 71–78 and accompanying text.

\(^{138}\) *See supra* Part I.

\(^{139}\) In Siegel’s version of popular constitutionalism.

\(^{140}\) In Kramer’s version of popular constitutionalism.
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 Clark’s non-congruent majorities, popular constitutionalism’s engaged citizens must deal with the fact that their “perfect world will not be enacted.” Just like legislative choices, constitutional choices get made 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. Or as Siegel describes it, social movements modify their constitutional claims in response to claims by countermovements. 141

Popular constitutionalism also fits with Clark’s point about voter priorities. Individual activists’ engagement in social movements and other moments of popular political expression demonstrates that they cannot engage in all the actions, at all the times, that their political commitments would demand. Social movements, for example, are 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 struggle in which that movement is engaged. 142

141 See Siegel, Social Movement Conflict, supra note 11, at 1363–66 (Noting that “[w]hen 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,” and observing that “[t]his struggle to win the public’s confidence often has a moderating influence on the claims movements advance”).

142 Cf. Akhil Reed Amar & Vik Amar, Essay, President Quayle?, 78 VA. L. REV. 913, 930–32 (1992) (observing and explaining 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”).
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 did so 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].”\textsuperscript{143} One reporter described Jennifer Gratz in these terms: “[H]er personal commitment to ending what she considers discrimination appears resolute.”\textsuperscript{144} Or consider one group working to defeat the MCRI, whose very name communicates the intensity of its preference: By Any Means Necessary.\textsuperscript{145} Surely not all Michiganders fit this description, however. Said one: “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.”\textsuperscript{146} This resident had an opinion on the University’s admissions policy, but she did hold it so intensely that it drove her to join Gratz’s group. Michiganders certainly voted on the MCRI, but so too were they 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. Michiganders who held intensely their preferences regarding the MCRI founded or joined groups, and those whose preferences were less intensely held 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.

\textsuperscript{143} Lewin, \textit{Campaign Splits Michigan}, supra note 87 (quoting Connerly).
\textsuperscript{144} See Bell, \textit{Iron Will}, supra note 81.
indicates a patch of overlap between the models. To be sure, movements to amend constitutions by initiatives (or Article V processes) are not mutually exclusive with popular constitutionalism.

Indeed, the historical evidence on which Siegel relies when making her argument about social movements and constitutional change demonstrates the interrelationship between popular constitutionalism and text-based changes to constitutions. Consider the name she gives to the set of precedents under which the Court uses the Equal Protection Clause to cognize gender discrimination: “[T]he de facto ERA.” By so describing it, Siegel invokes an (unratified) constitutional amendment around which the feminist and antifeminist movements organized to name the nontexual constitutional change these movements effected. 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.\(^\text{147}\) 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. Moreover, popular constitutionalists do not claim that text has no independent role to play in establishing and nurturing constitutional norms and values.\(^\text{148}\) Nonetheless, even popular constitutionalism’s critics concede that “ours is a written constitution, but nothing important hangs on that.”\(^\text{149}\)

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 differences.

\(^{147}\) See Siegel, Text in Contest, supra note 47, at 297–98 (writing against 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”).

\(^{148}\) Supra notes 69–70 and accompanying text.

\(^{149}\) Alexander & Solum, Popular?, supra note 11, at 1603 n.20. The authors continue: “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.” Id.
inconsistency. Initiative constitutionalism does not, and cannot, account for the dynamism and constancy of engagement that defines popular constitutionalism because its model is too focused on the constitutional text its protagonists wish to change. Proponents of citizen lawmaking focus on the elections at which ballot initiatives are approved or rejected, and imagine popular sovereignty as occurring at particular times and places. And 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 betray 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. And once 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 the making of 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 constitutional change to occur both on and off the books.

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150 Supra text accompanying notes 96–99.
151 Certainly, elections are far less extraordinary than the “constitutional moments” that Bruce Ackerman argues are when constitutional meaning is fundamentally changed by the mobilization of a tangible popular sovereignty. See ACKERMAN, FOUNDATIONS, supra note 11, 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 U.S. Constitution’s strictures.
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 volunteer; 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 it blurs the distinction between politics and constitutional law. This is how it locates constitutional change on the ground\textsuperscript{152} and lets the constitution live among people. This is the recognition initiative constitutionalism cannot make, and it is why initiative constitutionalism is not, and cannot be, popular constitutionalism.

**IV. 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 their meanings unchangeable by ordinary politics. 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

\textsuperscript{152} Cf. George Fisher, *Historian in the Cellar*, 59 STAN. L. REV. 1 (2006) (re-reading work by Lawrence Friedman 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 official pronouncements about those laws).
elections as rare moments of proper constitutional change, and thus as paradigmatic moments during which The People speak.153

The task of this Essay 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 and experienced “among people” and “in action,” not as it has been “entombed in a glass case.”

This distinction is important for a number of reasons; paramount among them is that to understand our actions as citizens, we must properly contextualize them in theories of democracy and popular sovereignty. By conflating multiple forms of nonjudicial constitutional change into 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. 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.

153 See Clark, Populist Critique, supra note 125, 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.”).