

**The Unnecessary Referendum:
Popular Sovereignty in the Constitutional Interregnum
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v.2**

We are the Egyptian people, sovereigns in a sovereign homeland. This is our will and this is the Constitution of our revolution.

Preamble to the Constitution of the Arab Republic of Egypt, 2014

We, the people of Kenya ... adopt, enact and give this Constitution to ourselves and to our future generations.

Preamble to the Constitution of Kenya, 2010

We, the people of South Africa ... adopt this Constitution as the supreme law of the Republic.

Preamble to the Constitution of the Republic of South Africa, 1996

We, the representatives of the Tunisian people, members of the National Constituent Assembly ... in the name of the Tunisian people, with the help of God, draft this Constitution.

Preamble to the Constitution of the Republic of Tunisia, 2014

We the People of the United States ... do ordain and establish this Constitution for the United States of America.

Preamble to the US Constitution, 1787

I Introduction

The relationship between constitutions and popular sovereignty is a close one, at least textually. Many of the world's constitutions make the preambular claim to having been adopted and enacted by the people themselves in an exercise of sovereign self-government. The constitution claims to be the voice of the people and, the people having spoken, is the authoritative statement of sovereign power and popular will in the nation.¹ And once in place, the constitution is

¹ Stephen Tierney, 'Constitutional Referendums: A Theoretical Inquiry' (2009) 72(3) *Modern Law Review* 360, at 365-66; Stephen Tierney, *Constitutional Referendums* (Oxford, Oxford University Press 2012), at 133; Stephen Gardbaum, 'Revolutionary Constitutionalism' (2017) 15 *International Journal of Constitutional Law* 173, at 182; Martin Loughlin, *The Idea of Public Law* (Oxford: Oxford University Press, 2003), at 84; Thomas Hobbes, *Leviathan*, Edwin Curley (ed) (Indianapolis and Cambridge, Mass: Hackett, 1994), ch XVII at para 13; ch XVIII at paras 6-7.

supreme: no commands or rules inconsistent with it or unauthorised by its provisions hold any legal power over the people. The constitution remains the formal repository of popular sovereignty, until such time as the people come together to exercise popular sovereignty anew and establish a fresh constitutional foundation for political authority.²

Just how a nation's people might come together and exercise popular sovereignty to establish a political community and institutions and rules to govern it, is a question of practical politics that has no self-evident answer. The referendum is one possible solution. It is a mechanism for gauging popular opinion on particular, narrow issues, and is increasingly used both nationally and regionally for this purpose.³ And referendums have indeed been used to ratify new constitutions. Between 1793 and 2016 there were 179 single-question referendums on new constitutions (all but eleven of them were approved). Although a total of 572 constitutions were ratified without referendum in the same period, meaning that fewer than a quarter of new constitutions over some 220 years – 23 per cent – were submitted to referendum,⁴ I am less interested in the statistical frequency of constitutional referendums than in two distinct claims that arise during these moments of constitutional change.

The first is that a referendum is necessary for a new constitution to make a meaningful claim to the authority of popular sovereignty, especially in circumstances of 'constitutional interregnum'⁵ where the previous constitutional order is abrogated before the new constitution is

² John Locke, *Second Treatise of Government* (1689), ch XIX at paras 221-2; ch IV at para 22. See also Mark Tushnet, 'Peasants with pitchforks, and toilers with Twitter: Constitutional revolutions and the constituent power' (2015) 13 *International Journal of Constitutional Law* 639, at 641; James A Gardner, 'Consent, Legitimacy and Elections: Implementing Popular Sovereignty under the Lockean Constitution' (1990) 52 *University of Pittsburgh Law Review* 189, at 200-205.

³ See, e.g., Lawrence LeDuc, *The Politics of Direct Democracy: Referendums in Global Perspective* (New York: Broadview, 2003); Mads Qvortrup, *A Comparative Study of Referendums: Government by the People* (Manchester: Manchester University Press, 2002); Matthew Mendelsohn and Andrew Parkin (eds), *Referendum Democracy: Citizens, Elites and Deliberation in Referendum Campaigns* (New York: Palgrave, 2001); Rich Braunstein, *Initiative and Referendum Voting: Governing through Direct Democracy in the United States* (New York: LFB Scholarly Publications, 2004). Republican theorists are more critical of referendums, arguing that their simple majoritarianism, single-issue focus, and the reductivist questions they ask undermine republican commitments to deliberation. See, e.g., Phillip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997), at 8; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007); Sherman J Clark, 'A Populist Critique of Direct Democracy' (1998) 112 *Harvard Law Review* 434; and Erwin Chemerinsky, 'Challenging Direct Democracy' (2007) *Michigan State Law Review* 293.

⁴ Comparative Constitutions Project, *Chronology of Constitutional Events* (v. 1.2); Zachary Elkins and Alexander E Hudson, 'When do Constitutional Referenda Fail?', draft presented at the symposium 'The limits and Legitimacy of Referenda', Toronto, 22-23 September 2017.

⁵ Richard Stacey, 'Popular Sovereignty and Revolutionary Constitutionalism', in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2016).

adopted. The dissolution of existing legal arrangements takes with it all institutional markers or formal expressions of popular sovereignty, leaving any new constitutional order without a connection to the sovereign people's will. If the people are to be understood as sovereign in any meaningful sense, the argument goes, any new set of principles and institutions under which they are to be governed can be established only 'with the popular approval of the people in a national referendum.'⁶ There are strong links to Carl Schmitt's ideas of constituent power here, and indeed the Kenyan High Court insisted in 2005 that the total replacement of one constitution with a new one could occur only following an exercise of constituent power through referendum.⁷

The second claim is that approval of a constitution at referendum is sufficient to infuse it with the authority of popular sovereignty, and that any constitution approved at referendum carries the imprimatur of popular sovereignty precisely because of that fact. The elision of constitutional referendum and popular sovereignty is visible in constitution-makers' claims that it is the referendum that renders authoritative a constitution's institutional and substantive legal arrangements. In Egypt, for example, the Supreme Council of the Armed Forces (SCAF) relied on the referendum as a marker of the people's will at each point at which a new constitution took effect – the 2011 interim Constitution, the short-lived 2012 Constitution and the 2014 Constitution – insisting that the people's will is sufficient for the legitimacy of the constitutional order.⁸

But it is at least arguable that the constitutions adopted in Germany after the Second World War (1949), South Africa after apartheid (1994 and 1996), Tunisia after the Arab Spring (2014) and the United States after the Revolutionary War (1787) marked the total replacement of one constitutional order with another, of the sort for which Schmittian constitutional theory demands

⁶ Richard Albert, 'Constitutional Amendment and Dismemberment' (2018) *Yale Journal of International Law* (forthcoming), 48. For summaries of this position, see, e.g., Tierney 'Constitutional Referendums' (n 1), at 363; Eoin Daly, 'A Republican Defence of the Constitutional Referendum' (2015) 35 *Legal Studies* 30, at 38, 44-47.

⁷ *Njoya and Others v Attorney General and Others* [2004] KLR 4788 (HCK). For Carl Schmitt's view on constituent power, see especially *Constitutional Theory*, Jeffrey Seitzer (trans) (Durham: Duke University Press, 2008). Schmitt says very little about the referendum as a mechanism of constituent power, though he does say that the identity of the people are represented to the fullest extent through a referendum (at 240; see also at 287-88, 133-34 and 304-305). While the data make it clear that 77 per cent of new constitutions enacted between 1793 and 2016 were adopted without referendum, not all of these new constitutions were enacted in circumstances of constitutional interregnum. Where legal continuity is not interrupted by a break from the old constitutional order, there may be no need for a fresh expression of popular sovereignty. I am here concerned only with the claims that the referendum is a necessary expression of popular sovereignty in circumstances of constitutional interregnum.

⁸ SCAF, 'Declaration of Fundamental Principles for the New Egyptian State', 1 November 2011. See also [Turkey? Bolivia? Venezuela? Claims to legitimacy through the referendum?](#)

the intervention of the people. None of these constitutions was adopted through referendum, though. Whether a constitutional order is approved by referendum or not apparently makes little difference to whether that constitution makes the preambular claim to speak for the people and to bear the imprimatur of popular sovereignty.

In this paper I reject claims that a constitutional referendum is either necessary or sufficient for a new constitution to claim the authority of popular sovereignty, even in conditions of constitutional interregnum. Indeed, I argue that the replacement of one constitution with another can only happen outside of the purview of the old constitution and in circumstances of constitutional interregnum where constitution-makers cannot piggy-back on the previous constitutional order's claims to popular sovereignty. It does not follow, however, that a constitution which emerges from constitutional interregnum demands a referendum before it can make a meaningful claim to popular sovereignty.

The core of my argument is a distinction between the concepts of constituent power and popular sovereignty. I understand the former as the power to make a constitution, whether exercised by a people, person or group of persons. By contrast I take popular sovereignty to reflect the idea that an entire people authorises the principles and institutions that govern it. If this collective people is to offer a view about how it is to be governed, then each person that constitutes it must enjoy the freedom to form an opinion on that matter and be assured that her opinion will be considered in constituting the new order. Popular sovereignty involves something other than just majoritarian decision-making or a form of 'constitutional positivism':⁹ the claim to popular sovereignty brings with it a prior commitment to substantive principles of moral autonomy and political equality that do not depend on the outcome of any referendum that follows.¹⁰ Moreover, this substantive commitment is sufficient to make meaningful a constitution's claim to popular sovereignty.

⁹ See, e.g., Frederick Schauer, 'Constitutional Positivism' (1992-1993) 25 *Connecticut Law Review* 797, at 806-807; and David Dyzenhaus, 'The Incoherence of Constitutional Positivism' in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge, UK: Cambridge University Press, 2008).

¹⁰ See Stacey, 'Popular Sovereignty and Revolutionary Constitutionalism' (n 5), at 173-78, arguing that constitution-making is never unfettered and must always respect principles of civil and political equality inherent in the notion of popular sovereignty. See also Andreas Kalyvas, 'Popular Sovereignty, Democracy, and the Constituent Power' (2005) 12 *Constellations* 223, at 234-35; Hannah Arendt, 'What is Freedom', in *Between Past and Future: Eight Exercises in Political Thought* (New York: Penguin, 1993); and Hannah Arendt 'Some Questions of Moral Philosophy' (1994) 61 *Social Research* 739, at 741.

I begin in Part II by presenting my target in this paper, the argument for the necessity of referendum, alongside the rhetoric surrounding constitutional referendums in Kenya in 2005 and 2010, and Egypt between 2011 and 2014. In Part III, I develop the core of my argument, more clearly delineating popular sovereignty from constituent power by questioning the necessary connection between constitutional interregnum and constitutional referendum. Finally, in Part IV I distinguish between popular sovereignty as an element of constitutional theory on one hand, and the popular legitimacy that a referendum can bring, as an expression of constituent power, to a constitutional order. I recognise that a referendum may deliver a degree of legitimacy that increases the likelihood of successful constitutional transition, but warn that a referendum may undermine the substantive principles that popular sovereignty demands and, in some cases, bring a veneer of legitimacy to abusive or illiberal constitutional arrangements that are antithetical to the very idea of popular sovereignty.¹¹

II The case for referendum: constitution-making by the people

A constitution plays a key role in modern legal systems by serving as a marker of legal validity. The principle of constitutional supremacy means that any law that is inconsistent with the provisions of the constitution has no validity or legal force in that system, and no ordinary law can supersede the provisions of the constitution.¹² A commitment to constitutionalism recalls HLA Hart's description of a legal system as the union of primary rules of conduct and secondary rules of rulemaking.¹³ It suggests a distinction between the provisions of the constitution on one hand, and the ordinary laws which depend for their validity on congruence with the constitution on the other. For Hart, a society's secondary rules or its rules of recognition allow its members to conclusively identify commands that carry the force of law and distinguish them from social

¹¹ Bellamy, *Political Constitutionalism* (n 3), at 263. On the various ways that constitutional government can fail to uphold principles of liberal democracy, see, e.g., David Landau, 'Abusive Constitutionalism' (2013) 47 *UC Davis Law Review* 189; Fareed Zakaria, *The Future of Freedom: Illiberal Democracy at Home and Abroad* (New York: WW Norton and Company, 2003); Steven Levitsky and Lucan Way, *Competitive Authoritarianism; Hybrid Regimes after the Cold War* (Cambridge: Cambridge University Press, 2010); Mark Tushnet, 'Authoritarian Constitutionalism' (2015) 100 *Cornell Law Review* 391.

¹² See, for example, section 2(4) of the Kenyan Constitution, 2010: 'Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid'; and section 2 of the South African Constitution, 1996: 'This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid'.

¹³ HLA Hart, *The Concept of Law* (New York and London: Oxford University Press, 1961), ch 5.

conventions, customs, rules of etiquette or presidential tweets that do not.¹⁴ Constitutions provide secondary rules for rulemaking by establishing ‘manner and form’ procedures, according to which laws are made by legislative bodies specifically constituted for the purposes of making law, and by setting substantive limits to the laws a legislature can pass.¹⁵

For Hans Kelsen, the validity of the ultimate secondary rule on which the validity of all other law depends is determined by its social acceptance, or its efficacy.¹⁶ We can tell that a new legal order is valid, even where it purports to replace an existing legal order, when ‘individuals whose behaviour the new order regulates actually behave, by and large, in conformity’ with it.¹⁷ Hart, too, sees the validity of the rule of recognition as a matter of sociological fact flowing from its acceptance by society as an appropriate standard of legal validity.¹⁸

If the validity of secondary rules depends on their acceptance by members of a political community, then there is no reason that those same people cannot define the secondary rules. Just as there is a distinction between primary and secondary rules, there is a distinction between primary- and secondary rulemaking. Making primary rules of conduct – i.e. ordinary legislative lawmaking – is a non-exceptional exercise of a limited form of ‘command sovereignty’ made possible and controlled by secondary rules. But the making of secondary rules is an exceptional exercise of constitutional lawmaking that engages the more fundamental concept of ‘constituent sovereignty’.¹⁹ Making these secondary rules by which a society can recognise valid law

¹⁴ Id, at 92. Hart never mentioned tweets, of course, but he did point out that the rules of recognition allow people to distinguish a lawmaker’s private orders to his wife or mistress from formal announcements of law (id, 66). The distinction remains remarkably current: in response to US President Donald Trump’s tweet apparently indicating that the US military would no allow transgender service personnel (<https://twitter.com/realDonaldTrump/status/890193981585444864>), the Department of Defense said that it does not equate the president’s tweets with legal orders, and that no changes to policy will occur until made through ‘proper chain-of-command channels’ (Associated Press, ‘Transgender Troops: A Presidential Tweet is not an Order’, 27 July 2017, *New York Times*, <https://www.nytimes.com/aponline/2017/07/27/us/politics/ap-us-trump-military-transgender.html> (accessed 31 July 2017)).

¹⁵ Hart, id, at 66-70. Kent Greenawalt cautions against conflating the constitution with Hart’s rule of recognition, because most constitutions provide for their own amendment. The validity of a constitutional amendment thus depends on some even more abstract rule of recognition. Greenawalt suggests that constitutional amendment rules might amount to a rule of recognition in constitutional democracies: ‘The Rule of Recognition and the Constitution’ (1987) 85 *Michigan Law Review* 621, at 632-33.

¹⁶ Hans Kelsen, *General Theory of Law and State* (New York and London: Routledge, 2005), at 120.

¹⁷ Id, 118. See also Tushnet, ‘Peasants with Pitchforks’ (n 2), at 647, 654

¹⁸ Hart, *The Concept of Law* (n 13), at 105-107.

¹⁹ Tierney, ‘Constitutional Referendums’ (n 1), at 363. The distinction between periods of ordinary lawmaking and exceptional moments of constitutional lawmaking is made by Bruce Ackerman, *We the People: Foundations* (Cambridge, Mass: Belknap Press, 1991), ch 1. In the second volume of this work, Ackerman seems to deny that constituent sovereignty is at work during these moments of constitutional lawmaking, seeing the exercise of constituent power as a lawless and arbitrary activity that takes place during political crisis rather than a careful and

amounts to nothing less than constituting a society's legal system: in this sense, sovereignty means the capacity to 'determine the constitutional form, the juridical and political identity, and the governmental structure of a community in its entirety.'²⁰

Popular sovereignty, making a very short leap here, implies that the people hold the constituent power to define the constitutional, political, and legal contours of their community by directly controlling second-order lawmaking.²¹ While command sovereignty is embodied in an already constituted legislator or legislative institution, and constituent sovereignty might conceivably be exercised single-handedly by the conquering founder of a new people (Romulus, Genghis Khan, or Daenerys Targaryen, say), the exercise of popular sovereignty must overcome the difficulty inherent in the fact that it is reposed in all of the individuals who would form a political community. Popular sovereignty suggests a collective act of secondary rule-making, which the constitutional referendum purports to be. As a vehicle of popular sovereignty, then, the constitutional referendum claims to 'encapsulate a real world manifestation of the notion of the people as the ultimate source of legitimate power.'²²

The referendum, or at least some mechanism of majoritarian decisionmaking, plays a part in Hobbes's story about the establishment of a political community too. Hobbesian social contract theory starts with the premise that for a multitude of individuals threatened by the infelicity of the state of nature, their best option to defend themselves against 'the injustice of one another' is to erect a common power to 'conform the wills of them all to peace.' The agreement between all the members of this multitude consists in each of them saying to everyone else, I give up my right of governing myself to this common power, on condition that you all do the same. Each individual's right to govern him- or herself is thus transferred to the sovereign they all establish to exercise sovereign power and govern them in their name.²³

The social contract is an exercise of constituent sovereignty to the extent that it is the act by which a power to make laws binding on all the members of this new political community is

deliberate selection of constitutional rules: see *We the People: Transformations* (London, UK and Cambridge, MA: Belknap Press, 1998), at 11. However, as Joel Colon-Rios and Allan Hutchinson point out, the constitutional lawmakers Ackerman celebrated – American revolutionaries, post-bellum reconstructionists and the architects of the New Deal – were just as lawless to the extent that they did not follow the pre-existing rules for constitutional change: see Joel Colon-Rios Allan C Hutchinson, 'Democracy and Revolution: An Enduring Relationship?' (2011-12) 89 *Denver University Law Review* 593, at 597.

²⁰ Kalyvas, 'Sovereignty' (n 10), at 226.

²¹ Tierney, 'Constitutional Referendums' (n 1), at 364.

²² Tierney, 'Constitutional Referendums' (n 1), at 363.

²³ Hobbes, *Leviathan* (n 1), ch. XVII at paras. 13-14.

established and assigned to a lawmaker. For Hobbes, it is also an act of popular sovereignty because it is the people who exercise this power: the social contract is a collective act of the people, which operates on the same majoritarian principle as a referendum:

A commonwealth is said to be instituted, when a multitude of men do agree and covenant, every one with every one, that to whatsoever man or assembly of men shall be given *by the major part* the right to present the person of them all (that is to say, to be their representative) every one, *as well as he that voted for it as he that voted against it*, shall authorize all the actions and judgments of that man or assembly of men, in the same manner as if they were his own.²⁴

Once Hobbes's multitude has come together to exercise their sovereignty and authorise a sovereign to rule over them, they are reduced to mere subjects of the sovereign's authority and no longer hold sovereign power themselves. They are in no position to complain about any of the sovereign's commands, because having authorised the sovereign to govern them they are themselves author of those commands.²⁵ Further, since the people give up their sovereignty at the moment they confer authority on the sovereign to govern over them, they cannot lawfully make a new contract to replace the sovereign.²⁶ Like drone bees that die after fertilising their queen, popular sovereignty withers once exercised to empower a sovereign.

A society governed by Hobbes's sovereign rests on an unwritten constitution containing but one secondary rule: whatever commands the sovereign issues are laws that must be obeyed. Although most constitution making results in constitutions with more detailed rules of lawmaking than this, both processes share at least one common outcome. Once an exercise of popular sovereignty has produced a constitution setting out secondary rules according to which valid laws are made, the constitution itself assumes this sovereign authority. The people's constituent power is effectively 'replaced by the representational force of constitutional authority'.²⁷ The paradoxical implication is that popular sovereignty is eventually limited and controlled by the very constitution to which its initial exercise gives rise.²⁸ Abraham Lincoln fully committed to this paradoxical outcome in his inaugural address, proclaiming that 'a

²⁴ Hobbes, *Leviathan* (n 1) ch. XVIII at para. 1 (my emphasis). See also ch. XVI at paras. 14-15; ch. XVIII at para. 5.

²⁵ Hobbes, *Leviathan* (n 1), ch. XVII at para 13; ch. XVIII at paras 6-7.

²⁶ Id, ch. XVIII at para. See also Schmitt, *Constitutional Theory* (n 7), at 125.

²⁷ Tierney 'Constitutional Referendums' (n 1), at 366; see also Gardbaum, 'Revolutionary Constitutionalism' (n 1), at 182.

²⁸ Martin Loughlin and Neil Walker, 'Introduction' in Loughlin and Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007), at 1.

majority, *held in restraint by constitutional checks and limitations* ... is the only true sovereign of a free people.²⁹

A constitution thus limits a sovereign people's power to legally reshape their legal order. While a constitution may set rules for amending the provisions of the constitution, amendment rules are themselves secondary rules produced by the initial exercise of constituent sovereignty. Amending the constitution is something that is wholly within the purview of the institutions established by the constitution – the constituted powers – and does not require any reference to constituent power. But amendments to a constitution are possible only to the extent that the constitution itself contemplates. Making a distinction between constitutional amendment and constitutional replacement, Carl Schmitt and others suggest that it is not possible to change the fundamental substance of a constitution – to change the German Reich into an absolute monarchy or a Soviet republic, for example – through the amendment procedures.³⁰ On this view, the replacement of a constitution changes the second-order rules of lawmaking and amounts to an act of constituent sovereignty which, if popular sovereignty is to be respected, cannot happen without the intervention of the people.³¹

This does not mean, however, that a constitution can never be replaced once adopted. One difference between Hobbes and Locke is the latter insists that the people retain a right to reassert sovereignty. In Locke's view the people delegate sovereignty through a social contract, but they

²⁹ Abraham Lincoln, First Inaugural Address, 4 March 1861, quoted in Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era* (New York: Fordham University Press, 1998), at 86 (my emphasis). Other figures in US constitutional history have taken a similar line: Justice John Marshall recognized in *Marbury v Madison* 5 US (1 Cranch) 137 (1803), at 176, that while the people have an original right to establish the principles of government, doing so 'is a very great exertion' that should not frequently be repeated. Madison rejected Jefferson's idea that there should be frequent constitutional assemblies intended to allow the people to tweak the constitutional principles of government, instead insisting that the Constitution should not be left subject to the 'decisions of the whole society' but protected against change by complicated and onerous amendment procedures (*The Federalist* No 49 (ed. Clinton Rossiter), at 315).

³⁰ Schmitt, *Constitutional Theory* (n 26), at 79, 72-74 and 150-55 (discussing the amendability of the Weimar Constitution). More generally, Schmitt submits that the power of constitutional amendment is a 'statutorily regulated competence' that is 'in principle bounded [and] cannot transcend the boundary of the constitutional regulation on which it rests' (at 146). For commentary on these ideas, see, e.g. Gary J Jacobsohn, 'An Unconstitutional Constitution: A Comparative Perspective' (2006) 4 *International Journal of Constitutional Law* 460. For judicial considerations of the 'basic structure doctrine' and unconstitutional constitutional amendments in the Indian Supreme Court, see *Kesavananda Bharati v. State of Kerala*, AIR 1973 SC 1469, and in the South African Constitutional Court, *United Democratic Movement v President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC).

³¹ Schmitt, *Constitutional Theory* (n 26), at 152. Stephen Gardbaum offers a definition of 'revolutionary constitutionalism' that posits the exercise of raw constituent power through a 'genuine form of mass mobilization' as a sine qua non of the adjectival element of the term ('Revolutionary Constitutionalism' (n 1), at 177).

do not irrevocably alienate it.³² Whenever the sovereign acts in foolish or wicked ways, the bond of obedience legal subjects owe to the sovereign is severed and sovereign power reverts ‘into the hands of those that gave it, who may place it anew where they think best for their safety and security’.³³ In a constitutional democracy where sovereignty is transferred to the constitution rather than any one person or assembly, the commitment to this Lockean conception of popular sovereignty implies that the people nevertheless retain the power to do away with a constitution that no longer works for them and replace it with one that does.³⁴

From this discussion I make two observations about constitutional replacement. First, the replacement of one constitution with another necessarily involves a constitutional interregnum, a moment where there is no constitutional foundation for the act of constitution-making by which the new constitution comes into being. Even a self-consciously temporary constitution that foresees its own demise and sets out the procedures for its own replacement, like South Africa’s interim Constitution for example, cannot imbue the new constitution with authority because any such authority vanishes at the moment the old constitution is no longer law.³⁵ As soon as the old constitution is abrogated, a nation occupies a ‘legal no-man’s land’ until the new constitutional order is in place.³⁶ The enactment of the new constitution takes place in this vacuum of

³² Loughlin, *Public Law* (n 1), at 103.

³³ Locke, *Second Treatise of Government* (n 2), ch. XIII at para. 149. Carl J Friedrich calls this ‘a right to revolution’: *Constitutional Government and Democracy; Theory and Practice in Europe and America* (Boston: Ginn, 1950), at 129. George Lawson, in the 1660 work *Politica Sacra et Civilis or, A Modell of Civil and Ecclesiastical Government* (Conal Condren (ed) (Cambridge: Cambridge University Press, 1992) at 47), distinguishes between the King’s ‘inferior, delegated, and constituted “personal majesty”’ and the ‘real majesty’ to ‘constitute, abolish, alter, reform forms of government’. See also Loughlin, *Public Law* (n 1), at 85; and Tierney, *Constitutional Referendums* (n 1), at 135-37.

³⁴ A handful of the world’s constitutions do include rights to resist abusive governments: see Tom Ginsburg, Daniel Lansberg-Rodriguez and MilaVersteeg, ‘When to Overthrow your Government: The Right to Resist in the World’s Constitutions’ (2013) 60 *UCLA Law Review* 1184. However, a constitutional right to resist an abusive government is quite different from a constitutional provision allowing for the replacement of a constitution in its entirety.

³⁵ Section 73(1) of the Constitution of the Republic of South Africa Act 200 of 1993 provided: ‘The Constitutional Assembly shall pass the new constitutional text within two years as from the date of the first sitting of the National Assembly under this Constitution.’ Section 73(13) provided: ‘A new constitutional text adopted in terms of this Chapter shall be assented to by the President and shall upon its promulgation be the Constitution of the Republic of South Africa.’ The subsections in between set out the procedure for the drafting and adoption of the new constitution. A referendum was to be held only in the event that the Constitutional Assembly approved a constitutional text with a majority of members rather than a two-thirds supermajority (s. 73(6)-(8)). The adoption of the new constitutional text in these circumstances required a supermajority of 60 per cent of votes cast.

³⁶ David Landau, ‘The Importance of Constitution-Making’ (2011-12) 89 *Denver University Law Review* 611, at 612 and 616: ‘Virtually all new constitution-making happens this way, because it is rare for an existing constitution to have a provision allowing for its own replacement’. Landau argues that once a constitution has been abrogated, through necessarily extra-legal means, the writing and adoption of the new constitution follows in similarly extra-legal circumstances. Mark Tushnet suggests slightly differently that the amendment of a constitutional provision that

constitutional authority, even if this vacuum exists only at the exact moment that the new constitution comes into force. But the constitutional interregnum may last longer than a moment, as in Egypt, where those who took power after a popular uprising against the existing regime abrogated the old constitutions and left Egypt without a constitutional framework until new rules for government were adopted. In cases like Egypt's, the new constitution does not draw its authority from the provisions of the previous constitution and in fact explicitly denounces whatever authority the previous constitution relied on. But even in cases like South Africa's, just the abrogation of the old constitution by the new implies that the new constitutions must rest on a different source of authority than the old.

My second, related observation is that the exercise of constituent sovereignty inherent in the making of a new constitution in circumstances of constitutional interregnum expunges whatever sovereignty was reposed in the constitution that came before.³⁷ Making a new constitution is an exercise of constituent sovereignty that supplants the old constitution as sovereign. The makers of a new constitution thus cannot rely on whatever claims to popular sovereignty the previous constitution made, as a basis for claiming that the new constitution is backed by the authority of popular sovereignty.

These two observations provide the foundations for the argument that no new constitution can make a claim to popular sovereignty without a discrete act of collective constitution-making, most commonly operationalized as approval at referendum. In circumstances of constitutional interregnum, where all secondary rules previously established by an exercise of popular constituent sovereignty have been abrogated and no markers of popular sovereignty remain, a constitutional referendum allows the people to establish a new legal order with the imprimatur of popular sovereignty to replace one with which they have grown disillusioned. This is the line of reasoning behind the constitutional referendums in Kenya and Egypt.

the constitution declares to be unamendable amounts to the abrogation and immediate reenactment of the entire constitution in identical terms but for the differences between the previously unamendable provision and the new version of that provision ('Peasants with Pitchforks' (n 2), at 641). Since the constitution itself provides no authority for the amendment of that unamendable provision, the only way to amend it is by stepping outside of the constitution and precipitating a miniature constitutional interregnum by abrogating the whole thing. For the contrary view that constitutional revolutions can happen without any break or rupture, see e.g. John Finnis, 'Revolutions and the Continuity of Law' in AWB Simpson (ed), *Oxford Essays in Jurisprudence (2 series)* (Oxford: Clarendon Press, 1973), 44, at 52-53.

³⁷ Tierney 'Constitutional Referendums' (n 1), at 366.

a) *Constituent power in Kenya*

In March 2004, the Kenyan High Court temporarily derailed the country's progress towards constitutional reform. In *Njoya v Attorney General*,³⁸ the Court found that the process for enacting a new constitution, set out in the Constitution of Kenya Review Act 13 of 1997, was fatally flawed because it did not require a referendum on a new draft constitution. The Court's reasoning depends on the close connections it saw between popular sovereignty, constituent power and constitution making. This reasoning begins with the premise that Kenya is a democracy in which the people are sovereign. Taking a Lockean rather than a Hobbesian line on sovereignty, the Court said that the sovereignty of the people 'betokens that they have a constituent power – *the power to constitute and/or reconstitute*, as the case may be, their framework of government.'³⁹ The Court drew the principles of constitutionalism and popular sovereignty together in this important passage in the judgment:

The most important attribute of a sovereign people is their possession of the constituent power. And lest somebody wonder why, the supremacy of the Constitution proclaimed in section 3 is not explicable only on the basis that the Constitution is the supreme law, the *Grundnorm* on Kelsenian dictum; nay, the Constitution is not supreme because it says so: its supremacy is a tribute to its having been made by a higher power, a power higher than the Constitution itself or any of its creatures. The Constitution is supreme because it is made by they in whom the constituent power is reposed, the people themselves.⁴⁰

The judgment goes on to admit the practical difficulties that the people would face in trying to draft a constitution without the mediation of some representative body. There is 'neither a stadium large enough to accommodate them', the Court said, 'nor expertise on the part of their body as a whole to process a Constitution.'⁴¹ While practicality demands a more manageably sized constitution-drafting body, the Court insisted that the people's constituent power requires the popular ratification of any new draft constitution that such a body produces.

The Court's resort to referendum as a mechanism of exercising popular sovereignty recalls Schmitt's sense that popular sovereignty is an amorphous and unwieldy power. Schmitt draws an important distinction between the initiation of constituent power and the execution of the changes sought by it, suggesting that some formal process is necessary if the people are to move

³⁸ *Njoya*, (n 7).

³⁹ *Id.*, at 15 (my emphasis).

⁴⁰ *Id.*

⁴¹ *Id.*, at 16.

beyond a disorganised mass of pure will towards formal proposals for a new constitutional framework.⁴² Any process by which a new constitution that claims the authority of popular sovereignty replaces an old one, then, must cut as closely as possible to a notionally pure exercise of popular sovereignty.⁴³ Even though the content of a new constitution results from an organised ‘political decision’, Schmitt insists that ‘the people’s constitution-making will always expresses itself only in a fundamental yes or no.’⁴⁴

The Kenyan High Court accordingly held that a constitutional referendum is a fundamental right of the people in the exercise of their constituent power, and that the constituent power requires nothing less than a compulsory referendum on a proposed new constitution.⁴⁵ In providing for a referendum only in the case that the constitution-making body could not reach consensus on the text of a draft constitution, the Court found that the Review Act failed to uphold this right and declared it to be unconstitutional. The legislature amended the Review Act to require a referendum on the draft, affirming the Court’s view that ‘the people of Kenya have the sovereign right and power to replace the Constitution with a new Constitution’.⁴⁶ The draft constitution, however, was eventually defeated by 57 per cent of voters in a national referendum held in November 2005. When the constitutional reform initiative was restarted after the bloody national elections in 2007, the new statute contemplated that the process would culminate in a referendum.⁴⁷ Kenya’s Constitution of 2010 became law in August 2010 after approval by 67 per cent of voters in a referendum.⁴⁸

b) Constitutional reform in Egypt

The end of Hosni Mubarak’s 30-year rule in Egypt in early 2011, following months of popular protests, was the dramatic centrepiece of the regional uprisings known as the Arab Spring. In the days following Mubarak’s resignation on 11 February, the Supreme Council of the Armed Forces (SCAF) made a number of statements indicating their commitment to the ‘legitimate

⁴² Schmitt, *Constitutional Theory* (n 26), at 132-35.

⁴³ Colon-Rios and Hutchinson, ‘Democracy and Revolution’ (n 19), at 608.

⁴⁴ Schmitt, *Constitutional Theory* (n 26), at 132.

⁴⁵ *Njoya*, (n 38), at 16-17.

⁴⁶ Constitution of Kenya Review Act, 13 of 1997 (as amended), section 26.

⁴⁷ See the Constitution of Kenya Review Act, 2008, Act 9 of 2008, part V.

⁴⁸ For a fuller account of the process of constitutional transition in Kenya, see Richard Stacey, ‘Constituent Power and Carl Schmitt’s Theory of Constitution in Kenya’s Constitution-making Process’ (2011) 9 *International Journal of Constitutional Law* 587.

demands of the people'.⁴⁹ Two days later on 13 February, the SCAF issued a declaration suspending the operation of the 1971 Constitution, arrogating lawmaking and executive authority to itself and indicating that amendments to the 1971 Constitution would be made in due course and submitted to referendum.⁵⁰ Egypt's 2011 'interim Constitution' was eventually proposed by a committee appointed by the SCAF and approved at a referendum held on 19 March 2011.⁵¹ It entered into force on 30 March, although the SCAF made significant changes to the text during those eleven days.⁵²

It is tempting to understand the 45 days between 13 February and 30 March as a constitutional interregnum, in the sense that no formal constitution was in force for that period. However, the SCAF's 13 February declaration did provide secondary rules to the extent that it dissolved the legislative bodies constituted by the 1971 Constitution and declared that the SCAF 'shall issue laws during this transitional period'. This declaration amounted to an act of constituent sovereignty, putting in place the Hobbesian secondary rule that any commands the SCAF makes are valid laws to be obeyed. Egypt operated under this constitutional framework between 13 February and 30 March, and so experienced a constitutional interregnum only in the sense that the SCAF's arrogation of lawmaking power to itself occurred in a vacuum of constitutional law.

⁴⁹ *New York Times*, 'Egypt's Supreme Council of the Armed Forces: Statements and Key Leaders' http://www.nytimes.com/interactive/2011/02/10/world/middleeast/20110210-egypt-supreme-council.html?_r=0 (accessed 3 August 2017).

⁵⁰ The relevant provisions of the 13 February declaration read:

First: the Constitution is suspended.

Second: The Supreme Council of the Armed Forces shall temporarily administer the affairs of the country for a period of 6 months or until People's Assembly, Shura Council and Presidential elections are held.

Third: The Chairman of the Supreme Council of the Armed Forces shall represent it internally and externally.

Fourth: The People's Assembly and the Shura Council are dissolved.

Fifth: The Supreme Council of the Armed Forces shall issue laws during this transitional period.

Sixth: A committee to amend a number of articles of the constitution shall be established, and a popular referendum shall be held.'

⁵¹ Neil MacFarquhar, 'Egyptian voters approve constitutional changes' *New York Times*, 20 March 2011, http://www.nytimes.com/2011/03/21/world/middleeast/21egypt.html?_r=0 (accessed 3 August 2017).

⁵² The draft submitted to referendum was the 1971 Constitution with key amendments made to some of its 200-some provisions, including imposing term limits on the president, limiting the president's power to declare a state of emergency, and requiring the drafting of a new constitution. The interim Constitution promulgated on 30 March, however, was an entirely new document containing just 63 provisions.

It is far from clear, however, that the SCAF's 13 February declaration was an act of popular sovereignty.⁵³ The SCAF certainly did claim to be acting in fulfilment of the people's 'legitimate demands', but the 13 February declaration does not use the language of popular sovereignty that characterises the preamble to the 2011 interim Constitution. The SCAF was careful to proclaim in that later document that 'Sovereignty is from the people only, and the people are the source of authority. The people practice this sovereignty and protect it, safeguarding national unity.'⁵⁴

As it turned out, the SCAF came to regret this commitment to popular sovereignty. Anticipating that the political wing of the Muslim Brotherhood (the Freedom and Justice Party) would comfortably win upcoming elections and dominate the drafting process for a constitution to replace the 2011 interim Constitution, the SCAF attempted to pre-emptively bind the new constitution to recognising a set of 'supra-constitutional principles'.⁵⁵ Reaction from the Egyptian people was swift, pointing out that because they approved at referendum the rules for constitution-making set out in the 2011 interim Constitution, the SCAF had no authority to supersede those rules.⁵⁶ In walking back and eventually abandoning the attempt to control the content of the new constitution, the SCAF said:

We are convinced that the people are the source of legitimacy, that its will should never be circumvented through the establishment of irrevocable supra-constitutional principles, that there is no need to issue a constitutional declaration on supra-constitutional principles or other such principles, as the people's will is sufficient.⁵⁷

⁵³ Stacey, for example, argues that 'Where a constitution-making body assumes the authority to enact a constitution simply by having defeated all other competitors by force, and is unconcerned with representing the sovereignty of the people, then popular sovereignty is simply not in play' ('Popular Sovereignty' (n 5), at 178).

⁵⁴ SCAF Constitutional Declaration, 30 March 2011 (interim 2011 Constitution of the Arab Republic of Egypt), article 3.

⁵⁵ SCAF, 'Declaration of Fundamental Principles for the New Egyptian State', 1 November 2011. The provisions were detailed and specific: one of them, for example, reserved decisions affecting the military's budget to the SCAF and empowered the SCAF to veto any legislation relating to the military (art 1(9)).

⁵⁶ Kristen Stilt, 'The End of "One Hand": The Egyptian Constitutional Declaration and the Rift between the "People" and the Supreme Council of the Armed Forces' (2010-2011) 16 *Yearbook of Islamic and Middle Eastern Law* 43, at 43-44; Landau, 'The Importance of Constitution-making' (n 36), at 615.

⁵⁷ SCAF, 'Declaration of Fundamental Principles for the New Egyptian State'. As it turned out, the 2012 Constitution adhered to many of the supra-constitutional principles, indicating that the SCAF was ultimately somewhat successful in steering the constitution-drafting process towards its own ends. See, e.g., Hilal Khashan, 'The Eclipse of Arab Authoritarianism and the Challenge of Popular Sovereignty' (2012) 33 *Third World Quarterly* 919, at 923-24.

The 2012 Constitution was eventually adopted in Egypt following a referendum in which about 63 per cent of voters approved of the draft, with about 33 per cent voter turnout.⁵⁸ It lasted only six months. The SCAF ousted President Mohamed Morsi's government on 3 July 2013, issued a statement on television suspending the 2012 Constitution, and appointed the Chief Justice of the Supreme Court Adly Mansour as acting president.⁵⁹ After five days without any obvious constitutional framework – a tangible period of constitutional interregnum – the acting president issued a constitutional declaration on 8 July setting out in 33 articles a roadmap to a new constitution, a basic framework for interim government, and a familiar celebration of popular sovereignty that identifies the people as the source of all power.⁶⁰ The preamble to the declaration refers directly to SCAF leader General Abdel Fattah el-Sisi's televised statement as the source of its authority, essentially admitting that its best claim to popular sovereignty lay in the military's own assertion of having acted in accordance with the people's legitimate demands.⁶¹ In line with the procedural requirements set out in the 8 July constitutional declaration, the draft constitution prepared between July and December 2013 was submitted to popular referendum in January 2014. It was approved by 98 per cent of voters, with a 38 per cent turnout.

Egypt's experience illustrates the distinction between constituent power and popular sovereignty, insofar as a set of secondary rules for rulemaking need not claim popular sovereignty in order to succeed in authorising primary lawmaking. But Egypt's experience also indicates how the referendum has come to be seen as a primary indicator, and perhaps even a necessary element, of popular sovereignty. It is important to interrogate, in the first place, whether a referendum is either necessary or sufficient to transform an exercise of constituent sovereignty into an act of popular sovereignty. A second concern is that a referendum may do little more than bring a measure of legitimacy to a new constitution the content of which remains inconsistent with principles of popular sovereignty. I address these two concerns in Parts III and IV of this paper.

⁵⁸ BBC, 'Egyptian constitution "approved" in referendum', 23 December 2012, <http://www.bbc.com/news/world-middle-east-20829911> (accessed 3 August 2017).

⁵⁹ BBC, 'Egypt crisis: Army ousts President Mohammed Morsi', 4 July 2013, <http://www.bbc.com/news/world-middle-east-23173794> (accessed 3 August 2017).

⁶⁰ Constitutional Declaration of 8 July 2013, article 2.

⁶¹ Nathan Brown, 'Egypt official declares what is and isn't important', *New Republic*, 9 July 2013, <https://newrepublic.com/article/113792/egypt-president-adli-mansour-makes-constitutional-declaration> (accessed 3 August 2017).

III The flaws in constitutional positivism

The core of popular sovereignty is the idea that when it comes time to constitute or reconstitute the legal system, the people to be governed by that system will select the secondary rules of lawmaking. A commitment to popular sovereignty thus implies a kind of constitutional positivism, in that the validity of a society's constitutional rules depends on their source in the people's constituent power alone, rather than on their substantive merit. HLA Hart's legal positivism turns on this 'sources thesis' too, holding that the validity of primary rules of conduct depends only on whether those rules are generated in accordance with the secondary rules of lawmaking, regardless of whether those laws are morally good or bad.⁶² The principle that only the people can make valid constitutional laws in terms of which the rest of the legal system operates emerges as the ultimate secondary rule – the rule of recognition – in a constitutional democracy with popular sovereignty as its foundation. As Schmitt says in this regard, 'law is everything that the people intends.'⁶³

The connection between referendum and popular sovereignty, emerging from both constitutional theory and the experiences of constitutional transition outlined above, in turn forges a link between referendum and constitutional positivism. As a primary marker of popular sovereignty, the referendum in fact becomes the source of valid constitutional rules, and constitutional rules will be valid only if they have been approved by the people at referendum. And since the substantive content or merit of constitutional rules is irrelevant to their validity, the people are indeed free to select whatever constitutional rules they want at referendum. Whatever constitution the people approves will carry the authority of popular sovereignty.⁶⁴

⁶² John Gardner, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199, at 199. The 'separation thesis', the legal positivist principle that the validity of a law is a matter entirely separate from its moral value, follows from the sources thesis.

⁶³ Schmitt, *Constitutional Theory* (n 26), at 286.

⁶⁴ The phrase 'constitutional positivism' might not capture the full extent of the conception of the popular will at work here. In a discussion of the theory of democracy, Carl Schmitt refers to Rousseau's unique contractarian position that a person who disagrees with the majority has merely deceived him- or herself about what is actually best for the community. Rousseau famously says that those that disagree with the majority, in being forced to go along with the majority, will 'be forced to be free' (Jean-Jacques Rousseau, *On the Social Contract* (Hackett: Indianapolis IN and Cambridge UK, 1987), book I, ch. VII). Moreover, for Rousseau it is the people themselves who decide questions of political morality: 'What the people want is simply good, because they will it' (Schmitt, *Constitutional Theory*, n 26, at 260, 264-65). The implication here is not merely that whatever the people select as secondary rules are valid, but that those rules are necessarily good because the people select them. Beyond legal or constitutional positivism, this is a form of moral positivism in that what is good depends on what is posited as good by the relevant source.

This makes a certain degree of sense from a phenomenological point of view as well, because if only the rules of rulemaking and the legal system they constitute are capable of constraining political power, then until the legal system is constituted there can be no limits to popular sovereignty.⁶⁵ Carl Schmitt appears to commit to constitutional positivism when he says that ‘a constitution is not based on a norm whose justness would be the foundation of its validity’ but on ‘a political decision concerning the type and form of its own being’.⁶⁶ The constitution-making will of the people is, accordingly, an ‘unmediated will’ that exists prior to any constitutional rules and procedures.⁶⁷

I think there are reasons we should be sceptical of this Schmittian understanding of popular sovereignty. In what follows I question the soundness of the connection between popular sovereignty and constitutional positivism, arguing in turn that the validity of the constitution does not depend solely on the popular political decision from which it arises. Consequently, the political decision – the referendum – is not essential to the establishment of a constitution backed by the authority of popular sovereignty. I describe below how the intersection of representation and the drafting of a constitution imposes substantive limits on the power of popular sovereignty, and ultimately allows us to identify more precisely what role a constitutional referendum plays in the process of constitution making.

a) Representation in constitution making: the referendum’s shortcomings

A common question about the voluntarist virtues of social contract theories is whether the people ever actually enter into a contract or not. And if they do not, can it be said that popular sovereignty actually is the foundation of the system? Locke insists on one hand that a deliberate and voluntary act of consent is required from the members of a polity to establish a political

⁶⁵ Stacey, ‘Popular Sovereignty’ (n 5), at 167. The Colombian Constitutional Court held in 1990 that the president has the power to call elections for a constituent assembly and that, because the people of the Colombian nation are ‘the primary constituency which takes on a sovereign character ... it cannot have any limits other than those it imposes on itself, nor can the constituted powers revise its acts’ (quoted in Landau, ‘The importance of Constitution-making’ (n 36), at 617.

⁶⁶ Schmitt, *Constitutional Theory* (n 26), at 125. See also at 268: ‘The democratic understanding sees every constitution ... as resting on the concrete political decision of the people capable of political action’; and at 286: ‘There are no limitations on this *will* stemming from democratic principles. Injustices and even inequalities are possible.’

⁶⁷ *Id.*, at 132.

community,⁶⁸ but on the other hand admits that a form of tacit consent, identifiable in people's acquiescence to a government's commands and their continued use of public goods, is enough to satisfy the requirement of a voluntary approbation of a state's political arrangements.⁶⁹ For a person to tacitly consent to a government or a constitutional system of which she is already a subject, by merely continuing to obey the laws of the system, she must nevertheless assess the system as it is and consider whether or not she finds it sufficiently objectionable that she will actively oppose it. Locke's position is that the people exercise sovereignty by tacitly consenting to being governed.

It follows that a society's consent to a constitutional system is the product of a qualitative and substantive assessment of that system – a decision to submit to it and not oppose it – rather than the product of any procedure of contracting or active agreement. At the same time, tacit consent is singularly retrospective. It assumes that there already is a political system in place, which stands or falls by the attitude the people adopt to it based on their assessment of its normative quality. Tacit consent provides no assistance in cases where the old legal system has been or is about to be replaced with a new one based on a brand new constitutional text. In the constitutional interregnum, we need a different way of inserting the people's voice into the constitution-drafting process. The referendum is an obvious contender for this role, and its majority-rule logic is appealing to both democratic and contract theorists.⁷⁰ In a democracy, Schmitt insists along with Locke, the people are sovereign and can violate the entire system of constitutional norms at will.⁷¹ The ability of a people to act as a political unity and exercise popular sovereignty is constrained, however, by both the theoretical foundations and the practicalities of a popular constituent decision. Direct or pure democracy, Schmitt begins, requires an entire people to express an unmediated self-identity and make a political decision without the intercession of any representative institutions.

But the majority of a voting public cannot be considered sovereign, Schmitt continues, because even the entirety of a state's citizenry can do no more than represent the sovereign

⁶⁸ Locke, *Second Treatise* (n 2), ch. VIII at para 99: 'That which begins and actually constitutes any political society is nothing but the consent of any number of freemen capable of majority, to unite and incorporate into such society'. See also ch. VIII at para 122; ch XI at paras 140-41; and ch XV at para 173.

⁶⁹ Id, ch. VIII at para 119.

⁷⁰ Hanna Pitkin argues that since there is no contract with the government, the government has to get its powers from the society acting by majority vote: Hanna F Pitkin, 'Obligation and Consent I' (1965) 59 *American Political Science Review* 990, at 994.

⁷¹ Schmitt, *Constitutional Theory* (n 26), at 300.

political unity ‘which transcends an assembly convened at a particular time and place.’⁷² Schmitt says plainly that the referendum realises the principle of identity to the fullest extent possible. But even the referendum involves representation, he goes on, because every individual who votes must be assumed to have voted not as a private citizen concerned with her own private interests but as a representative of the political unity of which she forms part.⁷³ Inversely, any representative body (including the voting public) represents the people only to the extent that it is concerned with public rather than private matters. Any decision-making body that deals exclusively with private matters no longer represents the political unity of the people.⁷⁴ For Schmitt, then, there can be no public political identity without representation. Indeed, the specific structure of each state’s form – monarchy, aristocracy, parliamentary democracy – depends on how the people resolves the ‘decisive opposition of *identity* and *representation*’ when constituting the state.⁷⁵ The very idea of democratic identity faces limits inherent in the unavoidable role of representation in the people’s political decisions.⁷⁶

On a more practical level, representation is unavoidable at the constitutional moment because the people cannot collectively draft their new constitution. The Kenyan High Court has drawn attention to this logistical obstacle to popular constitution making already.⁷⁷ Since it is never ‘the people’ who write the constitution, we must recognise a distinction between authorship and authorisation.⁷⁸ A referendum is a second-best mechanism of popular constitution making that allows the people to authorise a constitution that they have not, as a collective thing, authored. The referendum introduces popular sovereignty into a constitution-making process from which an unwieldy people would otherwise be excluded. But if the constitution is drafted in a way that has no connection to the political identity of the people – that is, without some degree of representation – popular constituent sovereignty will be confined to participation in a constitutional referendum that can only confirm or reject the constitutional proposals formulated

⁷² Id, at 240.

⁷³ Id, at 240-41.

⁷⁴ Id, at 242.

⁷⁵ Id (Schmitt’s emphasis).

⁷⁶ Id, at 241.

⁷⁷ *Njoya v Attorney General* (n 38), at 16. See also text accompanying note 41 above.

⁷⁸ Pasquale Pasquino, ‘The Un-constituent Power of the People: Article 138 of the Italian Constitution and Popular Referendum’ (2017) *Italian Law Journal* 139, at 143. I make a similar distinction, between authorship and acceptance, in Part IV.

at some remove from the people, by a person or assembly exercising a constitution-making agency independent of the people.⁷⁹

If the exercise of popular sovereignty is to amount to something more than just the post-hoc majoritarian approval of a constitutional proposal, the question to be answered by the people must itself be formulated in a manner representative of the people's constitution-making power. The greater the involvement the people have in drafting the constitutional text – i.e. in formulating the question to be put to them at referendum – the more closely the constitutional referendum will fulfil the demands of popular sovereignty. The Kenyan High Court said as much in the *Njoya* case, faulting the composition of the National Constitutional Conference that produced the final draft constitution in 2004 because a majority of its members was appointed rather than elected. Such a body could not be said to represent the people for the purposes of constitution-making, and thus held no mandate to make a constitution in the name of the people – regardless of whether or not it was subsequently approved at referendum.⁸⁰ Indeed, the constitutional transitions in South Africa and Tunisia involved constitutions drafted by elected constitutional assemblies, which went into force without ever being subjected to referendum.⁸¹

The strongest case for constitutional referendum arises in cases like Egypt, where all markers of popular sovereignty disappear in the constitutional interregnum during which a new constitution is drafted. In order for constitution-makers to claim that their work in drafting a new constitution is representative of a people for whom there are no representative structures in place, some degree of representational gymnastics is required. But just going through these gymnastic contortions dilutes the positivist flavour of popular sovereignty by revealing a set of substantive constraints within which constitution making must operate, if it is to claim to be representative. These substantive constraints call into question whether the sources thesis applies to constitutional lawmaking and in turn whether a constitutional referendum is in fact necessary.

b) The limits of popular sovereign power

⁷⁹ Id, at 287; Daly, 'A Republican Defence' (n **Error! Bookmark not defined.**), at 39.

⁸⁰ *Njoya v Attorney General* (n 38), at 16. Under the Constitution of Kenya Review Act 2008, A Committee of Experts revised the failed 2004 draft constitution, which was then presented to Parliament for revision and approval before being submitted to the people at referendum.

⁸¹ It is interesting to note – although I make no more of it here – that the preamble to Tunisia's 2014 Constitution couches its claim to the support of the people in much plainer representative language than does the South African and other Constitutions: 'We, the representatives of the Tunisian people, members of the National Constituent Assembly ... in the name of the Tunisian people, with the help of God, draft this Constitution.'

One proposal for inserting the people's voice into a constitution-drafting process in which there are no structures of representative government is to have the drafters of the new constitutional text consider what the people would put into the new constitution if they could draft it collectively. Although the drafters can make no claim to representing the people in any formal sense, they may be able to justify the substance of the constitution they propose as consistent with the principle of popular sovereignty on the basis that it is what the people might conceivably have come up with themselves. 'The only "consent" that is relevant is the hypothetical consent imputed to hypothetical, timeless, abstract, rational men.'⁸²

This move to hypothetical consent allows the drafters of a constitution to claim both to have acted on behalf of the people by putting themselves in the position of the people, and that their constitutional proposal is agreeable to every rational member of the society. John Rawls relies on the hypothetical consent of timeless, abstract and rational people too, when he derives principles of justice from the device of the original position. If the architects of a new society find themselves behind a veil of ignorance, Rawls argues, with no knowledge of the position in which each will actually find him- or herself in society, it would be rational for them to order the society such that primary social goods are equally distributed and any inequalities in distribution benefit the worst-off individuals.⁸³

But the drafters of a new constitutional text do not have the luxury of the original position or a veil of ignorance. They must work within the realities of the already existing society for which they are drafting a constitution, with all of its diversity, difference and disagreement. It is difficult in circumstances of increasingly plural societies for constitution makers to presuppose and attempt to represent a homogenous political unity or a single voice with which all members

⁸² Pitkin, 'Obligation and Consent' (n 70), at 997. See also A John Simmons, *On the Edge of Anarchy: Locke, Consent and the Limits of Society* (Princeton, NJ: Princeton University Press, 1993), at 205-206; Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991* (Cambridge, UK: Cambridge University Press, 1993), at 53; and Bernard Yack, 'Popular Sovereignty and Nationalism' (2001) 29 *Political Theory* 517, at 521.

⁸³ John Rawls, *A Theory of Justice* (Cambridge, MA and London: Belknap Press, 1971), setting out the argument for these two principles of justice at 18-19; 60-61; 136-38; 302-303. See John Rawls, 'Distributive Justice' [1967], in *Collected Papers* (Samuel Freeman, ed; Cambridge, MA and London: Harvard University Press, 1999), at 140, for an indication of the contractarian roots of the argument: 'It may be observed that the difference principle represents, in effect, *an original agreement* to share in the benefits of the distribution of natural talents and abilities, whatever this distribution turns out to be, in order to alleviate as far as possible the arbitrary handicaps resulting from our initial starting places in society.'

of a society speak. Even Schmitt admits that the ‘essential presupposition’ of the principle of identity, ‘a substantial similarity of the people, is misperceived’.⁸⁴

Instead, modern pluralistic societies are characterised by widespread disagreements about how people should behave, what rights we have and don’t have, and what those rights allow us to do or prevent others from doing.⁸⁵ Constitution makers have to take disagreement seriously in designing constitutional frameworks, and recognise that there is no single view to which they can give voice in claiming to speak for the people. Indeed, failing to recognise the diversity of a plural society and attempting to shoehorn divergent views into a single voice seems to undermine any real commitment to popular sovereignty.⁸⁶ Popular sovereignty can no longer be thought of as all of the people ‘intoning a shared political catechism’, but must recognise that the sovereign people is composed of numerous competing and contradictory voices.⁸⁷

Upholding a commitment to the idea that this multi-throated people are sovereign means that all of the people in their numerous opinions and identities must be represented in the process of drafting the constitution. Simone Chambers argues in this regard that even if hypothetically agreeable and suitably universal constitutional principles are able to get us some of the way towards popular sovereignty, it is just as important that people actually be given a chance to make their views known and to actively participate in formulating the content of a new constitution. She points to South Africa’s extensive public consultation during the drafting of the 1996 Constitution and to debates in post-unification Germany about whether a new constitution should be drafted or West Germany’s Basic Law adopted throughout unified Germany.⁸⁸ Similarly, the Committee of Experts who revised Kenya’s draft constitution in 2009 invited and received tens of thousands of comments during their work in drafting the text.⁸⁹

It is here that the flaw in constitutional positivism starts to emerge. Recognising that ‘the people’ is actually a diverse and pluralistic thing, and providing an opportunity for people to

⁸⁴ Schmitt, *Constitutional Theory* (n 26), at 248.

⁸⁵ Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999); Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346, at 1366-69.

⁸⁶ Simone Chambers puts this point the other way around: ‘A growing sensitivity to diversity and in particular the idea that treating someone with respect means allowing her to speak in her own voice, undermines the plausibility of the notion of a ‘people’ that can speak in one voice’ (‘Democracy, Popular Sovereignty, and Constitutional Legitimacy’ (2004) 11 *Constellations* 153, at 153). See also Tierney, ‘Constitutional Referendums’ (n 1), at 375-76.

⁸⁷ Chambers, *id.*, at 158.

⁸⁸ *Id.*, at 161-68.

⁸⁹ Christina Murray and Coel Kirkby, ‘Constitution-Making in Anglophone Africa – We the People?’, in Muna Ndulo and Mamaoudou Gazibo (eds), *growing Democracy in Africa; Elections, Accountable Governance and Political Economy* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2016) 86, at 102.

participate in the drafting of the constitution, presupposes a view of human beings as morally autonomous agents capable of forming opinions about how they should be governed. Moreover, recognising that this diversity of opinions must be represented in the constitution-drafting process suggests that no single opinion is more valuable than any other. All are to be treated with equal respect. In the first place, then, for drafters to even consider public participation in the drafting process implies a prior commitment to a principle of equality comprising both a recognition of every person's equal moral agency and the entitlement to having her view valued just as much as anyone else's.

In the second place, regardless of whether or not the constitution-drafting process provides opportunities for public participation, a constitution that makes a claim to popular sovereignty must ensure that it continues to recognise the autonomy and diversity of the people whose sovereignty it claims to represent. The substantive rules it adopts must treat each individual member of the people as a full and equal participant in popular discourse.⁹⁰ The failure to do so undermines popular sovereignty for the very reason that it silences or is deaf to the views of at least some of the people who constitute a multi-throated and pluralist political people. The very commitment to popular sovereignty, in other words, carries with it a commitment to a set of substantive rules that guarantee the moral autonomy and equality of all members of the people in which the sovereignty to constitute a legal order is reposed, both at the constitutional moment and afterwards. And to the extent that these substantive constitutional principles follow from the commitment to popular sovereignty, constitution-makers who claim the authority of popular sovereignty must recognise and uphold these principles: to this extent, they are not free to establish whatever constitution they want.

Even Carl Schmitt's advocacy of constitutional positivism is tempered by his admission that a democratic constitution is bound to uphold certain substantive principles. A 'merely formal concept of law such as that the law is anything that the lawmaking bodies ordain', he says, merely transforms a legal system from the tyranny of a despot or the absolutism of a monarchy into the 'absolutism of the legislative office'.⁹¹ If constitutional democracy is to be something different, Schmitt continues, we have to recognise that the concept of law in a constitutional democracy is different: 'Every constitutional regulation of legislative authorizations *presupposes*

⁹⁰ Stacey, 'Popular Sovereignty' (n 5), at 175.

⁹¹ Schmitt, *Constitutional Theory* (n 26), at 191.

a substantive concept of law'.⁹² Although Schmitt at one point boldly concludes that 'law is everything the people intends',⁹³ he now seems to moderate his position: 'Equality before the law is immanent to the Rechtsstaat concept of law. In other words, law is that which intrinsically contains equality within the limits of the possible'.⁹⁴

The point I want to emphasise here is not so much that equality is an immanent principle of a constitutional democracy backed by the authority of popular sovereignty, but rather that the claim to popular sovereignty as the source of constitutional authority commits a legal system to recognising a set of substantive principles. The positivist idea that the people as bearers of constituent sovereignty can constitute whatever constitutional system they want is false to the extent that any exercise of popular constituent sovereignty presupposes a commitment to these substantive principles. Indeed, even holding a referendum that purports to stamp a constitution with the mark of popular acclamation requires a voting system built on the same commitment to moral autonomy and political equality.⁹⁵

Contrary to the constitutional positivist position, substantive commitments to moral autonomy and political equality do not depend for their validity on their entrenchment in a constitution or on acclamation in a referendum. Rather, in every constitutional system that claims the authority of popular sovereignty, these principles precede the constitution and flow directly from the very commitment to popular sovereignty. Their source, and in turn the sources thesis, is irrelevant here. Popular sovereignty lives and breathes in the substance of the constitution, whether or not there is a subsequent referendum that claims to express popular sovereignty. A referendum is therefore not sufficient by itself to make good a claim to popular sovereignty,

⁹² Id, at 189. (Schmitt's emphasis).

⁹³ Id, at 286 (see also above, n 63).

⁹⁴ Id, at 194. In chapter 4 of *The Nomos of the Earth*, a work first published nearly a quarter of a century after *Constitutional Theory*, Schmitt revisits this tension between a political decision by the people and normative principle as the foundation for political society. Defining *nomos* as something like the rule of recognition – 'the first measure of all subsequent measures' – he notes that while Xenophon 'defined any written directive of the authorized ruler as *nomos*, whereby he equated plebiscites (*psephismata*) with *nomos*', Aristotle 'said that *nomos*, rather than democratic plebiscites, should be decisive' (Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, GL Ulmen (trans) (New York: Telos Press, 2006), at 67-68.

⁹⁵ In a similar vein, Pasquino argues ('Un-constituent Power' (n 78), 143) that the people's constituent power is not a free-standing thing that arises from nothing other than the original agreement of free individuals in a state of nature. On the contrary, 'the people' who exercise constituent power are an already-constituted power who are no more and no less than the list of names of people, put together by some 'preexisting (provisional) authority', entitled to vote in an election or referendum according to rules that they, the people, did not create. 'So, the "people" are a result of the positive, heteronomous established law. Not its author.'

because the idea of popular sovereignty brings with it a necessary recognition of substantive principles independent of any positive decision by the people.

IV The constitutional referendum, popular sovereignty, and popular legitimacy

If a constitutional referendum is not made necessary by a constitution's claim to popular sovereignty, what then do we make of those situations where a proposed constitution is defeated at referendum? The commitments Kenya's 2004 draft Constitution made to political equality, and the circumstances of autonomy and equality in which people voted were arguably consistent with the substantive requirements I argue here are sufficient for a constitution to make a meaningful claim to popular sovereignty. But the people rejected that draft constitution at referendum, exercising their moral autonomy in doing so. Whatever its substantive merits, can a constitution really claim to have been the product of the people's constituent sovereignty when the people refuse to endorse it? The possibility of a 'no' vote suggests that before any constitution that seriously makes a claim to represent the people can take effect as law, the people have to be asked whether they approve of it or not. A constitutional referendum might not be sufficient to make the claim to popular sovereignty, but the possibility of 'no' certainly suggests that it is necessary.

My response to this conundrum is to identify more specifically what a referendum brings to a constitutional system, and to separate the idea of a constitution's acceptance, as a sociological or empirical matter, from the authority it claims from substantive commitments to moral autonomy and political equality. I argue there is a conceptual distinction between a constitution's claims to popular sovereignty and to legitimacy, between its authorship and its acceptance, which revolves around the fact that a multi-throated people will inevitably disagree about what details a constitution should include in much the same way that they will disagree about whether primary laws of conduct are right or wrong.⁹⁶

⁹⁶ Jeremy Waldron has consistently argued that the fact of inevitable, widespread, deep-seated and, moreover, reasonable disagreement over the demands of justice in public life, must be acknowledged and accepted by anyone who hopes to say anything worthwhile about how a constitutional system should be arranged. See, e.g., *Law and Disagreement* (n 85), at 7, 105-106, 112-13, 152-58. For Waldron, the possibility that there are objective moral truths is irrelevant in light of the fact that these truths cannot easily be discovered, and many people are just as convinced about the truth of their own view as others are about opposing or inconsistent views. See 'Moral Truth and Judicial Review' (1998) 43 *American Journal of Jurisprudence* 75, at 77-79 and *Law and Disagreement*, at 176-80.

Where the people governed by a legal system accept that the state is justified in taking steps to ensure that everyone complies with the law, including those people who hold a reasonably defensible view that some of these laws are simply wrong, the state can be said to enjoy a measure of de facto or sociological legitimacy.⁹⁷ People may complain that a specific law is morally bad, wrongheaded, ill-advised, misguided and so on, without those complaints necessarily calling into question the legitimacy or ‘respect-worthiness’ of the broader legal system in which those laws are situated.⁹⁸ Some people will consider some laws good that others consider bad, but until a law turns out to fall foul of the constitutional rules that determine the validity of primary rules, it requires obedience. One of the ways of assessing the respect-worthiness of a legal system as a whole, then, is to look to the constitution that sets out the secondary rules from which all other rules derive their force as law.⁹⁹

On what basis can a constitution claim legitimacy, then? Where does its respect-worthiness come from? I have already raised the inapplicability of Rawlsian hypothetical consent as a basis for any actually existing constitutional system. Set out in more detail now, that argument holds that the conditions of abstraction required for constitutional principles to generate universal agreement from rational people just don’t exist in societies confronted with the challenge of designing a legal system. While it is conceivable that people may agree that a constitution should enshrine values like equality, judicial independence and executive accountability, there are protracted and serious disagreements at the constitutional moment about whether discrimination on the basis of sexual orientation should be prohibited,¹⁰⁰ how judges should be appointed,¹⁰¹ or whether a presidential, semi-presidential or parliamentary system is preferable.¹⁰²

⁹⁷ Frank I Michelman, ‘Is the Constitution a Contract for Legitimacy?’ (2003) 8 *Review of Constitutional Studies* 101, at 103; and Richard Fallon, ‘Legitimacy and the Constitution’ (2005) 118 *Harvard Law Review* 1787, at 1795-1801, distinguishing between legal legitimacy (or positivist validity), sociological legitimacy, and moral legitimacy.

⁹⁸ Michelman, id, at 105-106. Michelman makes it clear that laws may be valid in a formal or positivist sense – slave laws in the ante-bellum United States or racist laws in apartheid South Africa – but may issue from a legal system that is illegitimate or wicked and thus command no moral duty of obedience from subjects or enforcement from officials (115-116). See also David Dyzenhaus, *Hard Cases in Wicked Legal Systems: Pathologies of Legality* 2ed (Oxford: Oxford University Press, 2010).

⁹⁹ Michelman, id, at 107-109; Gardbaum, ‘Revolutionary Constitutionalism’ (n 2), at 189-92.

¹⁰⁰ Compare constitutional protections for equality in South Africa and Kenya: the former prohibits discrimination on grounds of sexual orientation (s 9(3)), the latter does not (s 27(4)).

¹⁰¹ See, for example, Sujit Choudhry and Richard Stacey ‘Independent or Dependent? Constitutional Courts in Divided Societies’ in Colin Harvey and Alex Schwartz (eds), *Rights in Divided Societies* (Oxford and Portland: Hart, 2012), 87.

¹⁰² Sujit Choudhry and Richard Stacey, ‘Semi-Presidentialism as a Form of Government: Lessons from Tunisia’, Center for Constitutional Transitions Working Paper No. 2, June 2013.

Even after the constitutional text is agreed, people continue to disagree about what it actually means. In the United States, debates persist as to whether same-sex couples should be allowed to marry, whether the criminal justice system should allow sentences of death, and whether rights to free speech should protect the dissemination of hateful and violent ideologies, even though the US Constitution extends the equal protection of the laws to all, disallows laws that abridge freedom of speech, and prohibits cruel and unusual punishment. If it is possible to forge agreement on a constitutional text only by staying silent on these hard questions and postponing their resolution to some later date, it is difficult to argue that a constitution can generate respect-worthiness from its content alone.¹⁰³ The very questions that a person might want to know the answers to before deciding if a constitution deserves her respect are the same ones the constitution leaves unanswered.

And yet, there can be no doubt that constitutions all around the world are legitimate and are workable in fact, despite the persistence of these disagreements about their content. If content-dependent legitimacy is off the table, the legitimacy of a constitutional system has to depend on content-independent justifications for its enforcement. One form of content-independent justification is acceptance by the people it purports to govern, while another is its claim to authorship by those same people.¹⁰⁴ A people can, of course, show its acceptance of a constitution in a referendum. There is perhaps no better way to show it. But content-independent justification is also to be found in a constitution's meaningful claim to having been authored by the people themselves: that is, from a claim to popular sovereignty.

Popular sovereignty and referendum thus offer two quite distinct routes to constitutional legitimacy, but this does not establish any necessary connection between popular sovereignty and referendum. The failure of a constitution to win approval from the voting public at referendum means only that it cannot claim the legitimacy of social acceptance, but there is nothing in that failure that undermines its claim to authorship by the people. There is no contradiction in a constitution whose author makes a reasonable claim to represent the people at the moment of its drafting but which the people, being a multi-throated and internally incoherent thing, nevertheless choose not to endorse when put to referendum. This eventuality is entirely

¹⁰³ Michelman, 'Is the Constitution a Contract for Legitimacy?' (n 97), at 123-24. 'No constitution', Michelman goes on, 'described with adequate completeness, can be assumed to supply a publicly objective and transparent reason – a reason that is clear and counts as such for everyone (reasonable) – to accept compulsion to comply with all constitutionally valid laws' (at 127).

¹⁰⁴ Michelman, *id.*, at 126-27.

consistent with the model of popular sovereignty I present here: the disagreement, pluralism and diversity made visible in an unsuccessful constitutional referendum presupposes a commitment to and celebration of the moral autonomy and political equality from which disagreement springs in the first place. And no meaningful claim to representing the people as author of the constitution can be made without recognising the moral autonomy and political equality of each of the people. Indeed, the Lockean understanding of popular sovereignty, which reserves the right of revolution to the people, assumes that the people may even approve of or accept a constitution at one moment, and yet change their minds and reject that same constitution at some later time.

Put at its simplest, my position is that popular sovereignty concerns the authorship of a constitution, while the outcome of a referendum goes to its acceptability or sociological legitimacy. The challenges involved in having the people themselves draft the new constitution mean that if those charged with drafting the constitution are to adequately represent the people as authors of the constitution, the process must be built on guarantees that everyone has just as much claim to defining the text of the constitution as anyone else. Once drafted, it may be difficult for a replacement constitution to find social acceptance without a referendum, especially in circumstances of tangible constitutional interregnum – although Tunisia’s 2014 Constitution and the US Constitution of 1787 stand as counterfactuals to this position. At the very least, approval at referendum makes the claim to legitimacy a little easier. But the important point remains that the substantive constraints that popular sovereignty imposes make possible a meaningful claim to the people’s authorship of a constitution, regardless of whether or not the people subsequently accept the constitution at referendum. The cogency of a constitution’s claim to popular sovereignty, to growing directly out of the people’s constituent power, is independent of its sociological legitimacy.

V Conclusion: the danger of ‘yes’

The distinction between authorship and acceptance discloses another permutation of constitutional transition. We need not look very far around the world to find constitutions that fail to uphold the principles of moral autonomy and political equality that I argue here are necessary and sufficient for a meaningful claim to popular sovereignty, or where public officials

fail to act in congruence with those principles.¹⁰⁵ Some of these constitutional systems nevertheless claim legitimacy from their approval at referendum: the system established under Egypt's 2014 Constitution is an example,¹⁰⁶ while Erdogan's Turkey in another.¹⁰⁷ The legitimacy that flows from social acceptance, marked by a referendum, thus provides a screen behind which a constitutional system that ignores the substantive imperatives of popular sovereignty can hide. The danger of a 'yes' vote is that it provides a veneer of legitimacy to an otherwise illiberal constitutional framework that can make no meaningful claim to the people as its author.

In societies already characterised by permanent minorities or historically disenfranchised groups, the likelihood that referendum will solidify the advantages of the politically privileged or socially better-off is something of a self-fulfilling prophecy. A distribution of socio-political goods (civil and political rights, access to the mass media, or social capital) that is already skewed towards certain groups makes it more likely that those groups' views will prevail in a referendum, whether or not they constitute a numerical majority. 'The use of a referendum in this type of situation is particularly dangerous', Stephen Tierney warns,

because this clear act of hegemony is presented as being democratic, offering a spurious constitutional legitimacy for political power play. The referendum is paraded as a self-evidently democratic device. It asks 'the people' to speak, and each person can do so with an equal say. But this simplistic notion of fairness is based upon ... 'undifferentiated equality'. Voters as individuals are decontextualized from their discrete communal settings. Their votes are then aggregated across communities and the total is taken to be the voice of one demos.¹⁰⁸

A constitution clothed in the legitimacy of a positive referendum result has a seductive appeal to proponents of democracy.¹⁰⁹ But there is a great danger in equating constituent power and

¹⁰⁵ On congruence between previously declared laws and official conduct as an element of the rule of law, see Lon Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969).

¹⁰⁶ For the illiberal character of Egypt's legal system, see, e.g., Zaid al Ali, 'Egypt's Third Constitution in Three Years: A Critical Analysis' in Bernard Rougier and Stéphane Lacroix (eds), *Egypt's Revolutions: Politics, Religion and Social Movements* (Houndmills: Palgrave MacMillan, 2016) 123.

¹⁰⁷ The rules for constitutional amendment in Turkey allow the President to put constitutional amendments to a referendum if proposals for amendment do not win sufficient support in the legislature (Constitution of the Republic of Turkey, 1982, article 175). President Recep Erdogan's government proposed constitutional amendments in 2017 to centralise power in the office of the president, which failed to win the necessary majorities in the legislature but were subsequently approved at referendum.

¹⁰⁸ Tierney, *Constitutional Referendums* (n 1), at 71. The quote comes from Avigail Eisenberg, 'The Medium is the Message: How Referenda Lead Us to Understand Equality for Minorities' in Mendelsohn and Parkin (eds), *Referendum Democracy* (n 3), at 149.

¹⁰⁹ Bellamy, *Political Constitutionalism* (n 3), at 132.

popular sovereignty to the results of a referendum. It is undeniable that a constitution acclaimed by a majority of the people bears a certain legitimacy because of the ‘yes’ vote; but this legitimacy may serve only to mask either a constitutional text or government practices that fail to uphold substantive commitments to autonomy and equality.

The argument I have sought to make here is twofold. In the first place, I reject the claim that a constitutional referendum is sufficient to make a constitution’s claim to popular sovereignty meaningful. A substantive commitment to principles of moral autonomy and political equality must precede any reliance on referendum as a marker of popular sovereignty, especially in conditions of constitutional interregnum. Second, I have sought to dispel the idea that a constitutional referendum is necessary to the claim to popular sovereignty by drawing a distinction between authorship as a matter of popular sovereignty, and acceptance as a matter of sociological legitimacy.

Accordingly, we should be wary of the false positives that constitutional referendums may produce. In a world where new democratic governments are increasingly susceptible to backsliding into regimes variously described as illiberal democracy, competitive authoritarianism, and authoritarian or abusive constitutionalism, the referendum is just one more device by which a regime can claim the legitimacy of popular sovereignty even as it undermines the conditions that popular sovereignty implies.