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Democratizing the Criminal: Jury Nullification as Exercise of Sovereign Discretion over the Friend-Enemy Distinction

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Democratizing the Criminal: Jury Nullification as Exercise of Sovereign Discretion
Over The Friend-Enemy Distinction

A Dissertation Presented

by

TIMOTHY A. DELAUNE

Submitted to the Graduate School of the
University of Massachusetts Amherst in partial fulfillment of the
requirements for the degree of

DOCTOR OF PHILOSOPHY

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Political Science

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TIMOTHY A. DELAUNE

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DEDICATION

For Nick, who was patient.

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I thank first and foremost my dissertation chair Nick Xenos for his years of mentorship and helpful advice on matters ranging from scholarship to the politics of academic life. I also thank committee members Joan Cocks and Gary Malaney for their encouragement and trenchant critiques of my work, and consulting member Larry Lessig for taking the time to read the dissertation and help me think about the ideas it entails in fresh ways.

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Finally, this dissertation could not have been dreamt, much less achieved, without the love, support, and patience of my husband Nick Trépanier. I am forever in his debt.

ABSTRACT

DEMOCRATIZING THE CRIMINAL: JURY NULLIFICATION AS EXERCISE OF SOVEREIGN DISCRETION OVER THE FRIEND-ENEMY DISTINCTION

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This dissertation examines jury nullification – the ability of American juries in particular criminal cases to ignore or override valid law to be applied to defendants by acquitting them in cases in which the facts are undisputed or clear – as an exercise of sovereignty over the friend-enemy distinction as those terms are defined by Carl Schmitt. It begins with a biography of Schmitt and a description of his concept of sovereignty as ultimate decisional power. It then discusses sovereignty in the American context, with particular attention to the principles of the Founding and the nature of the fictively constructed American people. It next applies Schmitt's concept of decisional sovereignty to the American context, concluding that sovereignty in America is diffuse, and its exercise by particular governmental actors is to some degree cloaked, and that the sovereignty of the American people, while crucial to the founding moment, is largely latent in ordinary times. This application of Schmitt to sovereignty in America also demonstrates the deep tension between democratic popular sovereignty and rule-of-law liberalism.

The dissertation then turns to Schmitt's understanding of the distinction between friend and enemy as the central political axis, and argues that the criminal in the American

context is functionally the enemy, if not the absolute enemy of the polity. It then discusses in detail the mechanics and history of jury nullification, ultimately concluding that jury nullification both operates at the crucial political moment at which enemies are generated (or not) through the application of criminal law to defendants, and is an act of popular sovereignty, intended by the Founders to help preserve a balance between democracy and liberalism by maintaining a central political role for the people.

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CHAPTER 1

INTRODUCTION

This dissertation applies the core theories of Carl Schmitt to jury nullification in the American criminal law context. Jury nullification describes situations in which a jury, in addition to determining whether the evidence supports a conviction of criminal defendants, also takes the law into its own hands, either by ignoring a judge's instructions as to how to interpret the law, or by otherwise failing to convict where the evidence before it warrants a conviction. In so doing, the jury may be expressing disapproval in general of the law the defendant is accused of violating, dislike for the way the law has been applied to the defendant, or solidarity with or approval of the defendant. I argue that when a jury nullifies, it engages within the context of American democracy in an act of sovereignty as Schmitt understands that term, and does so on the centrally political issue for Schmitt, which is the identification of friends and enemies.

In Chapter 2, I lay the groundwork for my arguments by discussing Schmitt and his thought in historical context and explaining and interpreting his theory of sovereignty as ultimate power to render decisions regarding exceptional circumstances. In addition, I explore his theories of democracy as popular sovereignty, including his ideal democratic constitution, the need for a homogeneous people, and the role of the people before, during, and after the founding of a democratically constituted state.

In Chapter 3, I examine sovereignty in Schmittian terms in America, arguing that the Founders deliberately struck a potentially unstable balance by dividing sovereignty among multiple actors, including the people as well as multiple government institutions. Along the way, I show that the Founders appear to have invested sovereignty in the Constitution as a founding and legally binding text, as well as perhaps in supporting texts such as *The Federalist*,

and that this renders the American polity one that makes the locus of sovereignty hard to identify when it is exercised. I also discuss the construction of “the people” as a fictive exercise that renders always problematic claims by various actors to represent the popular will, and to that extent undermines American democracy in terms of popular sovereignty.

Chapter 4 applies Schmitt’s ideas of sovereignty to my analysis of diffuse sovereignty in America. In it I show that American practice exemplifies the tension Schmitt identifies between rule-of-law liberalism, which claims that the law is sovereign and thus covers over the exercise of sovereign power by human actors on behalf of the state, and democracy as popular sovereignty, which the Framers often adverted to, but which is not functionally an aspect of day-to-day governance in the US. I nonetheless argue that sovereignty in America under Schmitt’s definition remains in latent form with the people, pursuant to the Declaration of Independence and the right to revolt. Thus the Framers struck a tenuous balance designed to keep the American polity relatively stable despite the tensions between rule-of-law liberalism and popular sovereignty by balancing the two, against the backstop of latent popular power to revolt. While Schmitt would see this arrangement as unstable and likely either to devolve into liberal proceduralism that masks the acquisition of power by government against the population, or to erupt into outright violent revolution, my ultimate goal is to show in later chapters how this tension can be beneficially maintained by preserving the Founders’ allocation of power to the people through the role of the criminal jury in deciding upon law as well as fact.

Chapter 5 turns to a discussion of Schmitt’s concept of the friend-enemy distinction as the central axis of the political, with particular attention to the way that his definitions of friend and enemy, and extension of the enemy category, developed over the course of his writing. In particular, I address in this chapter the somewhat unstable distinctions among

the ordinary criminal, the equal enemy, the subhuman absolute enemy, and the terrorist or partisan in Schmitt's thought, as well as the question whether Schmitt has fully or clearly theorized the role of the friend.

Following this discussion, in Chapter 6 I apply Schmitt's concepts of friends and enemies to the context of the criminal in America, arguing functionally that the way we treat criminals shows that we consider them enemies if not absolute enemies, and that despite Schmitt's insistence on a distinction between the ordinary criminal and the enemy, American practice constructs most criminals as members of an internal enemy class. This lays the groundwork for understanding the centrally political role, in Schmitt's terms, of the American criminal jury.

Chapter 7 outlines the history of jury nullification, tracing it from its origins in England to its use before and after the American founding, and describing its decline in the nineteenth century. I describe its mechanics, and its bases in American constitutional and criminal law, and provide examples of its use, addressing in particular concerns regarding ways in which it deprives some defendants of equality under the law.

In Chapter 7, I connect jury nullification to Schmitt's theories of the sovereign and the political. I argue that it is unique within the American context as a site of popular sovereignty exercised over the friend-enemy distinction, and intended by the Framers as a bulwark against process failures of representative democracy and the potential for tyranny exercised by government actors under the guise of the rule of law. I argue that by taking nullification off the table as a right of juries or defendants, American judges and prosecutors have undone a key locus of popular sovereignty, one that the Framers meant to be part of the delicate balance between popular sovereignty and the rule of law.

I conclude by bringing the strands of the argument together, with particular emphasis on the way that respect for and faith in American governmental institutions has been undermined by their drift away from the popular will, a drift that could have been, and could still be, ameliorated by anchoring the criminal law to the views of those randomly selected members of the community who can in individual cases decide what the law means and how it will be deployed — who can decide to generate criminal enemies, or to refuse to do so because where the law itself amounts to an abuse of governmental sovereignty.

CHAPTER 2

CARL SCHMITT AND THE SOVEREIGN

Introduction

To prepare the way to consider sovereignty in America in general and jury nullification in particular in light of Carl Schmitt's theories, this chapter provides an introduction to Schmitt and his work, with special emphasis on his theory of sovereignty as the power to decide in exceptional circumstances. It begins with a brief biography of Schmitt, addresses the situational and unsystematized nature of his work, and then discusses his membership in and political work on behalf of the National Socialist (Nazi) Party and his favorable reception by contemporary thinkers on the political left. It then describes his views on legal positivism and political liberalism, and connects these to his most significant positions on the Weimar Republic and its Constitution. Against this background, the final part of this chapter examines the contours of Schmitt's theory of sovereignty, as well as his specific related concerns regarding democratic homogeneity in the context of popular sovereignty, the nature of constitutions, and the citizen's right to resist her government.

Schmitt's Life and Work, Then and Now

Brief Biography

Carl Schmitt was born in 1888 and raised in a Catholic family in Plettenberg, Germany, a town in the predominately Protestant Rhineland.¹ He was thus born under the shadow of the *Kulturkampf*, which had peaked ten years earlier, in which Bismarck's government had sought to reduce the influence of Catholicism in Germany through a series

¹ Gopal Balakrishnan, *The Enemy: An Intellectual Portrait of Carl Schmitt*. (London: Verso, 2000), 11.

of discriminatory laws.² Despite his family's early wishes that he enter the priesthood, Schmitt ultimately studied jurisprudence with their blessing at the Friedrich-Wilhelm University in Berlin, writing his as-yet-untranslated dissertation, "On Guilt and the Degrees of Guilt," in the field of criminal law, and making his first acquaintance with a city to which he would return in various capacities later in life.³

Though he served during World War I, Schmitt never saw combat, having been relegated to a domestic position as a censor in a regional martial law unit due to a back injury.⁴ He nonetheless witnessed firsthand the violent turmoil of postwar Germany: his office was broken into by revolutionaries, and he saw an officer shot at a nearby table while at a café.⁵

After rotating through several minor governmental and temporary university positions, Schmitt returned to Berlin in 1928 to accept a relatively low-status teaching position at the Schools of Business Administration (*Handelhochschulen*) there. Within Weimar's nerve center, Schmitt fostered social connections to governmental officials, in particular Reich Finance Ministry bureaucrat Johannes Popitz, a conservative monarchist who would be executed in 1945 for his support for a *coup* plot against Hitler.⁶ Schmitt's connections to conservatives in the Weimar Republic led to his collaboration with President Paul von Hindenberg's inner circle on legal issues, including Schmitt's advocacy on behalf of the federal government regarding whether states (*Länder*) or the Reich had the right to fill railroad administrative positions. Schmitt used the occasion to develop a theory that the

² Ibid. 12.

³ Ibid. 13.

⁴ Ibid. 16.

⁵ Ibid. 21.

⁶ Ibid. 116-18.

German federal court could not properly be considered to be the definitive interpreter — in Schmitt’s terms, the “guardian” — of the Constitution. Rather, only the president, on Schmitt’s view, could play this role, acting as an arbitrating neutral power (*pouvoir neutre*).⁷

This skirmish previewed Schmitt’s involvement in seeking to interpret the Weimar Constitution to give the federal government, and in particular the president, the highest hand in decisions regarding the form and substance of the Reich. In 1932, Chancellor Franz von Papen sought to consolidate power in the national government and quell often violent strife instigated by the Communist and Nazi parties by placing Prussia, the Reich’s largest *Land*, under federal control.

Prussia had outlawed both these parties as enemies of the Weimar constitution. The Papen government took this opportunity to make use of the Weimar Constitution’s Article 48, which broadly speaking gave the government emergency powers to, among other things, exercise control over *Länder* using armed force when their governments failed to follow Reich statutes or the Constitution, and to use armed force more generally and suspend constitutional provisions when public security and order were threatened. Schmitt provided legal advice and advocacy supporting Papen’s action, arguing that what appeared to be words of limitation in Article 48 restricting the number of constitutional provisions that could be suspended to an enumerated few were in fact more exemplary, and not meant to constrain the Chancellor’s imposition of martial law when internal strife threatened the Reich.

Schmitt argued the issue before the German constitutional court, and though the court ultimately rejected his arguments, it held in a somewhat incoherent ruling that both the Reich and Prussian governments’ positions had some merit. On the Prussian side, the court held that Papen’s suspension of its government was unconstitutional; on the Reich side, the

⁷ Ibid. 139.

court held that Papen's imposition of a commissar to rule Prussia on the Reich's behalf was constitutionally permitted. Nonetheless, despite the defeat of Schmitt's maximal position, the outcome of the case provided legitimacy for later power grabs by Adolf Hitler and led to Schmitt's famous sobriquet, "Crown Jurist of the Third Reich."⁸

In the months following the court's October 1932 ruling in *Preussen contra Reich* (Prussia versus the Reich), Hitler's Nazi party rose to power through significant popular support at least in part influenced by the violent techniques of the party's military organ, the SA. Following the 27 February 1933 Reichstag fire, and the subsequent destruction of the scapegoated Communist party, Schmitt apparently abandoned any reservations he had previously entertained about national socialism and embarked on a course of supporting Nazi rule.⁹ On 1 May 1933, Schmitt queued up in a long line (as did Martin Heidegger on the same day) to apply for Nazi party membership, though there is little evidence that his career would have been endangered by his failure to do so.¹⁰

Membership certainly did not hurt Schmitt's employment prospects, however. Shortly after joining the party, Schmitt moved to Cologne and effectively unseated his Jewish academic rival Hans Kelsen at Cologne University. He subsequently began to produce works of increasingly anti-Semitic and pro-Hitler content seemingly designed to bolster his reputation as a friend of the Nazi party and its government.¹¹ In March of 1933, Schmitt had been called to serve in the Prussian State Council (*Staatsrat*) and accepted the appointment. He found himself now close to the center of Nazi Power, and in particular

⁸ See *ibid.* 164-70.

⁹ See *ibid.* 176-77.

¹⁰ *Ibid.* 181.

¹¹ *Ibid.* 181-83.

had the personal support of Hermann Göring. He soon returned to Berlin to become a full professor at the University there.

Schmitt did not remain in the party's good graces long, however. In 1936, the SS magazine *Das Schwarze Korps* (*The Black Corps*) attacked Schmitt for his Catholic background, alleged opportunism in joining the Nazi party relatively belatedly, and acquaintances with Jewish scholars, all despite Schmitt's having shortly before organized a conference to repudiate Jewish influences on German legal scholarship.¹² Schmitt was protected from further SS interference by Göring, but while he maintained his academic position in Berlin and remained a member of the ineffectual *Staatsrat*, he effectively withdrew, both practically and in terms of his published work, from participation in the Nazi government thereafter.¹³ Most of Schmitt's research in the later years of World War II concerned international relations rather than domestic constitutional theory, and in 1943 and 1944 he frequently lectured abroad on international legal theory.¹⁴

In the war's waning days, as the Soviet Red Army encircled Berlin, Schmitt like many older Germans was mobilized to defend the city as an air-raid warden.¹⁵ Upon the capture of Berlin, Schmitt was initially arrested by the Red Army on 30 April 1945, but was released after being interrogated for a few hours. He was again arrested in the autumn of 1945 and held and interrogated by the American army for about a year, released in autumn of 1946, and rearrested in March 1947 as a possible Nuremberg Trials defendant after claiming as his

¹² Jan-Werner Müller, *A Dangerous Mind: Carl Schmitt in Post-War European Thought*. (New Haven, CT: Yale University Press, 2003), 39-41.

¹³ Balakrishnan, *The Enemy*, 205-07.

¹⁴ *Ibid.* 246.

¹⁵ *Ibid.* 252.

profession that of a “freelance scholar.” After further interrogation, he was again released and returned to Plettenberg in May 1947.¹⁶

“Thinking that he, too, had in his own way been victimized by the Nazis, Schmitt was surprised to be arrested . . . and held . . . as a potential defendant at Nuremberg.”¹⁷ As a result, he became increasingly embittered against his American captors as well as returning Jewish émigrés during his detention.¹⁸ He refused ultimately to sign a de-Nazification certificate, and as a result was barred from holding any academic position in Germany thenceforth.¹⁹ He instead entered semiretirement in Plettenberg at a home he named San Casciano in apparent tribute to Machiavelli’s exile home, and continued to engage in academic life informally with the support of students and intellectual friends.²⁰ He died in 1985 at age 96.²¹

Schmitt’s Unsystematized Thought

Schmitt’s work was what today’s political scientists would call problem driven. Most of his writing addressed concrete political circumstances, domestic or international, of his day. In particular, “Schmitt [was] basically interested only in situations and problems in which he participate[d] personally and to which his fate [was] linked.”²² Moreover, “[t]he

¹⁶ Müller, *Dangerous Mind*, 39-47.

¹⁷ Balakrishnan, *The Enemy*, 254.

¹⁸ Ibid. 254.

¹⁹ Ibid. 255.

²⁰ Balakrishnan, *The Enemy*, 260. San Casciano is also an allusion to the scholar martyred when his students stabbed him to death with their pens. Müller, *Dangerous Mind*, 54.

²¹ Tracy B. Strong, “Foreword: Carl Schmitt and Thomas Hobbes: Myth and Politics,” in *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, by Carl Schmitt, trans. George Schwab and Erna Hilfstein. (Chicago: University of Chicago Press, 2008), viii. Balakrishnan incorrectly claims that Schmitt died in 1983 at age 95. Balakrishnan, *The Enemy*, 260.

²² George Schwab, *The Challenge of the Exception: An Introduction to the Political Ideas of Carl Schmitt between 1921 and 1936*, 2nd ed. (New York: Greenwood Press, 1989), 27.

themes [Schmitt] explored, the idioms he employed and the range of his references defy — even wilfully transgress — the disciplinary classifications of even the traditional era in which he lived, let alone those of contemporary *Homo academicus*.²³ Because of these factors, identifying systematic or consistent ideas across the temporal range of Schmitt’s thought is difficult,²⁴ a fact routinely noted by those who interpret him — detractors, adherents, and neutral critics alike. It is “widely acknowledged” according to Ulrich Preuss, that “Schmitt was an ‘occasionalist’ thinker who did not elaborate a theoretical system.”²⁵

This causes specific problems for applying Schmitt’s theory, especially when one borrows from multiple texts. Schmitt’s concepts do not readily translate in the same ways throughout his oeuvre. His critique of the concept and practices of liberalism has been denounced as inconsistent.²⁶ His distinctions between normal and emergency acts from his 1921 work *Die Diktatur*, discussed below, shift so far by his 1932 work *Legality and Legitimacy* that it becomes “almost impossible to recognize when he is discussing normal constitutional operations and when he is discussing emergency ones.”²⁷ Indeed, Schmitt’s own critique of bodies of thought without clear and consistent positions, apparent in his chiding romanticism for lacking definite content, would seem to apply as well to his work as a whole.²⁸ One further set of problems caused by Schmitt’s unsystematized and problem-driven thought is that it is easily put to use for a wide range of causes or hijacked by

²³ Balakrishnan, *The Enemy*, 255

²⁴ *Ibid.* 3.

²⁵ Ulrich K. Preuss, “Political Order and Democracy: Carl Schmitt and His Influence,” in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 156.

²⁶ Robert Howse, “From Legitimacy to Dictatorship — and Back Again: Leo Strauss’s Critique of the Anti-Liberalism of Carl Schmitt,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 60.

²⁷ John P. McCormick, “The Dilemmas of Dictatorship: Carl Schmitt and Constitutional Emergency Powers,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 235.

²⁸ Balakrishnan, *The Enemy*, 22.

adherents to multiple and often opposed points of view. “Schmitt’s insights [can] be selectively appropriated and normatively reversed” by subsequent thinkers.²⁹ Because of its antiuniversalist and occasionalist qualities, and inherent antinormativity, Schmitt’s thought has been subject to takeover by racist categorizations.³⁰ Schmitt has also, in part because his thought is so mutable, come into fashion on the political left.

Ultimately, these facts make it important not to confuse interpretation of Schmitt with appropriation of his ideas for purposes beyond his intent (assuming one can identify such intent with any certainty).³¹ This dissertation primarily appropriates Schmitt, and in many ways clearly beyond or outside his intent, as I will note as the argument unfolds. Doing so, however, necessarily will involve some attempts to understand Schmitt first on his own terms, and this dissertation is to that degree interpretive. I believe that appropriating Schmitt is nonetheless on a deeper level consistent with his intent, since it involves a commitment to “eternal possibility.” I thus agree with Heinrich Meier that Schmitt’s political theology, once deployed by him, can be “used as a concept of self-determination and self-description by political theologians who reject Schmitt’s political options and do not share *his* faith.”³²

Distancing oneself from Schmitt’s political commitments, given his membership in the Nazi party and continuing post-war anti-Semitism, is something of a banal ritual among those who study him at all approvingly. On the other hand, scholars such as David Dyzenhaus are at pains to demonstrate a continuity in Schmitt’s thought from his seminal Weimar works (such as *Political Theology* and *The Concept of the Political*, the primary two texts

²⁹ Müller, *Dangerous Mind*, 238.

³⁰ Ibid. 43.

³¹ Balakrishnan, *The Enemy*, 8.

³² Heinrich Meier, *Carl Schmitt and Leo Strauss: The Hidden Dialogue*, trans. J. Harvey Lomax. (Chicago: University of Chicago Press, 1995), xv.

examined here), through his Nazi party years, even while acknowledging Schmitt's deliberately unsystematic thought.³³ Though I do not believe it to be centrally related to this dissertation, Schmitt's Nazi past is always in question and deserves at least an attempt at an answer here.

Schmitt's Politics

The question of Schmitt's membership in the Nazi party, his participation in that party's governance of Germany before and during World War II, and the relationship of both of these to his theoretical commitments arises in part because of his early research into the nature of dictatorship, which presaged the emergency legislation and political actions that ushered in the Nazi era. In *Die Diktatur*, which has yet to be translated into English, Schmitt famously outlined a distinction between commissarial dictators, who are commissioned to defend existing constitutions in times of emergency through extraordinary means (that is, means that are extralegal in light of normally operative law), and sovereign dictators.³⁴ Because a commissarial dictator is tasked with defending the constitution, he acts to maintain republican institutions. Such a dictator differs from a sovereign dictator in that the latter is empowered, again through extraordinary, extralegal means, to end an old constitutional order in favor of a new one and dissolve existing republican institutions.³⁵ Schmitt's critics argue that this distinction, from which even Schmitt moved away in later years, is untenable — that it is ultimately impossible in practice to police the boundary

³³ David Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*. (Oxford, UK: Oxford University Press, 1997), 39, 41.

³⁴ Balakrishnan, *The Enemy*, 29.

³⁵ *Ibid.* 32.

between commissarial and sovereign dictatorships, and that the former inevitably become the latter, as arguably occurred at Weimar's end.³⁶

Did Schmitt intend to deploy a substantive theory of sovereign dictatorship's inevitability? Some of his critics insist that despite his development of the idea of commissarial, republic-preserving dictatorship, "no matter what else he might [have been, Schmitt] was not a democrat."³⁷ Setting aside for the moment the distinction between democracy and a polity governed as a republic under a constitution, this claim too swiftly dismisses Schmitt's reams of theoretical texts on democracy and democratic sovereignty. Moreover, Schmitt's overt critiques of the concrete polities of his day focus not on a rejection of democracy, but rather on the dangers of liberalism and legal positivism. Finally, one must be careful in reading Schmitt not to take him out of context. While *Die Diktatur* was a historical study designed to show that emergency dictatorships need not all threaten constitutional orders, in other works he seems more directly to advocate an authoritarian "qualitative total state." Those latter arguments, however, "applied to Germany only. [Schmitt] did not attempt to provide universal answers to questions pertaining to concrete situations in Germany."³⁸

Nonetheless, Schmitt was politically committed at least at times to highly objectionable leaders, actors, and actions. His anti-Semitism and outright praise for Hitler, demonstrated by his organization of the 1936 conference on eradicating Jewish thought from German legal theory and his 1934 justification of Hitler's political authority and the

³⁶ Giorgio Agamben, *State of Exception*, trans. Kevin Attell. (Chicago: University of Chicago Press, 2005), 8.

³⁷ Tracy B. Strong, "Foreword: Dimensions of the New Debate around Carl Schmitt," in *The Concept of the Political*, by Carl Schmitt, trans. George Schwab. (Chicago: University of Chicago Press, 2007), xx. Schmitt's emphasis on nondemocratic forms of government, observable in much of his work, likely contribute to elements of incoherence and imprecision in his theories of democracy as popular sovereignty. See text accompanying notes 164 to 199.

³⁸ Schwab, *Challenge of the Exception*, 148-49.

murders of the Night of the Long Knives in “*Der Führer schützt das Recht*” (“The Leader Defends the Law”), are reprehensible. Yet I agree that “political thought should not be evaluated on the basis of authors’ personal political judgments. Thus the value of Schmitt’s work is not diminished by the choices he made.”³⁹ Even skeptical interpreters such as David Dyzenhaus have argued that renewed interest in Schmitt is warranted because his criticisms of liberalism are so trenchant that they must be taken account of *especially* by political liberals, even though the substance of his conclusions must often be rejected.⁴⁰

In the end, I agree with interpreters of Schmitt on the political left, such as Chantal Mouffe and Andreas Kalyvas, who seek to learn from Schmitt’s theories and recast them in the service of democratic and sometimes even liberal values. I turn to Schmitt’s reception by the contemporary left in the next section but I also should note one further reason for my willingness to engage the thought of this man who became a Nazi and remained an anti-Semite. I believe that Schmitt was replying honestly when he told his American interrogators in 1947 that he was a mere academic and intellectual adventurer.⁴¹ While one might quibble over whether one can be a “mere” academic, I do believe Schmitt toiled out of a thirst for knowledge and understanding of political realities, rather than in an attempt to remake those realities in his own preferred image. Schmitt wrote in 1941, when World War II’s outcome was still far from certain, that “[w]e are like sailors on a continual journey and no book can be anything more than a logbook.”⁴² Schmitt logged well his own dark journey, and we later sailors ignore his observations at our peril.

³⁹ Paul Hirst, “Carl Schmitt’s Decisionism,” in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 8.

⁴⁰ Dyzenhaus, *Legality and Legitimacy*, xiii.

⁴¹ Müller, *Dangerous Mind*, 43.

⁴² Balakrishnan, *The Enemy*, 240, translating and quoting Carl Schmitt, *Völkerrechtliche Grossraumordnung*. (Berlin: Deutscher Rechtsverlag, 1941), 208.

Schmitt's Reception by the Left

I am not alone in reviling Schmitt's politics while admiring the degree to which his theoretical observations can be mobilized in favor of popular sovereignty and political liberalism.⁴³ Beginning in the late 1960s, Schmitt first began to receive widespread and close attention from leftist theorists in Germany and Italy, and more recently has achieved scholarly notoriety on the left in the United States.⁴⁴ Even before then, Schmitt had been followed in the 1920s by such leftist thinkers as Lukács and Benjamin, and since then post-Marxist leftists rediscovered him in the 1990s.⁴⁵ And while Tracy Strong has argued that left-leaning political thinkers who have adopted Schmitt's theories have done so selectively, "introduc[ing] elements of democracy by pluralizing his notion of sovereignty and suggesting that the decision about the exception is a decision *each* person can make,"⁴⁶ such selective appropriation is effectively invited by the fact that once decoupled from their concrete circumstances, Schmitt's observations do not lead inevitably to any particular political results. Just as Marxist theorist Mario Tronti could insist that Schmitt's commitments to right-wing politics and saving the capitalist state were irrelevant to the usefulness to the left of his criticisms of parliamentary democracy,⁴⁷ so too is Schmitt seen as increasingly relevant to "debates in contemporary Anglo-American legal theory that are fast becoming more like

⁴³ The content of the terms "left" and "liberal" here is admittedly imprecise. The discussion below of Schmitt's views on liberalism will provide some helpful context, but in general liberalism should be understood here to include commitments to limited government and individual rights, in particular the subordination of decisional sovereignty to the rule of law, and commitments to political and economic equality as well as emphasis on the well-being of humans — collectively or individually — over the well-being of institutions, political or otherwise. These values, of course, are not universally shared by those who consider themselves to be, or whom others consider to be, on the political "left."

⁴⁴ Balakrishnan, *The Enemy*, 7-8. See also Joseph W. Bendersky, "Introduction: The Three Types of Juristic Thought in German Historical and Intellectual Context," in *On the Three Types of Juristic Thought*, by Carl Schmitt, trans. Joseph W. Bendersky. (Westport, CT: Praeger, 2004), 3, noting that an international resurgence of interest in Schmitt's thought began in the 1980s.

⁴⁵ Müller, *Dangerous Mind*, 169.

⁴⁶ Strong, "Dimensions of the New Debate," xix.

⁴⁷ Müller, *Dangerous Mind*, 178-79.

the debates of Weimar” in terms of identifying problems inherent in liberalism and legal positivism.⁴⁸

Apart from its malleability, what attracts leftists to Schmitt’s theorizing? Perhaps it is their proximity along some dimensions to the political thought of many on the right: “Inasmuch as the goals of the political right often converge with those of the political left,” especially in terms of acquiring political power at the expense of one’s opponents and of exercising it beyond liberal rule-of-law constraints “it is not surprising that the left too has turned to Schmitt.”⁴⁹ Perhaps it is because of specific components of his thought, such as the argument that all constitutional systems are constituted by external power arrangements, an argument that directly confronts liberalism’s claim that constitutions are grounded in contractual orders.⁵⁰ Though she is at pains to distinguish herself and others from “some kind of ‘left-wing Schmittianism’ that would agree with Schmitt that liberalism and democracy are in contradiction, and conclude that liberalism is therefore to be discarded,”⁵¹ Chantal Mouffe, who is nonetheless often labeled a “left-Schmittian,” argues that “political theorists must be willing to engage in the arguments of those who have challenged the fundamental tenets of liberalism,” including Schmitt in particular.⁵²

Notably, in connection with Strong’s criticism above, Mouffe acknowledges that in repurposing Schmitt’s theories she occasionally does violence to his intent, questions, and

⁴⁸ Dyzenhaus, *Legality and Legitimacy*, 16.

⁴⁹ Schwab, *Challenge of the Exception*, vi.

⁵⁰ Grigoris Ananiadis, “Carl Schmitt and Max Adler: The Irreconcilability of Politics and Democracy,” in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 118.

⁵¹ Chantal Mouffe, “Introduction: Schmitt’s Challenge,” in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 5.

⁵² Chantal Mouffe, “Carl Schmitt and the Paradox of Liberal Democracy,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 159.

concerns.⁵³ For instance, Mouffe argues that though valuable lessons can be learned from the contradictions that Schmitt identifies between liberalism and democracy, we need not accept his central conclusion that the two are mutually incompatible.⁵⁴ In sum, many political thinkers on the left who have adopted Schmitt's views generally have done so to confront his challenges head on, in an attempt to rescue liberal democracy from what Schmitt sees as its inherent contradictions, while others have used Schmitt to show that those contradictions cannot be resolved, and side with him in favor of popular sovereignty, however dangerous, over liberal rule-of-law commitments. This dissertation, in line with the former attempts, seeks to show how preservation of democratic citizens' sovereign prerogatives in the context of jury nullification can ameliorate problems inherent to positivist, legalistic liberalism without utterly abandoning the rule of law. In the following sections, I examine Schmitt's views on legal positivism and liberalism and show how these played out in the context of his reactions to the Weimar Republic.

Schmitt on Positivism, Liberalism, and Weimar

Schmitt and Legal Positivism

Legal positivism, like most political labels, can refer to a variety of strains of thought. Most relevant to understanding Schmitt, however, is the new legal positivism that arose in Germany in the 1870s, which "sought to elevate[] the study of public law to the status of a proper academic discipline by eliminating now discomfiting political problems from the field."⁵⁵ In Weimar Germany, the strongest and most creative exponent of positivism was Schmitt's Jewish rival, Hans Kelsen. Building on Kant's theory, Kelsen posited that all

⁵³ Ibid. 163.

⁵⁴ Ibid. 164.

⁵⁵ Balakrishnan, *The Enemy*, 87.

constitutional systems are centered on basic norms, which themselves come about “solely [as] mental construction[s], [and] products of thought.”⁵⁶ All talk of the legitimacy of constitution makers and constitutions was, for Kelsen, ideological, and thus of no interest to legal science.⁵⁷ Kelsen thus sought to drain law of political content, in the sense of debates about who was properly entitled to found a constitution.

In this sense, both Kelsen and Schmitt understood popular sovereignty (or, for that matter, monarchical or other forms of sovereignty), in terms of the power to establish new basic norms, beyond legality. They part company in that for Schmitt the question of legitimacy is also central and suffuses the legal with the political.⁵⁸ Kelsen indeed had to acknowledge that the basic norm might have to come “from the naked subjective will of an individual or a group of individuals who had the force to overthrow the previous basic norm and impose a new one,” and that as a result, “the legal system, which Kelsen sought to insulate from power,” would turn out to be “firmly rooted in a purely extralegal political act.”⁵⁹ Because of this, perhaps surprisingly, Kelsen’s legal positivism runs the same risk that has been identified with Schmitt’s unsystematized thought: it can suborn any basic norm, regardless of content, and is thus just as open to use by dictators or enemies of civil liberties — in short, antiliberals — as by democrats or civil libertarians more closely affiliated with liberalism itself.⁶⁰ At least Schmitt’s theory, though equally capable of use by proponents of any number of political values, allows for some sovereign actor to inquire into, evaluate, and

⁵⁶ Andreas Kalyvas, *Democracy and the Politics of the Extraordinary: Max Weber, Carl Schmitt, and Hannah Arendt*. (Cambridge, UK: Cambridge University Press, 2008), 104.

⁵⁷ *Ibid.* 105.

⁵⁸ *Ibid.* 106.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* 112.

act upon the normative elements of constitutional and juridical systems, and indeed not only acknowledges but highlights the significance of such sovereign action.⁶¹

Because Kelsen's theory is, at a minimum, agnostic as to the legitimacy of various sovereign founders and constitutional orders, preferring rather to take existing orders as given and work through their legal consequences from there, it necessarily "detaches the legal order and the state from the needs and expectations of the participants."⁶² It thus cannot and will not differentiate among constitutional orders based upon their legitimacy.⁶³ For this and other reasons, Kelsen's legal positivism was seen as increasingly untenable as a means of channeling power given the emergence of sociological perspectives on law, and greater attention to law's use as a tool of power, even before World War I.⁶⁴ Moreover, and particularly relevant to the question of jury nullification as a potential democratic corrective for moribund law, in the course of casting law as objective, detached norms, positivists such as Kelsen make law abstract, and "[i]nstead of being broad and flexible, law becomes rigid."⁶⁵

This happens, for instance, in criminal law because positivism seeks to elevate generally applicable rules above concrete instances, such that all acts that might violate the law are anticipated (however incompletely or inaccurately because generally) in advance. So, for instance, particular forms of self-defense might not appear in the abstract as defenses to murder charges according to preexisting law, but in a case tried before a jury able to examine concrete facts of self-defense might provoke an acquittal on the basis that a conviction

⁶¹ Ibid. 115. "From Schmitt's perspective, which is the perspective of the participant, a basic norm is valid not in the sense of a logical-transcendental presupposition, but rather because it has emanated from those directly affected by it." Ibid.

⁶² Ibid. 107.

⁶³ Ibid. 112.

⁶⁴ Balakrishnan, *The Enemy*, 88.

⁶⁵ Bendersky, "Three Types of Juristic Thought," 21.

would be unjust. “Ought remains undisturbed by is” in such a system, which for Schmitt means that positive criminal law is divorced from the world it is meant to regulate, and becomes especially so over time as unanticipated concrete contexts proliferate.⁶⁶ Seeing these problems, in particular in the context of Weimar, Schmitt deployed his theoretical intervention.

Though as I have outlined, Schmitt’s theoretical work is far from systematic or internally consistent across multiple texts, one of his recurring arguments is that “all social and legal problems are, potentially at least, political problems, which involve conflict over the monopoly of power,” an argument that not coincidentally endears him to left-oriented theorists who seek to highlight power’s role in seemingly politically neutral operations, e.g. of law.⁶⁷ This first demonstrates that for Schmitt law and politics are analytically distinct categories, in that he refers to them as discrete before arguing that the former necessarily involve the latter. Indeed, in his view, pairing politics and law, just like pairing politics and economy or politics and morality, serves to highlight the distinction between the category of the political (to be discussed at length in Chapter 5) and other categories of social organization.⁶⁸ But the fact that politics and law are analytically distinct does not mean that there is no political moment inherent in legal determinations. Schmitt is particularly emphatic that at crucial junctures, law devolves into politics. “[W]hen Schmitt said there is a political moment in every [legal] judgment, it was to make the point that this fact cannot be assimilated within the positivist system. . . . [Rather,] each judgment contains a necessarily

⁶⁶ Dyzenhaus, *Legality and Legitimacy*, 66.

⁶⁷ Jeffrey Seitzer and Christopher Thornhill, “An Introduction to Carl Schmitt’s *Constitutional Theory*: Issues and Content,” in *Constitutional Theory*, trans. and ed. Jeffrey Seitzer. (Durham, NC: Duke University Press, 2008), 45.

⁶⁸ Carl Schmitt, *The Concept of the Political*, trans. George Schwab. (Chicago: University of Chicago Press, 2007), 20.

personal moment of decision.”⁶⁹ This is so for Schmitt because although legal positivists such as Kelsen claim that it is not the state but the law that exercises power,⁷⁰ legal ideas cannot translate themselves independently into action, as they cannot specify in advance all potential situations to which they might apply, or how or by whom they must be applied.⁷¹ Consequently, for any given legal system, “[w]hat matters for the reality of legal life is who decides.”⁷²

This core theoretical commitment of Schmitt’s, with which I am in deep agreement, makes it possible for him to critique Kelsen’s notion of a pure theory of law — a kind of self-regulating system that requires no political action — as a tautology, according to which law “is valid when it is valid and because it is valid.”⁷³ Or as Schmitt put it in a somewhat different context, in the pure *Rechtsstaat* — that is the classic bourgeois constitutional state with a limited government and a positivist rule-of-law-not-men outlook — “the state is law in statutory form; law in statutory form is the state. Obedience will be granted only to the statute There is only legality, not authority or commands from above.”⁷⁴ For Schmitt, on the contrary, law, though analytically distinct from politics, is not a preexisting normative obligation, but rather a concrete, factual component of being in a state that results from political decisions.⁷⁵ Law cannot, on Schmitt’s view, be divorced from politics in practice,

⁶⁹ Dyzenhaus, *Legality and Legitimacy*, 121.

⁷⁰ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty*, trans. George Schwab. (Chicago: University of Chicago Press, 2005), 23.

⁷¹ *Ibid.* 31.

⁷² *Ibid.* 34.

⁷³ Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer. (Durham, NC: Duke University Press, 2008), 64.

⁷⁴ Carl Schmitt, *Legality and Legitimacy*, trans. and ed. Jeffrey Seitzer. (Durham, NC: Duke University Press, 2004), 18.

⁷⁵ Agostino Carrino, “Carl Schmitt and European Juridical Science,” trans. Jorge del Rio Fernandez, in *The Challenge of Carl Schmitt*, edited by Chantal Mouffe. (London: Verso, 1999), 183.

and a constitution in terms of procedure or moral values cannot entirely check politics.⁷⁶ It is thus clear that Schmitt rejects legal positivism's attempt to sever politics from law in order to cement the latter's independence from human discretion and power.

Schmitt and Liberalism

Schmitt is “arguably alone” among political theorists “in having developed a body of theoretical work which focuses directly” on such major contemporary issues as “the hollowing out of liberal democracy” and “the nature of war and peace in a New World Order.”⁷⁷ He held liberal democracy to be an inherently contradictory political form, impossible to achieve with any stability in practice.

One of Schmitt's central theses is that “democracy negates liberalism and liberalism negates democracy.”⁷⁸ This contradiction arises because, for Schmitt, democracy as a concept refers to the sovereign exercise of power by the people, and sovereignty inheres in the power to make ultimate decisions for a polity. Liberalism, on the other hand, regulates political action for the purposes of limiting state power in order to safeguard individual (Schmitt would say mostly bourgeois individual) rights, and thus necessarily seeks to replace the sovereign substantive will of the people with the formal will of parliament or of constitutional law as it stands, rather than as it might be reconfigured through the exercise of popular sovereignty.⁷⁹ The rise of the liberal *Rechtsstaat* or “rights state” was, in Schmitt's view, a reaction to the leviathan state form that seeks to limit the leviathan's reach by carving out a private sphere of individual rights. In doing so, liberalism makes the state's exercise of

⁷⁶ Seitzer and Thornhill, “Introduction,” 13.

⁷⁷ Balakrishnan, *The Enemy*, 261.

⁷⁸ George Schwab, introduction to *Political Theology: Four Chapters on the Concept of Sovereignty*, by Carl Schmitt, trans. George Schwab. (Chicago: University of Chicago Press, 2005), xxxvii.

⁷⁹ Dyzenhaus, *Legality and Legitimacy*, 59.

power “indirect,” and “veil[s] the unequivocal relationship between state command and political danger, power and responsibility, protection and obedience, and the fact that absence of responsibility associated with indirect rule allows the indirect powers to enjoy all of the advantages and suffer none of the risks entailed in the possession of political power.”⁸⁰ In Schmitt’s view, “liberalism does not reject the state, but transforms it into ‘the rule of law’ [a central *Rechtsstaat* feature] and as a consequence dissolves the political into ethics and economics.”⁸¹ For Schmitt, “[t]he mistake of rule-of-law liberalism lies in its outright denial of sovereignty. But sovereignty, never fully repressed, always finds channels for its manifestation.”⁸²

Schmitt’s understanding of sovereignty centrally involves the ability of some exerciser of political power to make ultimate decisions for a polity, in particular in emergency or exceptional situations. Sovereignty, whether held by democratic actors or not, is thus threatened by liberal constitutionalism in the sense that the latter seeks to regulate the exception by spelling out in detail under what exceptional circumstances law suspends itself in order to deal with unforeseen situations. This goal is for Schmitt definitionally unachievable, precisely because at least some unforeseen emergencies are *a priori* unforeseeable.⁸³ Moreover, liberalism, which ultimately cannot succeed in preventing sovereign decisions, in seeking to do so merely delays or disguises them, with potentially negative consequences for political order. “The essence of liberalism is negotiation, a

⁸⁰ Carl Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*. trans. George Schwab and Erna Hilfstein. (Chicago: University of Chicago Press, 2008), 73-74.

⁸¹ Ellen Kennedy, “*Hostis Not Inimicus: Toward a Theory of the Public in the Work of Carl Schmitt*,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 95.

⁸² Renato Cristi, “Carl Schmitt on Sovereignty and Constituent Power,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 184.

⁸³ Schmitt, *Political Theology*, 14.

cautious half measure, in the hope that the definitive dispute, the decisive bloody battle, can be transformed into a parliamentary debate and permit the decision to be suspended forever in an everlasting discussion.”⁸⁴ Thus Schmitt’s pithy remark that liberalism, when confronted with the question “Christ or Barabbas?” responds “with a proposal to adjourn or appoint a commission of investigation.”⁸⁵ In short, out of a desire to limit the powers of government and thus bolster bourgeois rights, liberalism refuses to decide upon important issues, in particular exceptional circumstances, putting statutory law in a democracy in increasing tension with the popular will.⁸⁶

Yet liberalism’s attempt to dissolve the political, including the politics of the *demos*, which for Schmitt is certainly a viable form of politics,⁸⁷ is untenable, not only definitionally in the sense that law cannot foresee all exceptions or emergencies, but also because the liberal attempt to carve out law as a zone free of politics constructs political spaces that, because they are outside of law, prevent law from achieving hegemony over the political. As Paul Hirst explains, classical liberalism implies that sovereignty is limited by a constitutive political act that occurs outside of normal politics (in Kelsen’s terms, the establishment of a basic norm). Politics on this view cannot be dispensed with, though this is rule-of-law liberalism’s goal — to render the state a legal entity, where law decides, and political power is thus cabined. In seeking to create such a rule-of-law state, liberalism requires a moment prior to the state at which sovereignty founds it, and then ends.

⁸⁴ Ibid. 63.

⁸⁵ Ibid. 62.

⁸⁶ I discuss the constructed nature of the people, and by implication the popular will, in a subsequent chapter. See Chapter 3, text accompanying notes 115 to 144. But however much the popular will is a fiction or stand-in for the actual compiled (or diverse) desires of the existing population of a state as whole, it is nonetheless a concept with a content that comes closer to reflecting the desires of actual people at a given moment than static law ever can.

⁸⁷ Heinrich Meier, *The Lesson of Carl Schmitt: Four Chapters on the Distinction between Political Theology and Political Philosophy*, trans. Marcus Brainard. (Chicago: University of Chicago Press, 1998), 139.

This is visible in the fact that legal orders inevitably construct spaces outside themselves that are centrally political, for example the extralegal space available for resisting the government and potentially developing a new constitutional order or basic norm. “A constitution can survive only if the [initial] constituting political act is upheld by some political power.”⁸⁸ Thus, Hirst agrees with Schmitt *contra* Kelsen that “[l]aw cannot itself form a completely rational and lawful system; the analysis of the state must first make reference to those agencies which have the capacity to decide on the state of exception.”⁸⁹ Liberalism in terms of the rule of law, which limits not only government power but also the people’s power to constitute and reconstitute government, serves as the means by which legal positivism seeks to subsume sovereign decisionism. Legal positivism avoids sovereign decisions; liberalism deploys legal positivism to limit government by marginalizing the political — a task that in Schmitt’s view is doomed to failure. Thus a key problem with liberalism for Schmitt is its “fear of the constituent power of the multitude, that is, of extraordinary [democratic] power.”⁹⁰

Apart from its internal contradictions, Schmitt argues that liberalism is dangerous in part because of its postponement and refusal to acknowledge or adequately address exceptional circumstances. Schmitt criticizes liberalism “for attempting to systematize all of political phenomena,”⁹¹ not only because such systematization is itself inherently problematic, but also because liberalism’s denial of the exception puts political leaders acting under crisis conditions in the bind of having either to stand by as danger envelops the polity or to act in illegitimate ways while trying to pass such action off as legitimate, thus

⁸⁸ Hirst, “Schmitt’s Decisionism,” 11.

⁸⁹ Ibid. 13.

⁹⁰ Kalyvas, *Politics of the Extraordinary*, 269.

⁹¹ McCormick, “Dilemmas of Dictatorship,” 239.

undermining law's claim to legitimacy just as Abraham Lincoln famously did, for instance, by suspending *habeas corpus* rights during the US Civil War.⁹² And even if a Lincoln is able to act in these ways and still preserve the state against its enemies, liberalism, by embracing the argument that the truth can be "found through an unrestrained clash of opinion and that competition will produce harmony," adopts an "eternal competition of opinions" that amounts to "renouncing a definite result."⁹³ In other words, not only does liberalism undermine its own legitimacy in times of crisis, but it is not well suited to act as swiftly and decisively as such crises demand in order to achieve the state's highest end of protecting its citizens in return for their obedience. In order to secure individual rights, liberalism operates antithetically to politics, but only reactively: it does not propose any positive counterpolitical theory, but only opposes political uses of power in every realm in which it encounters them. Liberalism thus "makes of the state[']s] . . . institutions a ventilating system."⁹⁴ That is, enmity within the state, rather than being acknowledged or even mobilized to strengthen the state in its protective functions, is sublimated into endless talk, without result. In times of existential crisis, liberalism's ventilation cannot adequately handle internal political pressures.

Contextualizing Schmitt's critique in pragmatic terms helps demonstrate that his concerns with liberalism do not amount to a complete embrace of authoritarianism. I thus disagree here with commentators such as Heiner Bielefeldt who claim that "Schmitt systematically undermines the liberal principle of the rule of law" so that it can "be replaced

⁹² Ibid. 238, 249 n. 34.

⁹³ Carl Schmitt, *The Crisis of Parliamentary Democracy*, trans. Ellen Kennedy. (Cambridge, MA: MIT Press, 1985), 35.

⁹⁴ Schmitt, *Concept of the Political*, 70.

by an authoritarian version of a democracy.”⁹⁵ Rather, Schmitt’s critique of liberalism is an attempt to counter an Enlightenment-era overcompensation. Enlightenment liberal thinkers were disenchanted with a then-dominant consensus favoring prudential and discretionary exercises of raw political power in exceptional circumstances, and were concerned in particular with the continuation of those exercises after such circumstances receded and the accompanying tendency of decisional power to become increasingly abusive and arbitrary. They sought to erect bulwarks against such power through liberal proceduralism, limitations on government power, and clearly delineated individual rights in the private sphere.⁹⁶ Schmitt’s conservative reaction to this “seeks to cut through the web of liberal procedures and indirect action . . . and to end the endless liberal postponements of final decisions in favour of what is both the ultimate and the immediate.”⁹⁷

Beyond these pragmatic concerns, however, Schmitt also foresaw a deeper set of threats emanating from liberalism. In liberalism as well as totalitarianism, Schmitt anticipated a tendency toward “depoliticization as a dehumanization of the other (who loses his identity and becomes no more than a common criminal).”⁹⁸ This claim might seem counterintuitive: after all, does not liberalism expressly seek to safeguard individual rights, thus making others, who hold those rights, expressly equally human? Schmitt’s focus here is on the mechanical nature of liberalism’s emphasis on the rule of law and attempt to avoid the political, which gives it the potential to turn the other into the enemy effectively without

⁹⁵ Heiner Bielefeldt, “Carl Schmitt’s Critique of Liberalism: Systematic Reconstruction and Countercriticism,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 23.

⁹⁶ McCormick, “Dilemmas of Dictatorship,” 237.

⁹⁷ Müller, *Dangerous Mind*, 11.

⁹⁸ Jorge E. Dotti, “From Karl to Carl: Schmitt as a Reader of Marx,” trans. Daniel Hahn, in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 107. I will return to the question of the criminal enemy in Chapters 5 and 6.

human review or choice. That is, the rule of law makes criminal enemies without human intervention, and indeed suppresses legal actors' urges and ability to intervene when enmity is not appropriate. Thus Schmitt saw in liberalism, as in communism in practice in the Soviet Union, a tendency toward a world in which the political is subsumed in "organizational-technical" and "economic-sociological" tasks.⁹⁹ He also discerned in liberalism's bourgeois roots a move toward a culture of falsely guaranteed security. Rather than protect citizens from enemies, liberalism purports to protect citizens from the state, while at the same time making the state unable to provide the security for which liberalism creates a high demand. Thus for Schmitt "[t]he bourgeois is the promoter and ultimate fulfillment of the 'age of security' all in one."¹⁰⁰

Some Schmitt scholars have argued that, in insisting on seeing democracy and liberalism as inconsistent and mutually incompatible, Schmitt obscured an important feature of the two original modern liberal democracies, the outcomes of the American and French revolutions. Specifically, they claim, Schmitt overemphasizes the sovereign decision of the people to constitute themselves democratically at the expense of both revolutions' enshrining protections of individual liberty in their constitutions.¹⁰¹ While it is true that Schmitt clearly favors a decisive sovereign, popular or otherwise, over the attempt to obviate the exercise of power through decision in order to protect individual rights, Schmitt's position is actually more nuanced and complex, and at the same time not carefully attuned to American or French contexts. In his view, political liberalism is troublesome in part because it claims a legitimacy grounded on a fit between overlapping consensual values: those of a homogeneous sovereign *demos*, and those liberal values enshrined in a society's written

⁹⁹ Schmitt, *Political Theology*, 65.

¹⁰⁰ Meier, *Lesson of Carl Schmitt*, 9.

¹⁰¹ Seitzer and Thornhill, "Introduction," 34.

constitution. This hypothesized fit, for Schmitt, spells the end of politics, because it fosters the wrong kind of homogeneity among the people, “one of bourgeois individuals content to be passive consumers of the space accorded to them by the state.”¹⁰² The touchstone for Schmitt’s claim in this regard was not abstract theoretical analysis of liberal democracies, however, or historical experiments with liberal democracy in general. Schmitt developed his theory of the antithesis between liberalism and democratic sovereignty in the specific context of the Weimar Republic,¹⁰³ and it is to this context that I now turn.

Schmitt in the Context of Weimar

As noted above, Schmitt was intimately involved in the interpretation and use of Germany’s Weimar constitution, in particular during a time of crisis for the interwar Weimar Republic. While his legal advocacy on behalf of the Papen government concerned primarily the government’s emergency powers under Article 48, Schmitt engaged in a broader overall analysis of the Weimar constitution that can be found in many of his theoretical writings, including especially his 1928 work *Constitutional Theory (Verfassungslehre)*. Germany’s adoption after World War I of a “ramshackle” constitution that deliberately avoided resolution of key founding issues, and was overlain on a long and crosscutting tradition of Roman law in Germany, left the Weimar Republic with numerous unresolved issues of constitutional interpretation.¹⁰⁴ Like many other civil law states, and in contrast to such common-law states as Britain and the United States, Germany lacked a long tradition of the study of

¹⁰² David Dyzenhaus, “Putting the State Back in Credit,” in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 83.

¹⁰³ Accord George Schwab, who argues that Schmitt’s claim that liberal states in general ignore the reality and ubiquity of the political is “fallacious,” but agrees that the Weimar Republic did so, significantly imperiling its stability. Schwab, *Challenge of the Exception*, 75-76.

¹⁰⁴ Balakrishnan, *The Enemy*, 3.

sovereignty in connection with the contours of the public-private distinction. Schmitt's work, especially in *Constitutional Theory*, helped fill this gap for Weimar.¹⁰⁵

In turn, living through Weimar significantly changed Schmitt's views. Ever attuned to the concrete contexts in which law and politics subsisted, Schmitt modified for one thing his views as expressed in *Die Diktatur* on the distinction between commissarial and sovereign dictatorships. For Schmitt, the difference between the two arose from the latter's bearing the people's constituent power (*pouvoir constituant*).¹⁰⁶ That is, the sovereign dictator does not merely rule under commission to maintain an existing constitutional order as does the commissarial dictator, but rules by dint of sovereign power — one that in a democracy is ceded to him by the people — to remake a constitutional order and in the meantime to rule in its stead. “Schmitt coined the term ‘sovereign dictatorship’ to designate the provisional legislative authority, exercised in the name of the people, which dissolves an old constitution and enacts a new one. This sort of revolutionary political authority is usually called a ‘constitutional convention,’ ‘constituent assembly,’ or ‘*pouvoir constituant*.’”¹⁰⁷

But while in early works Schmitt insisted on a bright-line distinction between the two, remarking: “Either sovereign dictatorship or constitution; the one excludes the other,”¹⁰⁸ he recognized that in practice the Weimar constitution permitted the Republic's president, even if acting in the mode of a commissarial dictatorship, and even absent popular will or command to do so, to alter the constitution itself in conjunction with a parliamentary majority, thus rendering them together bearers of the *pouvoir constituant*, and therefore

¹⁰⁵ Ibid. 4.

¹⁰⁶ Schwab, *Challenge of the Exception*, 33.

¹⁰⁷ Balakrishnan, *The Enemy*, 36.

¹⁰⁸ Ibid. 41, translating and quoting Carl Schmitt, *Die Diktatur*. (Leipzig: Duncker and Humblot, 1921), 238. Accord Carl Schmitt, *Constitutional Theory*, trans. and ed. Jeffrey Seitzer. (Durham, NC: Duke University Press, 2008), 110.

themselves sovereign rather than the people. This evidence from Weimar, though in general terms simply one more example of that constitution's inherent contradictions, soon led Schmitt to reconsider the firmness of the distinction between commissarial and sovereign dictators, which in later works he tended to blur.¹⁰⁹

The lack of a clean line between commissarial and sovereign dictatorship in the Weimar constitutional scheme was far from the only concern Schmitt had. For Schmitt, the benefit of the law inhered not in its own justice (as it did for instance for Kelsen), but rather in its ability to end (or at least settle for the life of the state) the struggle over justice.¹¹⁰ But the Weimar constitution enshrined a liberal *Rechtsstaat* version of pluralism that allowed parties and interest groups — beholden not to the state as a whole, but to their own fractious constituencies — to compete internally for power, including the power of parliament to rewrite parts of the constitution itself. This pluralism, rooted in the constitutional system, Schmitt saw as tantamount to a barely contained civil war, in which parties and interest groups eviscerated the leviathan state from within.¹¹¹ Schmitt saw pluralism, particularly in the context of Weimar, as an attempt to keep governmental power at a minimum so that it could not disrupt a fragile, trucelike status quo among parties and interests with vastly divergent and often existentially contradictory political views. He thus argued that the Weimar truce would devolve into a radically decentered polity set on the road to catastrophe.¹¹²

¹⁰⁹ Balakrishnan, *The Enemy*, 40.

¹¹⁰ Preuss, "Political Order," 161.

¹¹¹ Balakrishnan, *The Enemy*, 124. Schmitt thus feared and opposed "the development of powerful, partial societies, straddling the faltering boundary line between public and private, and manipulating public opinion as the increasingly decisive source of power, preferring instead the classic sovereign state." Ibid. 80.

¹¹² Ibid. 104.

This conception of Weimar as a kind of slow-moving civil war is vital to understanding Schmitt's seeming advocacy for sovereignty being placed in a single presidential or dictatorial figure. Schmitt's point is not, as is often asserted, that single-person sovereigns are always preferable to democratic sovereignty (though the focus of much of his work seems to indicate a personal preference for such sovereigns in the German context), but rather that when democratic sovereignty is combined with the liberal *Rechtsstaat*, including especially one that divides power among governmental branches and allocates to parliament the power to amend the constitution in the context of an interest-group based multiparty system, the popular will gets ignored or distorted. In that case, some single person, preferably in the executive branch, is best positioned to serve as the guardian of the constitution and thus the people's sovereignty in a democratic state. In this connection, the Weimar constitution was further flawed on Schmitt's view in that it left the guardianship of the constitution in the hands of a constitutional court tasked with deciding disputes about constitutional provisions.¹¹³ We have seen above how well the constitutional court performed in the instance of the Republic's exercise of emergency power over Prussia.¹¹⁴

In the end, Schmitt's concerns about the proper holder of authority to render decisions on constitutional interpretation and crisis situations is consistent with those parts of his theories that advocated democratic popular sovereignty. The Weimar system's central weakness, resulting from the contradictions and flaws noted above, was that it failed to save the German state "from a form of jurisprudence that refused to pose the question of the

¹¹³ See Schwab, *Challenge of the Exception*, 117. On Kelsen's view, to the contrary, the sovereign could not be a single individual, because only a supreme court, exercising positive legal sovereignty, could legitimate such sovereign acts as suspension of a constitutional order during an emergency. Michael Hoelzl and Graham Ward, "Editors' Introduction," in *Political Theology II: The Myth of the Closure of Any Political Theology*, by Carl Schmitt, trans. Michael Hoelzl and Graham Ward. (Cambridge, UK: Polity Press, 2008), 13.

¹¹⁴ See text accompanying notes 7 to 8.

friend and enemy of the constitution,” much less resolve that question.¹¹⁵ Indeed, his *Legality and Legitimacy* was aimed in chief at demonstrating that the emergency powers granted in Article 48 of the Weimar constitution were intended to permit executive bans on such parties as the Nazis and the Communists who, should they rise to power, had vowed to implement their own constitutive political views through constitutional amendment. As enemies of the constitution itself, such parties could properly be resisted by the existing government acting as the constitution’s protector.¹¹⁶ And despite Schmitt’s many criticisms of the Weimar constitution, he wrote especially approvingly of two of its provisions. Both its Preamble and its First Article specified that it, and the power of the Republic under it, derived ultimately from the people as “concrete political decisions” thereof.¹¹⁷ At the very least, Schmitt’s theories at times supported popular sovereignty.¹¹⁸ I turn now to Schmitt’s understandings of sovereignty and democracy, and their relationship to constitutional politics and orders.

¹¹⁵ Schmitt, *Legality and Legitimacy*, 95.

¹¹⁶ John P. McCormick, “Identifying or Exploiting the Paradoxes of Constitutional Democracy? An Introduction to Carl Schmitt’s *Legality and Legitimacy*,” in *Legality and Legitimacy*, by Carl Schmitt, trans. and ed. Jeffrey Seitzer. (Durham, NC: Duke University Press, 2004), xix.

¹¹⁷ Schmitt, *Constitutional Theory*, 111.

¹¹⁸ During the Nazi Reich, of course, Schmitt notably departed from any defense of popular sovereignty, and indeed portrayed it as having been, in that context, “obliterated in substance and simultaneously transvalued into a symbolic code of total domination.” Balakrishnan, *The Enemy*, 185. He now “no longer saw the growing indeterminacy of legal procedure as the disruption of a normal condition,” but instead “believed that the abandonment of fixed rules of legal procedure was a dialectical breakthrough to an order based on the untrammelled imperatives of political necessity.” Ibid. 188. In this way among others, Schmitt’s Nazi-era thought clearly deviated from his writings before and after the Third Reich, whether because honestly but temporarily held or for expediency’s sake.

Sovereignty, Democracy, and Constitutionalism in Schmitt

Sovereignty in Schmitt

In one of his most ambitious theoretical moves, Schmitt sought to reconceptualize sovereignty within the state form. Schmitt argued, with an eye toward Max Weber, that because the modern state was losing its traditional monopoly on legitimate violence, classic theories of sovereignty were no longer adequate to explain how state power functioned and whence it derived.¹¹⁹ We have seen above that Schmitt sought to investigate the meaning and role of the rule of law in connection with political systems, inquiring in part to what degree lawfulness of rule was connected to legitimacy, and under what circumstances.¹²⁰ As we know, Schmitt concluded that law could not be insulated from politics in terms of ultimate decision-making authority vested in human actors.¹²¹ Schmitt's attempt to theorize the content of modern sovereignty led to his seminal work 1922 work *Political Theology* (*Politische Theologie*), in which he identified sovereignty with the political capacity to decide upon both the existence of and the solution to interpretive gaps in existing law and norms with respect to exceptional circumstances.¹²²

Politische Theologie famously opens with the German sentence, “So[u]verän ist, wer über den Ausnahmezustand entscheidet,”¹²³ usually translated into English in accordance with George Schwab's reading: “Sovereign is he who decides on the exception.”¹²⁴ Two translation

¹¹⁹ Balakrishnan, *The Enemy*, 2.

¹²⁰ See text accompanying notes 67 to 76; Balakrishnan, *The Enemy*, 45.

¹²¹ Balakrishnan, *The Enemy*, 45.

¹²² *Ibid.* 45.

¹²³ Tracy B. Strong, foreword to *Political Theology: Four Chapters on the Concept of Sovereignty*, by Carl Schmitt, trans. George Schwab. (Chicago: University of Chicago Press, 2005), xi, quoting the reprint Carl Schmitt, *Politisches* [sic] *Theologie*. (Berlin: Duncker and Humblot, 2004), without citation to page. I cannot account for the errors in Strong's German except to assume charitably that they are typographical rather than scholarly.

¹²⁴ Schmitt, *Political Theology*, 5.

issues immediately present themselves. The first is relatively minor: the German preposition *über* ordinarily means above, but in this context can mean on, upon, or about. Thus in German as well as in Schwab's English representation, the sovereign somewhat ambiguously decides "*whether* there is an extreme emergency as well as *what* must be done to eliminate it."¹²⁵ In the former instance, when the sovereign decides that an exceptional circumstance obtains, she is not identifiable in advance, but rather reveals herself as sovereign by authoritatively declaring the existence of an exception.¹²⁶ Schmitt himself notes that because "[p]ublic order and security manifest themselves very differently in reality" depending upon who decides what they are and when they are in jeopardy, figuring out who is sovereign is in part a function of figuring out who defines authoritatively, in the sense of being capable of implementing that definition decisionally, public order and security.¹²⁷

The second and thornier translation question, in particular for my appropriation of Schmitt's theory in the microsovereign context of jury nullification, involves the precise meaning of *Ausnahmezustand*. In various contexts, even the same translators will sometimes render *Ausnahmezustand* differently. For example, George Schwab, Giorgio Agamben, David Dyzenhaus, and Michael Hoelzl and Graham Ward translate it as "exception" or sometimes "state of exception."¹²⁸ Gopal Balakrishnan, Robert Howse, and John McCormick translate it as "emergency" or "emergency situation."¹²⁹ Renato Cristi variously translates it in the

¹²⁵ Ibid. 7 (emphasis added); accord Dyzenhaus, *Legality and Legitimacy*, 43.

¹²⁶ Dyzenhaus, *Legality and Legitimacy*, 43.

¹²⁷ Schmitt, *Political Theology*, 9-10. Note that this sovereign could potentially be the people, however defined. Citing Tocqueville, Schmitt approvingly opines that in a democracy "the people hover above the entire political life of the state, just as God does above the world, as the cause and the end of all things." Ibid. 49.

¹²⁸ Ibid. 5; Schwab, *Challenge of the Exception*, 42 (noting that "the term 'state of emergency' is preferred in Bonn," then the West German political capital); Agamben, *State of Exception*, 1; Dyzenhaus, *Legality and Legitimacy*, 42; Hoelzl and Ward, "Editors' Introduction," 15.

¹²⁹ Balakrishnan, *The Enemy*, 45; Howse, "Legitimacy to Dictatorship," 61; John P. McCormick, "Dilemmas of Dictatorship," 226.

same essay as “extreme conflict,” “extreme case,” and “exceptional circumstances.”¹³⁰ And Joseph Bendersky translates it as “exceptional case.”¹³¹ In some instances, Schmitt’s English translators comment further on their linguistic choices. Heiner Bielefeldt claims that while *Ausnahmezustand* can correctly be translated as “state of exception,” its true meaning in Schmitt’s usage is “state of emergency.”¹³² Schwab elaborates on and limits the scope of his translation in *Political Theology* by remarking in a translation note that “a state of exception includes any kind of severe economic or political disturbance that requires the application of extraordinary measures.”¹³³ Bendersky refers to the central meaning of *Ausnahmezustand* as a disruption or endangerment of the normal order.¹³⁴

Andreas Kalyvas argues that scholars and translators have conflated two concepts both signified by *Ausnahmezustand*, namely the extraordinary, which refers to sovereign constitutional foundings and refoundings, and the exception, which involves emergency situations not originating in sovereign acts that threaten the present constitutional order’s existence.¹³⁵ For Kalyvas, “[d]uring [] extraordinary moments, the slumbering popular sovereign wakes up to reaffirm its supreme power of self-determination and self-government and to substantially rearrange or alter the fundamental norms, values, and institutions that regulate ordinary legislation and institutionalized politics.”¹³⁶ This differs of course from what happens during exceptional emergencies, when a sovereign guardian of a republic takes on the power to act extraconstitutionally in the name of preserving constitutional norms.

¹³⁰ Cristi, “Schmitt on Sovereignty,” 181, 186.

¹³¹ Bendersky, “Three Types of Juristic Thought,” 11.

¹³² Heiner Bielefeldt, “Schmitt’s Critique of Liberalism,” 26.

¹³³ Schmitt, *Political Theology*, 5 n. 1.

¹³⁴ Bendersky, “Three Types of Juristic,” 12.

¹³⁵ Kalyvas, *Politics of the Extraordinary*, 3.

¹³⁶ *Ibid.* 6-7.

Indeed, for Kalyvas, this conflation, which is also Schmitt's responsibility, accounts for the failure of his theories of constitutional democracy and popular sovereignty to differentiate clearly among distinct sovereign moments. On his view, this conflation led Schmitt to “endors[e] an omnipotent personalistic executive power with a plenitude of dictatorial powers, thus substituting the extraordinary with the exception, foundations with emergencies.”¹³⁷

What is at stake in this battle of translations is whether Schmitt sought to mark as sovereign only decisions regarding an empirically verifiable emergency — a situation that threatens the state — or whether his theory of sovereignty can be extended to other exceptional or extraordinary circumstances, and if so, how far into situations that while exceptional in the sense that they were not foreseen by ordinary law are not significant in terms of their threat to the state or its ongoing viability. Schmitt himself states that the exception “can best be characterized as a case of extreme peril, a danger to the existence of the state, or the like,” but nonetheless “cannot be circumscribed factually and made to conform to a preformed law.”¹³⁸ He also insists that “the exception is to be understood to refer to a general concept in the theory of the state, and not merely to a construct applied to any emergency decree or state of siege,” thus delinking it to an extent from particular state crisis situations.¹³⁹ Schmitt also uses a different vocabulary in *The Concept of the Political*, discussed in greater depth in Chapter 5, employing the term *Ernstfall* (typically translated as “emergency”) to designate a dire emergency of the state in which everything is at stake.¹⁴⁰ Elsewhere, in his *Constitutional Theory*, Schmitt holds that “[t]he question of sovereignty [] is

¹³⁷ Ibid. 14-15.

¹³⁸ Schmitt, *Political Theology*, 6.

¹³⁹ Ibid. 5.

¹⁴⁰ Meier, *Hidden Dialogue*, 4.

the decision on an existential conflict.”¹⁴¹ Thus it appears that the political or apolitical intent of his English translators notwithstanding, Schmitt vacillated at least somewhat between his commitment to keeping the “exception” sufficiently open and ambiguous to encompass any unforeseen legal-political circumstance of some significance to the state, and his commitment to examining first and foremost exceptional circumstances in which the state’s existence is fundamentally threatened.

Characteristic of the confusion this ambiguity breeds is Balakrishnan’s claim, despite his translation of *Ausnahmezustand* as “emergency situation,” that “Schmitt thought that even short of an extreme emergency in which all legal protections and jurisdictional boundaries are suddenly suspended, the problem of the exception, of ‘gaps’ in the legal order, was unavoidable,” such that decisions even on nonemergency interpretive gaps in the law amount to sovereign decisions.¹⁴² And this “softer” read of the exception is implicit in claims Schmitt makes outside of *Political Theology*, as, for instance, in his *Constitutional Theory*. There, Schmitt differentiates between the bourgeois *Rechtsstaat*’s and its defenders’ rhetorical emphasis on equality before the law, which is generally an attribute of legislative, statutory law, and the inevitably personalistic decisionist character of administrative or executive acts, which necessarily aim at particular people, and thus never are applied equally, noting that

¹⁴¹ Schmitt, *Constitutional Theory*, 389.

¹⁴² Balakrishnan, *The Enemy*, 46.

Schmitt argued that the hardest cases of legal interpretation involve the problem of the legitimacy of the law, and sometimes even the authority of those who enact and administer it. In such situations, simply referring to what the law says will not suffice, because the most difficult problems of justification cannot be addressed within the language of legal rules.

Ibid. 92. In particular, for Schmitt, interpreting fundamental provisions of constitutions regarding the relationship between authority and rights is an “irreducibly political” act. Ibid. 93. On this read, such core acts of legal interpretation as for instance are engaged in by the US Supreme Court might amount to sovereign decisions.

“[t]here is no equality before the individual command because, in terms of its content, it is entirely determined by the individual circumstance of the single case.”¹⁴³

For Schmitt, “[w]hat characterizes an exception is principally unlimited authority, which means suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes.”¹⁴⁴ From this, two important questions arise: First, who is the source of this authority — that is, in whose name does the unlimited authority act? And second, who actually exercises this authority in the time during which law has receded? In Schmitt’s view, the critical and more important of these two questions was “*Quis iudicabit?*” or “Who decides?” among the multiple interpretive perspectives laying equal claim to morality or legitimacy in the context of political power.¹⁴⁵

Recall from the discussion above of Schmitt’s critiques of legal positivism and of liberalism that the answer for him to the question as to who decides cannot slough decision off onto law or a constitution. “‘Rule of law’ is an empty manner of speaking if it does not receive its actual sense through a certain opposition. This fundamental idea of the Rechtsstaat contains . . . the rejection of the rule of *persons*.”¹⁴⁶ Rejecting a line of thought tracing back to Aristotle’s claim that absent rule of law one has rule by people, which amounts to demagoguery, Schmitt argues that the rule of law is only ever fictitious, and that

¹⁴³ Schmitt, *Constitutional Theory*, 194. Cf. Carl Schmitt, *On the Three Types of Juristic Thought*, trans. Joseph W. Bendersky. (Westport, CT: Praeger, 2004), 60, in which Schmitt notes that “[f]or jurists of the decisionist type, it is not the command as command, but the authority or sovereignty of an ultimate decision with which the command is given that is the source of all *Recht*, that is, all ensuing norms or orders. Note that in *Juristic Thought*, Schmitt embraces neither decisionism or normativism (the latter a rough analog of positivism), but rather “concrete order thinking” as an alternative to both. Ibid. 62.

¹⁴⁴ Schmitt, *Political Theology*, 12.

¹⁴⁵ Balakrishnan, *The Enemy*, 79.

¹⁴⁶ Schmitt, *Constitutional Theory*, 181.

failing to see through this fiction leads one to misunderstand how politics works.¹⁴⁷ In

Schmitt's words:

Law in the sense of the political concept of law is concrete *will* and *command* and an act of sovereignty. . . . Law in a democracy is the will of the people A logically consistent Rechtsstaat aspires to suppress the political concept of law, in order to set a 'sovereignty of the law' in the place of a concrete sovereignty. In other words, it aspires, in fact, to not answer the question of sovereignty [T]his must lead to concealments and fictions, with every instance of conflict posing anew the problem of sovereignty.¹⁴⁸

Emphasis on the sovereignty of a constitution “diverts attention from the concept of sovereignty proper, or more abstractly, the concept of a [spurious] ‘sovereignty of justice and reason’ in the place of a concrete existing political sovereignty.”¹⁴⁹ Rather, Schmitt holds with Thomas Hobbes that “sovereignty of law means only the sovereignty of men who draw up and administer this law.”¹⁵⁰ The idea that law can be sovereign is thus expressly and repeatedly excluded from Schmitt's theory.

What about the people? In the next part of this section, I outline Schmitt's understanding of democracy, the role of the people as sovereign in democratic contexts, and his view that a people must be in some sense homogeneous. First, though, we must confront the question whether Schmitt's theory really comprehends the people as capable of sovereignty at all, and if so, in what ways. Secondary scholarship on Schmitt reveals no consensus as to his views on the possibility of popular sovereignty. Henrich Meier argues that “[n]o theoretician who intended to support the sovereignty of the people would think of

¹⁴⁷ Ibid. 182.

¹⁴⁸ Ibid. 187.

¹⁴⁹ Ibid. 235.

¹⁵⁰ Schmitt, *Concept of the Political*, 67. David Dyzenhaus notes that “[c]uriously, at times in *Political Theology* Schmitt seemed to argue that the exception is law-governed at least in that it can be understood from the legal point of view.” Dyzenhaus, *Legality and Legitimacy*, 43. What Dyzenhaus means here is opaque to me: understanding the exception from a legal point of view does not at all imply that the exception can be “governed” or addressed according to any preexisting law. See also Agamben, *State of Exception*, 34 (“The norm as well as the decision remain in the framework of the juridical.”).

presenting the teaching of sovereignty that Schmitt presents.”¹⁵¹ George Schwab holds that in Schmitt’s theory, the people cannot properly be understood to be sovereign because they recede after deciding upon constitutional norms, laws, or political acts.¹⁵² Other scholarship, however, emphasizes ways in which Schmitt’s analysis of sovereignty might be interpreted to favor democratic sovereignty. Schwab, for instance, elsewhere writes that despite all the many instances in which Schmitt appears to favor a single powerful state leader, “by postulating a grassroots form of political legitimacy, Schmitt implicitly expressed his reservation about one-man rule.”¹⁵³ And in Renato Cristi’s view, Schmitt’s analysis can serve to ground sovereignty in the people: “Acts of sovereignty will inevitably occur. But ‘these acts of inevitable sovereignty’ are better justified when they are seen as grounded on the constituent power of the people.”¹⁵⁴

Some of this may be a result of the temporal development of Schmitt’s theory. Though in his early works Schmitt generally identified decisionism with authoritarian action restraining popular sovereignty, his emphasis later on the element of the sovereign will could equally support popular sovereignty in the sense of the people’s will.¹⁵⁵ But a more subtle distinction is at work here. Schmitt’s interest in popular sovereignty arguably limits it to specific moments in the life of democratic polities. In particular, Schmitt’s interest in popular sovereignty centers primarily on founding moments, when, for him, the people’s power is at its zenith. For Schmitt, at times of founding, “the sovereign is the constituent

¹⁵¹ Meier, *Lesson of Carl Schmitt*, 144.

¹⁵² Schwab, *The Challenge of the Exception*, 114.

¹⁵³ George Schwab, introduction to *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol*, by Carl Schmitt, trans. George Schwab and Erna Hilfstein. (Chicago: University of Chicago Press, 2008), xxxix.

¹⁵⁴ Cristi, “Schmitt on Sovereignty,” 192 (quoting Cristi’s own earlier work).

¹⁵⁵ Balakrishnan, *The Enemy*, 194.

subject.”¹⁵⁶ Thus Schmitt characterizes approvingly popular sovereignty in Hobbes’s conception as being asserted momentarily only to be destroyed in favor of the newly constructed sovereign leviathan.¹⁵⁷ Schmitt sought to show how political power could *originate* democratically as part of his project of rethinking sovereignty in the democratic age, and did so by mobilizing both Hobbesian absolutism as well as the concept of the *pouvoir constituant* propounded by French revolutionary theorist Emmanuel-Joseph Sieyès.¹⁵⁸ Under this theory, the sovereign people is always extant potentially, but its active force is limited to moments of founding. Thus constituent power, no matter how radical and insurgent, is not the same as a theory of ongoing participatory democracy in Schmitt.¹⁵⁹ Rather, “political stability demands from the sovereign people that it express[] itself only in extraordinary moments and that it refrain[] from exercising continuously its constituent power at close intervals.”¹⁶⁰ The people’s exercise of “[a] true sovereign decision . . . escapes subsumption under any rules or norms because it constitutes their ultimate origin.”¹⁶¹ That is, popular sovereignty in a sense derives from a role in the extraordinary case — the founding moment.

Popular sovereignty in Schmitt thus appears not to have a central role in the quotidian operation of the state, but rather sits next to, or hovers above, the popularly constituted state, always ready to be mobilized to decide — in Schmitt’s theory by majority vote or by acclamation — what to do in the exceptional crisis of founding or refounding a new state when the old one has failed. For Kalyvas, this limited role for the *demoi*

¹⁵⁶ Kalyvas, *Politics of the Extraordinary*, 93.

¹⁵⁷ Balakrishnan, *The Enemy*, 215-16. As discussed below, however, see text accompanying notes 240 to 261, Schmitt took the people’s role a step beyond Hobbes by asserting for them a latent right to revolt and refound.

¹⁵⁸ Kalyvas, *Politics of the Extraordinary*, 88. See also *ibid.* 11.

¹⁵⁹ *Ibid.* 87.

¹⁶⁰ *Ibid.* 144.

¹⁶¹ *Ibid.* 94.

nonetheless represents an importantly radical claim on Schmitt's part. "By locating parts of the constituent power of the people *next to* the constitution, Schmitt's approach opens up the possibility for rethinking the survival of democratic participation within a lasting constitutional state."¹⁶² In a Schmittian democracy, the continuing existence of a sovereign people after establishment of the constitution ultimately prevents the constitutional order from achieving complete closure; precisely because it is sovereign, the sovereign people could always shatter any constitutional formulation, and replace it with a new one.¹⁶³

Schmitt's Views on Democracy and Popular Homogeneity

Given the debate over whether Schmitt can be considered to have favored democracy at all, it is not surprising that the nature of his understanding of "democracy" itself raises considerable controversy. First, both in ordinary usage and in Schmitt's theory, "democratic politics has [] come to mean the regime of popular sovereignty."¹⁶⁴ Second, Schmitt does not equate democracy or popular sovereignty with a representative regime. Indeed, he sees the latter as a dangerous institution that undermines the quintessential characteristic of a *demos*: its political unity. Thus in a democracy, the necessary participation of all state citizens (even if such participation numerically fictive in the sense that some citizens do not participate, or do not agree with the outcome of a majoritarian or supermajoritarian decision) produces the self-identity of these participants as a people with a political unity in a process that does not allow for any kind of representation.¹⁶⁵

¹⁶² Ibid. 180.

¹⁶³ Balakrishnan, *The Enemy*, 37.

¹⁶⁴ Kalyvas, *Politics of the Extraordinary*, 210. So much is this the case that for Hannah Arendt democracy retained a "totalitarian kernel" because it bestowed upon the people a uniform will similar to the indivisible sovereignty of the monarch. Ibid. 212.

¹⁶⁵ Schmitt, *Constitutional Theory*, 249.

Representation is, for Schmitt, an undemocratic element in a democracy.¹⁶⁶ If the representative body in a polity becomes too strong, it violates the democratic principle of identity of the people with the sovereign government, a concept Schmitt borrows from Rousseau.¹⁶⁷ This is so because identity and representation are opposing concepts. A state is born when a people exercises *pouvoir constituant* to bring itself into being as such, and at this point and thereafter “[i]t need not and cannot be represented.”¹⁶⁸ “[O]nly all adult members of the people act and then only in the moment when they are assembled as the community or as the army.”¹⁶⁹ There is no popular sovereignty in representative bodies, which break the unity of the people by identifying some as decisive and others as merely capable of electing deciders. In addition to the identity of the sovereign people with their government that does not allow for representation, Schmitt’s understanding of democracy also carries the requirement of unity, which connects to a kind of homogeneity of the people, and thus goes beyond Rousseau’s more technical formulation of the identity of the ruler with the ruled. For Schmitt, “[d]emocracy is a state form that corresponds to the principle of identity (in particular the self-identity of the concretely present people as a political unity).”¹⁷⁰

What exactly constructs the homogeneous unity of the democratic principle is very much in question among Schmitt scholars. Schmitt himself left the field relatively open, though he is often accused of having done otherwise. In a discussion focused more on international relations than the internal workings of states, Schmitt argued for a restructuring of the international order around a system of *Großräume* or “great spaces,” rather than nation

¹⁶⁶ Ibid. 251.

¹⁶⁷ Ibid. 322.

¹⁶⁸ Ibid. 239.

¹⁶⁹ Ibid. 240.

¹⁷⁰ Ibid. 255.

states, each of which should be organized around a homogeneous *Volk* or “people” who would rule over all others living within that great-space territory. Yet his version of a *Volk*, rather than centering on supposedly natural racial or ethnic characteristics, required “a great measure of conscious discipline, increased organization, and the capacity to create out of one’s power what could only be created and secured with enormous resources of understanding, namely a modern polity.”¹⁷¹ Schmitt’s homogeneous people, at least in this context, is more functionally defined than based on race or ethnicity. Likewise functionally, for Schmitt “the state rested on the identity of the *Volk* as a political unit constituted through its national will to distinguish friend and enemy.”¹⁷² This latter claim is mirrored as well in Schmitt’s identification of political unity with equality. Because in a democracy the people are in some important sense alike — again, precisely in what sense is left open — they are in this sense equal. “The *equality* that is part of the essence of a democracy thus orients itself *internally* and not externally: *within* a democratic state system, all members of the state are equal.”¹⁷³ Thus the homogeneous state can establish and recognize its members as internally equal, while at the same time setting apart nonmembers (including members of other states) as unequal to them and as potential enemies.¹⁷⁴

Nonetheless, most scholarly commentary has focused not on functional definitions of political unity in Schmitt’s thought, but rather on finding in Schmitt’s work definitions

¹⁷¹ Müller, *Dangerous Mind*, 44, translating and quoting Carl Schmitt, “Völkerrechtliche Großraumordnung mit Interventionsverbot für raumfremde Mächte: Ein Beitrag zum Reichsbegriff im Völkerrecht,” in Carl Schmitt, *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969*, ed. Günther Maschke. (Berlin: Duncker and Humblot, 1995), 310.

¹⁷² Müller, *Dangerous Mind*, 31. Accord Kalyvas, *Politics of the Extraordinary*, 121-22. Schmitt’s friend-enemy distinction as the central political axis is discussed in depth in Chapter 5.

¹⁷³ Schmitt, *Constitutional Theory*, 258.

¹⁷⁴ See also *ibid.* 394, noting that homogeneity serves to exclude the possibility of enmity among the people, thus effectively constructing the homogeneous democratic polity as a collection of political friends; Dyzenhaus, *Legality and Legitimacy*, 80, noting that on Schmitt’s view, “the whole purpose of a constitutional decision is to distinguish friends from both internal and external enemies.”

tioned to race, nationality, and ethnicity, most likely because these cohere with Schmitt's participation in the Nazi movement and criticism of his work based thereon. Thus, for instance, Jeffrey Seitzer and Christopher Thornhill claim that "Schmitt argues that modern democratic states in societies with complexly structured [i.e. racially or ethnically pluralistic] populations and franchises, can never obtain fully democratic legitimacy, for democracy in the strictest sense means that government is conducted on the basis of a self-identical will, formed and shared by all constituents of the state."¹⁷⁵ Yet this overlooks the possibility that the self-identical will could be grounded on something other than shared race or ethnicity. This same urge to connect Schmitt's homogeneity to something antithetical to *all* forms of pluralism inclines John McCormick to claim that Schmitt is "simply wrong" to claim that democracy must be founded on the presupposition of a homogeneous, unified people, citing "many theories of democracy that allow for pluralism among parties, diversity among individuals, negotiation among classes, and so on."¹⁷⁶ Schmitt's theory, however, can be applied to radically plural populations within a single state, *provided* that there is, over against such pluralities, some other source of political unity.

What exactly does Schmitt have to say about the nature of political unity in a democracy? Though he often asserts the need for it, he rarely supplies such unity with any substantive content, a move, I argue, that allows his theory to be opened up to novel forms of unity he may not have foreseen or even understood as unifying. In this respect I agree with Heiner Bielefeldt that "[t]he question of what [] substantial homogeneity should consist of [in Schmitt's thought] is deliberately left open. One may think of common tradition, language, ethnic origin, religion, or ideology," but of course if deliberately left open, this list

¹⁷⁵ Seitzer and Thornhill, "Introduction," 38.

¹⁷⁶ McCormick, "Identifying or Exploiting the Paradoxes," xxxii.

cannot be exclusive.¹⁷⁷ And those who have tried to work through Schmitt's understanding of this concept have not done much better: both theorists on the left and on the right have sought to find resources for creating homogeneous political forms in traditions and organic communities, for instance, "without revealing much about where exactly such integral resources were to be found."¹⁷⁸ For Schmitt, "[e]very democracy, even the parliamentary variety, fundamentally rests on a presupposed homogeneity that is thorough and indivisible."¹⁷⁹ This political unity is coterminous with the unity of a nation, because a nation

denotes a people as a unity capable of political action, with the consciousness of its political distinctiveness and [] the will to political existence, while the people not existing as a nation is somehow only something that belongs together ethnically or culturally, but [] is not necessarily a bonding of men existing *politically*.¹⁸⁰

So by negative implication, ethnicity and culture do not suffice as unifying political factors, yet at the same time may be among the potential sources of political unity.

In perhaps his most explicit statement of possible factors involved in constructing a political unity, Schmitt claims that "[t]he quality of belonging to a people can be defined by very different elements (ideas of common race, belief, common destiny, and tradition)."¹⁸¹

Schmitt also adds another source of unity, arguing that "[t]he substance of democratic equality can be found in commonly held *religious* convictions. Inside religious communities, an equality of all members arises to the extent that all sincerely agree on essentials."¹⁸²

Taken together, these hints at what a political unity *could be* for Schmitt simply do not support the claims of his detractors that his homogeneous democracy thesis amounted to a

¹⁷⁷ Heiner Bielefeldt, "Schmitt's Critique of Liberalism," 27.

¹⁷⁸ Müller, *Dangerous Mind*, 218.

¹⁷⁹ Schmitt, *Legality and Legitimacy*, 41.

¹⁸⁰ Schmitt, *Constitutional Theory*, 127.

¹⁸¹ *Ibid.* 258.

¹⁸² *Ibid.* 260.

national socialist-type insistence on racial or religious purity. Ulrich Preuss, for instance, denounces Schmitt's homogeneity requirement as mandating a "sameness' based on race, ethnicity, common history, culture, or language."¹⁸³ This both misstates the list of factors Schmitt provides in *Constitutional Theory*, and closes it off, misinterpreting Schmitt's example factors as an exclusive list. Preuss later truncates even his own list to "ethnic and national sameness,"¹⁸⁴ implicitly damning Schmitt's theory by linking it to Nazi doctrines of racial purity. Nor is Preuss alone. Andreas Kalyvas takes to task Jürgen Habermas and William Scheuerman, among others, for improperly promoting misleading views of Schmitt's theory in this regard. Habermas, for instance, "caricature[s democratic homogeneity] as an ethnic and racist theory," even though nothing in Schmitt's Weimar era writings demonstrates a necessary connection between constituent sovereignty of the people and common ethnic origins.¹⁸⁵ He notes further that Scheuerman, who makes roughly the same claim, provides no textual evidence for it.¹⁸⁶ Likewise, Ellen Kennedy points out that "[a]lthough Schmitt's conception of democratic homogeneity has frequently been misinterpreted as simply requiring that the people be a naturally (or racially) homogeneous community, in fact the argument . . . does not depend on any such homogeneity."¹⁸⁷ Indeed, "Schmitt never postulated that [] belonging to a people could only be envisaged in racial terms."¹⁸⁸

What these limiting characterizations of the scope of homogeneity in Schmitt also obscure is the possibility for new forms of homogeneity, including some that would do

¹⁸³ Preuss, "Political Order," 156.

¹⁸⁴ Ibid. 162.

¹⁸⁵ Kalyvas, *Politics of the Extraordinary*, 120.

¹⁸⁶ Ibid. 121.

¹⁸⁷ Ellen Kennedy, "Introduction: Carl Schmitt's *Parliamentarismus* in Its Historical Context" in *The Crisis of Parliamentary Democracy*, by Carl Schmitt, trans. Ellen Kennedy. (Cambridge, MA: MIT Press, 1985), xxxii.

¹⁸⁸ Mouffe, "Paradox of Liberal Democracy," in *Law as Politics*, 162.

violence to the core of Schmitt's theory, but nonetheless render it useful in modified form for pluralistic modern states. Chantal Mouffe, for example, agrees with Schmitt that a political democracy can only belong to a specific people, while noting that in this connection Schmitt

never postulated that this belonging to a people could be envisaged only in racial terms. On the contrary, he insisted on the multiplicity of ways in which the homogeneity constitutive of a demos could be manifested. He says, for instance, that the substance of equality "can be found in certain physical and moral qualities, for example, in civic virtue, in arete, the classical democracy of *vertus* (*vertu*)."¹⁸⁹

Admittedly Mouffe's aim in emphasizing the open-endedness of Schmitt's homogeneity is to move beyond Schmitt's core conception, "since his main concern is not democratic participation but *political unity*."¹⁹⁰ In fact, Mouffe, like other left-leaning students of Schmitt, seeks to rework his theory of homogeneity in order to ground it on a concrete participatory commonality based on constitutionalism itself.

Taking a hint from Schmitt student Ernst-Wolfgang Böckenförde, who argues that constitutional law can itself serve to construct political unity,¹⁹¹ Mouffe and Reinhold Mehring, among others, see possibilities for democratic homogeneity built on an ideational ground.¹⁹² Mehring in particular reviews a 1961 proposal by Dolf Sternberger that the horizons of Schmitt's democratic theory be expanded to include a kind of "constitutional patriotism" defined as a "loyal identification with the political constitution as a form of

¹⁸⁹ Chantal Mouffe, "Carl Schmitt and the Paradox of Liberal Democracy," in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 40-41 (quoting Schmitt, *Crisis of Parliamentary Democracy*, 9).

¹⁹⁰ Mouffe, "Paradox of Liberal Democracy," in *Challenge*, 42.

¹⁹¹ Ernst-Wolfgang Böckenförde, "The Concept of the Political: A Key to Understanding Carl Schmitt's Constitutional Theory," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 40.

¹⁹² See Mouffe, "Paradox of Liberal Democracy," in *Law as Politics*, 168.

general consensus regarding one's political identity."¹⁹³ Likewise, Mouffe, admittedly using Schmitt selectively, in particular resisting his critique of liberal democracy's contradictions and instead trying to find ways to acknowledge them without conceding that they make that combination infeasible, argues that advocates of liberal democracy should, *contra* Schmitt, "put[] into question any idea of 'the people' as already given."¹⁹⁴ Mouffe takes Schmitt's conceptions as leaving open the inevitable possibility of a political unity founded on constitutional norms.¹⁹⁵ One result of this theoretical commitment on her part is that it leaves permanently open a space for contestation between the liberal principles of a *Rechtsstaat* constitution and the latent but always potentially active constitutive power of a democratic people united either in dormant form by the extant constitutional order, or in ascendant form by the values of a newly constituted order.¹⁹⁶ In this way, Mouffe would seek to avoid the related tendencies, identified by Schmitt as inherent in liberal democracy, that democracies' dominance in modernity would lead to conservative rather than liberal political outcomes, and that democracies would have great difficulty, despite the liberal *Rechtsstaat's* commitment to doing so, in protecting minorities from the will of the majority.¹⁹⁷

¹⁹³ Reinhold Mehring, "Liberalism as a 'Metaphysical System': The Methodological Structure of Carl Schmitt's Critique of Political Rationalism," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 150.

¹⁹⁴ Mouffe, "Paradox of Liberal Democracy," in *Challenge*, 50.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Ibid.* 51. For Mouffe, what advocates of the paradoxical possibility of liberal democracy must do

is precisely what Schmitt does not do: once we have recognized that the unity of the people is the result of a political construction, we need to explore all the logical possibilities that a political articulation entails. . . . Liberal democracy is precisely the recognition of this constitutive gap between the people and its various identifications. Hence the importance of leaving this space of contestation forever open.

Ibid.

¹⁹⁷ See Balakrishnan, *The Enemy*, 70, 161.

There is moreover some indication that Schmitt might have left room in his own theorizing for a democratic homogeneity established upon shared constitutional commitments, although he appears not to have said much about precisely how this would work in practice in light of the dilemmas Mouffe elucidates. In a 1930 lecture, “Ethic of the State and Pluralistic State,” Schmitt argued that democratic unity in some cases “rests in particular on the constitution recognized by all parties, which must be respected without qualification as the common foundation. The ethic of state then amounts to a constitutional ethic.”¹⁹⁸ Kalyvas cites this lecture in the course of arguing that Schmitt’s concepts might be useful to support a kind of constitutional democratic unity, grounded in shared ethics cemented in an existing constitution, while also noting that Schmitt saw such unity as capable of resisting the centrifugal forces of other kinds of pluralism, and one that moreover required a commitment of at least some pluralist institutions (specifically political parties) to remain viable.¹⁹⁹

Whether Mouffe’s attempt to meet Schmitt’s claim of contradiction between liberalism and democracy with a proposed democratic hegemony based upon constitutional or legal values can succeed depends in part upon the role of the people with respect to the constitutional order. It is to that issue, and specifically the question of distinct moments in the relationship between a democratic people and a constitutional order, that I next turn. Borrowing from Kalyvas and, from Hinduism, a metaphorical shorthand, I identify three such moments in Schmitt’s thought. In the first, the people (as self-constructed unity — for Schmitt ordinarily bound by majority decisions of those empowered to decide) decides upon norms, laws, and a constitutional order for a newly founded (or refounded) state. This

¹⁹⁸ Carl Schmitt, “Ethic of State and Pluralistic State,” trans. David Dyzenhaus, in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 207.

¹⁹⁹ Kalyvas, *Politics of the Extraordinary*, 161.

moment involves the people's use of its *pouvoir constituant*, and can be thought of as comparable to the role of Brahma, the creator, in the Hindu grand trinity. In the second, the people are quiescent, and stand next to (or above) the constitutional order, which has been founded, settled, and is intended to remain stable at least for the time being, though always potentially subject to popular sovereignty. This moment resembles Vishnu, the preserver. Finally, when the constitutional order's stability decays sufficiently, usually because it falls out of step with the latent popular will, the people exercises its right to revolt, destroying the constitution and clearing the way for a new refounding. This moment is reminiscent of Shiva, the destroyer.²⁰⁰

Founding the State: The People in Action

For Schmitt, the founding moment in a democracy is a moment of constitution, both in the sense that a written constitution is created that will preserve the democratic characteristics of the state, and in the sense that the act of founding establishes both a state *and a demos*. "Constitution in the positive sense means the formation of [] political unity by conscious act, through which the unity receives its particular form of existence."²⁰¹ Constitutions in this sense result from conscious decisions "which the political unity reaches *for itself* and provides *itself* through the bearer of the constitution-making power."²⁰² That bearer of the *pouvoir constituant* is, in democracies, the unified people, which comes into being precisely by and in the moment of constituting itself as such. In Schmitt's understanding, the decisive action of the people in founding a constitution is an absolute necessity. "For its

²⁰⁰ Though essentially unacknowledged in Schmitt, this conception of a cyclical nature of democracies owes much to Machiavelli.

²⁰¹ Schmitt, *Constitutional Theory*, 97.

²⁰² *Ibid.* 75-76.

validity as a normative regulation, . . . even constitutional law[] ultimately needs a political *decision* that is prior to it, . . . reached by a power or authority that exists politically.”²⁰³ Thus before constitutional rules or norms in the textual, preserving sense can be established, the people must first decide to declare itself as the unified bearer of the *pouvoir constituant*, a declaration which is in some sense fictive, given that there will inevitably be some degree of dissent among the people however constructed. In the American context, as will be seen in greater detail in Chapter 3, the Preamble to the Constitution’s declaration that “We the People” found the state amounts to a memorialization of such a decision in Schmitt’s terms.²⁰⁴ The temporal priority of the founding constitution of the people is also important in Schmitt’s theory: textual constitutions for him are not social contracts that in turn found the state. Rather a founding of the people itself is necessarily prior to and presupposed in the creation by that people of a textual constitution containing norms and rules for the preservation of the democratic state.²⁰⁵ Some number of actually existing humans bound by some form of homogeneity simultaneously identify themselves as “the people,” develop some basis for knowing how they, united as a singular if fictive subject, will make and recognize their decisions, and constitute themselves as a unity. Only after this do they make a constitution in the legal or contractual sense. Thus “[t]he very act of creating a constitutional order [amounts to] a sovereign act of decisionism on the part of those . . . instituting that system”²⁰⁶ — meaning in a democracy, the persons who have made of themselves a people. This people thereafter may act directly, or through specific, revocable delegation of power to a constituent assembly, but does not need and is not properly served

²⁰³ Ibid. 76.

²⁰⁴ Ibid. 77.

²⁰⁵ Ibid. 112.

²⁰⁶ Bendersky, “Three Types of Juristic Thought,” 12.

by permanently empowered representatives.²⁰⁷ That is, if the people as *pouvoir constituant* acts, it does so only through *its own* decisions, which it may delegate to others to enact, but which it may not leave up to representatives to make on its behalf. It is in this sense that constitution-making assemblies of delegates differ from conventional representative legislative bodies.²⁰⁸

This understanding of the role of the *pouvoir constituant* in connection with the founding of states and constitutional orders helps make sense of other components of his theorizing. For example, it connects to his deep suspicion of legal positivism, in that for Schmitt a constitution, like ordinary law, cannot serve as a basis for sovereignty in terms of authoritative decision making. Rather, the sovereign authority of the people is what makes a constitutional text possible.²⁰⁹ The idea of a constitution being a potentially sovereign document specifying the source, use, and limits of state power is, for Schmitt, a modern one of bourgeois origin, and deeply in tension with the facts of sovereignty as he sees them.²¹⁰ Because, in Schmitt's view, the will of the people stands before the constitution, no textual constitution can properly be understood to embody this will.²¹¹

Worse still, on Schmitt's read, considering constitutions to be sovereign is evasive: “[T]he actual political question whether the prince or the people are sovereign is evaded. . . . Neither the prince nor the people but rather ‘the constitution’ is sovereign.”²¹² Speaking of a “sovereignty of the constitution . . . only sidestepped and veiled” the question of sovereignty “behind the somewhat occult-like image of constitution making power of the

²⁰⁷ Kalyvas, *Politics of the Extraordinary*, 155.

²⁰⁸ Schmitt, *Constitutional Theory*, 80.

²⁰⁹ David Dyzenhaus, “State Back in Credit,” 78.

²¹⁰ Balakrishnan, *The Enemy*, 91.

²¹¹ *Ibid.* 95.

²¹² Schmitt, *Constitutional Theory*, 63.

constitution.”²¹³ The “sovereignty of the constitution” is thus a false portrayal and means of evading core political questions.²¹⁴ Focusing instead on the people (in a democracy) as sovereign accords with Schmitt’s view that “[u]nder democracy, the people are the subject of the constitution-making power.”²¹⁵ And that focus in turn can help make sense of the functions of various founding documents. For instance, Schmitt, citing the United States Declaration of Independence as an example, notes that

[t]he declaration of basic rights means the establishment of principles on which the political unity of the people rests and whose validity is recognized as the most important presupposition of the fact that this unity always produces and forms itself anew. . . . If through a great political act a new state system is founded or through a revolution a completely new principle of state integration is established, then a declaration is a natural expression of the intention, in the decisive moment, to give a certain turn to its own political destiny.²¹⁶

Here the link between founding (the Brahma moment) and revolution (the Shiva moment) is visible. When the people of a state turn to a new political system, they sweep away the old one and announce new founding principles for themselves through their *pouvoir constituant*.

Likewise, Schmitt theorized the connections between foundings of new states and ongoing maintenance of newly founded constitutional orders (the Vishnu moment). For instance, as I will cover in greater detail in Chapter 3 with respect to the American system, constitutions tend to enshrine the exclusive means for their own alteration through amendment procedures, raising the question whether and when constitutional orders can be altered in ways not set forth within their own texts. Schmitt saw this problem clearly and addressed it directly. For him, oaths to constitutional texts could never properly include oaths to be bound by their amendment procedures, because an oath to a constitution is only

²¹³ Ibid. 104.

²¹⁴ Ibid. 105.

²¹⁵ Ibid. 268.

²¹⁶ Ibid. 200.

truly binding with respect to the form of political existence it establishes, e.g. democracy.²¹⁷

Likewise, “[t]here cannot be a regulated procedure, through which the activity of the constitution-making power would be bound.”²¹⁸ Ultimately, constituent power is not restricted by constitutional amendment rules, because that power, having constituted those rules, remains always outside them and ready to act to alter an existing constitutional order other than through those means.²¹⁹ Or as Schmitt put it inversely:

The authority to undertake constitutional amendments resides in the framework of the constitution . . . and does not extend beyond it. This authority does not include the power to establish a new constitution, and no power of the constitution can be gained in reference to this authority.²²⁰

The power to constitute or reconstitute a state, which rests in the people in a democracy, is thus an extraordinary power — one that is prior to and outside any established constitutional order.

Preserving the State: The Constitutional Order and Latent Popular Will

What roles do the people and the constitution play once the state is founded? First, it is important to note that at a constitution’s core is its requirement that it not be altered through ordinary law, but only through specified amendment procedures. A constitution thus stands above ordinary law.²²¹ Ordinary law, on the other hand, is changeable. “In a democracy, law is the momentary will of the people present at that time, that is to say, in practical terms, the will of a transient majority.”²²² The constitution’s elevated status allows

²¹⁷ Ibid. 81.

²¹⁸ Ibid. 130.

²¹⁹ Kalyvas, *Politics of the Extraordinary*, 142.

²²⁰ Schmitt, *Constitutional Theory*, 74.

²²¹ Schmitt, *Constitutional Theory*, 71.

²²² Ibid. 24.

it to stabilize the founding decisions of the people as a whole, rather than transient majorities of the people, in light of such transient majorities' changeability. A constitution cements founding principles and decisions of the people by safeguarding them both from changing views of the people itself and from action by their representatives or agents.²²³ Because of this, "a constitution of a politically existing people cannot only consist of [procedural] *Rechtsstaat* principles[, which] only form a moderating component of the constitution, which supplements the political principles."²²⁴ That is, constitutions not only spell out legal protections for citizens and rules of government in the *Rechtsstaat* sense, but also have a component that enshrines the decision of the bearer of the *pouvoir constituant* in favor of some particular form of sovereignty within the state, such as that a dictator, or the people themselves, or representatives will render fundamental decisions.

Of course as we have seen, Schmitt believed there were significant tensions between modern constitutions' *Rechtsstaat* (liberal-procedural) and political (sovereignty allocating) elements, in particular in bourgeois democracies. But despite his wariness of these tensions, he appears to have recognized that they were more or less inevitable within the modern state form. Once the people have founded a constitution, they "become a 'normalized' and institutionalized constituent sovereign,"²²⁵ such that popular sovereignty "becomes, in other words, a proceduralized and institutionalized representative sovereignty."²²⁶ Knowing this, Schmitt did not dismiss procedures out of hand, but rather opposed their appropriation by

²²³ Kalyvas, *Politics of the Extraordinary*, 131.

²²⁴ Schmitt, *Constitutional Theory*, 234.

²²⁵ Kalyvas, *Politics of the Extraordinary*, 133.

²²⁶ *Ibid.* 134.

liberal political discourses seeking to cement them for all time and so undermine the constitutive power of the people.²²⁷

Schmitt believed, nonetheless, that constitutional orders were pragmatic and necessarily limited forms of stability. For him, “[e]very constitution of a real state must adapt itself to political circumstances, just as the abstract outline of a building must adapt to its foundation and to other substantive facts.”²²⁸ Schmitt recognized that the inherent tension between *Rechtsstaat* and politically sovereign elements of modern democratic constitutions — the former intended to channel power through rule of law, and the latter marking the discretionary power of the sovereign elements of the state to act without legal limits — would lead eventually to political instability; in particular in liberal parliamentary democracies, Schmitt anticipated that stability would be short-lived as pluralist elements, whether formal political parties or otherwise, tore the homogeneous people apart despite following procedural rules. In Balakrishnan’s view, Schmitt “recognized that it is only in the struggle between parties vying for hegemony over ‘the people’ that the latter is mobilized as an agent, and becomes something more than the empty signifier of an imagined community.”²²⁹ I think that this understates the people’s latent role, even in Schmitt’s conception, but the core point is clear: pluralist democracies on Schmitt’s view decay, as plural elements fight to define the content of “the people.” As Schmitt himself put it, “[i]f the state becomes a pluralistic party state, the unity of the state can be maintained only as long as two or more parties agree to recognize common premises,” i.e. reach homogeneous agreement on some fundamental political or legal tenets.²³⁰

²²⁷ Ibid. 137.

²²⁸ Schmitt, *Constitutional Theory*, 233-34.

²²⁹ Balakrishnan, *The Enemy*, 263.

²³⁰ Schmitt, “Ethic of State,” 207.

And what of the people's latent role? Here Schmitt comes in for some significant, and I believe warranted, criticism for failing fully to theorize the latent role of the people in the context of extant democratic polities. Schmitt believed that within an established democracy,

[t]he people can only respond yes or no. They cannot advise, deliberate, or discuss. They also cannot set norms, but can only sanction norms by consenting to a draft set of norms laid before them. Above all, they also cannot pose a question, but can only answer with yes or no to a question placed before them.²³¹

It follows from this, of course, that some authoritative body must be empowered to formulate and place before the people proper questions to be answered by them without misusing such power, a set of requirements he believed were rarely met in democratic practice.²³² Thus “the democratic will in Schmitt is a combination of the power of a man or minority to ask the people a question and the peoples’ [sic] right to answer.”²³³ The people have here receded substantially from their prior prominence as bearers of the *pouvoir constituant*. Once they have established a constitution, and *until they do so again*, they become passive in Schmitt’s view, waiting to vote up or down (whether through plebiscite or through less formal means of acclamation) on questions properly posed by state actors given authority through the constitution to pose them. In this regard, then, for Schmitt, “[p]opular sovereignty seemed to be becoming what it should be in a stabilized constitutional democracy: an all-pervasive idiom of political life, a formless source of legitimating acclamation.”²³⁴

²³¹ Schmitt, *Legality and Legitimacy*, 89.

²³² Ibid. 90.

²³³ Schwab, *Challenge of the Exception*, 66.

²³⁴ Balakrishnan, *The Enemy*, 100.

But this seems to leave out of the argument who will pose questions for acclamation (or rejection), and how such question posers relate to the people hovering above the founded democratic state. This, argues George Schwab, “is a perversion of a true democracy, because of the dependence of the people on the question being asked.”²³⁵ “This idea of acclamation as a type of direct rule,” Kalyvas claims, “is unsustainable, even laughable.”²³⁶ In adopting a narrow view of the popular democratic role during normal times as limited to acclamation,

Schmitt ignored forms of radical contestation that do not target the constitution directly but rather endeavor to challenge peripheral constellations of everyday power relations, local forms of domination, and more hidden practices that escape from the pincers of the legal system and thus from the constituent power.²³⁷

I agree in general with these criticisms. Schmitt’s theorizing of the Vishnu moment of constitutional democracy leaves the people largely out of the picture, except for its potential to act in the face of dire need, tantamount to entering the Shiva moment. Schmitt theorizes the day-to-day inadequately. Indeed, a core aim of this dissertation is to show how microsovereign popular action in the context of jury nullification (which not coincidentally amounts to juries engaging in acclamation or rejection of questions put to them by state actors — prosecutors and judges — in the context of criminal trials) can serve to bring the people back in to quotidian exercises of sovereignty under law.

Nonetheless, Schmitt’s focus was never on the norm, but rather on the exception.²³⁸ Thus it should come as no surprise that even when examining examples of specific constitutions, he did so with an eye toward their making or their undoing. For example,

²³⁵ Schwab, *Challenge of the Exception*, 66-67.

²³⁶ Kalyvas, *Politics of the Extraordinary*, 183.

²³⁷ *Ibid.* 185.

²³⁸ See, for example, Schmitt, *Political Theology*, 15, (“The exception is more interesting than the rule. The rule proves nothing; the exception proves everything.”).

Schmitt wrote approvingly of John Adams's constitution for the Commonwealth of Massachusetts, citing specifically its insistence (in parallel to the Declaration of Independence) that the people of the commonwealth could change their government even outside the constitution's amendment procedures when its purpose was no longer fulfilled, and claiming that under such provisions political unity resulted from a pact of the entirety of the people with each citizen to guarantee that "[t]he entire body of citizens is presupposed as the political unity," and thus as the bearer of the *pouvoir constituant*.²³⁹ Schmitt clearly was more focused on the first and third moments of constitutional democracy, in which the people would end existing constitutional orders in a process that would culminate in their founding new ones. It is to the third, Shiva moment that I now turn.

Resisting the State: The People Reawakened

Yet another debate in Schmitt scholarship asks whether Schmitt believed that a democratic people had the right to resist or revolt against its government. According to David Dyzenhaus, Schmitt believed that Immanuel Kant was right that the state's position as supreme judge "excludes any individual right of resistance against the state."²⁴⁰ Dyzenhaus is either wrong about this, or Schmitt is inconsistent on this point. Schmitt does note that "Kant rejected the right of resistance outright because it contradicted the idea of the unity of the state," but in this context Schmitt is reviewing, not endorsing, Kant's ethic of state, which he in any event associates with the ethic of liberal individualism, which we have seen he clearly disfavors.²⁴¹ "Do the people have a right to revolt?" George Schwab claims that

²³⁹ Schmitt, *Constitutional Theory*, 113.

²⁴⁰ Dyzenhaus, "State Back in Credit," 77-78.

²⁴¹ Schmitt, "Ethic of State," 196.

“Schmitt makes no specific statement on this question.”²⁴² Yet Schmitt does claim in that work at least that individuals have a right to resist in order to secure their basic rights. The individual’s right to resist his government serves as the utmost means of protecting his and his fellow citizens’ basic rights. It is inalienable, but also unorganizable, and an essential component of a democratic *Rechtsstaat*.²⁴³

Some purchase on Schmitt’s thoughts on the right to resist or revolt can be found in his analysis of Thomas Hobbes’s *Leviathan* and associated theory of the state. According to Schmitt, before Hobbes, in the era of the medieval state, “the feudal . . . ‘right to resist’ an unlawful ruler [was] self-understood. . . . The endeavor to resist the leviathan,” however, was made by Hobbes’s theory “practically impossible.”²⁴⁴ There is ordinarily no right to resist the leviathan, who as sovereign determines the law.²⁴⁵ In part, apparently, this is because the leviathan state is “[a] closed legal system [that] establishes the claim to obedience and justifies the elimination of every right to resistance.”²⁴⁶ Yet the modern Hobbesian leviathan state also generates “the assumption of total political responsibility regarding danger and, in this sense, responsibility for protecting subjects of the state. If protection ceases, the state too ceases, and every obligation to obey ceases. The individual then wins back his ‘natural’ freedom.”²⁴⁷

²⁴² Schwab, *Challenge of the Exception*, 114, citing *Constitutional Theory*.

²⁴³ Schmitt, *Constitutional Theory*, 202.

²⁴⁴ Schmitt, *Leviathan*, 46.

²⁴⁵ Ibid. 53.

²⁴⁶ Ibid. 66.

²⁴⁷ Ibid. 72. I do not address here the Hobbesian claim, which Schmitt rejected, that citizens did *not* have to obey commands of the sovereign requiring them to lay down their own lives. See Schmitt *Concept of the Political*, 71: “In the case of need, the political entity must demand the sacrifice of life. Such a demand is in no way justifiable by the individualism of liberal thought.”

I believe that the best way to make sense of these claims, which seem to be in tension, is to recall that Schmitt's theory of the state comprehends both normal legal order, which Schmitt sees as attempting always to assert its hegemony but also as fragile, and extraordinary circumstances, in which the political breaks through the norm. After all, a central paradox to Schmitt's political thinking is that the state aims to achieve order and stability, and yet is founded beyond order-maintaining law.²⁴⁸ "Schmitt is valuable because he stresses that all legal orders have an 'outside.'"²⁴⁹ In the Hobbesian state, the normal legal order inheres in the capability of the leviathan to protect the people in return for their obedience. When protection fails, the right of the people to revolt and disobey reasserts itself, *outside* the prior legally constituted order.²⁵⁰ On this read, it is erroneous to think that Schmitt sides with Kant and against rights to resist.

Here I follow a line of argument developed by Andreas Kalyvas. Recall that, as I have argued above, a constitutional founding (or refounding) is a legal break from the preceding constitutional norms. Sovereign dictatorship — whether popularly instituted or exercised by a single dictator — is thus a "form of *constituting* politics."²⁵¹ Schmitt, however, in the context of defining and describing sovereign dictatorship, conflates the extraordinary with the exception. Suspending the constitutional order is a form of dictatorship that flows from the exception. Establishing a new constitutional order is an exercise of sovereignty identified with the new category Kalyvas introduces — the extraordinary.²⁵² Because Schmitt saw dictatorship, even sovereign dictatorship, as a mandate on behalf of the

²⁴⁸ Hirst, "Schmitt's Decisionism," 14.

²⁴⁹ Ibid. 16.

²⁵⁰ Accord Schwab, *Challenge of the Exception*, 148: "The relation between protection and obedience is crucial for understanding Schmitt's political ideas."

²⁵¹ Kalyvas, *Politics of the Extraordinary*, 90.

²⁵² Ibid. 92-93.

sovereign people rather than as exercise of sovereignty in its own right, his failure to keep the categories of the exceptional and the extraordinary distinct has led to difficulty in distinguishing between an extralegal, unauthorized democratic founding (such as the adoption of the US Constitution), democratic sovereign dictatorship, and the rule of a sovereign but democratically unaccountable dictator.²⁵³

Once, however, it becomes clear that Schmitt not only anticipated but favored some latent right of the people to resist, revolt, and refound, it becomes easier to make sense of certain other of his claims. Recall that Schmitt expressed concern about the modern total legal state and its attempt to subordinate everything to law — a concern closely linked to his deep discomfort with both legal positivism and the liberal *Rechtsstaat*. This concern is typically mobilized against Schmitt to demonstrate his illiberal political commitments and even opposition to individual rights. Yet lurking within Schmitt's theory is an alternative conception, according to which he presciently identified a totalizing nature in law and the *Rechtsstaat*. For as the liberal state proliferates law in an attempt to eliminate exceptional circumstances and thus decisions by human actors, it simultaneously subjects more and more of its citizens to increasingly complex legal restrictions. Schmitt associated the turn toward the total state in modernity as primarily implicating a move toward proliferation of the administrative state form — one in which bureaucratic functionaries govern either according to the exercise of their own unchecked decisions, or in which they claimed to do otherwise, pointing always toward law as the source of all otherwise political decisions.²⁵⁴ Thus a state that did *not* give credence to or derive its foundations from a right to resist would have been, in Schmitt's thought, a state that refused to deal with the concrete political realities of

²⁵³ Ibid. 97.

²⁵⁴ See Schmitt, *Legality and Legitimacy*, 6.

administrative actors who either brazenly rule contrary to the popular will, or under the guise of following law accomplish the same results.

In fact, Schmitt formulated consent of the people as bearers of the *pouvoir constituant* to be governed in a democracy not positively, but negatively in terms of a right to resist. “Legitimacy depends not on the overt compliance of those over whom authority is exercised but rather on their choice not to resist such authority.”²⁵⁵ That is, acclamation’s flip side is exercise of the right to resist, which is how the people reclaim their *pouvoir constituant* in the face of a failed government that does not correctly take into account the people’s acclamation or rejection on questions posed to it during the Vishnu moment, or perhaps simply fails to pose sufficient or proper questions. Schmitt understood a political entity to be truly democratic only if it tolerated periodic emergencies in which the people could publicly and vocally show their power in such instances through, for example, mass demonstrations, rallies, and general strikes.²⁵⁶ Such public rejection of extant law or orders mirrors the ancient Roman “tumult” in which the plebs could, usually in some kind of crisis situation, demonstrate its unhappiness with current rulers.²⁵⁷

Schmitt also seemed to contemplate, however, that “even under conditions of normal politics the people need, for reasons of democratic legitimacy, to periodically arise from within the constituted powers. They do so through ‘inauthentic’ political forms and institutional channels, such as referenda and periodic plebiscites.”²⁵⁸ Schmitt holds that in these appearances and actions, “apocryphal acts [of popular sovereignty] inevitably reappear [] during everyday politics as [the people] strive[] to survive within an institutionalized

²⁵⁵ McCormick, “Identifying or Exploiting the Paradoxes,” xxiv.

²⁵⁶ Balakrishnan, *The Enemy*, 263.

²⁵⁷ Niccolò Machiavelli, *Discourses on Livy*, trans. Julia Conaway Bondanella and Peter Bondanella. (Oxford, UK: Oxford University Press, 1997), I:4, 30.

²⁵⁸ Kalyvas, *Politics of the Extraordinary*, 176.

political system.”²⁵⁹ In this way, albeit without a great deal of careful consideration, Schmitt begrudgingly lets the people back into political action even during the more-or-less stable period of an established democratic order. It thus seems at least possible that, on Schmitt’s understanding, the foreclosure of such apocryphal sovereign acts, of which I believe jury nullification to be one, by existing legal orders might lead to the people to engage in more tumultuous aimed at destroying the *polis* in order to clear the way for its refounding.

What kinds of situations might give rise to the resurgent power of the people? Schmitt is less than comprehensive about this question, but does point to circumstances that might lead to a state’s downfall in this way. In a corrupted state, on Schmitt’s view, the situation is one in which

[l]egality and legitimacy [] become tactical instruments that each [side of a political struggle] can use for momentary advantage Even the constitution itself breaks up into its contradictory components and interpretive possibilities such that no normative fiction of a “unity” can prevent warring factions from making use of that part of the constitution . . . that they believe is best suited for knocking the opposing party to the ground in the name of the constitution.²⁶⁰

In such a circumstance, “[t]he claim to legality renders every rebellion and countermeasure an injustice and a legal violation or ‘illegality.’ If legality and illegality can be arbitrarily at the disposal of the majority, then the majority can, above all, declare their domestic competitors illegal, . . . thereby excluding them from the democratic homogeneity of the people.”²⁶¹

Caution is warranted here. Schmitt might appear to be foreclosing the possibility of a homogeneous democratic people whose unity is grounded in law or constitutional principles. But to say that such a unity can be exploited by a majority acting in the name of the law is different from saying that no unity can be grounded in legal principles, including

²⁵⁹ Ibid. 176.

²⁶⁰ Schmitt, *Legality and Legitimacy*, 93.

²⁶¹ Schmitt, *Legality and Legitimacy*, 30.

agreement to adhere to some form of legal rule. Rather, Schmitt, read as a whole, seems to be pointing out that while there might be good reasons to found democracy on a constitutionally normative unity, such democracies are unstable and fleeting, precisely because of the inherent tensions between democracy and the representative, party-dominated *Rechtsstaat*. This problem is only compounded by the fact that liberalism promotes the supremacy of statutory law, which is understood as safeguarding justice and freedom, but which in so doing threatens democratic sovereignty, including especially the right to resist, which is antithetical to the supremacy or sovereignty of existing law.²⁶² This antithesis is why, as Giorgio Agamben observed, “in both the right of resistance and the state of exception, what is ultimately at issue is the . . . juridical significance of a sphere of action that is itself extrajudicial.”²⁶³ In any event, it is clear what course Schmitt would urge upon democratic citizens in response to a *Rechtsstaat*'s attempt to achieve a monopoly on legality, and thus on legitimacy: “If the danger exists that democracy might be used in order to defeat democracy,” e.g. through the enactment and enforcement of antidemocratic statutes or amendments by a majority or supermajority, “then the radical democrat has to decide whether to remain a democrat against the majority or to give up his own position.”²⁶⁴

Conclusion

This chapter introduced Schmitt and his thought, with particular attention to his political commitments and role in attempting to save the Weimar Republic, including his role in its collapse, his adoption of at least certain elements of Nazi ideology, and his participation in the Nazi Reich. It examined his theorizing in connection with its gradual

²⁶² McCormick, “Identifying or Exploiting the Paradoxes,” xxx.

²⁶³ Agamben, *State of Exception*, 11.

²⁶⁴ Schmitt, *Crisis of Parliamentary Democracy*, 28.

reception by theorists on the political left, as well as Schmitt's views on legal positivism and liberalism. Finally, it introduced Schmitt's seminal understanding of sovereignty as the power to decide upon exceptional circumstances and what to do about them, before undertaking an exegesis of his problematic and sometimes inconsistent views on democracy, democratic homogeneity and the operation of democracy within constitutional systems. This work clears the ground for an application of these core principles in Schmitt's thought to sovereignty in America. In the next chapter, I discuss the American founding through close analysis of where America's key founding documents appear to locate sovereignty. I then in the subsequent chapter analyze the American situation according to Schmitt's principles of sovereignty, in order that the remainder of the dissertation can better identify jury nullification's role within the matrix of American sovereignty in accordance with Schmitt's views.

CHAPTER 3

SOVEREIGNTY IN AMERICA

Introduction

Having detailed in the previous chapter Carl Schmitt's theory of sovereignty as the exercise of ultimate decisional authority in exceptional circumstances, together with other relevant aspects of Schmitt's views on democracy, liberalism, and constitutionalism, I turn now to applying his theories in the concrete context of the American founding. In this chapter I will analyze both provisions of the US Constitution and arguments made in *The Federalist*, showing that the Framers established a republic built on radically diffuse, and as a result obscure, sovereignty. In so doing, I will address authorship and rhetoric in *The Federalist*, the observable differences among the views of its authors, elements of sovereignty inherent in the Constitution and *The Federalist* as founding texts, the sovereign power to interpret these texts, and the fictive nature of "the people" as addressed in these texts. With this foundation in place, I examine in the subsequent chapter the American situation through the critiques of liberal conceptions of sovereignty propounded by Carl Schmitt and some of the theorists who have extended his ideas.

Diffuse Sovereignty in America

Following the 2008 financial markets crisis, and throughout the Obama presidency, loosely affiliated grass-roots movements of citizens opposed to the Obama health care plan, finance and auto industry bailouts, and federal government regulation and spending in general have proliferated. These groups, who self-identify with the Boston Tea Party, in which a group of American colonists protested British taxes through an act of civil disobedience, take inspiration and derive political legitimacy from principles they claim to

trace to the American founding, properly understood. In particular, they advert to the US Constitution's Ninth and Tenth Amendments, which respectively reserve rights not expressly identified in the Bill of Rights to the people, and powers not delegated to the federal government to the states or the people.¹

While these tea partiers' messages are not unified — these groups and their members prize independence, including from one another — they appear to agree in general on a theory of the American founding and of constitutional jurisprudence that invests “the people” (and to a secondary degree the states acting through popular militias) with the ongoing right to resist, even by violent means, federal encroachments on the prerogatives of states and the rights of citizens. For them, the most central crisis posed by recent political events is their further tilting of the original balance between the rights and powers of citizens and states on one hand, and the powers of the federal government on the other, in favor of the latter at the expense of the former. They organize classes and book club readings, intending to inform themselves about the Constitution, the American Founding, and founding principles. They largely conclude, in part on the basis of these investigations, that contemporary political actors including the Supreme Court have ceded too much power to the federal government through overly broad interpretations of Congress's Article I powers (including those granted by the Welfare, Commerce, and Necessary and Proper Clauses). Betraying a preference for the Framers' original intent over later democratic reforms, some even object to the Seventeenth Amendment's provision for popular election of US Senators as upending an important state power originally designed to check the federal government.²

¹ Amy Gardner, “Tea Party Gatherings on the Fourth Mix the Educational and the Patriotic,” *Washington Post*, 5 July 2010, A3. The US Supreme Court has not interpreted these amendments as broadly as their plain language would seem to dictate, though tea party members undoubtedly would like to see them more fully implemented, at least in the abstract.

² Ibid.

Many mobilize the Gadsden flag with its coiled snake emblem and “Don’t Tread on Me” motif, as well as Thomas Jefferson’s call to nourish the tree of liberty periodically with the blood of patriots and tyrants, as symbols of their willingness to take up arms to protect their originalist vision of the American republic. In short, they reach for the words and images of the founding generation as evidence for the general claim that in America, power is and must remain fundamentally an attribute of the people (apparently even when mediated in ways designed to check popular sovereignty, as in the case of state legislatures’ role in electing US Senators prior to the Seventeenth Amendment).

In so doing, I argue, they profoundly misread the Constitution and the Founders’ intent in drafting it and securing its ratification. While the tea partiers’ views cohere with a set of important founding myths, and while they correctly point to a popular sovereignty deficit in contemporary America, close analysis of the Framers’ intent as memorialized in particular in the US Constitution and in *The Federalist* demonstrates that the nascent American republic did not fundamentally rest on popular sovereignty as that term is ordinarily understood. Indeed, Schmitt at times is critical of American democracy on precisely this basis, arguing that its liberal *Rechtsstaat* elements hold popular democratic sovereignty at a distance from the core of American power. Rather, the constitutional system was meant to channel popular constituent power through a diffuse series of mechanisms and actors, which make it more difficult to determine where power lies and who exercises it. The Framers were self-consciously engaged in a key founding act: the construction of functional myths, which overrode memory of the prior order, and established new ontological values; at the same time, they were both divided amongst

themselves and individually ambivalent with respect to the workings of power in the new republic.³

American Sovereignty Conventionally Understood

In contrast to tea party rhetoric, diffuse sovereignty is currently quite popular in America — in the sense of being embraced by most citizens. A 2010 Penn Schoen Berland poll prepared for the Aspen Institute shows that “[b]y 64 to 19 [percent Americans] endorse the system of checks and balances as necessary to prevent one branch from dominating the Government.” However, some of the mechanisms of diffuse sovereignty in America do not fare so well: 69 percent favor mandatory retirement for Supreme Court Justices, 66 percent favor term limits for Justices, and 51 percent want Justices to be subject to popular election, while 74 percent favor abolishing the electoral college.⁴ In a sense, this demonstrates that the Constitution has accomplished what the conventional view of American constitutional theory claims it has: once the Constitution was established, the initial constituent power of the people was channeled through its new institutions, and restricted in its ability to amend the Constitution through its own textual procedures.⁵ This also, however, shows that in the contexts of the Constitution’s textual sovereignty as subjected to judicial interpretation, and

³ Antonio Negri, *Insurgencies: Constituent Power and the Modern State*, trans. Maurizio Boscagli. (Minneapolis, MN: University of Minnesota Press, 2009), 148. See also Kathleen Davis, *Periodization and Sovereignty: How Ideas of Feudalism and Secularization Govern the Politics of Time*. (Philadelphia: University of Pennsylvania Press, 2008).

⁴ Mark Penn, “Poll Shows People Support Checks and Balances, but Want More Limits on Supreme Court Justices,” *Huffington Post*, 9 July 2010. Available via http://www.huffingtonpost.com/mark-penn/poll-shows-people-support_b_640864.html (accessed 9 July 2010).

⁵ Stephen M. Griffin, “Constituent Power and Constitutional Change in American Constitutionalism,” in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker. (Oxford, UK: Oxford University Press, 2007), 49-50. For Schmitt, to the extent to which the Constitution can only be modified according to its own terms, the United States is a classic bourgeois *Rechtsstaat*. If, however, the people retain a latent sovereign right to modify or undo the Constitution outside express amendment procedures, then the US is a democracy. As we have seen, for Schmitt these two categories properly understood and applied conflict and are mutually exclusive. Schmitt, *Constitutional Theory*, 154-55.

of the method of electing presidents, most Americans would like to see greater popular control, though they do not yet appear willing to oppose *en masse* judges appointed to lifetime positions or the electoral college.

The founding ideal becomes, on this analysis, one that crystallized the values of the Revolution — setting up a political system that incorporates popular sovereignty in at least a rhetorical way, but that simultaneously constrains change, consistent with Schmitt’s analysis of the role of the people in an established constitutional order. The Framers set up a political system that while not abandoning entirely the principles of the Declaration of Independence, “nonetheless . . . would demand obedience to its laws from a majority of adults — women, non-whites, and some white males — who were excluded from active participation in making those laws, whether directly or through their elected representatives.”⁶ Moreover, “the framers deliberately created a framework of government that was carefully designed to impede and even prevent the operation of majority rule.”⁷ In the conventional view, then, American sovereignty lies in the Constitution, subject to amendment, as implemented by governmental institutions, subject to popular election.

Allocated Sovereignty in the Constitution and Declaration

As the governing document of the United States, the Constitution is an appropriate first place to look for signs of sovereignty in the American polity. American schoolchildren are taught that ours is a system of separation of powers, marked by checks and balances

⁶ Robert A. Dahl, “On Removing Certain Impediments to Democracy in the United States,” in *The Moral Foundations of the American Republic*, ed. Robert H. Horwitz, 2nd ed. (Charlottesville, VA: University Press of Virginia, 1979), 238.

⁷ Ibid. 239.

exercised by various governmental entities against, and sometimes in conjunction with, others. In short, American sovereignty is diffuse. Its attributes are divided.⁸

⁸ The House of Representatives can impeach the President and members of the judiciary (U.S. Const., Art. I, Sec. 2, Cl. 5). The Senate tries impeachment cases; its verdict is unreviewable (Ibid. Art. I, Sec. 3, Cl. 6). Congress may override state determinations on the time and manner of federal legislative elections (Ibid. Art. I, Sec. 4, Cl. 1). Each house of Congress requires the other's consent to adjourn more than three days or to any other place than where they both are meeting (Ibid. Art. I, Sec. 5, Cl. 4). Members of Congress are privileged from arrest by the executive except for treason, felony, or breach of the peace (Ibid. Art. I, Sec. 5, Cl. 4). Congress may override a presidential veto by a two-thirds vote (Ibid. Art. I, Sec. 7, Cl. 2). Congress can establish inferior federal courts (Ibid. Art. I, Sec. 8, Cl. 9; Art. III, Sec. 1). Congress can declare war, raise and support armies, provide for and maintain a navy, regulate both, call forth state militias, and organize these and the armed forces (Ibid. Art. I, Sec. 8, Cl. 11-16). Congress must consent to states' imposts or duties except pursuant to inspection laws, all of which are subject to congressional revision (Ibid. Art. I, Sec. 10, Cl. 2). States require congressional consent to exercise foreign relations powers (Ibid. Art. I, Sec. 10, Cl. 3). The House and Senate originally selected the President and Vice President respectively when no candidate received a majority of electoral votes (Ibid. Art. II, Sec. 1, Cl. 3). Congress sets the time and date of presidential elections (Ibid. Art. II, Sec. 1, Cl. 4). Congress originally provided exclusively for presidential succession beyond the Vice President (Ibid. Art. II, Sec. 1, Cl. 6). The Senate must approve treaties by a two-thirds vote, and has consent power over presidential nominees to the executive and judiciary (Ibid. Art. II, Sec. 2, Cl. 2).

The President is required to report to Congress on the state of the union (Ibid. Art. II, Sec. 3). Congress may provide for the manner by which the validity public acts to which the states must give full faith and credit shall be proven (Ibid. Art. IV, Sec. 1). Congress must consent to the admission of new states (Ibid. Art. IV, Sec. 3, Cl. 1). Congress may propose new amendments to the Constitution, subject to state ratification (Ibid. Art. V). The Vice President sits as presiding officer of the Senate and casts tie-breaking votes there (Ibid. Art. I, Sec. 3, Cl. 4). Members of Congress may not serve in the executive while serving as legislators, nor take any office in the executive created during or for which the pay is increased during their legislative terms (Ibid. Art. I, Sec. 3, Cl. 4). All legislative acts requiring both houses of Congress to concur must be approved by the President, subject to his veto (Ibid. Art. I, Sec. 7, Cl. 2-3). The President's pay may not be altered by Congress during his term (Ibid. Art. II, Sec. 1, Cl. 7). The President commands the army, navy, and militia (Ibid. Art. II, Sec. 2, Cl. 1). Subject to senatorial approval, the President makes treaties and appoints federal judges and executive officers (Ibid. Art. II, Sec. 2, Cl. 2). He may appoint officers during congressional recess for the remainder of the congressional term without senatorial approval (Ibid. Art. II, Sec. 2, Cl. 3). He may convene Congress and may adjourn it when its houses cannot agree upon adjournment (Ibid. Art. II, Sec. 3).

The judiciary is empowered over other branches in that the Chief Justice of the Supreme Court presides at impeachment trials of the President (Ibid. Art. I, Sec. 3, Cl. 6). Members of Congress cannot serve in judicial positions created or for which the pay has been raised during their terms (Ibid. Art. I, Sec. 6, Cl. 2). Federal judges at all levels serve lifetime appointments provided they are on "good behavior" and Congress may not diminish their pay during their tenures (Ibid. Art. III, Sec. 1).

The states too are invested with powers: State legislatures determine the times, places and manner of federal legislative elections subject to congressional override as to time and manner only (Ibid. Art. I, Sec. 4, Cl. 1). States appoint presidential electors (Ibid. Art. II, Sec. 1, Cl. 2). States are required to give full faith and credit to each other's public acts, records, and judicial proceedings (Ibid. Art. IV, Sec. 1). They may not deny to each other's citizens the privileges and immunities of state citizenship (Ibid. Art. IV, Sec. 2, Cl. 1). They must extradite criminals within their borders to the states where they are wanted (Ibid. Art. IV, Sec. 2, Cl. 2). They could not originally, by harboring escaped slaves, emancipate them (Ibid. Art. IV, Sec. 2, Cl. 3). New states formed out of existing states' territories must be approved by those existing states (Ibid. Art. IV, Sec. 3, Cl. 1). States are guaranteed a republican form of government and protection from foreign invasion and domestic violence by the federal government (Ibid. Art. IV, Sec. 4). And they may by calling conventions propose amendments, and have, through their legislatures or through state conventions the power to ratify amendments (or not), provided that no such amendment may deprive any state of equal representation in the Senate without its consent (Ibid. Art. V). Nine states were originally empowered to ratify the Constitution itself, through state conventions, as binding among themselves (Ibid. Art. VII).

From this express constitutional division of powers, we can glean a picture of sovereignty spread unevenly and in often contradictory ways among political actors. Sovereignty is not just divided, but tangled and diffuse. Just when it seems to be in one place, some other entity's sovereignty impinges. This was perhaps less true at the founding than now. For instance, during the Founders' generation, states were understood as "sovereign" even after the Constitution's ratification, where "sovereignty" implied supremacy.⁹ Under this view, any significant overlap of powers between states and the federal government, a common feature of American government now, would have been conceptually impossible, because it would have meant that states were not really sovereign.¹⁰ Likewise, coordination of powers across federal governmental branches in forms common now (such as independent agencies established by Congress whose members are appointed by the President) was clearly not contemplated by the Founders.¹¹ Yet despite the somewhat cleaner lines of divided sovereignty at the founding, the original constitutional system still yields complex and conflicting results when one asks who, under particular circumstances, is

The Constitution's ratification by only nine states is claimed to have been proper, despite that the then-effective Articles of Confederation insisted on their amendment only through unanimity of the states, because of the necessity of self-preservation of the federation. It could also be argued that breaches by various states of the Articles rendered them nugatory as against all other states, as would have been the case in a treaty among sovereign nations. See James Madison, *Federalist* 43, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 279-80.

Apart from its particular branches, the federal government is also given some attributes of sovereignty. It is charged with guaranteeing to states a republican form of government and protection from foreign invasion, as well as upon state legislatures' application, from domestic violence (U.S. Const., Art. IV, Sec. 4). And federal law, together with treaties and the Constitution, is supreme over state laws and binds state judges (Ibid. Art. VI, Cl. 2). The federal Constitution itself bears marks of sovereignty: It is the supreme law of the land (Ibid.). And federal and state officers are expressly required to be bound by oath or affirmation to follow it (Ibid. Art. VI, Sec. 3).

⁹ Richard H. Fallon Jr., *The Dynamic Constitution: An Introduction to American Constitutional Law*. (Cambridge, UK: Cambridge University Press, 2004) 160.

¹⁰ Ibid. 161.

¹¹ See James Madison, *Federalist* 48, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 308: "It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, and overruling influence over the others in the administration of their respective powers."

sovereign in the Schmittian sense — that is, who ultimately decides that a decision is necessary, and what the content of that decision will be — a decision whose content, because it takes place in exceptional circumstances, is by definition unknowable in advance.

Theorist of the human mind Douglas R. Hofstadter aptly uses the American constitutional framework to illustrate the concept of tangled hierarchies or strange loops as a feature of intelligence, artificial or otherwise. Take, for instance, a case in the US court system (as that system is presently constructed by congressional legislation, duly signed into law by the President). Ordinarily, it will involve two disputants and a court that decides the outcome of the dispute. Should two trial courts disagree over a legal issue implicated by such suits, a yet higher appellate court decides it. Finally some highest court outside the others renders an ultimate and binding decision — if the case reaches the Supreme Court, that court's decision is final. But since there is no court higher than the Supreme Court, when it becomes involved in a dispute with co-equal branches of government (say over whether Congress may validly issue laws that appear to violate the Constitution as in *Marbury v. Madison*,¹² or in Hofstadter's example, whether President Nixon was required to obey Court rulings as in *United States v. Nixon*¹³), such disputes are insoluble by reference to any higher authority. As Hofstadter puts it, “once you hit your head against the ceiling like this, where you are prevented from jumping out of the system to a yet higher authority, the only recourse is to forces which seem less well defined by rules, but which are the only source of higher-level rules anyway: the lower-level rules, which in this case means the general reaction of society,” i.e., whatever sovereignty remains in the people in a residual, reactive sense, deployed when the complex system of diffuse sovereignty cannot by itself generate an

¹² 5 U.S. (1 Cranch) 137 (1803).

¹³ 418 U.S. 683 (1974).

authoritative answer.¹⁴ Hofstadter has unwittingly described the role of popular sovereignty precisely consistent with Schmitt's own conception of democratic power beyond the Constitution and beyond any written law or positivist norm that remains latent until a crisis provokes it to break through and decide.

And what of the people in the constitutional text? As was then the case with many state constitutions, the federal Constitution's Preamble began by asserting "the People" as the source of its own authority and legitimacy.¹⁵ This reference to the people as the constitutive source of the Constitution's sovereignty is of dubious validity in the sense that its authors were those members of the 1787 Constitutional Convention who signed their own names to that document before presenting it to the states for ratification. Their authority even to undertake the drafting of a new governing document for the states was questionable and called into question, even at the time of the Convention (which had been called to amend, not replace the existing Articles of Confederation, which by their own terms required a unanimous vote of all thirteen states to be altered).¹⁶

Nonetheless, the Constitution's key *Federalist* advocates argued strenuously for the legitimacy of that gathering and its results. James Madison writing in *Federalist* 40 found authority for the convention that drafted the Constitution in the first instance in recommendations by the Annapolis convention of September 1786 and the Congress in February 1787. The former had authorized appointment of commissioners to devise further provisions to the then-constitution (the Articles of Confederation) to meet exigencies of the union. The latter had noted that several states had called for remedies to defects in the

¹⁴ Douglas R. Hofstadter, *Gödel, Escher, Bach: An Eternal Golden Braid*. (1979; repr. New York: Vintage Books, 1989), 692-93.

¹⁵ U.S. Const., Preamble. Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America*. (New York: W.W. Norton, 1988), 281-82.

¹⁶ Arts. of Conf., Art. XIII.

Articles and appointed delegates to a convention in Philadelphia for the purpose of revising them and reporting to Congress on recommended revisions.¹⁷ The provisions calling for revision, however, were implicitly inconsistent with and subordinate to those calling for an effective government, and therefore could reasonably be read out of the delegates' commissions; thus Madison argued that the delegates could not have been understood to have been sent to revise the Articles without also remedying the Union's fundamental deficiencies. Moreover, he claimed, revising the Articles did not require retaining the original document itself in any degree.¹⁸ In his view the Constitution merely expanded upon powers already delegated to the national government under the Articles. And while the Constitution by its own terms could be ratified by fewer than all thirteen states, this was in Madison's view necessary for the practical reason that a single dissenting state, such as tiny Rhode Island, could otherwise hold the other states hostage to unreasonable demands.¹⁹ Madison further argued that even assuming the convention was itself illegal or insufficiently empowered to adopt a new draft constitution, its resulting draft document still amounted to good advice, and should thus be adopted (albeit according to its own terms, not the Articles').²⁰

Most importantly for a Schmittian analysis, however, Madison bolstered all these claims by reference to language in the Declaration of Independence proclaiming a right in the people to abolish or alter governments to effectuate their own safety and happiness, such that they could not be bound by the states or by law to adhere indefinitely to a bad set of

¹⁷ James Madison, *Federalist* 40, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 247-48.

¹⁸ *Ibid.* 249.

¹⁹ *Ibid.* 251.

²⁰ *Ibid.* 254.

Articles.²¹ This argument points directly to a latent constitutive power in the people that remains outside the legal norms of a constitution but is always ready legitimately to override it in favor of a new constitutional text. As will be shown below, Schmitt wrote approvingly of the Declaration's perpetual reservation of such constitutive power to the American people, and the degree to which that document demonstrates a truly democratic core to the American polity, its liberal *Rechtsstaat* elements notwithstanding.²²

Setting aside the legality and legitimacy of the Constitution in light of the prior Articles, and notwithstanding Madison's justification of the Constitution on the ground of latent popular sovereignty, the people had only a severely mediated role in adopting the Constitution; according to its own terms, it was to be ratified not by popular vote, but rather by representative conventions in the several states.²³ This practice was not unusual in the context of state constitutions in the post-colonial system. Early American drafters of state constitutions, recognizing the special legal status of these founding documents, endeavored to cast the people, usually in preambular language, as the source of their authority as drafters to set forth the states' fundamental governing rules. At the same time, the drafters characterized those rules as expressing the authoritative will of the people, exercised by the drafters and ratifiers at the people's behest.

Despite objections that merely claiming that these proxy exercises of popular sovereignty expressed the will of the people would not make it so, these claims generally

²¹ Ibid. 253. See Declaration of Independence, ¶ 2: "That whenever any Form of Government becomes destructive of [Life, Liberty and the pursuit of Happiness], it is the Right of the People to alter or abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness."

²² See Chapter 4, text accompanying notes 30 to 41 for discussion of Schmitt's analysis of the Declaration and the sovereign constitutive power of the people.

²³ U.S. Const., Art. VII, specifying no requirements for the means by which delegates such conventions were to be selected.

prevailed in the early years of the Revolution.²⁴ By 1779, however, Massachusetts voters rejected a constitution drawn up by preexisting popular representatives, choosing instead to elect a convention of delegates to draft a constitution that would subsequently require a two-thirds popular-vote ratification. Despite irregularities in the convention's interpretation of town votes, that state constitution "could be said, with more plausibility than any other, to be an act of the sovereign people,"²⁵ understood here, as in Schmitt's thought, as a majority of those empowered to vote. Thus, a true enactment by "the people" of the federal Constitution was at least conceptually possible by 1787.

Apart from their rhetorical appearance in the Preamble, one that implicitly refers back to the Declaration of Independence, "the people" are referred to only seven further times in today's Constitution. In the original text of the document, however, they are named only as electors of members of the House of Representatives.²⁶ All other constitutional references to "the people" came after the original ratification, appearing in Amendment I (right to peaceably assemble), Amendment II (right to bear arms), Amendment IV (right to security in persons, houses, papers, and effects), Amendment IX (not having other rights denied through enumeration of some), Amendment X (retaining residual power not given to the federal government or retained by states), and Amendment XVII (as electing Senators directly). Both rhetorically and functionally, then, the people remained largely outside the constitutional framework from its inception, though their latent constitutive power remained, pursuant to the Declaration.

²⁴ Morgan, *Inventing the People*, 256-57.

²⁵ *Ibid.* 258.

²⁶ U.S. Const., Art. I, Sec. 2, Cl. 1

Textual Sovereignty: *The Federalist* and the Constitution

Before I proceed to analyze *The Federalist* and the views expressed therein on popular sovereignty under the Constitution, it is necessary to address a linguistic ambiguity. In analyzing that text, Joshua Miller asserts that while its authors rhetorically expressed support for democracy, they substantively demonstrated a preference for what the Constitution truly enshrined, namely “popular sovereignty.”²⁷ Miller defines that term, however, in a way that would be unrecognizable to most users of ordinary language, including today’s tea partiers, though not to Carl Schmitt. For Miller, popular sovereignty places power in a strong central government but legitimizes it by claiming that it is rooted in the popular will.²⁸ For him, then, popular sovereignty is both consistent with a very powerful federal government and also does not require ongoing or active participation by the people.²⁹ According to Miller, and consistent with a strain of Schmittian analysis, while the Federalists, the Publius authors included, employed a rhetoric of “the people,” they did so in an effort to modulate democratic culture by juxtaposing it against a powerful national government.³⁰

On the face of it, the Federalists appear to be contradicting themselves. In some places, they seem to heartily support popular power; in other places, far more numerous, they seem to be designing a government in which representation, checks and balances, protection of private property, and expanding national boundaries will all serve to check the aims of the people and to prevent democracy.³¹

Substitute “popular sovereignty” as used in ordinary contemporary discourse for “popular power” and “democracy” in Miller’s lexicon, and his analysis substantially agrees with what follows.

²⁷ Joshua Miller, “The Ghostly Body Politic: The Federalist Papers and Popular Sovereignty,” *Political Theory* 16 no. 1 (February 1988): 99.

²⁸ Ibid. 103.

²⁹ Ibid. 99.

³⁰ Ibid. 100.

³¹ Ibid. 102.

The central dilemma of sovereignty — whether it would inhere in the people, in institutions representing them, or in some mixed medium — was not unknown to the founding generation. By the 1760s, John J. Otis, Jr. was advancing a then-current concept of sovereignty as supreme legislative and executive power, lodged entirely either in some body at the people’s behest, or if not, remaining residually in the “whole body of the people.”³² But as Otis and others attempted to draw boundaries between British parliamentary power over America and America’s own self-sovereignty, they began to undermine this monistic view of sovereignty and develop a new metaphysics of divided sovereignty.³³ The parameters of this division remained deeply contested, especially in the context of the newly proposed federal Constitution.

The authors of *The Federalist*, writing to persuade New Yorkers to support delegates to that state’s ratifying convention who would vote to adopt the Constitution, and to urge delegates’ support thereof, agreed in general terms that the federal government operative under the Articles of Confederation had to be substantially strengthened. Having finished an extensive survey of historical confederations, Madison had already concluded in 1785 that they shared a common vice with the US under the Articles, namely that they suffered from weak central national authority.³⁴ In an illustrative passage, Hamilton in *The Federalist* opined that “[t]he entire separation of the States into thirteen unconnected sovereignties is a project too extravagant and too replete with danger to have many advocates.”³⁵ Yet the overall content of *The Federalist* gives a more leavened perspective on the matter. Madison’s essays

³² Bernard Bailyn, *The Ideological Origins of the American Revolution*, enlarged ed. (Cambridge, MA: Belknap Press, 1992), 205, citing Otis’s *Rights of the British Colonies*.

³³ Ibid. 208-12.

³⁴ Michael I. Myerson, *Liberty’s Blueprint: How Madison and Hamilton Wrote the Federalist Papers, Defined the Constitution, and Made Democracy Safe for the World*. (New York: BasicBooks, 2008), 52-53.

³⁵ Alexander Hamilton, *Federalist* 13, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 97.

for the *Federalist* outlined a complex intermingling of federal and state powers under the new Constitution.³⁶ In *Federalist 37*, Madison admitted that in delineating state versus federal power, the Constitution is necessarily ambiguous.³⁷ And Hamilton argued that coordinate authority in general (i.e. divided sovereignty) in government could exist in fact and reality, citing the Roman republic's legislative authority's having been divided between independent patrician and plebeian legislatures.³⁸

The issue of federal versus state power serves as a specific example of ambivalence within *The Federalist*. According to Michael Myerson, the thrust of Publius' view on federalism (taking *The Federalist* authors, as they represented themselves, as a single entity) was that federal power should be limited in order to maintain at least some sovereignty in the states.³⁹ This balancing act reflects in part the divided view expressed in *The Federalist* as a whole: some of its essays prefer an almost unlimited federal government, and others advocate limiting federal powers in favor of primary governmental authority remaining with the states.⁴⁰ Ultimately, Myerson concludes that *The Federalist* intended that "the division of powers between the federal and state governments . . . be fluid."⁴¹ In fact, and again complicating matters, both Hamilton and Madison separately argued that the federal government's authority would ultimately be determined by the people, thus making them in

³⁶ Myerson, *Liberty's Blueprint*, 93.

³⁷ James Madison, *Federalist 37*, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 229.

³⁸ Alexander Hamilton, *Federalist 34*, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 206. In an interbranch example of divided sovereignty, Hamilton elsewhere opined that because treaty-making is a practice of making sovereign-to-sovereign agreements, that power is properly placed exclusively neither in the executive nor the legislative branch. Alexander Hamilton, *Federalist 75*, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 451.

³⁹ Myerson, *Liberty's Blueprint*, 196.

⁴⁰ *Ibid.* 197.

⁴¹ *Ibid.* 198.

this respect decisionally sovereign,⁴² and both claimed that state militias would ultimately guarantee that the pendulum would not swing too far in favor of the federal government as against the people or the states, though they expected that most checks on federal power would come from the ballot box rather than at gunpoint.⁴³

Federalists distinguished between the federal government exercising supremacy over states directly through law, which they claimed would not occur and would not be good for the republic, and federal supremacy operating against the individuals who make up states and collectively the union, and from whom the federal government's sovereignty ultimately derived.⁴⁴ As in the case of federal-state relations, *The Federalist* makes conflicting claims regarding the role of the people. Richard Hofstadter noted that both Madison and Hamilton saw representation — the exercise of mediated popular sovereignty by the US House — at least at points in *The Federalist* as not so much responsive to popular will as capable of shaping and educating it. Madison, in *Federalist* 10, hoped that representative government

would “refine and enlarge the public views by passing them through the medium of a chosen body of citizens” . . . wiser and more deliberate than the people themselves in mass assemblage[, while] Hamilton frankly anticipated a kind of syndical paternalism in which the wealthy and dominant members of every trade or industry would represent the others in politics.⁴⁵

As but one example of *The Federalist's* equivocation on this head, compare *Federalists* 39 and 45, both by Madison, which in near parallel emphasize in the former the people's and in the

⁴² Ibid. 202.

⁴³ Ibid. 203.

⁴⁴ Bailyn, *Ideological Origins*, 359.

⁴⁵ Richard Hofstadter, “The Founding Fathers: The Age of Realism,” in *The Moral Foundations of the American Republic*, ed. Robert H. Horwitz, 2nd ed. (Charlottesville, VA: University Press of Virginia, 1979), 78-79, quoting *Federalist* 10.

latter the states' primacy as the source of federal and constitutional sovereignty.⁴⁶ It is clear even on the surface of *The Federalist* that, as Bernard Bailyn put it, "Federalism[']s] . . . essence was not automatic harmony but an uncertain tension which statecraft alone could maintain."⁴⁷

It would be possible at this point to engage in an extensive qualitative analysis of particular instances of diffuse sovereignty in *The Federalist*, but that work has been done, including by the authors referenced herein. Instead, I offer a tally of references (overt or otherwise) to sovereign power in *The Federalist*, categorizing them according to where sovereignty is claimed to lie. This too is necessarily a qualitative exercise, and my specific categorizations are admittedly contestable. What I have attempted here is to catalog each distinct claim throughout *The Federalist* regarding sovereignty — as ultimate, legally sanctioned decisional power — under the proposed Constitution. This necessarily involves some judgment because the term itself is used only twenty-two times in this context.⁴⁸

My research revealed at least 317 total references in *The Federalist* to conceptual sovereignty under the Constitution. Of these, fifty-nine placed some form of sovereign power in the hands of the states, fifty-eight in the federal government, forty-four in the people, and twenty-seven in the Constitution. The President, Congress, and the judiciary

⁴⁶ James Madison, *Federalist* 39, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 242-44; James Madison, *Federalist* 45, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 290-93.

⁴⁷ Bailyn, *Ideological Origins*, 378.

⁴⁸ Of the twenty-two overt references to sovereignty under the Constitution, six involve the external sovereignty of the US or the states, and three involve constitutive sovereignty. The data presented here are selected results of my own research. They are available in full upon request, subject to a Creative Commons license. My method, roughly speaking, was to record each distinct reference to sovereign power in *The Federalist*, where such power involved formal legal (or informal external) ultimate control, as exercised under the proposed constitution. I noted in each case whether a cognate term of sovereign was used, whether or not either constitutive or external sovereignty was involved, and who was presented as sovereign. I did *not* record any references to sovereignty, overt or otherwise, that did not refer to the concept in the context of the proposed constitution's provisions.

followed with twenty-three, twenty-one, and nineteen references respectively. Negative references — to entities *not* having sovereignty — then appear in the list, with sixteen references to negation of state power. The House and Senate each get fifteen references to their being sovereign, and the frequency of references for other loci of sovereignty (or the lack of it) declines steeply thereafter. These numbers demonstrate that *The Federalist* indeed mirrored the Constitution in assigning sovereign power to diffuse entities. They also show that state versus federal power was a primary concern of *The Federalist*'s authors, as was the role of the people. Moreover, they clearly intended the Constitution to partake of some degree of sovereignty in its own right.

In aggregating these counts, I take seriously those authors' claim to be one author, Publius. *The Federalist*'s authors sought both anonymity and to appear united in thought, and their identities in general were not widely known until after the Constitution's ratification.⁴⁹ The *Federalist* authors' use of the pseudonym Publius allowed them, among other things, to speak with the double voice of, first, a popular politician, and second, a paternal founder of the new republic.⁵⁰ The specific authorship of individual essays was first, if inaccurately, revealed when Hamilton left a list in a book in an old friend's law office, but not corrected and fully confirmed until a 2003 stylometric study.⁵¹ The very fact of fractured and falsified authorship itself calls into question the edifice of consistency that *The Federalist* seeks to erect. In the very first essay of the series, Hamilton positions Publius as being candid and transparent with his readers about the Constitution, its mechanisms, and its benefits.⁵² This

⁴⁹ Myerson, *Liberty's Blueprint*, 2-3.

⁵⁰ James Jasinski, "Heteroglossia, Polyphony, and *The Federalist Papers*," *Rhetoric Society Quarterly* 27, no. 1 (Winter 1997): 34. It is the second, paternal founder's voice, that predominates, and Hamilton even warns in *Federalist* 35 against other authors' use of the popular politician voice.

⁵¹ Myerson, *Liberty's Blueprint*, 4-7.

⁵² *Ibid.* 80.

self-consciously crafted image is as much at odds with the *Federalist* as a whole, which presents an often inconsistent and fractured understanding of functional sovereignty and where it would lie in the proposed republic, as it is with the fact that Publius is in fact no “I.”

Astute observers of early American politics would soon witness some of the cracks in Publius’ visage. In opposing assumption by the federal government of state war debts, and speaking contrary to Hamilton’s views, Madison argued that if the goal of assumption was to strengthen the federal government, then this aim should be accomplished if at all through explicit grants of power in the Constitution.⁵³ Madison likewise objected to the establishment of a national bank on the grounds that the constitutional text did not grant the power to Congress to create such an institution.⁵⁴ Hamilton, meanwhile, defended the bank and the federal government’s power to establish one, based on a broader reading of the Constitution, in particular the Necessary and Proper Clause, together with a theory that implied powers of all externally sovereign states gave the federal government sufficient authority to create a national bank.⁵⁵

These arguments illustrate the divide between post-*Federalist* Hamilton and Madison, with the latter espousing more narrow textual readings of the Constitution (i.e. its textual sovereignty) and accusing the former of fostering despotism rather than republican government by advocating for broader constitutional interpretations and thus the possibility that the interpreters would arrogate broader powers to the federal government.⁵⁶ In this vein, Madison characterized the debate as one between himself, having remained consistent in his limited interpretation of the constitutional text, and Hamilton, who had “deserted”

⁵³ Ibid. 114-15.

⁵⁴ Ibid. 118-19.

⁵⁵ Ibid. 119-20.

⁵⁶ Ibid. 122.

Madison and the originalist principle.⁵⁷ In later disagreements over the appropriate allocation of powers concerning war, peace, and foreign relations, Hamilton would characterize strong executive power in this area as necessary and unexceptional, while Madison sought to check that power legislatively.⁵⁸ The authors even occasionally accused each other of departing from their own views as expressed in particular *Federalist* essays. In defending the Jay Treaty as Camillus, Hamilton mustered arguments from Madison's own *Federalist* 42 to illustrate that Madison's views had strayed from his original claims that the constitutional convention had intended the President's treaty power to include all kinds of international agreements, and that Congress — specifically the House — did not have a power to review international treaties merely because they had commercial effects.⁵⁹ In so doing, Hamilton began to use *The Federalist* itself as a kind of sovereign text.

In addition to these examples, my research shows that when the authorship of the various *Federalist* papers is taken into account, important differences between Hamilton and Madison emerge. While the papers as a whole give roughly equal weight to the sovereignty of the states and the federal government, and Hamilton's papers do as well, Madison cites state sovereignty thirty-two times, but federal sovereignty only twenty-three. Weighted as a percentage of papers written by author, Hamilton makes states sovereign in a number of instances equivalent to 51 percent of the papers he wrote, and makes the federal government sovereign in 53 percent. Weighted likewise, Madison makes states sovereign in instances equivalent to 110 percent of his papers, and the federal government only 79 percent.

Though Hamilton points to popular sovereignty twenty-one times, and Madison nineteen,

⁵⁷ Ibid. 124-25.

⁵⁸ Ibid. 126-27. As will be clear from the preceding chapter, Schmitt's preference for a strong executive over legislative horse trading inclines him to a view closer to Hamilton's, on which see Chapter 4, note 78.

⁵⁹ Ibid. 128-29.

when weighted by number of papers written, Hamilton refers to popular sovereignty in instances equivalent to 41 percent of his papers, and Madison in 65 percent.⁶⁰

The greater quantitative attention by Madison to state and popular sovereignty as against federal sovereignty tracks his articulated views in a number of ways. As noted above, Madison was much more skeptical than Hamilton in his later career of expansions of federal power, including through the Necessary and Proper Clause.⁶¹ Madison likewise expressly disfavored federal action pursuant to the Welfare Clause in *Federalist* 41, explaining that its content was limited to the powers enumerated in the remainder of Article I, Section 8, and that it did not form an independent source of congressional authority to act.⁶² Indeed, Madison, isolated from his fellow Publius authors, appears to favor generally a more robust conception of popular sovereignty — one closer to the views now expressed by many tea partiers. Madison in *Federalist* 46 predicts that if the federal government encroaches too much on state power, the people as a whole will become alarmed, and will work through the states to oppose it, as they did during the American Revolution against Britain.⁶³ This instance among all the *Federalist Papers* presents the strongest case for the tea parties' popular sovereignty views being consistent with those of the American Founders.

⁶⁰ These figures do not take into account arguable qualitative differences in the importance of tenets of sovereignty allocated by each author to various actors, e.g. states vs. the federal government. To do so, one would need a robust conceptual understanding of what powers are more and less important and why, and ideally what powers the authors thought were more and less important and why. That project is beyond the scope of this dissertation, and these numbers should accordingly be understood as back-of-the-envelope, first-cut indicators of Hamilton's and Madison's views.

⁶¹ See text accompanying notes 53 to 55.

⁶² James Madison, *Federalist* 41, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 253.

⁶³ James Madison, *Federalist* 46, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 298. Notably, this is a mediated position between an explicit popular right to resist or to reconstitute the democratic polity — the kind of action of which Schmitt would have approved — and a powerful central government led by a strong executive, of which Schmitt also wrote approvingly. This kind of half-measure popular sovereignty espoused by Madison may help explain why Schmitt is seen as more sympathetic to Hamiltonian than Madisonian views. See Chapter 4, note 78.

Madison's willingness to embrace popular sovereignty, including a right in the people to oppose an overweening federal government using violence if necessary, is strikingly at odds with Hamilton's views. Though the latter did not expressly oppose popular revolutions as a general matter in his *Federalist* essays, he repeatedly referred explicitly and with disfavor to Shays' Rebellion, which had taken place just a few months before, in which Massachusetts citizens followed the pattern of the American revolution in opposing violently what they viewed as illegitimate state action in the form of taxation and imprisonment of debtors. Madison's essays, on the other hand, make no specific references to that rebellion.⁶⁴ While Clinton Rossiter is correct that "Publius' "dislike of instability and downright fear of anarchy are writ large and often in these essays,"⁶⁵ that Publius is mostly Hamilton.

By presenting themselves as a single author, *The Federalist's* authors not only masked their identities, but also covered over their nascent political differences, crafting a text that at least appeared to present a unified view with respect to sovereignty, though close analysis reveals its internal contradictions. This, in turn, allowed Madison — without exposing his differences with Hamilton on this score — to appeal over the heads of state representatives opposed to the Constitution to sovereign popular authority as a way of lending legitimacy to

⁶⁴ Hamilton mentions Shays' Rebellion in several essays: Alexander Hamilton, *Federalist* 6, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 56, 59; Alexander Hamilton, *Federalist* 21, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 140; Alexander Hamilton, *Federalist* 25, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 167; Alexander Hamilton, *Federalist* 28, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 178; Alexander Hamilton, *Federalist* 74, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 448. Antonio Negri claims that Madison refers to it in *Federalist* 10, and that Hamilton does as well in *Federalist* 7 and 8, Negri, *Insurgencies*, 155, but I find no evidence in those texts to support that assertion. Hamilton's fervent opposition to Shays' Rebellion somewhat complicates Schmitt's support for his views, in that it tests Schmitt's loyalty to the right to resist as against a strong central government. Arguably, however, Schmitt would not fully approve of a right to resist absent a failure of the government to provide protection to citizens in return for their obedience, a circumstance absent in Shays' Rebellion. See Chapter 4, note 78.

⁶⁵ Clinton Rossiter, introduction to *The Federalist Papers*, by Alexander Hamilton, James Madison and John Jay, ed. Clinton Rossiter. (New York: Mentor, 1961), xiv.

the Constitution and its mode of adoption, and to promote its ratification, in short, “inventing a sovereign American people to overcome the sovereign states.”⁶⁶ I will return to the Founders’ invention of a people, and that tactic’s relevance to popular sovereignty, below.⁶⁷ I turn now to the Constitution and *The Federalist* as sources of sovereignty in their own right.

As evidenced by the oft-expressed view that the United States is “a government of laws, and not of men,”⁶⁸ “the Constitution transcended ordinary legislation.”⁶⁹ Indeed, as will be discussed below in the context of Carl Schmitt’s political theory, constitutional democracy is based on the idea of an ultimately authoritative constitutive higher law.⁷⁰ As noted above, *The Federalist* itself refers twenty-seven times to sovereignty conceptually resting in the text of the Constitution, seventeen times in Hamilton essays, nine in Madison essays, and once in a Jay essay. Yet textual sovereignty is problematic because texts require human interpretation, pushing sovereignty from the seemingly safe terrain of stable words on a page to highly contested decisional ground.⁷¹ Justice Antonin Scalia has famously argued for a kind of textual sovereignty of the Constitution that looks not to the intent of the drafters, but to the original meaning of the text they drafted.⁷² Under this reading, interpretation is not an exercise of power so much as a task of reading and understanding according to fixed,

⁶⁶ Morgan, *Inventing the People*, 267.

⁶⁷ See text accompanying notes 115 to 126.

⁶⁸ See, for example, Mass. Const., Art. XXX; *Marbury*, 5 U.S. (1 Cranch) at 163. As noted in the prior chapter, Schmitt links the “government of laws” claim to legal positivism, and thus rejects its validity. See Chapter 2, text accompanying notes 73 to 76.

⁶⁹ Myerson, *Liberty’s Blueprint*, 101.

⁷⁰ See Chapter 4, text accompanying notes 32 to 41.

⁷¹ For examples of how contested interpretive power is, one need only refer to any of the US Senate hearings on nominees to the Supreme Court over the past quarter century.

⁷² Myerson, *Liberty’s Blueprint*, 149.

crystallized scripts or algorithms.⁷³ Consult the text itself, and then consult some texts that define the terms given in the original text, and you have an accurate interpretation. What this prescription omits is that at every turn the interpreter must make choices: Which defining texts apply? How should they be interpreted when they disagree on some point (as do various of the *Federalist Papers*)? Scalia's originalism rests on a political judgment that the views of a sovereign people, demonstrated through state conventions' ratification of the specific words of the Constitution, are the sole legitimate source of sovereign power in the United States.⁷⁴ That is, the Constitution should be understood according to the original meanings of its words, because this best enacts the will of the nascent republic's founding citizens as represented then by ratifying convention delegates. That those delegates, were they exercising sovereign decisional power now, would agree with originalism as an exclusive interpretive framework is simply assumed.

Madison too concluded that because the state ratifying conventions had before them a delimited text, the words of that text itself should serve as the sole authoritative guide to its meaning — a position that explains, for instance, the originalism-advocating Federalist Society's current use of Madison's silhouette as its logo.⁷⁵ The text is understood as sovereign because it freezes in time the only known combined will of the people who adopted it. Yet neither Madison nor Hamilton was able to present a consistent and clear theory of how the Constitution should be interpreted, not only with respect to whether its words should be read broadly or narrowly, but also in regard to what amounted to a narrow,

⁷³ Indeed, this theory puts Scalia somewhat counterintuitively in Hans Kelsen's legal positivist camp, and helps explain some members of the political left's embrace of Schmitt's theory, which embraces and makes apparent the decisionism involved in legal interpretation.

⁷⁴ Myerson, *Liberty's Blueprint*, 152.

⁷⁵ *Ibid.* 146.

faithful, reading of the text itself.⁷⁶ This in turn points back to the inherent difficulty in making any text sovereign: it cannot guide with respect to the meaning of all of its own provisions. A constitution, by virtue of being superior to ordinary law, necessitates some form of legal constitutional review, whether or not strictly located in a judiciary.⁷⁷ Some human act of interpretation is required, and interpretation implies power — in Schmittian terms, sovereign decisional power — as even Chief Justice Marshall recognized in opining that it was the role of the Court to state authoritatively what the Constitution means.⁷⁸

Hamilton hinted at his own views on constitutional interpretation in this intriguing passage from *Federalist* 34:

[W]e must bear in mind that we are not to confine our view to the present period, but to look forward to remote futurity. Constitutions of civil government are not to be framed upon a calculation of existing exigencies, but upon a combination of these with the probable exigencies of ages, according to the natural and tried course of human affairs. Nothing, therefore, can be more fallacious than to infer the extent of any power proper to be lodged in the national government from an estimate of its immediate necessities. There ought to be a CAPACITY to provide for future contingencies as they may happen; and as these are illimitable in their nature, so it is impossible safely to limit that capacity.⁷⁹

Except for the foregoing passage and to a limited extent in Hamilton's *Federalist* 78, the Publius authors do not address who interprets the Constitution and how. Yet *The Federalist* has become a source of textual sovereignty in its own right, having been used repeatedly to bolster arguments about the content, meaning, and intent of the Constitution.

⁷⁶ Ibid. 146.

⁷⁷ Morgan, *Inventing the People*, 260. In mathematics, a similar idea is represented by the Gödel Incompleteness Theorem, which holds that “all consistent axiomatic formulations of number theory include undecidable propositions.” Hofstadter, *Gödel, Escher, Bach*, 17.

⁷⁸ Myerson, *Liberty's Blueprint*, 147-48. See also Carl Schmitt, *Constitutional Theory*, 104-105, 235.

⁷⁹ Hamilton, *Federalist* 34, 207. Hamilton's emphasis in the context of the remainder of this *Federalist* paper is on issues of war, emergency, and defense, mirroring Schmitt's emphasis on executive sovereignty in emergency circumstances, but his discussion leading up to this quotation is more general, and not expressly limited to this context. Hamilton may mean that no explicit limits should be placed on revenue collection, where the biggest concerns of his time in this regard were war debts. Nonetheless, the language quoted above is in no way expressly limited to that context either. Schmitt would no doubt have approved of Hamilton's remarks here.

Since the 1798 case *Calder v. Bull*,⁸⁰ the Supreme Court has repeatedly turned to *The Federalist* to shed light on constitutional questions, in over three hundred separate cases and at a growing rate in the last fifty years. Clinton Rossiter, the editor whose 1961 edition of *The Federalist* contributed to a modern revival in its popularity, described *The Federalist* as both the most important native work of political science to come out of the US, and “rightly counted among the classics of political theory.”⁸¹ In Rossiter’s view “*The Federalist* stands third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history.”⁸² It is, as a text, legitimate, authoritative, and authentic, and thus is referred to in order to understand what Jefferson called the “genuine meaning” of the Constitution.⁸³ Having been only “one of several hundred salvos in the loud war of words that accompanied the protracted struggle over ratification of the Constitution,” it apparently acquired textual authority because its arguments won the day, at least in the sense that New York’s state convention — the essays’ intended audience — ultimately ratified the Constitution, as all thirteen states eventually did.⁸⁴ “[R]elied on mostly as a means of persuasion,”⁸⁵ *The Federalist* can be seen as both providing “logical” interpretive arguments regarding the Constitution’s content and creating an ongoing dialog with its readers.⁸⁶ This, in turn, implies that its authors’ views might derive a degree of interpretive, even sovereign authority from the fact that their ideas became part of the bargain, so to speak, with the original ratifiers of the Constitution, and those citizens who elected them to

⁸⁰ 3 U.S. (3 Dall.) 386 (1798).

⁸¹ Clinton Rossiter, introduction to *The Federalist Papers*, vii.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid. viii.

⁸⁵ James G. Wilson, “The Most Sacred Text: The Supreme Court’s Use of *The Federalist Papers*,” *Brigham Young University Law Review* 1985, no. 1 (1985): 99.

⁸⁶ Myerson, *Liberty’s Blueprint*, 145.

ratifying conventions, directly or indirectly. This authority accrued slowly, however.⁸⁷ Chief Justice Marshall — a Federalist aligned with Hamilton’s political views more than those of Madison’s Republican party — first helped popularize *The Federalist* as an authoritative aid to interpreting the Constitution and as a bulwark against those who would undo its intent through allegedly spurious interpretations.⁸⁸ Only in contemporary times has his suggestion really taken off, though: Supreme Court citations to *The Federalist* have increased substantially in the last thirty years as compared with the previous century or so.⁸⁹

But the Court’s use of *The Federalist* has been inconsistent. It sometimes cites passages out of context, ignores others though they would support opposing views, and has even rejected its use where its advice would be inconsistent with the outcome in particular cases.⁹⁰ “[M]any respected scholars contend *The Federalist* is of either little or no use in interpreting the Constitution.”⁹¹ By way of illustration, consider *Printz v. United States*,⁹² a case concerning whether the federal government could require state executives to enforce federal laws, which featured an extensive discussion by both Justice Scalia writing for the majority and Justice Souter in dissent of portions of *The Federalist* as bearing on the question, presenting a kind of conflicting legislative history of the Constitution and its framers’ intent.⁹³ Citations to the Framers’ views in general and *The Federalist* in particular thus become “the secular equivalent to citing the Bible. It is an appeal to a higher and more

⁸⁷ Rossiter, introduction to *The Federalist Papers*, ix.

⁸⁸ Myerson, *Liberty’s Blueprint*, 142.

⁸⁹ Melvyn Durchslag, “The Supreme Court and the Federalist Papers: Is There Less Here than Meets the Eye?” *William & Mary Bill of Rights Journal* 14, no. 1 (October 2005): 247, citing Ira Lupu’s quantitative research.

⁹⁰ Wilson, “Most Sacred Text,” 99.

⁹¹ Myerson, *Liberty’s Blueprint*, 135.

⁹² 521 U.S. 898 (1997).

⁹³ Durchslag, “Supreme Court,” 243-44.

revered authority. It not only establishes an ethos of objectivity but the perception of infallibility.”⁹⁴ Yet like citations to the Bible, citations to *The Federalist* can be used equally well on both sides of a debate. Moreover, *The Federalist* is open to multiple, even conflicting, interpretations not only for the general reasons applicable to texts generally, but all the more so given its multiple authorship, and its sometimes internally contradictory claims.⁹⁵

One important reason not to rely on *The Federalist* exclusively or excessively to interpret the Constitution is that its “authors themselves never treated the work with such reverence.”⁹⁶ Madison himself claimed that while it was the best explanation of the constitutional text as it was understood by its drafters and ratifiers, it nonetheless could not have anticipated all future interpretations, nor predicted or prevented inaccurate ones.⁹⁷ Even Chief Justice Marshall, while speaking highly of *The Federalist’s* use as an interpretive aid, nonetheless claimed that the right to judge the correctness of this or any other text remained with the judiciary, which was in his conception thus the ultimate sovereign on such matters.⁹⁸ Myerson gives an example of the Court’s capacity to misuse *The Federalist* in the context of the doctrine of sovereign immunity, the key tenet of which is that states are

⁹⁴ Ibid. 315.

⁹⁵ See also Victoria Nourse, “Toward a ‘Due Foundation’ for the Separation of Powers: The Federalist Papers as Political Narrative,” *Texas Law Review* 74, no. 3 (February 1996): 449-50. Analyzing in particular Madison’s *Federalist* essays 47 through 51, Nourse identifies in them a “cancelling rhetoric” regarding separation of powers, as a result of which “[s]cholars and judges with widely varying, indeed contradictory, views on separation of powers have claimed Madison’s *Federalist* as their own, each finding an essential, yet different, separation of powers.” Ibid. 450.

⁹⁶ Myerson, *Liberty’s Blueprint*, 139.

⁹⁷ Ibid. 159.

⁹⁸ Ibid. 159-60. Hamilton, a later political ally of Marshall, in responding to Antifederalist criticisms, had to address carefully the issue of judicial review, and argued that the power to strike down laws as unconstitutional did not amount to judicial supremacy over legislative acts, but rather to constitutional supremacy over all, and by extension the supremacy of the crystallized will of the drafters and ratifiers of constitutional provisions. Ibid. 189. This of course apparently elides the necessity for judges to engage in interpretation when striking legislation as unconstitutional (or not), in line with Kelsen’s legal positivism and contrary to Schmitt’s insistence that the decisional power of judges (or other political actors) be frankly acknowledged. Such judicial sovereignty as inheres in interpretation is in Myerson’s view “ultimately the price we pay for a Constitution which limits the power of the elected branches of government.” Ibid. 191-92.

immune from lawsuits brought by their own citizens. This doctrine was blessed by the Court in reliance largely on Hamilton's views in *Federalist* 81. But the Court has, according to Myerson, extended it to apply to suits by noncitizens contrary to Hamilton's clear advice in *Federalist* 80.⁹⁹ In the end, Myerson views the Court's use of *The Federalist* in this way as improper, noting that "[d]espite the Supreme Court's assertions, *The Federalist* cannot provide significant support for the Court's sovereign immunity opinions," demonstrating that while it "is a superb source of constitutional insight, [] the modern reader must always strive to understand the context in which it was written."¹⁰⁰ That is, in Myerson's view the text of *The Federalist* itself is not, and should not be considered, independently sovereign.

In sum, like the Constitution, *The Federalist* cannot be completely sovereign because it is a text, and texts both require interpretations and submit to conflicting but equally plausible interpretations. As James Wilson has noted, the Court has used *The Federalist* in ways that uncritically assume both its relevance and importance, and likewise that its authors would have "agreed with the Court's interpretation and application" of them.¹⁰¹ Myerson advocates a theory for using *The Federalist* to interpret the Constitution that would give it much more credence with respect to questions of practical or effective sovereignty — which branches of government prevail under what circumstances, as well as the distribution of power between states or the federal government — while giving it substantially less weight regarding questions of political liberty and equality.¹⁰² This still, however, amounts to making the text at least partially sovereign with respect to sovereignty itself. Melvyn Durchslag, on the other hand, cites favorably David McGowan's thesis that the Court uses *The Federalist* less as an

⁹⁹ Ibid. 208-10.

¹⁰⁰ Ibid. 211.

¹⁰¹ Wilson, "Most Sacred Text," 99.

¹⁰² Myerson, *Liberty's Blueprint*, 155.

authoritative guide than to establish an “ethos” of its own institutional legitimacy by tying its decisions to *The Federalist’s* guides to the Framers’ intent and thus seeming to eschew interpretation in contentious cases.¹⁰³

Finally, although the Constitution cannot embody complete textual sovereignty, even with the assistance of the potentially sovereign *Federalist Papers*, sovereignty is not completely in the hands of the Supreme Court either. Alan Keenan, theorizing democracy as an ongoing process of questioning, relates Hannah Arendt’s understanding of the American founding in *On Revolution* thus: Instead of placing ultimate authority in, for instance, the will of the people, “Americans placed authority in an entirely separate, and more reliable, sphere: it was located in a text — the Constitution — and in an institution designed to interpret that text — the Supreme Court.”¹⁰⁴ Although that power of interpretation leads at points to contestable results, “even the most radical reinterpretation would always be in the terms of the original document, and thus confined.”¹⁰⁵ In this sense, the authority that manifests as foundation is wedded inseparably to the authority that manifests as Arendtian freedom: change can only occur within constitutional confines, but within this boundary change is endlessly possible.¹⁰⁶ We have here again Hofstadter’s strange loop: the judiciary interprets the Constitution, but subject to implicit constitutional constraints on such interpretation, which the Court in turn also interprets.¹⁰⁷ That the judiciary enforces constitutional

¹⁰³ Durchslag, “Supreme Court,” 248.

¹⁰⁴ Alan Keenan, *Democracy in Question: Democratic Openness in a Time of Political Closure*. (Stanford, CA: Stanford University Press, 2003), 91.

¹⁰⁵ *Ibid.* 92.

¹⁰⁶ *Ibid.* 94.

¹⁰⁷ See text accompanying note 14.

principles does not mean that they are externally enforced, because the judiciary acts from within the constitutional system, and according to constitutional rules.¹⁰⁸

So when, if ever, can the Constitution be overridden, short of amendment according to its own terms? One line of thought on this is that in times of deep crisis necessitating deprivation of individual rights and suspension of the constitutional order in favor of greater governmental power to address the crisis, the Constitution may be suspended. Clinton Rossiter, citing Carl Schmitt and Abraham Lincoln among others, makes this argument in detail in his *Constitutional Dictatorship*. Rossiter insists that any such suspension in the American context should have the sole goal of overcoming the crisis at hand and supporting over the long term the constitutional order's original purposes (including individual liberty). Thus, a proper constitutional dictatorship, in his view, must be temporary and instituted only in order to restore the *status quo ante bellum*.¹⁰⁹ While Rossiter is clear that traditional American constitutional theory provides for no such suspension of the Constitution in war or emergency, he points to the congressional power to declare war, call forth the militia, and suspend *habeas corpus*, together with the presidential power to act as commander in chief and to convene Congress, and the joint or several duty of the legislature and executive to guarantee to states a republican form of government and protect them from invasion as collective bases for extrapolating a kind of constitutional (or commissarial, in Schmitt's terms) dictatorship from the text.¹¹⁰ Despite that these specific powers are shared under the Constitution, Rossiter, consistent with Schmitt's theories, sees emergency power under constitutional dictatorship as falling primarily to the President, who would thus be sovereign,

¹⁰⁸ Griffin, "Constituent Power," 52.

¹⁰⁹ Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*. (New Brunswick, NJ: Transaction Publishers, 2002), 5-7. This comports with Schmitt's commissarial dictator. See Chapter 2, text accompanying notes 34 to 36.

¹¹⁰ *Ibid.* 212-15.

but subject to the sovereignty of the Constitution in the sense that at crisis' end he would be compelled to relinquish dictatorial power.¹¹¹

Another important strain of argument locates power to undo the Constitution in the people. We have seen this argument before in the context of Madison's *Federalist* 40: if the people, as claimed in the Declaration of Independence, have a fundamental right to reorder their government, then this right must obtain despite any current constitutional order.¹¹² Yet apart from this claim, and some hints in *Federalist* 46 that the people might retain a right to act through states or state militias against a federal government that oversteps the boundaries of its sovereignty,¹¹³ the Constitution, as understood by *The Federalist*, submits the constitutive power of the political man acting via revolution to the static, sovereign constitutional text.¹¹⁴ I return to the question of the nature of the people's sovereignty below. We must first examine more closely just who "the people" might be.

Constructing the People

In *Federalist* 78, by way of justifying judicial review of statutory law, Hamilton argues that "the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."¹¹⁵ In addition to ignoring temporality — the later-enacted statute might be due some preference over the earlier enacted will of the people — Hamilton's argument implies that the Constitution (then and forever) reflects the will of "the people." Which people? John Jay in *Federalist* 3 attempts to construct a coherent people out of the

¹¹¹ Ibid. 217-21.

¹¹² See text accompanying note 21.

¹¹³ See text accompanying note 63.

¹¹⁴ Negri, *Insurgencies*, 157.

¹¹⁵ Alexander Hamilton, *Federalist* 78, in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed. Clinton Rossiter. (New York: Mentor, 1961), 467.

former colonists, engaging in a kind of mythmaking in the process.¹¹⁶ But the construction of a people is hardly limited to that text.

Edmund Morgan has written extensively on “the people” as a constructed entity, identifying the concept of a people as necessary to found a government. It is, in his view, a fiction that “the people *have* a voice or make believe that the representatives of the people *are* the people[, or that] . . . governors are the servants of the people.”¹¹⁷ When using the term “fiction,” Morgan does not intend to be pejorative. Indeed, he acknowledges that political fictions are precisely those necessarily central and unquestionable determinants of the nature and stability of political societies.¹¹⁸ The issue goes back to Rousseau’s founding paradox: the people need norms to define themselves as a people and yet must define themselves as a people in order to promulgate legitimately constitutive norms.¹¹⁹ Rousseau solves this problem by reference to a hypothetical founding lawgiver or deity. The US Constitution solves this problem by assuming the people and simultaneously empowering it as a fictive group, and empowering its governmental actors as legitimate agents of that group. “We the People” form a more perfect union, ostensibly through, first, the delegates to the 1787 Convention, and then through state ratifying conventions.

The fiction of popular sovereignty provides both stability and the possibility of political change within that stable framework.¹²⁰ Of course not all theorists privilege stability. In Keenan’s view, “[r]ather than beginning from the assumption that a unified —

¹¹⁶ Miller, “Ghostly Body Politic,” 105.

¹¹⁷ Morgan, *Inventing the People*, 13.

¹¹⁸ *Ibid.* 14-15.

¹¹⁹ Keenan, *Democracy in Question*, 11-12, citing *On the Social Contract*. Schmitt agrees here in principle that this paradox is central to popular democracy: “The distinctive quality of the concept ‘people’ resides in the fact that the people is an entity that is not formed and is *never capable of being fully formed.*” Schmitt, *Constitutional Theory*, 271 (emphasis added).

¹²⁰ Morgan, *Inventing the People*, 38.

or ideally unifiable — version of the people exists to be adhered to, a preferable mode of democratic theory and practice would accept that democratic politics is stuck permanently in a state of transition, or formation.”¹²¹ Yet stability may forestall violence, provided the fiction of a people is not stretched too far. When it is, revolution may result as when the American colonies moved toward revolution and colonial thinkers increasingly decried the notion of “virtual” representation, whereby colonists were represented by members of parliament elected from within England (but never from among the colonists themselves). The colonists argued strenuously that the only valid representation in terms of creating binding law was by those who truly represented — that is, were elected by — those whom law would bind.¹²² Notably, however, “the people” never includes all the people, and thus some people are always governed by representatives they have no hand in selecting. Schmitt understood this, arguing that in democracies, not only voters in the minority but even nonvoting registered voters as well as citizens not registered to vote or not permitted to vote must nonetheless be considered — fictively — to have registered their will in any vote that takes place.¹²³

Tea partiers do not now argue that children should vote or participate in sovereign decision making. And while voters in the mid-eighteenth century American colonies were a proportionately greater segment of the national population than they were in England, they still were at most a majority of nonenslaved adult males.¹²⁴ Indeed,

popular sovereignty, in the colonies, as in England, became the prevailing fiction in a society where government was traditionally the province of a relatively small elite. Although the new fiction slowly widened popular participation in the governing

¹²¹ Keenan, *Democracy in Question*, 39.

¹²² Bailyn, *Ideological Origins*, 170-74.

¹²³ Schmitt, *Constitutional Theory*, 268.

¹²⁴ Morgan, *Inventing the People*, 137, 175.

process, those who made use of it generally belonged to that elite and employed it in contests with other members.¹²⁵

“The people” were thus from the outset of the American republic never all, nor even most of the people. Yet on a Schmittian analysis, and apparently consistent with American founding premises, none of these facts detracts from America’s democratic nature.

Not surprisingly, a key debate in the popular press during ratification and at ratifying conventions for the new Constitution centered on the degree to which the (relatively small) House of Representatives could be truly said to represent effectively the diverse interests of the (very large) American population. The Federalists’ ultimately victorious response was that just as the (fictively popularly ratified) Constitution would be superior to the representatives, so too were the people — whose specific identification was postponed — superior to the Constitution. In other words, representation didn’t matter much because the people (although really only an elite) retained sovereignty. In part, the success of this argument turned on the Antifederalists’ inability to settle on a single ground of objection to the Constitution: to the extent that they sought to shore up states’ power as against the federal government, they undermined their own advocacy of greater popular sovereignty (through, for instance, a larger House), playing into their opponents’ contention that representatives (as opposed to state-representing senators) were parochial and unreflective of the will of “the American people” as a whole, such that having more of them would further undermine popular sovereignty.¹²⁶

Given that “the people” is a fictive and imprecisely knowable entity, what, if any power do they have under the American constitutional system? As Morgan notes,

¹²⁵ Ibid. 148.

¹²⁶ Ibid. 277-81.

The ambiguities of popular sovereignty, its paradoxes and contradictions, especially as embodied in the mystery of representation, could be manipulated to shape fact in more ways than one. Americans, like their English ancestors, invoked the doctrine both to justify resistance to government and to support it.¹²⁷

Indeed, the Founders were not of one mind regarding the role of the people even with respect to the Constitution's ratification. In correspondence with Madison during the 1787 Convention, Jefferson argued for popular ratification of the Constitution and representation in the new Congress solely on a basis proportionate to state populations.¹²⁸ Madison, on the other hand, whom we have already seen was willing to concede more power to the people than was Hamilton, considered the legislature, because closest to the people, to be the strongest and thus most dangerous branch of government, implying that too a great degree of popular sovereignty entailed significant danger itself.¹²⁹

Popular sovereignty can “pose threats to the very values it [is] ostensibly designed to protect.”¹³⁰ In part, this is because, as Schmitt argues, “[i]n addition to other meanings . . . ‘people’ has the special sense that it includes a contrast to every state official People are those who do *not* govern, do *not* represent, do *not* exercise organized functions with an official character.”¹³¹ Giving “the people” power is a way of empowering “the people,” however understood, to exercise sovereignty over other people, potentially by way of closing off opportunities for people to exercise their own formal or (re)constitutive authority against “the people.” In part, this is because “if the ‘people’ is the subject of constitu[tive] power, it can be so only insofar as it first undergoes an organizational process capable of expressing its

¹²⁷ Ibid. 233.

¹²⁸ Myerson, *Liberty's Blueprint*, 64.

¹²⁹ Ibid. 179.

¹³⁰ Morgan, *Inventing the People*, 254.

¹³¹ Schmitt, *Constitutional Theory*, 270.

essence.”¹³² That is, some people must become “the people” before achieving any exercise of sovereign power, because in enacting sovereign power, “the people” continually defines its membership going forward, as well as the degree of sovereignty, if any, remaining in the hands excluded from “the people.”

American constitutional practice is illustrative of this problem. In America, representatives are proxies for geographically determined communities of people but collectively make laws that bind their entire societies.¹³³ “The people” elect representatives who authoritatively pass laws governing all the people. True, at the moment at which representatives are elected, the fiction of popular sovereignty is in some way made fact.¹³⁴ But even here, “the people” becomes a stand-in for anything from all who are entitled to vote, to a plurality of those who do actually vote. The victorious portion of any electorate is almost never close to all of the people, or even all of the people permitted to cast votes. Popular sovereignty comes to embody the ever-present contradiction between representatives who are both agents and (subject to removal at the ballot box, but only if they wish to stand for office again and are available at the time to do so) “wielders of the supreme power that *the* people mysteriously conveyed to them.”¹³⁵ The representative system strenuously advocated in *The Federalist* was intended both to give the people a modicum of sovereignty while insulating the republic from its dangers, removing governmental institutions from popular control by degrees, depending on the institution.

¹³² Negri, *Insurgencies*, 26.

¹³³ Morgan, *Inventing the People*, 41, 47.

¹³⁴ Ibid. 174.

¹³⁵ Ibid. 237.

“Popular sovereignty would give the new government the support of the people, and, at the same time, insulate the national government from the activity of the people.”¹³⁶

Schmitt’s own views on popular sovereignty recognize this conflicting tendency as inherent in the democratic liberal *Rechtsstaat*. “The people as bearer of the constitution making power are not,” he noted, “a stable, organized organ.”¹³⁷ Because not organized, the constitutive people cannot be dissolved, but at the same time their will is difficult to establish or interpret. This led Schmitt to the belief that in any democracy the people can only express their will through acclamation: the collective vocalization through some means of a “yes” or “no” to questions posed by their representatives in government, at least once they have established a constitution through their constitutive power.¹³⁸ Fundamentally, Schmitt, like Morgan, sees “the people” as an unformed, unorganized entity defined primarily through election procedures as a system of validations, and indeed as a fiction-making exercise that constructs a popular will.¹³⁹

What practices remain in the US, short of revolution (itself not clearly meant to be an act of the people, as opposed to “the people”), for the exercise of popular sovereignty? In some colonies, as even today in Massachusetts, a majority of voters, figured as “the people” could instruct or advise legislators by ballot with regard to specific statewide issues, thus somewhat short-circuiting the representative process.¹⁴⁰ Legislators did (and do) not always consent to follow these instructions, however.¹⁴¹ Petitions were also popular in the colonies and the nascent United States, and were used effectively by James Madison and his

¹³⁶ Miller, “Ghostly Body Politic,” 110.

¹³⁷ Schmitt, *Constitutional Theory*, 131.

¹³⁸ Ibid.

¹³⁹ Ibid. 279.

¹⁴⁰ Morgan, *Inventing the People*, 212-13.

¹⁴¹ Ibid. 216-17.

party against the Federalists.¹⁴² But nothing binds lawmakers to follow these either — only the threat of popular sovereignty exercised through balloting stands behind them. Apart from the threat of militant activity previewed in Madison’s *Federalist* 46, the chief residual attribute of popular sovereignty appears to be the capability, somehow, to alter the constitutional order. Hamilton, for instance, allowed for the possibility that the people might radically alter their government through “some solemn and authoritative act.” But as Joshua Miller argues, “[b]y attributing sovereignty to a fictitious people, the Federalists reduced the [altering] acts of that people to one: the ratification of the Constitution, symbolically interpreted as an act of the people. After that act, the people could only act again ‘when a general disruption in the federal system or some far-reaching constitutional change was contemplated,’” i.e. in, at a minimum, a state of exception.¹⁴³ This could, of course, also amount to revolution, a right to which was not only implicit in the Declaration, but also a component of some express constitutional provisions at the founding.¹⁴⁴

Conclusion

Sovereignty is diffuse in the American system — it is both everywhere, and on closer inspection, seemingly nowhere. The Constitution divides it in the name of the people. The people are themselves unidentifiable, and only active through momentary elections, or through revolution and reconstitution. The Constitution itself may be sovereign, but not solely, because texts require interpretation. *The Federalist* is offered up as a potentially sovereign interpretive tool, but which Publius do we follow? Tea partiers, like any other advocates of popular sovereignty, have at best a few verses of the American bible at their

¹⁴² Ibid. 229-30.

¹⁴³ Miller, “Ghostly Body Politic,” 115, quoting, respectively, *Federalist* 27 and 78.

¹⁴⁴ See, for example, N.H. Const., Art. 10 [Right of Revolution] (1784).

disposal, and those who view law, Congress, the President, the Supreme Court, history, the federal government, or states as ultimately sovereign have just as many arguments available to them. Can we speak of an American sovereignty at all? If so, what does it look like and where does it lie? In the following chapter, I apply Carl Schmitt's theories, as he presented them and as interpreted by Schmitt scholars, to sovereignty in America. In doing so, I prepare the ground for the following chapters' discussion of Schmitt's friend-enemy distinction, the application of that centrally political concept to the criminal as enemy in American legal and political practice, and the possibility of limited popular exercise of microsovereignty through jury nullification.

CHAPTER 4

A SCHMITTIAN ANALYSIS OF AMERICAN SOVEREIGNTY

Introduction

In the previous chapter, I described diffuse sovereignty in America by reference to its founding documents and their allocation of ultimate decisional power to varying actors, and connected it to conventional and contemporary tea party views regarding sovereignty and founding principles. I then discussed differences in founding views as to the intended role of popular sovereignty vis-à-vis the nation in American democracy, and limitations on both. In this chapter, I apply Carl Schmitt's theories of sovereignty, outlined in Chapter 2, to diffuse sovereignty in America, analyzing American sovereignty both according to his views and the views of scholars who have responded to the challenges of his work.

American Sovereignty in Schmittian Analysis

As we have seen, for Schmitt, sovereignty inheres in the power to decide about the existence of and the appropriate response to unanticipated or emergency situations, understood as “the exception.”¹ In making this claim, Schmitt in part is arguing against his contemporary Hans Kelsen's theory of pure law, according to which law, once in place, binds all citizens and eliminates sovereignty except under the law — a theory that is mirrored in conventional analyses of constitutionally-based sovereignty in the American constitutional system. Schmitt claims that Kelsen simply negates the problem of sovereignty through a kind of methodological conjuring.² In Schmitt's view, law, in terms of a constitutional text, is neither central nor sovereign. Instead, “[w]hat matters for the reality of legal life is who

¹See Chapter 2, text accompanying notes 123 to 137.

² Schmitt, *Political Theology*, 20-21.

decides.”³ Sovereignty on this conception is always a matter of ultimate human decision, which is invoked whenever the law fails fully to govern the circumstances at hand.

What did Schmitt make of the concept of sovereignty in America? In *Political Theology*, Schmitt argues that since the French Revolution, modern states have conceived of sovereignty deistically, making the sovereign the absent external engineer of the machinery of state, who remains outside it while the machine runs by itself. “The decisionistic and personalistic element in the concept of sovereignty was thus lost.”⁴ Writing probably about his own German state, but with an eye as well toward other states, such as the US, that operate on bourgeois *Rechtsstaat* principles, Schmitt states that “to an observer who takes the trouble to look at the total picture of contemporary jurisprudence, there appears a huge cloak-and-dagger drama, in which the state acts in many disguises but always as the same invisible person.”⁵ Thus, state power, in the guise of powers exercised mechanically by particular organs of government, is in fact always nonetheless the same state power — monistic and unified, but disguised as power contested and coordinated by at least potentially coequal and disagreeing actors. Whether Schmitt had America in mind or not, his mechanical and cloak-and-dagger metaphors appear to apply equally well to our constitutional regime. As the above examination of American constitutional sovereignty demonstrates, sovereignty in America is conventionally understood to involve a relatively mechanical — in the sense that those who apply the rules are merely following a

³ Ibid. 34.

⁴ Ibid. 48. Restating Schmitt’s view in this vein, John McCormick argues that “[t]he simple fact that the supposed pinnacle of Enlightenment constitutional engineering, the United States Constitution, does not have a clearly enumerated provision for emergency situations is a powerful testament to liberalism’s neglect of the political exception.” McCormick, “Dilemmas of Dictatorship,” 238.

⁵ Schmitt, *Political Theology*, 38. “Cloak-and-dagger drama” is a close idiomatic translation of Schmitt’s “Degen- und Mantelstück,” literally “dagger-and-cloak piece,” an inversion of the more common “Mantel- und Degenstück.” Carl Schmitt, *Politische Theologie: Vier Kapitel zur Lehre von der Souveränität*. (München: Verlag von Duncker und Humblot, 1934), 51.

constitutional script rather than making discretionary sovereign decisions — application of complex textual rules (located primarily in the Constitution) by authorized actors who share amongst themselves certain sovereign attributes, but of whom none can be said to be clearly sovereign over the others.

The significance of Schmitt’s “cloak-and-dagger play” metaphor becomes clearer in the light of Walter Benjamin’s study of German tragic drama. Tracing that genre’s genealogy, Benjamin distinguishes it from but links it to “the intrigues of the *comedia de capa y espada* [cloak and dagger play].”⁶ In their Spanish form, the cloak and dagger plays emphasize honor, plot, and intrigue (as the term cloak-and-dagger implies in modern English usage).⁷ These comedies “present[] noble characters in a sophisticated plot that revolves around honour, chance and disguise.”⁸ The cloak and dagger drama both entertains (and thus distracts) observers, and simultaneously fools its audience using disguise. From a Schmittian perspective, liberal constitutionalism, like Kelsen’s pure theory of law, distracts and disguises. Under it, what is truly important — who decides *in extremis* — is cloaked. Meanwhile, a distracting set-piece tells us that one entity, then some text, then some other decider, then another text, is truly sovereign.⁹ The problem with this is that when sovereign decisionism is hidden (whether by being intentionally disclaimed or otherwise), it becomes easy for government actors to make sovereign decisions that the people do not see as such, and that gradually over time both sap popular sovereignty, thus making a democracy ever

⁶ Walter Benjamin, *Origin of German Tragic Drama*, trans. John Osborne. (London: NLB, 1977), 86.

⁷ Andrés Franco, “Vega Carpio, Lope de,” in *McGraw Hill Encyclopedia of World Drama: An International Reference Work in 5 Volumes*, vol. 5. (Bonn: Verlag für die Deutsche Wirtschaft AG, 1984), 88.

⁸ Patrice Pavis, “Cape and Sword Play,” in *Dictionary of the Theatre: Terms, Concepts, and Analysis*, trans. Christine Shantz. (Toronto: University of Toronto Press, 1998), 43.

⁹ One of Schmitt’s primary sources on questions of sovereignty, the Spanish Marquis de Valdegamas Donoso Cortes, in an 1849 speech railing against the decline of Europe into amoral dictatorships from above or below, overtly advocated the former, likening them to dictatorship by sabre, as against dictatorships from below which involve dictatorship by dagger. Balakrishnan, *The Enemy*, 49. The sabre, of course, is a weapon used openly, while the dagger is a weapon used in stealth.

more undemocratic, and extend potentially tyrannical power over the people without raising popular alarm. This process has its ultimate end either in the enslavement of the people or their revolution, both ends that the American Founders sought to avoid, or at least forestall.

So in Schmitt's view, the cloak-and-dagger drama distracts the people from the true operation of sovereignty by the state, which itself must reduce to some, and ultimately one, human.¹⁰ Schmitt accepts this reductionism as a reality to be embraced. Contrary to the trend in the eighteenth through twentieth centuries toward "fragmentation" of political power as a "central tenet of constitutional liberalism," Schmitt insisted on making sovereignty indivisible once more.¹¹ As Tracy Strong has restated it, "if life can never be reduced [to] or adequately understood by a set of rules, no matter how complex, then in the end, rule is of men and not of law — or rather [] the rule of men must always existentially underlie the rule of law."¹² Schmitt "despised liberalism and regarded its vision of the rule of law as an ideological subterfuge, an attempt to hide the domination of liberal values under an allegedly neutral rule of law."¹³ In this light, Schmitt views separation of powers as in the American system as "merely an overly mechanical construction that inevitably paralyzes a state in the face of an exception because it obscures who is sovereign, who must decide and act at that moment."¹⁴ He cites Chief Justice Marshall's famous dictum that the government of America is one of laws and not of men as an example of a concept of law that serves as a

¹⁰ As discussed above, Schmitt sees sovereignty in an established democracy as ultimately, but latently, residing in the people. In the context of day-to-day operations of the polity, either some institution and ultimately probably one person within that institution acts as sovereign in the decisional sense, or the people retake their sovereignty to end a failed democracy and reestablish a new one. See Chapter 2, text accompanying notes 221 to 239.

¹¹ Schwab, introduction to *Political Theology*, xlii.

¹² Strong, foreword to *Political Theology*, xvii.

¹³ David Dyzenhaus, "The Politics of the Question of Constituent Power," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker. (Oxford, UK: Oxford University Press, 2007), 131.

¹⁴ McCormick, "Dilemmas of Dictatorship," 249.

“cornerstone . . . of constitutional and absolutist thought” that dangerously obscures the fact that some sovereign must decide “what constitutes an exception,” and thus allows state actors to accumulate sovereign power at the expense of the people without their noticing that this is being done.¹⁵ Elsewhere Schmitt alludes to the same claim without citation, arguing that it is the normativist (i.e. positivist, liberal-*Rechtsstaat*) demand for the rule of law that appears centrally in the American Constitution’s establishment of a government of law and not men.¹⁶

Ultimately Schmitt’s description of the rule-of-law *Rechtsstaat* as engaged in cloak-and-dagger politics is of a piece with his strident critique of legal positivism. The bourgeois *Rechtsstaat*, and in particular the form that separates power in a mixed government, “intends to evade the ultimate political decision.” The covered over political component in the *Rechtsstaat* is omnipresent and threatens through potential rupture the balance created by separation of powers.¹⁷ Liberal constitutional states “attempt[] to repress the question of sovereignty by a division and mutual control of competences.”¹⁸ The rhetoric describing diffuse sovereignty in a *Rechtsstaat* as fundamentally deceptive also pervades the secondary literature on Schmitt’s theorizing. Leo Strauss in his notes on Schmitt’s *Concept of the Political* claims that for Schmitt, liberalism does not destroy the political but rather hides it.¹⁹ Robert Howse notes that “liberal jurisprudence or ideology [] hides or obscures the decisionist character of all rule” for Schmitt.²⁰ Heinrich Meier associates Schmitt’s concern with

¹⁵ Carl Schmitt, *Crisis of Parliamentary Democracy*, 42-43.

¹⁶ Schmitt, *Three Types of Juristic Thought*, 50.

¹⁷ Schmitt, *Constitutional Theory*, 330.

¹⁸ Schmitt, *Political Theology*, 11.

¹⁹ Leo Strauss, “Notes on Carl Schmitt, *The Concept of the Political*,” trans. J. Harvey Lomax, in *The Concept of the Political*, by Carl Schmitt, trans. George Schwab. (Chicago: University of Chicago Press, 2007), 100.

²⁰ Howse, “Legitimacy to Dictatorship,” 63.

“unmasking . . . the deceitfulness of conducting politics under moral pretexts” with his critique of such political strategies’ “flight from responsibility.”²¹ And Paul Hirst opines that Schmitt’s concept of sovereignty forces us to consider carefully how law amounts to a “conjuring trick.”²² Even Hannah Arendt picks up on this theme, characterizing the key American innovation in politics as “the consistent abolition of sovereignty within the body politic of the republic,” by which I understand her to mean not that sovereignty really goes away, but that it is consistently (and on Schmitt’s view falsely) disclaimed as an aspect of republican government.²³

In a less polemic vein, Schmitt turned specific attention to describing the American constitutional system in his 1928 treatise *Constitutional Theory*.²⁴ This work carefully conceptualizes constitutional practice, and provides examples from among various contemporary constitutional systems to illustrate Schmitt’s views. In it, Schmitt critiques the American Constitution as “lack[ing] a genuine constitutional theory,” citing specifically *The Federalist* as mostly a document addressing technical questions regarding the organization of the new government.²⁵ Schmitt argues that the US Constitution conflates the specific constitutional covenant between the people and their government with any freely

²¹ Meier, *Lesson of Carl Schmitt*, 21-22.

²² Hirst, “Schmitt’s Decisionism,” 10.

²³ Kalyvas, *Politics of the Extraordinary*, 213.

²⁴ Schmitt’s analysis of the US Constitution is remarkable for its depth and breadth, but as can often be the case in comparative constitutional studies, Schmitt commits a few errors in his description of its mechanics. Schmitt incorrectly claims that when presented with a bill the President both signs it *and* provides remarks, whereas the US Constitution actually makes this a disjunctive proposition. Schmitt, *Constitutional Theory*, 224; cf. U.S. Const., Art. I, Sec. 7, Cl. 2. He further errs in claiming that a presidential veto is overridden by a two-thirds vote of the house in which it originated, when in fact a two-thirds vote of both houses is required. Schmitt, *Constitutional Theory*, 224; cf. U.S. Const., Art. I, Sec. 7, Cl. 2. Schmitt also somewhat misconceives the operation of judicial review in the US, claiming that when a judge holds a law unconstitutional, he does so only by declining to apply it the individual case before him. Schmitt, *Constitutional Theory*, 230. This ignores the role of precedent in common law, which requires that any lower court likewise refuse to apply the same law to comparable future cases. None of these errors are especially significant for Schmitt’s theoretical framework, however.

²⁵ Schmitt, *Constitutional Theory*, 127.

constitutive act of the people and the states regarding the particular existential form of the polity.²⁶ That is, it apparently fails to address sufficiently and distinctly the requirement in Schmitt's theory of constitutions that "[t]he democratic principle of the people's constitution-making power means the constitution is established through an act of the people capable of acting politically. The people must be present and presupposed as political unity, if it is to be the subject of a constitution-making power."²⁷ Yet, precisely as we have seen above, the Constitution resolves Rousseau's constitutive paradox, which Schmitt is here restating, only by sweeping it under the rug. The people create the Constitution and are created by it.²⁸ And yet popular sovereignty, while claimed as a source of constitutional legitimacy, played barely a role in the Constitution's adoption. Schmitt notes that the US Constitution was accepted through state ratifying conventions (not popular votes) and that the majorities of these conventions that ratified were "often very slight [and] accidental."²⁹ The Preamble's wave toward a people is, for Schmitt, an unsatisfactory resolution to the paradox of constitutional government, and a failure of the American constitutional system to acknowledge constituent power as a source of sovereignty.

Indeed, rather than the Constitution itself, the Declaration of Independence seems to come closer to meeting Schmitt's terms for appropriately democratic constitutional texts. Schmitt notes that although not all states decide consciously their form of political existence

²⁶ Ibid. 127.

²⁷ Ibid. 112.

²⁸ See William E. Scheuerman, "Revolutions and Constitutions: Hannah Arendt's Challenge to Carl Schmitt," in *Law as Politics: Carl Schmitt's Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 273-74 n. 9, citing and translating Carl Schmitt, *Verfassungslehre*. (Munich: Duncker and Humblot, 1928), 61, 78-79. Scheuerman argues that the American founding conflates what should be distinct moments of founding of the people and founding of a constitution by that people, thus undermining the homogeneity of the popular will Schmitt thought necessary to democracy.

²⁹ Schmitt, *Constitutional Theory*, 133.

through a decision regarding the concrete type the state adopts, the US did this through its Declaration of Independence, by declaring a right in the people to undo and remake their governmental forms when these do not suit their needs or rights.³⁰

The avoidance in the Constitution of a decision on the nature of the people itself does not, for Schmitt, invalidate the Constitution outright as replacement for the Articles. Recall Schmitt's insistence on a homogeneous, unified *demos* capable of exercising the *pouvoir constituant* to found a constitution and then remaining latent within the constituted system until it becomes necessary for it to reconstitute a new order. Something much like this occurred in the transition from the Articles of Confederation to the Constitution. For Schmitt, this transition was politically valid because of the people's inherent right to revolt, even though the people in this instance did not need to exercise that right violently or tumultuously.

In other words, the unmaking of the Articles outside their own amendment requirement was legitimate for Schmitt, if not legal, as outlined in Madison's argument from the principles of the Declaration.³¹ For Schmitt, "[t]he constitution-making will of the people is an unmediated will . . . prior to and above every constitutional procedure. No constitutional law, not even a constitution, can confer a constitution-making power and prescribe the form of its initiation."³² Thus, in Schmitt's view, the Articles could not require that the people amend them according to their own terms rather than refounding the state through the Constitution. "The legitimacy of a constitution does not mean that a constitution originated according to previously valid constitutional laws."³³ Further, "it is

³⁰ Ibid. 77.

³¹ Kalyvas, *Politics of the Extraordinary*, 96, quoting *Federalist* 40; see Chapter 3, text accompanying notes 17 to 22.

³² Schmitt, *Constitutional Theory*, 132.

³³ Ibid. 134.

incorrect to designate the authority, empowered and regulated on the basis of a constitutional law, to change constitutional provisions, to revise them in other words, as the constitution-making power or *pouvoir constituant*.³⁴ That is, amendment procedures internal to a constitutional text differ qualitatively from refoundings, and only the latter are secured by the popular use (in democracies) of the *pouvoir constituant*. As Andreas Kalyvas puts it, “the sovereign constituent people may initiate a change in the law in violation of the instituted law.”³⁵

Schmitt does cite approvingly a 1920 Harvard Law Review essay by William L. Marbury — “The Limitation upon the Amending Power” — as “rightly claim[ing] that the authority to alter and extend the constitution cannot be boundless and has not been conferred, in order to eliminate the constitution itself.” That is, within the bounds of a constitutional order, a constitution cannot be amended according to its own rules for the purpose of undoing its core principles.³⁶ An unresolved question, according to Schmitt, in American constitutional law is whether basic rights can be eliminated from the Constitution by constitutional amendment, or whether such elimination amounts to a destruction or elimination of the Constitution itself and thus would require a refounding.³⁷ In other words, it was unclear to Schmitt from his understanding of American constitutional law whether basic rights are core principles under the US Constitution or are ancillary. Constitutions in a typical modern liberal democratic bourgeois *Rechtsstaat* such as the United States are presented as outlining the sole means for alteration of the constitutional order, as though

³⁴ Ibid. 146.

³⁵ Kalyvas, *Politics of the Extraordinary*, 117. Schmitt also would not have seen the Articles as a genuine constitutional contract (such as the US Constitution) because in principle they formed an agreement among sovereign states to form a new unified state. Schmitt, *Constitutional Theory*, 113.

³⁶ Ibid. 153, citing *Harvard Law Review* 33, no. 2, 223.

³⁷ Ibid. 215.

they themselves, and not “the people” (neither the people who founded the constitutional order, nor the people presently living under it) were sovereign. But Schmitt’s approbation of Marbury’s commentary is analytic, not polemic: existing constitutional powers cannot properly be used to dissolve the constitutions that grant them because only the people (in a democracy), as subjects of the constitution-making power, can dissolve constitutions and establish new orders.³⁸

In sum, on the question whether the Constitution could legitimately supplant the Articles without the unanimous consent of the states united in the preceding Confederation, as required by the Articles, Schmitt clearly agreed with the position expressed by Madison in *Federalist* 40: because and to the extent that the Constitution was established through the popular *pouvoir constituant* announced in the (itself constitutive) Declaration, the fact that the founders did not act according to the law of the Articles in establishing it is of no moment. In this sense, Schmitt’s thought aligns with the views of both Hannah Arendt and Andreas Kalyvas. Arendt argued that one mistake of the American founding was seeking “to immortalize the constitutional document and to sacralize its legal foundations. By doing so, they inevitably limited the freedom of their successors to initiate in their turn new beginnings.”³⁹ Thus the founders, on Arendt’s view, failed to recognize that the Constitution might, precisely because it was better suited to the nascent American polity than the Articles, actually come to be seen as supplying the exclusive means for its own modification or replacement, not just in terms of legality, but of legitimacy as well. In this sense, the founders, presumably unwittingly subsumed the *pouvoir constituant* that the people

³⁸ Schmitt, *Constitutional Theory*, 153.

³⁹ Kalyvas, *Politics of the Extraordinary*, 260.

exercise in extraordinary political moments “under the [] founders’ prohibitive shadow.”⁴⁰

Thus while “[t]he main threat for the first [Brahma] moment [of popular sovereignty] is a permanent revolution . . . for the second one [Vishnu, it] is stagnation and juridification.”⁴¹

Another point of Schmittian analysis of American constitutionalism arises from Schmitt’s discussion of the mediating mechanisms by which the people indirectly establish a constitution. He characterizes these assemblies as either constitution-amending or constitution-making. The latter “convene after a revolution (more specifically, after an annihilation or elimination of a constitution) [as] the bearer of a sovereign dictatorship.”⁴² Given Schmitt’s distaste in general for representation of the people — recall that he holds both that the people are never truly represented, and that a key failure of parliamentary government is that representatives inevitably shift to partisan interest politics and away from their fictive but nonetheless nobler role as advocates for the interests of the people as a whole — he somewhat surprisingly approves of the exercise of the people’s *pouvoir constituant* through a body of delegates. Schmitt wrote approvingly of constitutional ratifying conventions, including in the US context, so long as they amounted to instances of delegated popular sovereignty, subject to delimited powers and instructions, as opposed to a more discretionary representation of the sovereign people.⁴³ Sovereignty has to be, for Schmitt, exercised by the people in a democracy, because of their ultimate authority, or can be *delegated*. It cannot properly, however, be represented.⁴⁴ The central distinction here is that a

⁴⁰ Ibid. 261. Consider in light of this the spectacle of an aide to Senator Tom Coburn tearing up during one of Coburn’s paeans to the founders’ constitutional intent during the confirmation hearings for Justice Sonia Sotomayor. Reverence for the founders’ constitutional choices among conservative politicians is in deep tension with the emphasis by tea partiers among others on the people’s ongoing rights to resist and revolt.

⁴¹ Ibid. 262.

⁴² Schmitt, *Constitutional Theory*, 148.

⁴³ Ibid. 205.

⁴⁴ Kalyvas, *Politics of the Extraordinary*, 117, 128, 147.

representative is elected to make decisions about the content of law according to his own views, although for Schmitt in a well-functioning democracy this will involve deciding according to the interest of the people as a whole, whereas a delegate to a constitutional convention has little or no discretion because she is given clear instructions by the people who are exercising their sovereignty through the *pouvoir constituant*. Put differently, for Schmitt, “the people cannot allow itself to be transformed into an official body without ceasing to be the people.”⁴⁵ So while a representative body claims to *be* — in the sense of representing — the people in official form, a convention of delegates merely carries out the people’s will, without pretending to be an embodiment, or stand-in for the people.

Of course as we have seen above in connection with Edmund Morgan’s arguments, the people is at best an amorphous and fictive concept, and at worst a deception that can be mobilized by any politician claiming to speak for the people but actually presenting his own views. And despite his insistence that the people not be represented, Schmitt’s own theory is open to the same critique. Schmitt has, for instance, been accused of appealing to a fictional and unidentifiable “people” as a pretext for establishing executive dictatorship.⁴⁶ At the same time, however, Schmitt at least tacitly acknowledged this indeterminate and fictive nature of the people in his analysis of voting, by arguing that one cannot really say that a majority decides a question in a vote, because really only the small part that gives the winning side the edge has “decided.”⁴⁷

In any case this is arguably not so much a problem with Schmitt’s theory (or with the American founding) as with the idea of democracy itself, which must be grounded on some understanding of “the people,” where any such understanding will necessarily be fictive.

⁴⁵ Schmitt, *Constitutional Theory*, 275.

⁴⁶ Kalyvas, *Politics of the Extraordinary*, 127.

⁴⁷ Schmitt, *Constitutional Theory*, 306.

Thus Chantal Mouffe, building on Schmitt's relatively unquestioning assumption of a democratic people, refines his understanding, arguing that "democracy requires . . . putting into question any idea of 'the people' as already given with a substantive identity."⁴⁸ Because, for Mouffe, the people are articulated through a temporary hegemonic process that is contingent, and reducing "the people" to only one of its many possible forms reifies the people's identity, it is thus important to recognize that "the people" is only ever a shifting stand-in for the *demos*.⁴⁹ This necessary understanding does not undermine democracy, but rather enriches it by calling attention to the eternal lack of fit between "the people" and the people.

Having noted important puzzles with respect to Schmitt's conception of the people, I now turn to a discussion broadly speaking of how Schmitt's understanding of sovereignty and the mechanisms states employ to obscure it operate in the American context.

Addressing the US constitutional system directly, Schmitt's core observation is that the US Constitution "is indeed consciously built on the opposition between the *Rechtsstaat* that divides power and democracy, but [the United States'] political ideology previously only spoke so unproblematically and optimistically of 'democracy' because it did not need to be conscious in a practical sense of the fundamental opposition [between democracy and *Rechtsstaat*]."⁵⁰ That is, at the founding, the inherent contradictions between democracy and *Rechtsstaat* were not terribly significant for America, though they appear to be now. Schmitt disfavored division of power as an elimination of political absolutism designed to further liberal *Rechtsstaat* principles, but not democracy or its political unity. "[A]ll separations,

⁴⁸ Mouffe, "Paradox of Liberal Democracy" in *Law as Politics*, 172.

⁴⁹ Mouffe, "Paradox of Liberal Democracy" in *Challenge*, 46.

⁵⁰ Schmitt, *Constitutional Theory*, 236.

divisions, limitations, and means of controlling state power operate only inside the framework of political unity.”⁵¹

As we have seen, this results directly from Schmitt’s decisionism: division of power obscures its exercise by particular, identifiable actors. Thus “the question is *not* whether unconstitutional laws are invalid. That is self-evident. The question, rather, is who resolves the doubts about the constitutionality or unconstitutionality of a law. Who, therefore, is competent to make this distinctive decision[?]”⁵² At one point, Schmitt opines that judicial review in the American system may locate ultimate sovereignty in the Supreme Court in a way that belies the *Rechtsstaat* concept of separation of powers. The US Constitution not only includes “reciprocal checks and controls” but also effects separations of powers as among the branches of government.⁵³ Yet at the same time, “judicial review of the constitutionality of laws, as the highest court of the United States of America exercises it, runs against the logically instituted schema of a separation of powers.” That is, it amounts to power of one branch over against another, in the form of a check or control that runs counter to the grain of separation.⁵⁴

Schmitt’s analysis of the inherent contradictions in the American system between *Rechtsstaat* elements and democratic sovereignty mirrors his critique of the outcome of France’s 1830 revolution: “The advocates of the liberal *Rechtsstaat* sought to evade the alternative, either sovereignty and the king’s constitution-making power or sovereignty and the people’s constitution-making power, and they spoke of a ‘sovereignty of the

⁵¹ Ibid. 102.

⁵² Ibid. 231.

⁵³ Ibid. 222.

⁵⁴ Ibid. 223. Ellen Kennedy, on the other hand, points to the US Supreme Court’s political question doctrine, according to which it generally stays out of disputes between its coequal branches of government, as an illustration of the Court’s self-denial of sovereignty in Schmitt’s sense. Kennedy, “*Hostis Not Inimicus*,” 97.

constitution,” which nonetheless did not answer, but “only sidestepped and veiled behind the somewhat occult-like image of the constitution-making power of the constitution” the ultimate question of sovereignty.⁵⁵ As demonstrated in Chapter 2, Schmitt was not antidemocratic; rather he argued that whether the people or some other entity would be the possessor of ultimate sovereignty, it must be some actual living actor capable of deciding and not a text that would be sovereign. Thus to the extent that the US Constitution, Declaration, *Federalist*, or other texts were meant to be sovereign, on Schmitt’s view, the American experiment was doomed to ultimate failure. On the other hand, attempts to meet Schmitt’s critique by identifying an ultimate sovereign actor within the American constitutional structure tend to lead to investing sovereignty in the executive. As we have seen, Clinton Rossiter identifies the president as the bearer of constitutional dictatorship in the American system.⁵⁶ Moreover, as John McCormick outlines,

The U.S. Constitution seemingly identifies the document itself, and thereby the sovereign popular will manifested within it, with the institution of the president. In a way that it does not for any other representative of any other governmental branch, the constitution dictates the inaugural oath for the president and concludes it with the declaration that he or she will “preserve, protect and defend the Constitution of the United States.”⁵⁷

One could also advance the argument that though sovereignty is nowhere fixed in particular actors in the American constitutional system, it is granted to particular actors in the context of particular situations. While this claim certainly applies Schmitt’s decisionism, it does so in a way that fundamentally opposes the core of his theoretical commitments: for Schmitt, sovereignty is located somewhere as an *ultimate* matter. If in varying situational contexts

⁵⁵ Schmitt, *Constitutional Theory*, 104.

⁵⁶ See Chapter 3, text accompanying notes 109 to 111.

⁵⁷ McCormick, “Dilemmas of Dictatorship,” 249, n. 38, quoting U.S. Const., Art. II, Sec. 1, Cl. 8. McCormick immediately casts doubt on this analysis, however, claiming that the presidential oath “is certainly an attempt at an added precaution against the branch that is the most likely institutional threat to the constitution rather than any substantively existential equating of the document to the office itself.” Ibid. 249-50, n. 38.

sovereignty appears to be exercised by varying actors, this is again simply a ruse that disguises the fact that sovereignty is the attribute in the end of some identifiable but concealed actor in any political system.⁵⁸

Notably, on Schmitt's view, the American federal system did *not* impinge upon sovereignty through division of power in a *Rechtsstaat* form by dividing powers between the nation and its component states. While the system of checks and balances that seems to locate sovereignty in various branches of government in various contexts amounts for Schmitt to an exercise in obscuring the actual source and operation of sovereign power, federations need not amount to a division of sovereignty, so long as homogeneity in the populace prevents the emergence of conflict between the federation itself and member states. On the other hand, "[w]here the substantial homogeneity is absent, the agreement on a 'federation' is an insubstantial and misleading sham enterprise."⁵⁹ In the specific case of American federalism, Schmitt sees the US Constitution as a special form because of its federal-state component, which requires submission for ratification to the people of the states, rather than to the people as a whole, thus complicating somewhat the question of popular exercise of the *pouvoir constituant*.⁶⁰ Schmitt does note that even before the Civil War, the contradictions inherent in the federal components of the US system had been discussed in the writings of John Calhoun, whose "theoretical significance for the concepts of a constitutional theory of the federation is even today still great and in no way settled by the fact that in the war of secession the Southern states were defeated."⁶¹ Yet despite seeing

⁵⁸ As will become apparent in Chapter 8, I too part ways with Schmitt here, by dint of applying his sovereign decisionism in microcosm to juries. Obviously juries are not ultimate sovereign actors, though I do associate them with the sovereignty of the people in a democracy in Schmitt's sense.

⁵⁹ Schmitt, *Constitutional Theory*, 395.

⁶⁰ *Ibid.* 133.

⁶¹ *Ibid.* 390.

these conceptual issues as unresolved, Schmitt argued that the “solution” to the question whether federal or state power ultimately prevailed was achieved through the Union’s victory in the Civil War, and meant that the constitution of the United States changed its character, and “no longer involve[s] the question of the independent political existence of the states.”⁶² In part, this is because the question of slavery in the dispute between North and South, which had endangered homogeneity in the US, was through the outcome of that war fully resolved.⁶³

Schmitt urges in *Constitutional Theory* that *Rechtsstaat* constitutionalism hides the actual operation of sovereignty. For instance, in the modern *Rechtsstaat* statutory ruptures, in which the legislature attempts to exercise power by going beyond the bounds of the constitutional order, are

the criterion of sovereignty. The difficulty lies in the fact that the bourgeois *Rechtsstaat* takes its point of departure from the idea of being able to comprehend and to limit the entire exercise of all state power without exception in written laws. In this way, political action of any given subject . . . is no longer possible. Instead, a diverse range of fictions must be set up, such as that there is no longer any sovereignty at all, or, what is the same thing, that the “constitution,” more precisely, constitutional norms, are sovereign In reality, however, it is precisely the essential political decisions, which elude normative definition. The fiction of the absolute normative quality then has no consequence other than that such a fundamental question like the one regarding sovereignty is left unclear. For the inevitable sovereign actions, a method for apocryphal acts of sovereignty develops.⁶⁴

These essential political decisions are, for Schmitt, hidden behind legality in the *Rechtsstaat*.

And they are the hallmarks of sovereignty itself. Thus, a

logically consistent and complete *Rechtsstaat* aspires to suppress the political concept of law, in order to set a “sovereignty of the law” in the place of a concrete existing sovereignty. In other words, it aspires, in fact, to not answer the question of sovereignty and to leave open the question of which political will makes the

⁶² Ibid. 392.

⁶³ Ibid. 393.

⁶⁴ Ibid. 154-55. I explore in Chapter 8 whether jury nullification can be seen as one such apocryphal act of sovereignty.

appropriate norm into a positively valid command. As noted [], this must lead to concealments and fictions, with every instance of conflict posing anew the problem of sovereignty.⁶⁵

According to Schmitt, normativism, in the mode of legal positivism, according to which law and not men govern, finds its concrete expression in “the decision of the fathers of the American constitution who provided for a government of law and not of men. Thus what is generally understood to be a *Rechtsstaat* [law-as-right state], Schmitt concluded, is nothing else than a *Gesetzstaat* [positive law state]. For the normativist, the norm produces the right.”⁶⁶ As Schmitt himself put it:

The American constitutions [sic] of the eighteenth century lacked a genuine constitutional theory. The most important historical source for the theoretical foundations of this constitution, *The Federalist*, offers insight mostly only into practical organizational questions. The people provides itself a constitution without distinguishing the general “covenant,” . . . from every other act of constituting a new political unity and from the act of the free political decision on the particular form of existence,⁶⁷

that is, whether the American state will be a democracy, monarchy, or other sovereign form. In short, Schmitt argues that the US constitutional system was founded as a mechanism for division and obfuscation of sovereign power, and as a would-be sovereign legal text in line with legal positivism, without giving adequate attention to the retention of fundamental sovereignty in the people. Put differently, one might safely conclude that while Schmitt admired the gestures in the direction of democratic sovereignty in the Declaration and in the Preamble’s reference to “We the People,” he nonetheless derided the US Constitution’s

⁶⁵ Ibid. 187.

⁶⁶ Schwab, *Challenge of the Exception*, 120.

⁶⁷ Schmitt, *Constitutional Theory*, 127.

failure to enshrine something like a right retained by the people to revolt against and remake the constitutional order.⁶⁸

This can be seen more clearly by connecting Schmitt's views on the US federal system with his insistence that a democracy involve a homogeneous and unified people. For Schmitt, the US Constitution's guarantee of a republican form of government in the states⁶⁹ is a means of ensuring democratic homogeneity in the US.⁷⁰ As we have seen, democracy and federation both require homogeneity for Schmitt, and the two naturally converge, effectively eliminating the substantive component of federalism as power sharing, and replacing it with a complete unity in which the independence of federal states is largely dissolved. Schmitt opines as noted above that this occurred in the US as a result of the Civil War, and cites the Preamble's reference to "We the People of the United States" as an early indicator of this necessary convergence.⁷¹ Schmitt further notes that the intent of the founding with respect to the states vis-à-vis the union was to create a *Rechtsstaat* system

⁶⁸ Importantly this should *not* be understood to indicate that Schmitt did not believe that American is truly a democracy, although to the extent that the answer to "*Quis iudicabit?*" is the President, the Supreme Court, Congress or some other institutional actor, he would not have so believed. In a sense, the only way to detect sovereignty is after the fact of an ultimate decision on the exception. Thus the US might be a regime of popular sovereignty if its people actually do mobilize to revolt against and remake a governmental system in crisis. Until such time, whomever exercises sovereign decisionism is evidently sovereign. "Under some circumstances, the revolutionary elimination of a constitution can even be designated somewhat rightly as mere constitutional change, but naturally only when one presupposes th[e] permanence of the subject of the constitution-making power." Schmitt, *Constitutional Theory*, 141.

Schmitt did elsewhere argue that English-based common law thinking was not as susceptible to normativism (effectively positivism) as civil law in continental Europe because case-based precedent is both limited to the facts of specific cases, and involves decisionism by judges interpreting new facts in light of extant law. Schmitt, *Three Types of Juristic Thought*, 85-86. In the context of the US Supreme Court, however, Justices are not bound by precedent, though they generally seek to abide, or to appear to abide by its normative terms. The high court thus operates on a profoundly more decisionist plane than lower courts, which must, if acting faithfully to their charges, apply the norms embodied in statutes as well as prior authoritative precedent.

⁶⁹ U.S. Const., Art. IV, Sec. 4.

⁷⁰ Schmitt, *Constitutional Theory*, 393.

⁷¹ *Ibid.* 404. See text accompanying notes 60 to 63.

involving complicated separations of powers in part in order to put off the decision about substantive political unity, citing in this context Madison's *Federalist* 49.⁷²

Schmitt was cognizant of the implications for political stability inherent in his critique of mechanical legal means for curbing popular sovereignty or constituent power. He “was fully aware of the politically revolutionary implications of his doctrine of constituent power. He also knew that political revolutions risk dual power and civil war, not to mention dictatorship, which he understood as the other side of the constituent moment itself.”⁷³ In the US context, separation of power is meant to tame power itself, which must in a democracy mean the power of the people.⁷⁴ And at least Madison among the *Federalist* authors too grasped that there lay at the core of constitutionalism the germ of violent revolution, opining that “[i]t is in vain to oppose constitutional barriers to the impulse of self-preservation.”⁷⁵ Madison's insight here, as in *Federalist* 46, foregrounds the looming potential of popular rebellion and thus the omnipresence of popular sovereignty. This in turn highlights the contrast between Madison's constitutionalism and Hamilton's, which more closely tracks the *Rechtsstaat* strategy Schmitt illuminates. Hamilton seeks to channel popular sovereignty through constitutionalism. Schmitt shows us the ultimate impossibility of this task. But in American politics and jurisprudence, Hamilton's *Rechtsstaat* view has triumphed, thanks in no small part to the contributions of his sometime allies, Chief Justice Marshall and President John Adams.⁷⁶ Madison's limited references to popular sovereignty in *The Federalist* are ultimately overshadowed both by his own, and Hamilton's and Jay's,

⁷² Ibid. 405.

⁷³ Andrew Arato, “Constitutionalism and the Founding of Constitutions: Carl Schmitt and the Revival of the Doctrine of the Constituent Power in the United States,” *Cardozo Law Review* 21, nos. 5-6 (May 2000), 1744.

⁷⁴ Dyzenhaus, *Legality and Legitimacy*, 62.

⁷⁵ Madison, *Federalist* 41, 257.

⁷⁶ See Chapter 3, note 98.

references to constitutional sovereignty, and as well by historical practice.⁷⁷ Schmitt's critique of sovereignty in America supports my thesis. Though in his view no democratic state can avoid the operation of popular sovereignty, the *Rechtsstaat*, including America as its example *par excellence*, denies its validity.⁷⁸

Schmitt notes that *The Federalist's* authors argued for a "mixture and tempering that directs itself especially against pure democracy."⁷⁹ This contrasts, as noted in Chapter 2, with Hans Kelsen's view that separation of powers should be considered a sharing of power rather than a division of power against itself.⁸⁰ William Scheuerman, taking up this line of reasoning, claims that even

[t]he *Federalist Papers* offers little more than meager details "about practical organizational questions," and American thought collapses the foundation of the social order and of a new constitutional order into one act. In contrast to the French, Schmitt thereby suggests, the Americans downplay the truth that constitution-making presupposes the existence of a unified homogeneous *Volk* with a real capacity for willful action.⁸¹

Jeffrey Seitzer confirms this interpretation of Schmitt's views, noting that "[t]he Americans had to 'constitute' their identity through the act of constitutionmaking itself, whereas the

⁷⁷ Madison, for example, opposed an easily amended Constitution on the ground that it would lead citizens both to believe the original document was seriously flawed, and to demonstrate their disrespect for it by changing it frequently, depriving the new government of the advantages of veneration over time. Myerson, *Liberty's Blueprint*, 222-23.

⁷⁸ John McCormick seeks to demonstrate that Schmitt's views on the whole align more with those of Hamilton's Publius than those of Madison's. McCormick, "Dilemmas," 249 n. 36, citing Schmitt, *Crisis*, 40, 45. Unfortunately, McCormick's overly simplistic conclusion here is not supported by the texts. Schmitt does indeed cite Hamilton's *Federalist* 70 favorably, summarizing at length its arguments for a strong executive. Ibid. 45, 102 n. 40. But McCormick's only citation for the proposition that Schmitt criticizes Madison's *Federalist* is to page 40 of *Crisis*, where Schmitt merely lists *The Federalist tout court* as among many "names" demonstrating a liberal bias toward balancing mechanisms in government. Neither here nor in the accompanying footnote does Schmitt refer to any specific *Federalist* papers, nor to Madison himself. Read most charitably, McCormick's conclusion here might be that only in Madisonian papers are there references to checks and balances, such that Schmitt's obliquely critical reference on page 40 applies only to Madisonian papers, but my catalog of references to sovereignty in *The Federalist* does not support that conclusion.

⁷⁹ Schmitt, *Constitutional Theory*, 238.

⁸⁰ David Dyzenhaus, *Legality and Legitimacy*, 115.

⁸¹ Scheuerman, "Revolutions and Constitutions," 255 (internal quotation neither identified nor sourced).

French were able to ‘presuppose’ this identity. The Americans, in other words, were stuck at some sort of preparatory stage, unable to grasp the great opportunity offered by their own Revolution.”⁸² Scheuerman goes on, incorrectly I believe, to argue that in Schmitt’s view America failed to recognize that all constitutions are established through “an exercise of arbitrary power illegitimate from the perspective of the constitutional order which [they] intend[] to generate.”⁸³ As discussed above, however, the founders recognized that the Constitution was in some sense illegitimate from the point of view of the Articles, since its establishment came outside the prescribed amendment mechanism for those and had to be defended by reference to other principles, such as those found in the Declaration.⁸⁴ Thus they recognized precisely this need for an arbitrary and illegitimate founding power. Likewise, its establishment, while in conformity with its own internal ratification rules, was accomplished through means it now forecloses for its own amendment.⁸⁵ In Schmittian terms, America’s founders, and specifically Hamilton and Madison, recognized the need to acknowledge and mobilize the *pouvoir constituant*, understanding as Bruce Ackerman has put it that “the People best express themselves through episodic and anomalous ‘conventions,’ and not through regular sessions of ordinary legislatures.”⁸⁶ This view is at least partially confirmed by reference to the arguments reproduced above from Madison’s *Federalist* 40.⁸⁷ What remains to be seen is what role the people play, and were intended to play, in

⁸² Jeffrey Seitzer, “Carl Schmitt’s Internal Critique of Liberal Constitutionalism: *Verfassungslehre* as a Response to the Weimar State Crisis,” in *Law as Politics: Carl Schmitt’s Critique of Liberalism*, ed. David Dyzenhaus. (Durham, NC: Duke University Press, 1998), 295.

⁸³ Scheuerman, “Revolutions and Constitutions,” 255-56.

⁸⁴ See Chapter 3, text accompanying notes 17 to 21.

⁸⁵ Compare U.S. Const. Art. V (Amendment) with U.S. Const. Art. VII (Ratification).

⁸⁶ Scheuerman, “Revolutions and Constitutions,” 267, quoting Bruce Ackerman, “Neo-Federalism?” in Jon Elster and Rune Slagstad, eds., *Constitutionalism and Democracy*, 153-94. (New York: Cambridge University Press, 1988), 163.

⁸⁷ See Chapter 3, text accompanying notes 17 to 21.

American democracy after its founding moment, and during the preservation of its newly established constitutional order. I address that question briefly before concluding this chapter.

Bringing the People Back In

I now examine the views of some theorists who have followed Schmitt's lead in analyzing sovereignty in the American system, and who in varying ways have proposed bringing popular sovereignty back into American constitutional practice. This discussion is intended to open a conceptual space for my application of Schmitt's theory to jury nullification in Chapter 8. I will ultimately show how jury nullification, somewhat in line with and in some ways contrary to Schmitt's theory, can bring the sovereign people back in to the American *Rechtsstaat*, in particular in the context of the criminal justice system. Here, however, I outline ways in which Schmitt's understanding of popular sovereignty informs and underlies contemporary arguments about how the people in general can be actively sovereign in American democracy.

Antonio Negri, a theorist of the political left who favors a resurgent popular sovereignty, largely agrees with Schmitt's diagnosis of sovereignty in America: "The American constitutionalists . . . enclose the contradictions of political space within a juridical machine so sophisticated that it is manipulable and soon distorted."⁸⁸ What Negri describes as "[t]he democratic game of power" in America is, in order to avoid a dictatorship of the few or the many, "dispersed through a multiplicity of offices of government" such that the constitutional order protects political society by dividing power within it.⁸⁹ But while his

⁸⁸ Negri, *Insurgencies*, 303-04.

⁸⁹ *Ibid.* 160.

diagnosis of sovereignty resembles Schmitt's, Negri distinguishes between sovereignty, which is for him exercised from above by the political few, and constituent power, which he defines as sovereignty exercised from below by the many — the people. “[I]he concept of sovereignty and that of constitutive power stand in absolute opposition” because they are only linked, paradoxically, by the fact that constitutive sovereignty is a continually renewed praxis of a constitutive act within the continuity of free praxis, rather than being subject to sovereign limits imposed from above.⁹⁰ That is, ideally, constitutive sovereignty escapes the founding paradox by continually reconstituting itself. Constitutive power thus never goes over into the sovereignty of the few. “[I]n Spinozian terms, Negri's conception of constituent power relies on a political ontology of pure immanence.”⁹¹ “This theory of constituent power [] cuts diagonally across the conventional divide between reform and revolution.” Disguised as reform, it amounts to “absolute procedure” that constantly transforms social structures.⁹² Or, to recall my exposition of Kalyvas on Schmitt from Chapter 2, for Negri, rather than enter a Vishnu or preserving moment, democracy always remains in an ongoing Brahma-Shiva cycle of creative destruction. For Schmitt, of course, this would undo the stability and security that he saw as the primary missions of the modern state.⁹³

Of course there is some debate whether Carl Schmitt himself favored any democratic form of constitutive power or sovereignty or remained committed to a mode of sovereignty lodged in a single sovereign, debate fueled by the lack of systematic consistency in Schmitt's

⁹⁰ Ibid. 22.

⁹¹ Michael Hardt, foreword to *Insurgencies: Constituent Power and the Modern State*, by Antonio Negri, trans. Maurizia Boscagli. (Minneapolis, MN: University of Minnesota Press, 2009), x-xi.

⁹² Ibid. xii.

⁹³ See Chapter 2, text accompanying notes 201 to 264.

theorizing discussed in a prior chapter.⁹⁴ Hans Lindahl, for instance, holds that Schmitt's *Constitutional Theory* "relentlessly moves to recover the primacy of constituent power over constituted power and of democracy over the rule of law."⁹⁵ In this way, "Schmitt's insistence on constituent power as the subject of a constitution aims to deny the possibility of a closed, purely normative constitutional system."⁹⁶ Damian Chalmers, on the other hand, disputes the degree to which Schmitt promotes constituent power, claiming that his writing as a whole does not contemplate such power "as an autonomous force separate from the State."⁹⁷ And this, I submit, is where Kalyvas' intervention is most helpful: by dividing Schmitt's theory into successive moments of creation, preservation and destruction, and by assigning the *demos* distinct roles in these moments, Kalyvas helps remedy this perceived inconsistency with respect to Schmitt's democratic thought.

In Negri's conception anyway, "[t]o speak of constituent power is to speak of democracy." This is apparently both because Negri wishes to associate the terms for his own purposes, but also because they "have often been related" as a matter of common understandings of the terms. According to Negri, "[t]he desire for community is the spirit and soul of constituent power" which links it profoundly and closely with democracy."⁹⁸ Constitutive power is a form of democracy that resists constitutionalization.⁹⁹ Instead, it is itself properly the source of constitutional norms. But it is too easily shunted into ordinary

⁹⁴ See Chapter 2, text accompanying notes 22 to 33.

⁹⁵ Hans Lindahl, "Constituent Power and Reflexive Identity: Towards an Ontology of Collective Selfhood," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker. (Oxford, UK: Oxford University Press, 2007), 9.

⁹⁶ *Ibid.* 12.

⁹⁷ Damian Chalmers, "Constituent Power and the Pluralist Ethic," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker. (Oxford, UK: Oxford University Press, 2007), 291, citing Dyzenhaus, *Legality and Legitimacy*, among others.

⁹⁸ Negri, *Insurgencies*, 23.

⁹⁹ *Ibid.* 1.

mechanisms of power, such as procedural and administrative institutional forms, and in this sense is opposed and confined by constituted power in the Vishnu moment.¹⁰⁰ The US Constitution, for example, makes constitutive power “a formal element of the government,” confining and channeling it.¹⁰¹ Because it is clear that the constitutional text cannot resolve all conflicts of power in America, the question arises whether recourse to the popular will can do so.

Here, consistent with my analysis, Negri sees *The Federalist* as a whole as being suspicious of too much popular power, characterizing recourse to it as a “‘perverse effect’ of democracy.”¹⁰² “The circle of the constitutional demonstration [in *The Federalist*] closes with a paradox, since *homo politicus*, who is constructed by the constitution, has now become the sociological referent of the constitution The constitution has absorbed not only constituent power, but also the subject of constituent power.”¹⁰³ Finally, Negri sees the constitutional grant of interpretive and dispute-resolving power to the United States judiciary as a final door slammed on constitutive power:

[H]ere the machine appropriates the last terrain on which the *homo politicus* could produce a direct innovation. The political innovation gives its ripe fruits: nothing is left of the sociality and the universality of the political expressed by the revolutionary moment. The strenuous centralization of the constitution takes up an exclusive and total place, from which constituent power is excluded. . . . Judiciary power assumes and exalts for itself the becoming explicit of constituent power, uncontainable in the net of a rigid constitution.¹⁰⁴

But Negri, unlike Schmitt, does not merely see this as a basis for critique of the attempt to confine constituent power (for Schmitt identified with sovereignty) in constitutional practice.

¹⁰⁰ Ibid. 2.

¹⁰¹ Ibid. 161.

¹⁰² Ibid. 165-66.

¹⁰³ Ibid. 167.

¹⁰⁴ Ibid. 175.

For Negri, the diagnosis is accompanied by a prescription for its cure. I examine now his suggestions for bringing constituent power, or popular sovereignty, back into the picture, along with those of a few other theorists.

According to Michael Hardt, Negri's longtime collaborator, Negri does not view exceptional decisionism from above, by the sovereign in Schmitt's terms, as convergent with exceptional decisionism from below, by the multitude. In Negri's view, at least in part, "constituent power," the multitude's exercise of what Schmitt calls sovereignty, "is . . . a democratic process that seeks constantly to institute mechanisms of social equality, in contrast to the fundamentally monarchical nature of sovereignty."¹⁰⁵ This essentializing view of the *demos* as always "good" and always operating in favor of equality over rank is problematic, to say the least: tea partiers, hardly the kind of multitude that shares Negri's political values or priorities, appeal to and attempt to mobilize popular sovereignty as constituent power. Nothing ensures that the multitude will not — even *before* it succeeds in exercising exceptional power — adopt or endorse exclusivist, elitist or antidemocratic goals. Negri argues that during and after the American Revolution, "[t]he 'people-in-arms' [were] not only a fact of military organization; they also represent[ed] a new constitutional order." Colonial militias became enactors of constitutive power.¹⁰⁶ Yet the "people-in-arms" who now claim lineage from colonial militias bear no resemblance to the Marx-inspired revolutionaries Negri anticipates. Understood more charitably, Negri hopes to change the ontology of constituent power into one that is democratic or democratizing.¹⁰⁷ Negri's proposal for opening constitutional systems to popular sovereignty appears to involve a kind of permanent revolution that allows constituent power always to reconstitute itself without

¹⁰⁵ Hardt, foreword to *Insurgencies*, ix.

¹⁰⁶ Negri, *Insurgencies*, 147.

¹⁰⁷ Hardt, foreword to *Insurgencies*, xiii.

ever permanently (or over a very long temporal horizon) being hardened into constituted power.

Kathleen Davis takes a more concept-driven approach, urging a reframing of norms and meanings of sovereignty. Davis outlines a general theory of the tendency for concepts of sovereignty to be associated retrospectively with starkly delimited temporal periods that thus coheres with Schmitt's views, at least as understood and critiqued by Kalyvas. She argues that this tendency contributes to a reification of concepts of sovereignty, when in fact sovereignty is fluid and contingent. In the context of American sovereignty, her insights show that it need not conform to any particular intent of the Framers' (even if such a singular and fixed intent is determinable), and leaves open the possibility, together with Schmitt and Negri, that "the people" or a at least a larger subset thereof might exercise sovereignty, provided that the people believe that they have such an opportunity, or can work through a sovereign who does.¹⁰⁸

Positioned as alternatives to revolutions, political or conceptual, are more incremental and more fundamentally legalistic (if nonetheless sometimes formally outside the legal system) versions of change designed to keep the American constitutional system open-ended. According to Andrew Arato, American proposals that near Schmitt's thinking in attempting to restore an extralegal constituent power must choose "revolution based on a new legitimacy, or extra legality led by an existing legitimate institution."¹⁰⁹ Incrementalists look for ways to work to open the constituted order from at least within the broadest borders of the constitutional system, and sometimes as well within the legal order more strictly determined. Robert Goldwin, for instance, cites Tocqueville's observations on the

¹⁰⁸ See generally Davis, *Periodization and Sovereignty*.

¹⁰⁹ Arato, "Constitutionalism and the Founding," 1746.

American founding by way of asserting that “[t]umult, confused clamor, a thousand voices — not harmony — [] is how America was and is constituted. And the framers wisely chose . . . not to strive to change it, but rather to institutionalize it.”¹¹⁰ Untrammelled revolutionary action is good for establishing, but not for maintaining, governments, but even the Founders recognized the need for some form of ongoing revolution, albeit cabined within institutions.

Whether this institutionalization can be accomplished, and how effectively, is hotly debated. Benjamin Barber notes the view of historians including Louis Hartz and Arthur Schlesinger that America was founded around a central consensus not informed by substantive views, but rather by an agreement to purposelessness under defined procedures — that is, an agreement to keep the constitutional system as open as possible to change, so long as change is rooted in legality.¹¹¹ But as the nation has become too large for its own needs and too small to successfully pursue empire, “the very institutions that once fostered success now catalyze failure.”¹¹² That is, procedure without agreement to substance can eventually lead, and in Barber’s view has led, to a manipulation of procedural techniques and carefully crafted institutions to pursue competing aims according to who is capable of manipulating them. Barber likens the representative system to “a benign tumor metastasized to become perilous to the body it once served,” in fulfillment of Rousseau’s warning against people allowing themselves to be represented.¹¹³

¹¹⁰ Robert A. Goldwin, “Of Men and Angels: A Search for Morality in the Constitution,” in *The Moral Foundations of the American Republic*, ed. Robert H. Horwitz, 2nd ed. (Charlottesville, VA: University Press of Virginia, 1979), 11.

¹¹¹ Benjamin R. Barber, “The Compromised Republic: Public Purposelessness in America,” in *The Moral Foundations of the American Republic*, ed. Robert H. Horwitz, 2nd ed. (Charlottesville, VA: University Press of Virginia, 1979), 30. This notion resonates with the Kelsenian view.

¹¹² *Ibid.* 31.

¹¹³ *Ibid.* 32.

Barber's point is well illustrated by recent developments in the US Senate. Stymied by repeated Republican filibusters in that body, some Democrats have lately pursued the possibility of a "constitutional option" that would allow the Senate to redefine its own rules, in accordance with Article I, Section 5 of the Constitution, at the beginning of a new term, to alter or abolish the practice on a majority vote, which itself would in theory not be subject to filibuster.¹¹⁴ The Senate Rules Committee recently held hearings on alternatives to the filibuster and proposed modifications to the informal practice of senatorial "holds" on nominations or bills.¹¹⁵ Both practices, and the proposals for overcoming them, offer direct insight into the extraordinarily complex rules — stated and unstated — that govern behavior in the Senate, all of which are, per the Constitution, determined by the Senate itself. This current contretemps recalls as well the much bemoaned decline in bipartisan cooperation in general in American government, and the Clarence Thomas confirmation hearings and Clinton impeachment, among other events. As political pressure increases from all sides, attempts at incremental reform become increasingly overwhelmed by political actors who learn the revised complex rules well and exploit them. Further tweaking of the rules, on this read, merely postpones — and not for long, the inevitable exercise of sovereignty by elites who cloak themselves in legalisms.

Apart from revolution and incremental reform according to the established constitutional order, are there any intermediate ways to foster the people's ongoing participation in determining the nature of American democracy and law? Alan Keenan, like Schmitt and Negri, diagnoses the problem with particular attention to the situation in the

¹¹⁴ Ezra Klein, "How to End the Filibuster with 51 Votes," *Washington Post*, 27 July 2010. Available via http://voices.washingtonpost.com/ezra-klein/2010/07/how_to_end_the_filibuster_with.html (last accessed 29 July 2010).

¹¹⁵ Dylan Matthews, "The Intent of Both Proposals Is to Make the Senate More Like the Senate," *Washington Post*, 28 July 2010. Available via http://voices.washingtonpost.com/ezra-klein/2010/07/the_intent_of_both_proposals_i.html (last accessed 29 July 2010).

United States today, noting that despite formal democratic principles of citizen participation “the people themselves are increasingly locked out of their own political system” through both procedural and substantive barriers.¹¹⁶ Keenan’s mission is to mine and reveal the centrally democratic “concept and practice of openness.”¹¹⁷ Openness in democracy has, for Keenan, two key qualities: participatory openness to all members of a community in making laws and decisions that will affect them, and openness to change, in the sense of freedom from static patterns or dead-hand control.¹¹⁸ That is, in Schmittian terms, he favors popular sovereignty or the exercise of constituent power over rigid adherence to constituted forms of power. The tensions between these and the practical needs for stability and clarity lead Keenan to a third form of democratic openness: incompleteness and imperfection — i.e., the idea that democracy is always in question.¹¹⁹ Respect for the essential openness of the definition of the democratic “we” is Keenan’s fourth form of openness.¹²⁰

Evidently from this synopsis, Keenan is not looking to radical or violent solutions. Keenan calls for restraint of left and radical impulses to resist entrenched power *tout court*, favoring instead the deployment of “second-order civic virtues . . . of compassion, forgiveness, self-critique, and self-limitation.”¹²¹ Keenan’s strategy reflects his acknowledgment that the central paradox of democratic freedom is that openness cannot be achieved without forms of closure, such that “democracy is better defined as a set of *questions* than as an answer or guide to action.”¹²² In this sense, so long as *democratic* questions are

¹¹⁶ Keenan, *Democracy in Question*, 3.

¹¹⁷ Ibid. 4.

¹¹⁸ Ibid. 9-10.

¹¹⁹ Ibid. 10-11.

¹²⁰ Ibid. 15.

¹²¹ Ibid. 22.

¹²² Ibid. 140-41.

being asked and answered, we live in a democratic context.¹²³ This seems to elide the issue, however, of who asks and answers the questions. If only ever a set of institutions — Congress, prosecutors, and courts, for instance — then is it not possible that stability, tantamount to institutional ossification, will trump openness across the run of instances?

Other third-way advocates who seek to retain both popular sovereignty and openness in the context of established constitutional orders both acknowledge and work through — without resolving — the constitutive paradox. According to David Dyzenhaus, Schmitt’s analysis of constitutional authority holds that those who wield constituent power are always “able to use constitutional form against itself and so constitutionalism sows the seeds of its own destruction.” Dyzenhaus nonetheless defends the liberal view of the rule of law against Schmitt’s critique, arguing that constituent power neither disappears in a constitutional context, nor is entirely contained by constitutional forms.¹²⁴ Damian Chalmers adopts a reformist stance, positing three aspects of constituent power: that it makes individual and collective subjects mutually constitutive while foregrounding political order; that it is always related to particular constitutional settlements that it informs and conditions; and that these in turn occur against broader means of generating meaning and legitimacy. He then argues that intolerance and authoritarianism that occur through the operation of constituent power do so when one or more of these aspects is missing from some exercise of such power (as in the case of fascism overemphasizing the collective over the individual in violation of the first aspect), so that making constituent power viable in a

¹²³ Ibid. 141-42.

¹²⁴ Dyzenhaus, “Politics of the Question,” 129.

constitutional context involves ensuring that his three conditions are met, rather than that constituent power be constitutionally channeled, or not.¹²⁵

A final possibility that both works through and subverts the constitutional order, is a mandatory sunset or revision period for laws, up to and including constitutive or constitutional law, an idea proposed by Thomas Jefferson in a letter to Madison.¹²⁶ Maryland, like thirteen other states, has a constitutional provision that requires a vote roughly each generation on whether to hold a constitutional convention to completely revise its constitution.¹²⁷ In Schmittian terms, this appears to be a kind of legally required, or institutionally led exercise of constituent power, in the mode of acclamation or rejection of the question “shall we retain these laws,” perhaps in line with Arato’s second option.¹²⁸ It could thus too be subordinated to raw sovereign power — say a dictatorial edict that no laws or provisions will be revisited or will expire until the sovereign decider so decrees. The problem of providing for substantive, ongoing constituent power, and for allowing change through popular sovereignty to the very order that channels it, seems to be intractable in the *Rechtsstaat*, no matter how approached, unless one is willing to accept threats either to democracy and liberty, or to the order itself. It is this insight that Schmitt introduced to German legal theory, that “the rebellious and insurgent force of the constituent power” discovered during the English civil war and American and French revolutionary experiences

¹²⁵ Chalmers, “Constituent Power, 291-92.”

¹²⁶ Jefferson to James Madison, 6 September 1789 [The Earth Belongs to the Living], in *The Portable Thomas Jefferson*, ed. Merrill D. Peterson. (London: Penguin Books, 1977), 444-51.

¹²⁷ Aaron C. Davis, “Md. to Vote in November on Whether to Hold Constitutional Convention,” *Washington Post* 5 July 2010, A1. In supporting a change to the Articles of Confederation that would have allowed Congress to levy imposts and to prohibit vessels from states not having commercial treaties with the US, Madison proposed that all such congressional action would expire if not renewed expressly within twenty-five years. He opposed, however, a similar sunset with a thirteen-year term. Myerson, *Liberty’s Blueprint*, 46.

¹²⁸ See text accompanying note 109.

is dangerous to political stability while at the same time constructive of democracy, that is perhaps also most valuable for a Schmittian analysis of sovereignty in the United States.¹²⁹

Conclusion

Intractable though it may seem, the problem of how to retain constitutive power in the people without at the same time inviting perpetual violent revolution of the kind Schmitt abhors begs some solution, and some solution or solutions will inevitably obtain from time to time. Along Giorgio Agamben's lines, Chalmers asserts that "even within liberal constitutional settlements, there must be some recognition of means through which extra-constitutional change can take place."¹³⁰ James Tully's proposal that a truly democratic constitutionalism (as distinguished from imperial constitutionalism) would preserve "the basic idea of democratic freedom," namely that "the laws must always be open to the criticism, negotiation, and modification of those who are the subjects of them as they follow them," may be a good starting point, even if he is not terribly specific as to how such negotiation and modification will occur.¹³¹

Or Tully may simply be making the same claim as Anne Applebaum in a recent *Washington Post* column critiquing the Occupy movement, that such protest activity "isn't what democracy looks like. This is what freedom of speech looks like. Democracy looks a lot more boring. Democracy requires institutions, elections, political parties, rules, laws, a judiciary and many unglamorous, time-consuming activities."¹³² Schmitt would disagree vehemently: what Applebaum describes are liberal *Rechtsstaat* institutions, designed precisely

¹²⁹ Kalyvas, *Politics of the Extraordinary*, 10.

¹³⁰ Chalmers, "Constituent Power," 296.

¹³¹ James Tully, "The Imperialism of Modern Constitutional Democracy," in *The Paradox of Constitutionalism: Constituent Power and Constitutional Form*, ed. Martin Loughlin and Neil Walker. (Oxford, UK: Oxford University Press, 2007), 334.

¹³² Anne Applebaum, "'Occupy' Everywhere," *Washington Post*, 18 October 2011, A15.

to channel and cabin democracy. Democracy is exercise of the *pouvoir constituant*, whether through acclamation, tumult or other means such as revolution. One way or another, popular sovereignty will express itself in America, whose Brahma moment of founding is far behind it. Whether popular sovereignty will reappear through violence in a Shiva moment (such as some tea partiers have advocated) or whether more incremental means can succeed in enacting or supplanting Schmitt's reliance on acclamation as the sole form of popular participation in a stable, established democracy remains to be seen.

As we learned in the prior chapter, Schmitt views the people in a well-functioning democracy as always latently next to the constituted *Rechtsstaat*, waiting to resist, revolt, and refund as and if necessary, but potentially only either through violence or by withholding acclamation (which may amount to the same thing in the extreme case).¹³³ One possible solution, though one Schmitt himself would possibly have dismissed as smoke and mirrors, is to foster a democratic homogeneity based on shared commitments to a legal-constitutional framework.¹³⁴ In the next chapter, I examine Schmitt's theory that the political is fundamentally based on an irresolvable distinction between friends and mortal enemies. This will not only allow for a discussion of criminal law in the United States in terms of Schmitt's understanding of the political, but will also help connect Schmitt's views on democratic homogeneity to a closer examination of the possibility that friendship and enmity in the American experience are grounded on something like law.

¹³³ See Chapter 2, text accompanying notes 221 to 239.

¹³⁴ See Chapter 2, text accompanying notes 188 to 199.

CHAPTER 5

SCHMITT'S FRIEND-ENEMY DISTINCTION

Introduction

In the preceding chapters I have presented Schmitt's biography and association with the Weimar and Nazi governments, and his theoretical approaches to sovereignty, democracy, and liberalism, and have applied these to an analysis of the American constitutional system with particular focus on the nature of sovereignty on Schmitt's terms in the United States. In this chapter, I continue my discussion of Schmitt's core theories, emphasizing his concept of the political as hinging centrally on a distinction between friend and enemy that both defines the modern state and enables it to engage in its primary function of protecting its citizens in return for their obedience. This discussion of Schmitt's friend-enemy distinction will pave the way for its application to the United States criminal justice system in Chapter 6, in order to allow for a full discussion of jury nullification in terms of Schmitt's theory in Chapters 7 and 8. In this chapter, I define Schmitt's friend-enemy distinction as the central political axis, briefly discuss critiques of his theory that argue that he shortchanges the friendship component of the political, distinguish the concepts of enemy and criminal in Schmitt's thought with reference to, among other things, Schmitt's theory of the partisan and contemporary international and domestic terrorism, and briefly detail Schmitt's views on criminality in general.

Schmitt's Concept of the Political as Friend-Enemy Distinction

Of Carl Schmitt's works, the two most influential and widely studied are *Political Theology*, in which Schmitt lays out his theory of sovereignty as decision on the exception,¹ and his 1927 work *The Concept of the Political*. In the latter Schmitt holds that "[t]he specific political distinction to which political actions and motives can be reduced is that between friend and enemy."² In this context, the enemy is "the other, the stranger," and "is, in a specially intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible."³ Such an enemy is no mere nuisance. "[T]o the enemy concept belongs the ever present possibility of combat."⁴ Indeed, "[t]he political is the most intense and extreme antagonism, and every concrete antagonism becomes that much more political the closer it approaches the most extreme point, that of the friend-enemy grouping."⁵ War, or at least death through human combat, must be realistically possible in order for a friend-enemy grouping to exist.⁶

Nonetheless, for Schmitt "[e]very religious, moral, economic, ethical, or other antithesis transforms into a political one if it is sufficiently strong to group human beings effectively according to friend and enemy."⁷ And consistent with Schmitt's understanding of sovereignty, some decision is necessary to identify an enemy. According to him, "[i]n its entirety the state as an organized political entity decides for itself the friend-enemy

¹ For discussion of this work, see Chapter 2, text accompanying notes 122 to 145.

² Carl Schmitt, *Concept of the Political*, 26.

³ Ibid. 27.

⁴ Ibid. 32.

⁵ Ibid. 29.

⁶ Ibid. 33.

⁷ Ibid. 37.

distinction.”⁸ Thus Schmitt claims “that the moment of political decision is at one and the same time a moment in which the distinction between friend and enemy is made.”⁹ And this decision on the friend-enemy distinction is both a core function of the state and constitutive of the state’s identity. Schmitt’s primary meaning in deploying the concept is to make a homogeneous group of friends more or less coterminous with the well-functioning state.¹⁰ The friend-enemy grouping constructs the political entity, whose sovereign in turn decides on critical, exceptional, situations.¹¹ And a state must make friend-enemy distinctions in order to be a state.¹² Schmitt “endowed the state with [] superiority solely because of its political nature. . . . No other organization or association within the confines of the national sovereign state can make a similar claim.”¹³ For Schmitt, when a people ceases to be able to distinguish friend from enemy, it ceases to be a people in the political sense.¹⁴ Moreover, true justice has to be guided by the friend-enemy distinction, including with respect to determining whether individuals *within* the polity may be considered undesirable such that they are not properly part of the polity after all.¹⁵

Yet as we have already seen, the state and its laws cannot act mechanically by themselves, absent human mediation. While it is ultimately the role of the state to identify friend and enemy, Schmitt asserts that “[o]nly the actual participants [in conflict] can correctly recognize, understand, and judge the concrete situation and settle the extreme case

⁸ Ibid. 29-30.

⁹ Dyzenhaus, *Legality and Legitimacy*, 47.

¹⁰ Böckenförde, “Concept of the Political,” 39.

¹¹ Schmitt, *Concept of the Political*, 38.

¹² Ibid. 44.

¹³ Schwab, *Challenge of the Exception*, 145.

¹⁴ Schmitt, *Concept of the Political*, 49.

¹⁵ Schwab, *Challenge of the Exception*, 116.

of conflict,” i.e. by deciding whether one’s adversary is an existential enemy.¹⁶ This interestingly implies that some quantum of sovereign decision making resides in combatants acting on behalf of the state. Importantly, however, the enemy is not properly identified as the result of “a psychological expression of private emotions and tendencies. . . . He is [] not the private adversary whom one hates,” but “solely the public enemy.”¹⁷ And this distinction is important in part because the state disposes of the lives of enemies in time of war against them.¹⁸ “[T]he distinction of friend and enemy in the age of revolution is primary, and . . . determines war as well as politics.”¹⁹ Thus the enemy should not be, for Schmitt, merely one’s own personal opponent in a feud. Political friends and enemies in Schmitt’s thought are “not private adversaries, but political communities whose very existence posed a potential threat to other political communities.”²⁰ Further, the political friend-enemy grouping is prior to law. And though they must act through particular human intermediaries, states are, for Schmitt, the “means of continuing, organizing and channeling political [i.e., friend-enemy] struggle.”²¹

¹⁶ Schmitt, *Concept of the Political*, 27.

¹⁷ Ibid. 28. Accord Ellen Kennedy, who observes that for Schmitt the friend-enemy distinction is never a private one, but goes on to argue that it neither refers to a person’s *or group’s* opponent, but instead is always a public matter, played out in the political sphere. Kennedy, “*Hostis Not Inimicus*,” 101. It is not entirely clear from Kennedy’s point of view why a group within a state might not amount to a public, political friend or enemy either of the state or of some other group vying for recognition as representative of an extant or emerging state. Schmitt’s own claims about civil war and internal enemies seem to mitigate against a strict elimination of internal groups from consideration as friends or enemies.

¹⁸ Schmitt, *Concept of the Political*, 46. Notably, however, Schmitt recognized that the right to decide on life and death can obtain in situations short of the friend-enemy distinction, and thus be apolitical, as in Roman tradition with respect to the head of household or *pater familias*’ right to put his slaves or children to death. Ibid. 47.

¹⁹ Carl Schmitt, *Theory of the Partisan: Intermediate Commentary on the Concept of the Political*, trans. G.L. Ulmen. (New York: Telos Press, 2007), 51.

²⁰ Balakrishnan, *The Enemy*, 106.

²¹ Hirst, “Schmitt’s Decisionism,” 9.

Nonetheless, and of central significance to this dissertation's hypothesis that Americans adjudicated to be criminals can count as political enemies, Schmitt clearly did anticipate the possibility of internal enemies, albeit in particular in the context of civil war. On his view it was possible for intensifying internal antagonisms to become friend-enemy groupings internal to the state, and in such cases weaken the state and lead to civil war.²² Moreover, the mere possibility of civil war apparently suffices in Schmitt's theory to compel the state to declare internal enemies from time to time, perhaps even short of actual civil war. "As long as the state is a political entity [the] requirement for internal peace compels it in critical situations to decide also upon the domestic enemy. Every state provides, therefore, some kind of formula for the declaration of an internal enemy."²³ These formulae include ostracism, expulsion, proscription, and outlawry.²⁴ Depending on the attitude and reaction of the declared enemies, use of these techniques may signal civil war.

As I will explicate more fully below, Schmitt's insistence on the need for a decision on the internal enemy derives in part from his requirement that democratic states clear the way for the development of a homogeneous population capable of democratic politics.²⁵ It is in this light that George Schwab's claim that "Schmitt insisted on the depoliticization of society; that is, the state must prohibit politically centrifugal forces from operating within its domain"²⁶ is best interpreted. That is, it is doubtful that Schmitt thought that society could be thoroughly depoliticized, but it is nonetheless clear that he argued that to the extent a

²² Schmitt, *Concept of the Political*, 32.

²³ Ibid. 46.

²⁴ Ibid. 47.

²⁵ Dyzenhaus, *Legality and Legitimacy*, 49.

²⁶ Schwab, introduction to *Leviathan*, xxxiv.

state was not homogenous, it would inevitably fly apart.²⁷ Thus for Schmitt, at least during Weimar, defense of that republic's constitution required clear identification of the constitution's and thus the republic's friends and enemies.²⁸ David Dyzenhaus urges that

if the political distinction between friend and enemy is properly made, the values that happen to bind together any particular community of friends are, by definition, ethical. The fundamental decision which any political order takes will be one which establishes a normal situation out of a state of exception or political conflict, and the glue of that situation is its ethic.²⁹

This requires some explanation, though, since Schmitt expressly denies in *Concept of the Political* that the political is equivalent to the moral.³⁰ It is unclear what Dyzenhaus means by ethic if not a reference to morality, though in Schmitt's terms, perhaps Dyzenhaus' "ethic" amounts to something more like "myth," or some other form of social glue.

One of the state's tools for defining and policing the difference between internal (or external) friend and enemy is indeed the power of myth-making. Schmitt saw the modern political world as one in which the unity of political communities could only be conceived through myth.³¹ What remains to be seen is whether the "rule of law" could serve this mythic function, demarcating friend (adherent to law) from enemy (opponent of law). In later editions of *The Concept of the Political*, Schmitt "argue[d] that any conflict can become political if it reaches the point of intensity at which individuals are grouped into friends and enemies."³² Thus criminals could constitute political enemies in contrast to law-abiding

²⁷ Indeed, Schwab seems to acknowledge as much elsewhere: while traditionally the state defined friend and enemy in the context of international relations, "with the politicization of society, the state . . . could at any time be forced to do likewise in [its] domain as well." Schwab, *Challenge of the Exception*, viii. Accord *ibid.* 75.

²⁸ Müller, *Dangerous Mind*, 67.

²⁹ Dyzenhaus, "State Back in Credit," 81.

³⁰ Schmitt, *Concept of the Political*, 26.

³¹ Balakrishnan, *The Enemy*, 80.

³² *Ibid.* 106.

friends provided the law-abiding citizens, or their state, see criminals as enemies with sufficient intensity. The possibility of disputes becoming political always exists because “[e]xperiences of life-and-death struggles, *even when they are vicarious and imagined*, crystallize into stereotyped, opposed and distinct ‘ways of life,’ generating zones of contention which cease to be explicable in terms of a simple conflict of interests.”³³ Recall, however, that although formally speaking, the friend-enemy distinction in Schmitt does not disqualify domestic conflicts as sources of the political, when domestic oppositions amount to especially strong existential friend-enemy groupings, civil war is at hand.³⁴ “If any internal polarization reached sufficient intensity to turn political, the state had a civil war on its hands — and effectively ceased to exist.”³⁵

One aporia in Schmitt’s theory is the question who determines friend from enemy. As seen above, even in *The Concept of the Political* Schmitt seems to vacillate between reserving this determination for the state, and requiring that it be made by actual participants in an existential conflict, which would apparently mean specific actors on behalf of the state (or of nonstate actors). Because only a threat to one’s own existence confers the right to end the lives of one’s enemies, and because enmity for Schmitt involves the “real possibility of a violent struggle to the death,” what counts as existential danger can only accurately be judged by conflict participants, in concrete situations.³⁶ Yet Schmitt demonstrates ambivalence about this premise, arguing elsewhere that friend and enemy must be

³³ Ibid. 107 (emphasis added).

³⁴ Ibid. 110.

³⁵ Müller, *Dangerous Mind*, 33.

³⁶ Balakrishnan, *The Enemy*, 108.

determined by some unspecified third figure not directly party to the conflict itself.³⁷ Thus George Schwab's claim that "[b]y virtue of its possession of a monopoly on politics, the state is the only entity able to distinguish friend from enemy and thereby demand of its citizens the readiness to die,"³⁸ while grounded in Schmitt's own arguments, does not properly capture the subtlety and even vacillation Schmitt's writings demonstrate on this point when taken as a whole.

Importantly, Schmitt leaves open the possibility of any number of divisions or disagreements becoming or constructing a friend-enemy grouping. Schmitt's concept of the political does not distinguish between high and low politics; rather all friend-enemy groupings sit on a continuum of potential intensity.³⁹ So, for instance, when what had been an economic concept of class conflict becomes sufficiently intense it generates a political friend-enemy grouping along class lines.⁴⁰ As Schmitt argued, "[t]he only scientifically arguable criterion [of the political] today is the degree of intensity of an association and dissociation; that is, the distinction between friend and enemy."⁴¹ "All issues — including theological ones, which necessarily touched on many areas of human life — could enter the force field of the political, as long as the relevant relations or polarizations between different groups of human beings became sufficiently intense."⁴² Politics can set in anywhere, and any

³⁷ Ibid. 113, translating and citing Carl Schmitt, *Glossarium: Aufzeichnungen der Jahre 1947-1951*. (Berlin: Duncker and Humblot, 1991), 220.

³⁸ George Schwab, introduction to *Political Theology*, 1.

³⁹ Balakrishnan, *The Enemy*, 110.

⁴⁰ Schmitt, *Constitutional Theory*, 263-64.

⁴¹ Carl Schmitt, *Political Theology II: The Myth of the Closure of Any Political Theology*, trans. Michael Hoelzl and Graham Ward. (Cambridge, UK: Polity Press, 2008), 45.

⁴² Müller, *Dangerous Mind*, 167. Accord Meier, *Lesson of Carl Schmitt*, 34: "In Schmitt's theory the political can enter into life at any time and in any context; everything is potentially political, and everything is to some extent political."

two who unite to fight one enemy amount to a political association in Schmitt's terms.⁴³

“Schmitt makes room for political associations of the most diverse kinds: for nations and classes, for polis, Church, and State, for bands of guerrillas, sects, etc.”⁴⁴ “[T]he constellation of friend and enemy can apply to *everything* and turn up literally *everywhere*.”⁴⁵

Indeed, on Ellen Kennedy's view, Schmitt's friend-enemy distinction does not even define politics or its content, but rather sets forth an objective criterion for measuring associative or dissociative intensity. The political, for Kennedy, has no intrinsic substance beyond this.⁴⁶ Similarly, Chantal Mouffe posits that Schmitt's friend-enemy distinction is not in fact a political construction but a recognition of already existing political realities.⁴⁷ Further, on Heinrich Meier's view, the intense existential nature of the centrally political friend-enemy distinction implies the possibility of an emergency for the state. “It is only in the light of the dire emergency that the exceptional position of the political becomes visible. Only when it comes into view as the reality which at any time can make a life-and-death claim upon man, does the political appear as what is authoritative.”⁴⁸

Moreover, not all conflict necessarily *does* rise to this level of intensity within the state: to claim, for instance, that the friend-enemy distinction turns debate within the state into such an intense antagonistic grouping is arguably a misunderstanding of Schmitt.⁴⁹ The political is not a predetermined arrangement but rather “a public relationship between

⁴³ Ibid. 68.

⁴⁴ Ibid. 69.

⁴⁵ Ibid. 75.

⁴⁶ Kennedy, “*Hostis Not Inimicus*,” 100.

⁴⁷ Mouffe, “Paradox of Liberal Democracy,” in *Law as Politics*, 171.

⁴⁸ Meier, *Lesson of Carl Schmitt*, 31.

⁴⁹ Böckenförde, “Concept of the Political,” 38.

people . . . marked by a specific degree of association or dissociation which can *potentially* lead to the distinction between friend and enemy.”⁵⁰ “Facing the ever-lurking potential of an escalating friend-enemy grouping, [the political] is [] present within the state, even though it does not visibly manifest itself in a normal situation.”⁵¹ And in Heinrich Meier’s view, it is precisely “[t]he concept of the intensity of the political [that] allows Schmitt to encompass civil war and revolution.”⁵² According to Meier, it is by expanding the enemy concept to include civil war that Schmitt “opens up the prospect of beating liberalism on its own turf, domestic politics.”⁵³ At the same time, by recognizing the possibility of internal enemy-making, Schmitt “introduces an ancillary construction in order to provide the political *within* the state at least a limited space beyond the equating of politics and police, without the need for the political unity immediately to become engulfed in civil war,” presumably where the friend-enemy conflict is insufficiently intense to metastasize in that way.⁵⁴ But without always having to end in civil war, every concrete opposition is political if intense enough, “everything is *more* or *less* — and at all events potentially — political.”⁵⁵

The friend-enemy distinction in Schmitt’s thought also has a mutually constitutive character. In *Ex Captivitate Salus*, his collection of essays and diaries from the period of his post-war detention, Schmitt figures the enemy as he upon whom one is mutually dependent, a shift from the mere mutual positing and existential threat of the public enemy in *The*

⁵⁰ Ibid. (emphasis added).

⁵¹ Ibid. 40.

⁵² Meier, *Hidden Dialogue*, 23.

⁵³ Ibid. 24.

⁵⁴ Ibid. 25, referring both to certain “secondary” concepts of the political in Schmitt’s thought as well as to the internal enemy.

⁵⁵ Ibid.

Concept of the Political.⁵⁶ Even in this context, however, the enemy must have a truly threatening characteristic. This mutual constitution of friend and enemy appears most prominently in Schmitt's post-Weimar works. So, for instance, in *Political Theology II*, Schmitt revives in connection with the friend-enemy distinction an old, oft-forgotten second meaning of the Greek term "*stasis*" that denotes in the political context "*unrest, movement, uproar and civil war*" contrary to its primary and now-dominant meaning as stability, quiet, stillness.⁵⁷ He does so to show that just as gnostic thinker Gregory of Nazianzus held that The One was always in a state of *stasis*-as-uproar against itself, likewise trinitarian formations promote *stasis* not as stability as one might be tempted to conclude (considering, for instance, the famous stability of three-legged stools), but instead as constant tension, strife, and movement.⁵⁸ So too, one might see a state comprising friend-enemy groupings might be in a constant state of tension resulting from their mutually constitutive strife, that nonetheless does not break out into utter civil war.

In this sense, Schmitt's realistic view of the inevitability of conflict-driven friend-enemy groupings comprehends the impossibility of permanent political stability. Schmitt opines that attempts to overcome the friend-enemy distinction are not only doomed to fail but mark a cataclysmic end to the political way of life. Schmitt feared the appearance of an Antichrist who convinces men that the friend-enemy distinction has been permanently overcome, thus bringing politics to an end.⁵⁹ In his view, when the age of perfect security arrives, the Antichrist has established his rule, having succeeded in convincing humanity,

⁵⁶ Müller, *Dangerous Mind*, 55-56.

⁵⁷ Schmitt, *Political Theology II*, 123.

⁵⁸ Ibid. 75, 122-23. Consider in this regard the dynamic relationship among the Brahma, Vishnu and Shiva moments of political development. See Chapter 2, text accompanying notes 200 to 264.

⁵⁹ See Meier, *Hidden Dialogue*, 49.

albeit falsely, that peace and security have become reality.⁶⁰ The danger Schmitt anticipates in this context includes the possibility that a radically deceived population believes it is safe and secure in a realm of lasting peace, when in fact it falls victim to the Antichrist figure, who can annihilate any of them at will after declaring its members enemies in an absolute sense.⁶¹

Friendship Shortchanged?

Because of Schmitt's emphasis on the role of the enemy as determinative of the polity — as we have seen states maintain their differences from one another, as well as their own internal homogeneity, by identifying external and internal enemies — some critics have argued that he shortchanges the concept of friendship, both in that he does not make significant efforts to describe the nature of friendship and in that he does not identify precisely its role in state formation and cohesion. According to Meier, “[t]he friend is ascribed no significant function in Schmitt's conception.”⁶² Leo Strauss also claims that Schmitt underspecifies the meaning of friend, concentrating instead on the meaning of enemy.⁶³ On Dyzenhaus' read, however, Schmitt does adequately theorize friends, specifically as those whom the sovereign decides are to be secured in their physical integrity in the context of the state in return for their obedience to the sovereign.⁶⁴

Schmitt himself seems to have recognized this in the course of revising *The Concept of the Political*. Heinrich Meier claims that in its first two editions, Schmitt says nothing about

⁶⁰ Meier, *Lesson of Carl Schmitt*, 25.

⁶¹ For a detailed discussion of the absolute enemy and criminal enemy, see text accompanying notes 73 to 99.

⁶² Meier, *Lesson of Carl Schmitt*, 52.

⁶³ Strauss, “Notes on *The Concept of the Political*,” 103.

⁶⁴ Dyzenhaus, *Legality and Legitimacy*, 96.

friends or the concept of friendship, but adds some thoughts on these in a 1937 “Corollarium” included in later editions, in which he holds that the friend “is whoever affirms and confirms me.”⁶⁵ In this sense, while the enemy defines himself by attacking me or putting me at risk of attack, the friend also determines himself by evidencing affirmation or confirmation of me.⁶⁶ Chantal Mouffe notes, moreover, that despite criticism of the undertheorized nature of friendship in his works, Schmitt’s concept of friendship is visible, if not highlighted, in his many discussions of political homogeneity.⁶⁷ And this is borne out by closer examination of Schmitt’s theoretical oeuvre, in particular *Constitutional Theory*. In that work, a central topic, though again not specified clearly in the terminology of *The Concept of the Political*, is what political associations of friends are possible in the modern state.⁶⁸ As Tracy Strong puts it, “[u]nderlying the state is a community of people . . . a ‘we’ that . . . presupposes and is defined by conflict. It derives its definition from the friend/enemy distinction.”⁶⁹ Thus friendship is at the heart of Schmitt’s conception of a unified and homogeneous *demos*. Whatever characteristics make the population of a state homogeneous simultaneously define friendship, and those who do not have those characteristics are by contrast enemies. Yet Strong also adds his voice to those who argue that friendship is underdetermined in Schmitt, claiming that “the problem with Schmitt is that he allows the notion of enemy to too easily define the notion of friend.”⁷⁰ In Strong’s view, only by facing

⁶⁵ Meier, *Lesson of Carl Schmitt*, 51, translating and quoting Carl Schmitt, *Der Begriff des Politischen*, Corollarium 2, 3rd ed. (Hamburg: Hanseatische Verlagsanstalt, 1937), 104.

⁶⁶ Meier, *Lesson of Carl Schmitt*, 51-52.

⁶⁷ Mouffe, “Paradox of Liberal Democracy,” in *Law as Politics*, 168.

⁶⁸ Ellen Kennedy, foreword to *Constitutional Theory*, by Carl Schmitt, trans. and ed. Jeffrey Seitzer. (Durham, NC: Duke University Press, 2008), xv.

⁶⁹ Tracy B. Strong, foreword to *Political Theology*, xv.

⁷⁰ *Ibid.* xxxi. Accord Strong, “Dimensions of the New Debate,” xxiv.

up to both sides of the friend-enemy distinction will some “we” be able to identify itself and rationally decide what that “we” ought to do with respect to relations with the “they.”⁷¹

In my view, Schmitt’s critics are right to note that he is less than explicit in connecting friendship, as opposed to enmity, to the larger corpus of his work. The mutually constitutive relations of the two notwithstanding, enmity is the clear focus of Schmitt’s conceptual examination in particular in *The Concept of the Political*, the text in which he posits, develops, and explains the friend-enemy distinction. Nonetheless, I agree with Mouffe and Kennedy that friendship, though not carefully connected to homogeneity and political unity in Schmitt’s writing, must be the functional equivalent to those concepts in Schmitt’s theory to the extent his work can be read cohesively. I next examine the role of friendship and enmity in constructing a homogeneous polity before engaging in a discussion of the distinctions Schmitt makes over the course of his work between the enemy and the criminal. Both topics are significant for my argument that the criminal in the American context can be considered an analog (at least) of the enemy in Schmitt’s theory.

Friendship and Homogeneity

Although like Schmitt I focus in this dissertation on the enmity side of the friend-enemy distinction, it is important that I point out as well the role that friendship plays in Schmitt’s concept of the political, in order to demonstrate how constructing the criminal as an enemy in American jurisprudence plays a key role in bolstering American democratic homogeneity, and how direct citizen participation in redefining the nature of criminality serves to alter sovereignty over the political in the American polity.

⁷¹ Ibid. xxi.

Recall from Chapter 2 that some left-leaning Schmitt scholars — in particular Andreas Kalyvas and Chantal Mouffe among others — have extended his theories of democratic homogeneity by claiming that such homogeneity might be forged along lines other than race, nationality, religion, language and the like. In particular they argue — as do I — that a democratic homogeneity might be based upon a societal consensus regarding founding legal principles.⁷² That is, a version of friendship might be constructed according to the willingness of particular persons to accept and abide by legal provisions, albeit most especially fundamental provisions such as those enshrined in a constitution. On this reinterpretation of Schmitt's theories, friendship is not merely significant as a kind of weak obverse of enmity, but is critical in terms of defining the basis for maintaining a homogeneous and unified polity. Friendship (and enmity) might be made to pivot not around such more or less readily identifiable characteristics as race, nationality, religion, or language, but instead along less obvious questions of abstract belief in and behavior according to formal law (or, for that matter, informal norms).

Obviously adherence to a set of legal commitments need not exist in isolation from other identifying trappings. Consider, for instance, the cohesiveness of such groups as the Iranian paramilitary Basij forces, American Hell's Angels, or sub- or transnational gangs of all stripes. They often accept members of various races, nationalities, religions, or languages, so long as these members both adhere to a code of behavior internal to the group in question and display that adherence through various outward signs. Whoever might be the enemies of these groups, as determined by their own sovereign actors from time to time, the groups' members identify themselves to each other as friends through adoption of uniforms,

⁷² See Chapter 2, text accompanying notes 183 to 199.

signs, and language games, among other things, all as a way of signaling not essentialized characteristics, but belief in and commitment to the group *and* its creeds.

The Enemy versus the Criminal in Schmitt's Theory

Schmitt's understanding of the enemy evolves throughout his work in ways that can render it confusing and inconsistent. As we have seen, when he introduces the enemy in *The Concept of the Political*, he makes it clear that for his purposes the enemy must be public, not private. On George Schwab's read, "Schmitt observed that not every antagonism, rivalry or antipathy necessarily constitutes enmity," and distinguished in this regard between *inimicus*, the private enemy, and *hostis*, the public enemy.⁷³ This observation, however, paraphrasing Schmitt in *The Concept of the Political*, does not yet address the concept of the absolute enemy, which Schmitt labels *hostis* in later works. In this regard, Schwab points out that the German term *Feind*, which Schmitt uses to signify "enemy" in *The Concept of the Political* can be translated either as enemy or foe, a distinction Schmitt neither recognizes nor addresses clearly until *The Nomos of the Earth*, first published in German in 1950.⁷⁴ According to Schwab, foe corresponds to the devil and absolute enemy, to whom no quarter is given, while enemy refers to the equally sovereign enemy state, for instance, which plays by the rules of conflict in the modern era.⁷⁵ Already apparent is Schmitt's focus in conceptualizing the distinction between absolute and equal enemy on interstate relations, a focus that leaves somewhat open the question how Schmitt would characterize criminals or other potential enemies internal to the state in terms of the enmity between them.

⁷³ Schwab, *Challenge of the Exception*, 51.

⁷⁴ Ibid. 53.

⁷⁵ Ibid. 53-54.

What Schmitt means by characterizing the enemy, specifically the public enemy, as “equal,” however, merits further examination. For Schmitt, the enemy was on an equal plane with the friend in terms of his humanity. According to Gopal Balakrishnan, Schmitt’s ethic of politics stripped the friend-enemy distinction of “self-righteous moralizing,” demanding that “the enemy [be] treated not as a criminal to be punished, but simply as an enemy to be overcome.”⁷⁶ The friend-enemy distinction involves enemies “recognized as legitimate, and respected as [] enem[ies].”⁷⁷

Although this distinction between enemy and criminal, along with the concomitant distinction between overcoming and punishing, is not yet entirely apparent in *The Concept of the Political*, both do emerge more clearly in later works. George Schwab for instance notes a shift in Schmitt’s thought, reflecting a change in empirical circumstances as he understood them, from characterizing the enemy as a personally hated “foe” — in Schmitt’s later works the absolute enemy — to seeing him as an ideologically “clean” enemy adversary, who could be a member of a fighting collectivity opposed to one’s own, but did not necessarily have to be the object of personal hatred. Schmitt praised this shift he claimed to observe in the thinking of states about enemies as a progressive move.⁷⁸ The endpoint of this shift is apparent in Schmitt’s *Theory of the Partisan*, in which he holds that “[t]he enemy is on the same level as am I. For this reason, I must fight him to the same extent and within the same bounds as he fights me, in order to be consistent with the definition of the real enemy by which he fights me.”⁷⁹

⁷⁶ Balakrishnan, *The Enemy*, 107.

⁷⁷ Ibid. 109.

⁷⁸ George Schwab, introduction to *The Concept of the Political*, by Carl Schmitt, trans. George Schwab. (Chicago: University of Chicago Press, 2007), 10.

⁷⁹ Schmitt, *Theory of the Partisan*, 85.

Even in *The Concept of the Political*, however, Schmitt begins exploring the distinction he will emphasize more clearly as his thought develops. There, he holds that “a new and essentially pacifist vocabulary has been created” to further the application by the liberal state of technical means to bring about violent death. Through this conceptual shift, “[w]ar is condemned but executions, sanctions, punitive expeditions, pacifications, protection of treaties, international police, and measures to assure peace remain. The adversary is thus no longer called an enemy but a disturber of peace and is thereby designated to be an outlaw of humanity.”⁸⁰ This, in tension with Schmitt’s refusal to see as the same the humanly equal enemy and the mere criminal who must be punished, implies at least that some modern states have begun to engage in existential conflict short of war, thus actually engaging in political enmity, but under guise of pacifism, by transmuting war against equals into punishments of those cast as subhuman criminals.

Given that Schmitt applies the enemy concept to one’s fellow countrymen in the context of civil war or revolution, the enemy can presumably be understood as a brother or equal. Nonetheless, Schmitt describes the enemy in *The Concept of the Political* as “plainly the other, the alien,” a move that might again on a merely superficial interpretation seem to push the enemy from the pole of equal to that of subhuman criminal foe.⁸¹ That such a reading embodies a misconception in turn helps unpack what Schmitt means by “equal” in the context of the enemy: he refers not necessarily to equality of might, or to moral neutrality or equality of enmity, but rather to the idea that the true enemy is not considered to be morally inferior to oneself, and thus is neither worthy of contempt, nor of annihilation or utter disregard. In a sense, for Schmitt, the enemy, while an existential threat to one’s own

⁸⁰ Schmitt, *Concept of the Political*, 79.

⁸¹ Meier, *Hidden Dialogue*, 23, translating and quoting Carl Schmitt, *Der Begriff des Politischen: Text von 1932 mit einem Vorwort und drei Collarien*. (Berlin: Duncker and Humblot, 1963), 38.

continued existence, is nonetheless properly understood as being on the same moral footing as oneself and one's friends. Put differently, the enemy is legitimate in a way that the criminal is not.

Again, however, Schmitt's shifting terminology confuses matters. The non-enemy "outlaw" from *The Concept of the Political* reappears in other contexts variously as the "absolute enemy" or the "criminal." Schmitt's categorizations in this regard even differ even across different editions of *The Concept of the Political*. In changes made after the first edition, Schmitt expanded on the idea of the political friend-enemy distinction to refer more clearly to more intense conflict that moves into the sphere of holy war or total war, in which the absolute enemy is not merely to be held back, but is now to be annihilated, implying a sub- or nonhuman status inconsistent with the formal existential enemy who is simply one's humanly equal opponent on the battlefield.⁸²

Heinrich Meier helpfully seeks to distinguish among various forms of enemy in Schmitt, differentiating from the ordinary, equal enemy the absolute enemy, who is characterized "as a criminal or a monster," and who must be annihilated as enemy of mankind who lacks value.⁸³ From there Meier reinterprets Schmitt's conception of civil war to include an understanding that it cannot be bounded or restricted because it knows no just, equal enemy target.⁸⁴ From 1932 on, "Schmitt leaves no doubt that the most extreme degree of intensity [obtains] where it is a question of the battle against an adversary whose moral dignity is contested, whose historical legitimacy is disputed, whose religious orthodoxy is negated, or the battle against an enemy who for his part attacks his opponent as the *absolute*

⁸² Meier, *The Hidden Dialogue*, 25-27.

⁸³ Meier, *Lesson of Carl Schmitt*, 55.

⁸⁴ *Ibid.* 56.

enemy.”⁸⁵ According to Meier, “the most intensive, decisive enmity presupposes an asymmetrical relationship,” apparently between an upstart power and an established order at a peak of great politics with which it is in conflict.⁸⁶ Meier understands this kind of intensive, decisive enmity as inherent in a battle between true and heretical faiths. “[E]veryday politics presents merely a pale reflection of this case.”⁸⁷ On Meier’s read, then, the absolute enemy, who corresponds roughly to the criminal or foe as opposed to the equal enemy, presents a kind of insurgent and heretical threat to the state it opposes, and thus must be utterly opposed, and, if the state is to be successful, annihilated.

So, for instance, were states capable of putting an end to civil war for all time (as opposed to winning civil wars), for Schmitt politics and foreign policy would become coterminous, and “[e]verything else would fall to the police.”⁸⁸ That is, if civil war is not political, only interstate conflict can be, in which case the internal enemy who is a threat to the stability of the state either becomes the absolute enemy who can be annihilated, or becomes a kind of lesser enemy properly addressed under criminal law. The latter reading seems more plausible, and implies that the domestic criminal is not a political enemy for Schmitt. In a somewhat different context, Schmitt seems to support this interpretation:

The criminal does not break the peace or order; he does not even break the general norm as a rule; “juristically considered,” he actually breaks nothing at all. Only the concrete peace or a concrete order can be broken; only with this in mind can the concept of crime be salvaged. The abstract norm and rule, in contrast, continue to operate unchanged . . . despite the “crime”: it hovers above every concrete situation and every concrete action; it is not annulled through a so-called violation.⁸⁹

⁸⁵ Ibid. 57.

⁸⁶ Ibid. 58-59.

⁸⁷ Ibid. 63.

⁸⁸ Ibid. 125.

⁸⁹ Schmitt, *Three Types of Juristic Thought*, 53.

That is to say, at least in Schmitt's empirical observation of Germany and other European states, the criminal does not pose an existential threat to the legal order. But if, as I argue below, the legal order is constitutive of a homogeneous political unity in Schmitt's terms, then the criminal is precisely the central threat to such a polity, with whose members she does not share a respect for the law, and thus is neither certainly no less dangerous than the equal enemy or the absolute enemy.

Tracy Strong emphasizes the importance of Schmitt's distinction between the enemy and the criminal, noting that "[t]he friend-enemy definition of politics that underpins Schmitt's analysis has the advantage of keeping combatants from seeing their enemy as criminal."⁹⁰ But in this restatement, "criminal" appears to have a specific conceptual valence that does not precisely resemble the ordinary criminal in the domestic sense. The Schmittian criminal to which Strong appears to refer is closer to the absolute enemy, in the sense that he is to be annihilated in the name of humanity because he is an existential danger to humanity as such. Schmitt's typical domestic criminal, who certainly seems to partake of enmity with respect to law-abiding citizens, is nonetheless *not* to be annihilated (at least in states that do not espouse the rhetorical insistence that crime itself should be eliminated — a seeming conceptual impossibility absent the elimination of laws making particular activities criminal). Marked as such even after serving his punishment, the ordinary criminal in Schmitt's conception, based upon civil-law European practice, remains within law and within the polity. He is not, except with respect to the death penalty (and recall that even equal enemies suffer death at each other's hands), to be annihilated, and thus Strong's conflation runs counter to Schmitt's categories, rightly understood.

⁹⁰ Strong, "Carl Schmitt and Thomas Hobbes," xxvi.

The possibility of a death sentence may play a more significant role in Schmitt's distinction between enemies and criminals than is made explicit in his thought, however. For instance, though as we have seen Schmitt admits the possibility of a real friend-enemy grouping on the basis of class conflict, he also claims that civil war among class enemies is an example of a situation in which the fighting enemies view each other not as proper enemies but as subhuman criminals in the absolute enemy mode properly subject to the death penalty merely for participation in combat.⁹¹ Yet basing the distinction between criminal and enemy on the possibility of a death sentence for the former would put Schmitt's theory in tension with itself, given that for Schmitt the state publicly disposes of the lives of noncriminal enemies in the context of war, an action that comes close to that of executing ordinary criminals even during peacetime.⁹²

Schmitt himself provides substantial support for the notion that his distinction between the enemy and the criminal is primarily one rooted in his views on international relations, and may not have much purchase outside that context. In *Political Theology II* he opines that the Hobbesian version of the state

has achieved, to date, the greatest rational "progress" of humanity in the definition of war as it appears in the theory of international law: namely the distinction between the enemy and the criminal, and therefore the only possible basis for the theory of the neutrality of states in times of war *That, for me,* is part of my political theology and it indicates the paradigm shift in modernity.⁹³

This passage shows clearly that Schmitt's distinction between enemy and criminal is made centrally in the realm of international relations, and that "criminal" in this context means something closer to "war criminal," or again absolute enemy, than a violator of ordinary

⁹¹ Schmitt, *Theory of the Partisan*, 30.

⁹² Schmitt, *Concept of the Political*, 46.

⁹³ Schmitt, *Political Theology*, 117-18.

domestic law who can be punished, at least formally, within the context of that law without being made *hostis humanis* — the enemy of all humanity.

Illustratively, Schmitt's distaste for the process by which states make of their opponents in war criminal or absolute enemies traces back to his recollection of Germany's treatment following World War I. In that case, the Versailles Treaty criminalized the defeated German enemy.⁹⁴ As Schmitt saw it, turning the instigator of a war of aggression into an unjust enemy makes it into "a criminal who must be punished . . . transforming international law into an annexe of penal law, and war into a matter of law and order."⁹⁵ Under the classical laws of war, enemies were distinguished from criminals such that even warring states respected each other as enemies rather than discriminating against each other as criminals.⁹⁶ The partisan — Schmitt's term for the guerrilla or similar warrior who is an irregular and does not wear the uniform of or operate directly for some state — when not recognized as a formal "troop" is also considered criminal and *hors la loi*.⁹⁷

This last phrase is particularly instructive, and especially in light of Schmitt's comments on pirates: to be *hors la loi* is akin to being in the position of a pirate or other *international* outlaw. Unlike in the domestic criminal context, one who is outside the boundaries of the law is the enemy of all, and is at the mercy, quite literally, of any legitimate (here state) authority who can apprehend him.⁹⁸ Thus the criminal enemy in Schmitt's

⁹⁴ Jean-François Kervégan, "Carl Schmitt and 'World Unity,'" trans. Daniel Hahn, in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 59.

⁹⁵ Ibid. 60.

⁹⁶ Schmitt, *Theory of the Partisan*, 9.

⁹⁷ Ibid. 10.

⁹⁸ See United Nations Convention on the Law of the Sea (UNCLOS), 1833 U.N.T.S. 3, 21 I.L.M. 1261 (1982), Arts. 101 (defining piracy), 100 (obligating all states to repress piracy on the high seas), and 105 (allowing all states to seize pirate vessels). See also Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum*, trans. and ann. G.L. Ulmen. (New York: Telos Press, 2006), 122-23, 153.

conceptualization is neither the enemy who must be treated as an equal in accordance with the law (or perhaps some extralegal morally based set of norms), nor the ordinary domestic criminal, who is not outside the law, but is specifically its object. Ordinarily, one may not apprehend and punish a criminal actor outside the applicable state legal regime. Instead one mobilizes the police, and the alleged criminal is dealt with in the context of the state's law. If a state's vessel encounters a pirate, however, it is not accountable at all for its actions: the pirate is quite literally *bors la loi*. Fundamentally, what Schmitt is arguing here, though the double use of the term "criminal" obscures this, is that international law has improperly imported the concept of the criminal who must be punished into international relations, conflating criminal and enemy in a way that creates the subhuman absolute enemy.

"As a metaphor," Schmitt holds, it "may be permissible" to call "any individualist and non-conformist . . . a partisan." But Schmitt does not himself intend to use that term outside the context of specific historical figures involved in interstate or intrastate war.⁹⁹ This indicates an important distinction between such warriors and criminals in the US domestic context for example, since the US criminal is never outside the law but rather is apprehended precisely within a legal system and even afforded rights thereunder. Yet in particular in the wake of the events of September 11, 2001, a class of absolute criminal enemy in Schmitt's absolute sense has arguably been identified. Terrorists, the subject of much debate in the United States as to whether they should be treated in accordance with ordinary criminal law or the extraordinary law of war, may well fit the Schmittian definition of the absolute criminal, as opposed to the equal enemy. It is to that question that I now turn.

⁹⁹ Schmitt, *Theory of the Partisan*, 18.

The Terrorist as Enemy or Criminal

In a relatively late work first published in German in 1963, Schmitt addressed the role of the partisan in world politics. Schmitt's *Theory of the Partisan* depicts the partisan fighter as a figure "precariously perched on the line between criminality and real legitimacy."¹⁰⁰ In Schmitt's view, irregularity in the conduct of war — the core characteristic of the partisan fighter — is unpolitical and merely criminal (rather than equal enemy) activity when neither aimed against a foreign invader nor in the service a revolutionary cause. But even when invasion or revolution is not at issue, as in the case of an interested third party whom the irregular assists as a kind of fifth columnist, a friend-enemy distinction does arise. The powerful third party, in such a case, is the friend of the irregular or partisan, and the equal enemy of the state or other power whom the partisan opposes.¹⁰¹

Also in *Theory of the Partisan*, Schmitt describes pirates as unpolitical because they "are focused on private robbery and profit."¹⁰² In this sense, pirates appear to lack important elements that give rise to enmity, in particular in the sense of opposing their victims not as sources of gain but as existential enemies. It should be noted, however, that historically many pirates have had a more coherent, overtly political (and in particular existentially antistate) motives than Schmitt recognizes here. Presumably because of their likewise pecuniary motives, thieves like pirates are not considered by Schmitt to be political in the sense that certain irregular fighters may be.¹⁰³

One might be tempted to think that this puts ordinary domestic criminals, such as thieves, firmly outside the realm of the political and the friend-enemy distinction on

¹⁰⁰ Müller, *Dangerous Mind*, 149.

¹⁰¹ Schmitt, *Theory of the Partisan*, 91.

¹⁰² Ibid. 14.

¹⁰³ Ibid. 75.

Schmitt's terms. But elsewhere in *Theory of the Partisan*, Schmitt claims that the partisan is distinct from uniformed combatants in that he "is a criminal according to ordinary law, and should be made harmless with summary punishment and repressive measures."¹⁰⁴ The reference here to "ordinary law" appears to point again to a difference in Schmitt's conceptualization between the criminal in the ordinary domestic sense and the absolute criminal enemy in the international sense. If partisans, who may be considered rough equivalents of terrorists, are ordinary domestic criminals, then if not excluded from formal international law, they are at least not equal enemies in the international law sense, which seems to define the prototypical enemies in Schmitt's thought.¹⁰⁵ Schmitt himself appears to confirm this interpretation when he claims that irregularity in fighting forces does not by itself amount to more than illegality (i.e. criminal behavior) in the international law sense.¹⁰⁶

Jan-Werner Müller provides an example from West German history to help distinguish terrorist, criminal and enemy according to Schmitt's thought. During the West German government's 1977 struggle with the German Red Army Faction (RAF) terrorist group, Müller recounts, the government considered declaring a state of emergency and treating the terrorists as subcriminal, absolute-enemy "counter-hostages" who could be shot without trial. The Helmut Schmidt government resisted these calls, however, and while it treated members of the RAF as criminals, it did so only within the framework of legality, thus not ultimately rendering them absolute enemies in Schmittian terms.¹⁰⁷

¹⁰⁴ Ibid. 25.

¹⁰⁵ As discussed above, see text accompanying notes 1 to 35, the core existential enemy in *The Concept of the Political* is an actual or potential enemy of the state, which usually means a state or state-based enemy, but can also amount to an internal enemy in the context of a nascent or actual civil war.

¹⁰⁶ Schmitt, *Theory of the Partisan*, 84.

¹⁰⁷ Müller, *Dangerous Mind*, 182-83.

This approach will be familiar to observers of recent American history with respect to terrorism. Here, liberal politicians have tended to respond to terrorism with calls for stepped-up police work and strengthening of the rule of law. Indeed, at the heart of the debate over how to manage accused terrorists imprisoned at Guantanamo Bay — that is, whether they should remain there indefinitely as imprisoned enemy combatants, should be tried according to military justice, or should be prosecuted in ordinary civilian courts — is a disagreement between American liberal politicians who generally favor the last approach, and conservatives who prefer one or both of the first two. In connection with this disagreement, “[a] whole new political and legal language [has] blurred traditional distinctions such as that between criminal and prisoner of war.”¹⁰⁸ We should, consequently, not be surprised that Schmitt’s conceptual categories of enemy and criminal do not easily fit contemporary terrorist actors, regardless how various states choose to treat them, or for that matter to American criminal or antiterrorist law.

Indeed, Schmitt himself recognized the difficulties that conflicts among these conceptual categories, as deployed in the actual practice of law and statecraft, might raise, most particularly in *Theory of the Partisan*. There Schmitt points to a crisis of law and thus of legality that the partisan (who might now be the equivalent of a terrorist) brings on. The partisan’s (or terrorist’s) enemy is never determined by a state, because the partisan (or terrorist) is never on Schmitt’s definition a state actor. For Schmitt, “Whoever claims the right to determine the enemy also claims the right to his own new legality, if he refuses to recognize the enemy determined by the former legal government.”¹⁰⁹ In this sense the partisan (or terrorist) poses a threat not only to the formal government of the territory in

¹⁰⁸ Ibid. 228.

¹⁰⁹ Schmitt, *Theory of the Partisan*, 84.

which he operates (or from which he is sent), but also to the relatively clean political system Schmitt anticipated in *The Concept of the Political*, in which the state, or at least actors closely associated with the legitimate state government, holds the exclusive power to declare enemies. The partisan may accept as friend the state opponent of the sitting government against whom he fights. Or he may declare that opponent government itself to be an enemy, thus undermining its legitimacy.

Finally, at the close of *Theory of the Partisan*, Schmitt appears to draw a clearer distinction between the absolute enemy and what he now calls the “real” enemy. “The real enemy will not be declared to be an absolute enemy, also not the last enemy of mankind.”¹¹⁰ So the real enemy is defined here negatively: she is not one whom states will declare to be in some sense ultimate, and properly treated as a danger to humanity in general. Recall in this connection Schmitt’s favorable paraphrase of Proudhon that “whoever invokes humanity wants to cheat.”¹¹¹ “Only the denial of real enmity paves the way for the destructive work of absolute enmity.”¹¹² Schmitt identifies this destructive work with the “cheating” in that “[w]hen a state fights its political enemy in the name of humanity, it is not a war for the sake of humanity, but a war wherein a particular state seeks to usurp a universal concept against its military opponent.”¹¹³ Setting aside whether we must confine ourselves to military matters to understand Schmitt’s argument correctly here, by connecting the characterization of terrorists (among others) as enemies of humanity to Schmitt’s understanding of absolute enmity, we can see that the degree to which US law distinguishes between the terrorist and the ordinary criminal closely tracks the degree to which one can validly consider the ordinary

¹¹⁰ Ibid. 92.

¹¹¹ Schmitt, *Concept of the Political*, 54.

¹¹² Schmitt, *Theory of the Partisan*, 95.

¹¹³ Schmitt, *Concept of the Political*, 54.

criminal in the US context a political enemy in the Schmittian sense. The closer the terrorist is to the criminal in America, the less America has an operative Schmittian concept of an ordinary criminal as opposed to an absolute criminal enemy.

Schmitt on the Domestic Criminal

All of this exegesis from Schmitt's references to the criminal or absolute enemy is necessary to trace correspondences between Schmitt's enemy concept and the criminal in the ordinary domestic context in part because Schmitt's own work on criminality is as yet inaccessible to English readers¹¹⁴ and in part because such work was not a significant focus of his oeuvre. For example, while Schmitt's concept of concrete orders, which is not centrally applicable to this dissertation in its own right, was developed in order to have an impact on evolution of criminal law in the early years of the Nazi Reich, and it succeeded in so doing,¹¹⁵ after the war, these concrete order theories did not remain central to Schmitt's writings.¹¹⁶ Nonetheless, this section briefly mines Schmitt's translated work for clues as to his views on criminality.

Schmitt's engagement with a concept closely related to both the declaration of terrorists or others to be criminal enemies, and the mobilization of humanity and enmity against humanity as a whole as a way of "cheating," may prove illuminating. In the civil law tradition of the European continent, the legal maxim *nulla poena sine lege* (no punishment without law) — sometimes rendered *nulla crimen sine lege* (no crime without law) — operates in much the same way as the prohibition on *ex post facto* laws in US jurisprudence. Both

¹¹⁴ See Chapter 2, text accompanying note 3.

¹¹⁵ Bendersky, "Three Types of Juristic Thought," 27.

¹¹⁶ Ibid. 30.

prohibit punishment for acts claimed to be criminal in the absence of *prior* law criminalizing such acts.

Tracy Strong makes much of Schmitt's devotion to the *nulla poena* doctrine, which would seem to rhyme with Schmitt's objection to states declaring persons absolute criminal enemies.¹¹⁷ In both cases, the target of absolute enmity is declared criminal in an essential way. It matters not, absent *nulla poena*, whether the actor was on notice that his acts were prohibited by law. They are simply awful enough to merit punishment in and of themselves. So too in the case of a declared enemy of humanity: the crimes she is alleged to have committed are deemed by the declaring state to be so obviously wrong that they merit her annihilation in humanity's name. But Strong overlooks an important historical lapse in Schmitt's adherence to *nulla poena*, and to this extent he overstates his case. In the early days of the Nazi Reich, Marinus van der Lubbe was executed for having set the Reichstag fire, despite that at the time the alleged crime was committed, the death penalty was not available for arson. Lubbe's execution was made possible by the so-called "*lex Lubbe*," under which the Nazi government retroactively applied the death penalty to treasonous arson, in direct conflict with the *nulla poena* doctrine. Schmitt argued that the doctrine had to give way in this instance because the liberal legal formalism of the *Rechtsstaat* of which the doctrine formed a part had to be replaced with "substantive, goal oriented justice."¹¹⁸ As previously discussed, however, Schmitt was often inconsistent in his views on various matters, particularly where the real-world politics of the Weimar and Nazi eras were involved, so his defection from *nulla poena* here is of uncertain significance.

¹¹⁷ See, for example, Strong, "Carl Schmitt and Thomas Hobbes," xxi-xxiv.

¹¹⁸ Balakrishnan, *The Enemy*, 192.

In more general terms, Schmitt gives only a few clues as to how he sees criminal law interacting with the political itself. In part pointing to the move undertaken by bourgeois liberalism toward subsuming the political in the economic, and in part indicating that he sees room for the friend-enemy distinction to be hijacked and distorted by economic power, Schmitt observes in *The Concept of the Political* that “[e]vidently, the possessor of economic power would consider every attempt to change its power position by extra-economic means as violence and crime and will seek methods to hinder this.”¹¹⁹ In other words, economic power, in Schmitt’s view, is likely to characterize its own existential enemies not as proper political enemies, but as criminal absolute enemies who must be opposed at all costs not because they threaten the existing economic order, but allegedly (and falsely, in Schmitt’s view) because they threaten humanity as such. Here Schmitt points again to an example of the abuse of the friend-enemy distinction, which consistent with his opposition to liberalism’s cloaking of sovereign power, he would rather see mobilized openly and honestly for what it is, rather than recast as an all-out war against inhuman forces.

Finally, a few more or less isolated remarks by Schmitt with regard to the role of criminal jurisprudence at the intersection of politics and law are worthy of attention. In recounting the Hobbesian turn in the development of the modern state, Schmitt identifies criminal law as the typical form of “decision and command” that characterized law and the role of the Leviathan in the state after law’s transformation from something binding upon even sovereigns to something sovereigns use to bind their subjects.¹²⁰ This suggests strongly that Schmitt viewed domestic criminal law-making as a central trapping of sovereignty, and it supports my claim in the following chapter that the decision on criminality is a sovereign

¹¹⁹ Schmitt, *Concept of the Political*, 77-78.

¹²⁰ Schmitt, *Leviathan*, 70.

decision. Similarly, while Schmitt notes in *Constitutional Theory* that decisions on criminal exonerations may be characterized as simple legal disputes, capable of resolution by judges, he also views such actions as being capable of resolution politically — as he defines that term in connection with the friend-enemy distinction — rather than legally, for instance in the case of legislative (or presumably executive) pardons.¹²¹ Clearly, for Schmitt, the possibility at least exists that determinations regarding the ordinary criminal in the domestic sense can have political implications in terms of the friend-enemy distinction.

Conclusion

In sum, Schmitt's central political concept embraces the sovereign's (or his officials') engaging in deciding who the state's friends are, in a way that constructs the homogeneity of the polity, democratic or otherwise, and more explicitly who the state's enemies are. In most of Schmitt's work on this friend-enemy distinction, the enemy is figured as a national group or formal state with whom the determining sovereign engages in existential conflict. But when we pierce certain confusions regarding the meaning of "enemy," "foe," and "criminal" in Schmitt's work, we see that the distinctions he draws between the real enemy and the absolute enemy who is labeled criminal have significantly more bite with regard to war criminals and others designated "enemies of humanity," and that it is important to avoid confusing his concept of the ordinary domestic criminal with its improper extension, in his view, to the existential international enemy, which in turn constructs the absolute subhuman enemy. Deeper in his writings, we see that Schmitt apparently anticipated, but did not work through carefully, the possibility that ordinary domestic criminals might themselves be the existential *internal* enemies of the state and thus centrally political figures. In one such

¹²¹ Schmitt, *Constitutional Theory*, 184-85.

moment in *Theory of the Partisan*, Schmitt alludes to the kind of threat that the internal, possibly criminal enemy, presents to the state's cohesiveness. "A commonwealth exists as *res publica*, as a public sphere," Schmitt argues, "and is challenged if a non-public space develops within it, which actually repudiates this public sphere."¹²² While Schmitt almost certainly has something in mind here like the partisan irregular fighter in a nascent or actual civil war, this threat to the cohesiveness of the state by nonpublic actors who repudiate the public sphere is something like the threat that the criminal, especially the organized criminal, presents to the state. In the next chapter, I seek to demonstrate the ways in which ordinary domestic criminals in the US context appear as and are treated as political enemies through the practical effects of contemporary criminal law, and how this phenomenon makes of such ordinary criminal enemies a political class that threatens the cohesiveness of the state, and which the state actively resists.

¹²² Schmitt, *Theory of the Partisan*, 72.

CHAPTER 6

THE CRIMINAL AS ENEMY IN AMERICA

Introduction

Having discussed Carl Schmitt's important, if sometimes imprecise, concept of the enemy, I now apply that concept in the context of American criminal law and penal practice. In this chapter, I will show how criminals in America can be seen as functional enemies of the state and its citizens, and how law and practice serve to construct criminals as an enemy class in line with Schmitt's definitions. In order to do this, I will first review some passing comments of Schmitt's that bear on the issue, and then examine elements of American rhetoric and action in general regarding criminals and their behaviors. I then focus in particular on the techniques of punishment, especially those central to the US prison system, to provide further evidence for the proposition that the criminal is treated functionally as the enemy — and in some ways as the Schmittian absolute enemy — in American society. By applying Schmitt in this way to the American criminal justice system, I set the stage for the following chapters' discussion of jury nullification as popular sovereign decisionism on what for Schmitt is the centrally political distinction of friend from enemy. If the criminal is the enemy, then whoever decides who is or is not a criminal is exercising a fundamental political power.

Schmittian Sovereignty and the Criminal Enemy

Though Schmitt distinguished the enemy from the “mere criminal,”¹ this does not imply that criminals, if treated or regarded in particular ways, might not be cognizable as

¹ See Chapter 5, text accompanying notes 88 to 98.

enemies of their societies in a Schmittian sense. In the American context, leading historian of criminal law Lawrence Friedman has observed that “[a]ll theories of crime are ultimately political.”² Moreover, as noted in the prior chapter,³ Schmitt understood that the construction of internal enemies could be a technique by which a sovereign might strengthen a polity, or by which a polity’s homogeneity could be fostered and sustained. So, for instance, Schmitt opined that “the inequality of those outside the association, is an especially firm foundation for equality *inside* the community.”⁴ That is, when outsiders — enemies — are treated differently from and indeed less well than insiders — friends, visible here as full citizens — this strengthens the friendship bonds upon which a political community is grounded. If one wishes to determine in a functional sense who a polity’s enemies are, one should look for out-groups treated unequally by that polity. Importantly, Schmitt is using “equality” in a different way here than with respect his critique of the absolute enemy perceived as subhuman. The policing of the state’s homogeneity by treating outsiders unequally does not imply treating them as less than human, and thus as absolute enemies. Rather, here, Schmitt is making a point about functional inequality of treatment, such that outsiders who to the extent that they threaten the state existentially are also enemies, are treated differently, albeit potentially still as fellow humans, than insiders who are members or friends.

² Lawrence M. Friedman, *Crime and Punishment in American History*. (New York: BasicBooks, 1993), 15. Although there is no reason to believe that Friedman is using “political” in the Schmittian sense of the friend-enemy distinction, the mere idea that identifying criminals is a political act in the ordinary language sense of the term emphasizes the element of sovereign choice involved, consistent with Schmitt’s view that the sovereign has a primary role in identifying enemies. Criminals do not simply present themselves as such without political decisions being made to construct them as such.

³ See Chapter 5, text accompanying notes 16 to 24.

⁴ Schmitt, *Constitutional Theory*, 261.

Schmitt further notes that a nonhomogeneous and thus in his view dysfunctional state can be remedied by assimilating nonconforming subpopulations, or through the more expedient means of violent suppression or exile of heterogeneous elements of population.⁵ Attempts in America to rehabilitate and reassimilate criminals resemble the former method of correcting homogeneity failures, and attempts to punish and imprison them the latter. Schmitt compares historical methods of discipline and excommunication to modern day “moral terror and social boycott,” all of which techniques have analogs in the American penal system.⁶

According to Schmitt’s theory, the determination of friend and enemy is a sovereign act. For Schmitt, the sovereign “is the one who has the power and [] authority to take a concrete, total decision on the type and form of the political existence, that is, to determine the existence of a political unity in its entirety.”⁷ If the sovereign act of constructing a political unity relies upon the identification of a political enemy class, then that identification, as well as determinations regarding how enemies will be treated in order best to safeguard political unity and homogeneity (assimilated, exiled, punished, or even considered subhuman and treated accordingly in the case of the absolute enemy) must also be matters of sovereignty.

Having briefly sketched the ways in which Schmitt’s theories link sovereign decisionism to the friend-enemy distinction, I turn now to a closer examination of both the criminal justice system in the United States, with an emphasis first on how the criminal in America resembles the enemy in Schmitt’s thought, and second on the nature of the penal

⁵ Schmitt, *Constitutional Theory*, 262.

⁶ Schmitt, *Leviathan*, 43.

⁷ Kalyvas, *Politics of the Extraordinary*, 99.

system in America, and how it confirms that criminals here are treated as enemies, if not absolute enemies, of the state.

The Criminal as Enemy of the American State

Consider, to begin with, some observations by Alexis de Tocqueville. Even in the early nineteenth century, Tocqueville noted, Americans were united to a great degree by their attitudes toward law. Tocqueville argued that Americans' active role in politics flowed directly from their respect for the law, such that they understood their own laws as truly their own creations and their own way of shaping their behavior as citizens — that is, citizens and law are mutually constitutive in the American polity. Americans' law-loving nature is thus deeply connected to their dedication to self-government.⁸ For Tocqueville, social homogeneity of the kind Schmitt identified as requisite for a properly functioning state can be built upon both shared language and a shared commitment to a governmental philosophy, in particular commitment to individual liberty under the law.⁹ Tocqueville saw American society as so completely premised upon respect for law that is of their own making and execution that for Americans “the idea of a jury surfaces in playground games and parliamentary rituals are observed even in the organization of a banquet.”¹⁰ Flowing from this centrality of law to the homogeneous identity of Americans is the idea that the lawbreaker is the existential enemy of the American state. Thus, Tocqueville observed, “[i]n Europe, the criminal is a luckless fellow, fighting to save his life from the authorities; the population, to some degree, watches as he struggles. In America, he is an enemy of the

⁸ Isaac Kramnick. “Introduction,” in Alexis de Tocqueville, *Democracy in America and Two Essays on America*, trans. Gerald E. Bevan. (London: Penguin Books, 2003), xxvii.

⁹ Alexis de Tocqueville, *Democracy in America and Two Essays on America*, trans. Gerald E. Bevan. (London: Penguin Books, 2003), 39-40.

¹⁰ *Ibid.* 357.

human race and has everyone entirely against him.”¹¹ In this way among others, the system of criminal justice in America, including its prison system, which Tocqueville had come to America to observe, has been, as Thomas Dumm argues, precisely constitutive of American liberal democracy.¹²

This notion of adherence to law as fundamental to American identity, and of the criminal as the enemy, remains robust in the rhetoric and practice of contemporary US politics. Consider, for example, the claim by former Housing and Urban Development Secretary Henry Cisneros that membership in the citizenry of the United States is premised on acceptance of the rule of law.¹³ Or note Illinois Governor George Ryan’s recapitulation in a speech explaining his decision to commute the sentences of over a hundred and fifty death row inmates of California Governor Pat Brown’s claim that society has a duty to protect itself against criminals, *who are its enemies*.¹⁴ Indeed, one commentator on the American criminal justice system has noted that “criminals are the only remaining group in society that it is acceptable to hate.”¹⁵

¹¹ Ibid. 113. Note that this distinction Tocqueville observed in the early nineteenth century between how criminals were perceived and treated in Europe and America then maps onto the distinction Schmitt makes between the (relatively undangerous) “ordinary criminal” and the enemy. See Chapter 5, text accompanying notes 88 to 98. I argue that that distinction can be collapsed in the American context based on evidence as to how American criminals are perceived and treated. Functionally, they are enemies, and the “ordinary criminal” category is, if not empty, vanishingly small in contemporary US criminal law and practice.

¹² Thomas L. Dumm, *Democracy and Punishment: Disciplinary Origins of the United States*. (Madison, WI: University of Wisconsin Press, 1987), 6.

¹³ Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution*. (Princeton, NJ: Princeton University Press, 2005), 91.

¹⁴ George Ryan, “I Must Act,” (speech, Northwestern University School of Law, Chicago, IL, 11 January 2003), repr. in Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution*. (Princeton, NJ: Princeton University Press, 2005), 169.

¹⁵ Marie Gottschalk, *The Prison and the Gallows: The Politics of Mass Incarceration in America*. (Cambridge, UK: Cambridge University Press, 2006), 26. This hatred, if taken far enough, would make the criminal subhuman, and thus the absolute enemy in Schmitt’s terms.

To be sure, criminal justice is “part of the official process of labeling and identifying who is in and who is out.”¹⁶ And sometimes this has meant that the official designations track ingrained societal prejudices. Thus the criminal enemy class in the United States has often comprised other out-group classes, and continues to do so. In the mid-nineteenth century, for instance, large proportions of those held in prisons in the United States were immigrants, with the percentage of immigrant prisoners rising from the 1820s through 1860s and eventually becoming a majority.¹⁷ In the 1980s and 1990s, a growing number of African Americans joined the “underclass,” a sociological group defined in part by participation in and victimization by violent crime, and high rates of incarceration.¹⁸ African Americans born in the twenty-first century have a thirty percent chance of being incarcerated at some point in their lives.¹⁹ In general, the top-down aspects of the American criminal justice system worked particular injustice on “outsiders, nonconformists, the unattached, the poor, the defenseless.”²⁰

There have, of course, been twists and turns in the historical development of the criminal enemy in American law and political life. In colonial America, the process of trying criminals was in part aimed at attempting to offer to the accused an opportunity for repentance and reintegration into the community against which he had transgressed, along the lines of Schmitt’s assimilation model.²¹ Recalcitrant criminals, however, and especially

¹⁶ Friedman, *Crime and Punishment*, 84.

¹⁷ Thomas G. Blomberg and Karol Lucken, *American Penology: A History of Control*. (New Brunswick, NJ: AldineTransaction, 2000), 59.

¹⁸ Ibid. 171.

¹⁹ James Austin and John Irwin, *It’s about Time: America’s Imprisonment Binge*. (Stamford, CT: Wadsworth, 2001), xiv.

²⁰ Friedman, *Crime and Punishment*, 240.

²¹ Ibid. 25, 31.

those who preached beliefs inconsistent with the official word of the church, were banished, mirroring Schmitt's exile alternative.²² After the failure of various approaches to rehabilitating criminals through the penitentiary system, discussed in greater detail in the following section, the American criminal justice system began to view criminals increasingly as inimical to and not truly part of American society. Especially beginning in the 1950s, as visible in the work of the US Senate's Kefauver Commission, "criminals were portrayed as somehow outside of American society, not organic to it."²³

An important part of this process of reconstituting the criminal as enemy is the essentialization of individuals who commit crimes not as citizens who have erred and can be rehabilitated and reabsorbed, but as irremediable career criminals. It is the concept of the career criminal, in fact, that is responsible in large part for the growth of American prisons as places where such irredeemably dangerous creatures (both to individuals and to the social order of the state) must be isolated.²⁴ Criminals have thus been constructed as a kind of enemy class in the American system through the essentialization of "habitual criminals," understood as those who will continue to commit crimes no matter what, unless rendered incapable of so doing through imprisonment as a form of internal banishment.²⁵ This essentialization also points to the possibility that criminals — in particular habitual or career criminals, however identified — are in the American context considered less than human. To this extent, what should be in Schmitt's view ordinary criminals become in the US not only enemies but absolute enemies, in a kind of inversion of the process of constructing one's opponents in war as subhuman absolute enemies, directed instead within the state.

²² Ibid. 32.

²³ Gottschalk, *Prison and Gallows*, 74.

²⁴ Austin and Irwin, *It's about Time*, 18.

²⁵ Friedman, *Crime and Punishment*, 160-61.

These observations, in turn, highlight the mutually constitutive relationship of prisons — as spaces of isolation and banishment — to the criminal enemy concept. The US criminal justice system constructs criminal enemies in two senses: First, from the standpoint of the state, the criminal is *ab initio* declared to be the enemy who must be punished, and may remain in some senses the presumptive enemy even beyond the prescribed punishment period, especially if considered an absolute enemy. As is often observed, Americans with felony convictions are effectively “marked for life.”²⁶ Second, from the standpoint of the convicted criminal (and to a lesser extent the practicing criminal who has not yet been caught), the state becomes her existential enemy. One striking illustration of this phenomenon is would-be terrorist Jose Padilla who, imprisoned for ordinary crimes, became radicalized through contact with Muslims in prison against the American state and made plans to set off explosive devices in the city of Chicago following the events of 11 September 2001.²⁷ In this sense, prison constructs enemies of the state by serving as minisocieties in which “deviate social norms” are explored and transmitted.²⁸

Certainly in some cases convicted criminals will seek reconciliation with society, but in so doing they face tremendous obstacles, not the least of which involve civic death, discussed below,²⁹ and socio-spatial isolation in crime-ridden ghettos, which can serve to exacerbate recidivism.³⁰ The criminal justice system’s role in creating a permanent criminal

²⁶ Gottschalk, *Prison and Gallows*, 17.

²⁷ Jonathan Simon, *Governing through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear*. (Oxford, UK: Oxford University Press, 2007), 276.

²⁸ Thomas G. Blomberg and Karol Lucken, *American Penology: A History of Control*. (New Brunswick, NJ: AldineTransaction, 2000), 118.

²⁹ See text accompanying notes 88 to 94.

³⁰ See generally Loïc Wacquant, “Deadly Symbiosis: When Ghetto and Prison Mesh and Meet,” *Punishment & Society* 3, no. 1 (January 2001): 95-134; Loïc Wacquant, “The New ‘Peculiar Institution’: On the Prison as Surrogate Ghetto,” *Theoretical Criminology* 4, no. 3 (August 2000): 377-89; and Loïc J.D. Wacquant, “The Rise of

enemy class can be seen, for example, in the fact that increasingly large proportions of prisoners are parole violators, who are usually guilty only of technical violations of release conditions rather than commission of new crimes.³¹ And in many cases, even temporary return to ordinary society is barred: Life without parole has become an increasingly prevalent sentence in the United States since the 1990s.³² As an example of the mutually constituted nature of the criminal enemy and the terms of his imprisonment, the phenomenon of the essentialized career criminal and the purported need for more life sentences both arose from what was seen as a key failure of the rehabilitation experiment of the 1960s and 1970s, namely that prison “subjected [criminals] to dangerous criminal associations that perpetuated criminal and delinquent careers.”³³ The idea that once one was a criminal one would always seek to violate the law became intertwined with the idea that if one had been incarcerated among criminals, one was bound to become even more intent on violating the law again.

Many students of the American penal system see in it a kind of war-making against or enslavement of certain elements of the population deemed to be criminal, and thus undeserving of any degree of equal citizenship. In the words of two criminologists deeply critical of the current operation of prisons in America,

[S]upport for an inhumane prison system requires that citizens embrace the simplistic concept that prisoners are less worthy beings who deserve their extreme punishment. This belief, which is advanced by unscrupulous and self-serving politicians for their self-gain, rests on and then in turn, in a looping process, promotes invidiousness, hate, fear, and other emotions.³⁴

Advanced Marginality: Notes on Its Nature and Implications,” *Acta Sociologica* 39, no. 2 (November 1996): 121-39.

³¹ Blomberg and Lucken, *American Penology*, 186-87.

³² Gottschalk, *Prison and Gallows*, 231.

³³ Ibid. 153.

³⁴ Austin and Irwin, *It's about Time*, 247.

This support is fed, at least in part, by the agreement among wide ranging political interest groups in the US on the need always to side with victims against offenders in what they view as a zero-sum exercise, which requires nearly perpetual increases in criminal penalties.³⁵ This ongoing zero-sum conflict makes it possible to see the war on crime perpetuated against living citizens in the United States as a kind of microcosmic civil war, with the criminal and the law-abiding citizenry locked in an existential battle.³⁶ Or, to deploy another popular comparison, the state of the American criminal justice system today means that “for the first time since the abolition of slavery, a definable group of American lives, on a more or less permanent basis, [are] in a state of legal nonfreedom . . . a shocking percentage of them descendants of those freed slaves.”³⁷

Having explained how the American criminal justice system in general treats convicts as enemies in the Schmittian sense, let me now turn to briefly address the somewhat novel, but increasingly common case of the terrorist as criminal enemy. Recall that for Schmitt, the categories of terrorist, criminal, and enemy are to be kept distinct, but that his own writing on these distinctions is less than completely precise.³⁸ It is worth noting that political debates over how to treat terrorists — as enemy combatants, for instance, or through the ordinary workings of the criminal justice system — illuminate the fact that for Americans, the criminal and enemy categories are often coterminous, to the extent that Schmitt would have seen them as dangerously muddled.

³⁵ Gottschalk, *Prison and Gallows*, 11-12.

³⁶ *Ibid.* 263.

³⁷ Simon, *Governing through Crime*, 6. Some advocates of jury nullification have argued that while excessive contemporary use in the US of criminal sanction fractures our society, sending increasing proportions of especially young black men to prison, jury nullification could help limit the reach of this trend. See, for example, Clay S. Conrad, *Jury Nullification: The Evolution of a Doctrine*. (Durham, NC: Carolina Academic Press, 1998), xix; Paul Butler, “Racially Based Jury Nullification: Black Power in the Criminal Justice System,” *Yale Law Journal* 105, no. 3 (December 1995): 677-725.

³⁸ See Chapter 5, text accompanying notes 73 to 99.

The Bush Administration's "War on Terror," for instance, can be seen as an extension of the war on crime.³⁹ Indeed, the president's power to declare persons "enemy combatants" is effectively a means of making him ultimately sovereign over the central political axis of friend versus enemy.⁴⁰ Not at all coincidentally, given Schmitt's own political commitments, declaring political opponents to be enemies of the people is a variant of governance through crime frequently deployed by fascist states.⁴¹ And for Schmitt, that would have been appropriate: the sovereign's job is to decide, including especially about who is friend and who is enemy. In Schmitt scholar Daniel Williams's view, the policy of declaring that particular terrorist individuals are enemy combatants — a technique widely deployed by the Bush Administration, but denounced by his 2004 opponent John Kerry, and renounced by President Obama — amounts to a sovereign decision on the friend-enemy distinction in Schmittian terms.⁴² Sovereignty thus entails the power to cast particular people, including criminals convicted according to ordinary law, as functionally beyond certain generally applicable legal protections, but not as beyond membership in the human race.⁴³

Were that the end of the story, Schmitt would doubtless approve. But American policy toward terrorists viewed more broadly has evinced a tendency to blur what Schmitt would prefer to see as clear lines between criminal and enemy, as can be seen not only in political resistance to Bush's enemy combatant decisionism, but also in the context of

³⁹ Simon, *Governing through Crime*, 265.

⁴⁰ *Ibid.* 266.

⁴¹ *Ibid.* 15.

⁴² Daniel R. Williams, "After the Gold Rush — Part II: *Hamdi*, the Jury Trial, and Our Degraded Public Sphere," *Pennsylvania State Law Review* 113, no. 1 (2008): 59.

⁴³ *Ibid.* 66.

Supreme Court rulings that even those classified as enemy combatants and detained at Guantanamo must be given legal protections consistent with the US criminal justice system, so that they are not cast outside the protections of ordinary law.⁴⁴ Even American foreign policy has largely collapsed any distinction between criminal and enemy.⁴⁵ In short, Americans generally are not adept at distinguishing strictly between enemy and criminal, and this provides further evidence that these categories are in American politics and jurisprudence overlap. Having shown as a matter of theory how the criminal qualifies as the enemy in Schmittian terms in America, I next will illustrate this fact through closer examination of the American penal system, and in particular American prison practice.

The American Penal System and the Criminal Enemy

“In America, everyone is free; prison is the negation of that freedom. Hence the prison experience is a negation of the conditions which allow one to define oneself as a person.”⁴⁶ Moreover, this negation occurs here more than anywhere else on earth: The United States imprisons its population at a higher rate than any other nation.⁴⁷ As of 2000, about one in every thirty-three Americans was under some kind of correctional supervision, whether in prison, on probation or parole, or otherwise.⁴⁸ Much of the rise in American imprisonment is attributable to stiff-penalty drug laws, and most of the crimes that account

⁴⁴ Mark Sherman, “High Court Sides with Guantanamo Detainees Again,” Associated Press Online report available via <http://www.highbeam.com/doc/1A1-D918ME080.html> (last accessed 16 April 2013).

⁴⁵ Leonard C. Feldman, “The Banality of Emergency: On the Time and Space of ‘Political Necessity,’” in *Sovereignty, Emergency, Legality*, ed. Austin Sarat. (Cambridge, UK: Cambridge University Press, 2010), 153 n. 44.

⁴⁶ Dumm, *Democracy and Punishment*, 3.

⁴⁷ Austin and Irwin, *It's about Time*, 1.

⁴⁸ *Ibid.* 3.

for Americans' imprisonment are petty.⁴⁹ Public pressure on politicians to reduce crime in general creates a one-way ratchet system, in which penalties are increased frequently and new crimes defined, but rarely are penalties reduced or activities decriminalized.⁵⁰ This pressure is often parasitic on preexisting prejudices regarding subaltern communities, such as racial minorities.⁵¹ The one-way ratchet operates despite the fact that when Americans are polled more specifically on the subject, they prefer nonprison sentences for nondangerous petty offenders.⁵² Yet when the focus is not on these specific minor crimes that account for so much contemporary imprisonment, "[t]he general public is not interested in rehabilitation [of criminals], not interested in what happens inside the prisons, not interested in reform or alternatives. It wants only to get these creatures off the streets."⁵³ That is to say, the criminal in general is the enemy who needs to be removed from participation in public life, even though when confronted specifically not all those whom the law makes criminal are really enemies in the minds of most citizens.

What Marie Gottschalk has labeled the American carceral state is largely invisible in the context of day-to-day political discourse.⁵⁴ According to Gottschalk,

the United States . . . has built a carceral state that is unprecedented among Western countries and in U.S. history. Three features distinguish the U.S. carceral state: the sheer size of its prison and jail population; its reliance on harsh, degrading sanctions[,] and the persistence and centrality of the death penalty.⁵⁵

⁴⁹ Ibid. 26.

⁵⁰ Blomberg and Lucken, *American Penology*, 187.

⁵¹ Gottschalk, *Prison and Gallows*, 34.

⁵² Austin and Irwin, *It's about Time*, 47.

⁵³ Friedman, *Crime and Punishment*, 316. Again, this is an indication that the criminal may, in the American context, come closer to the subhuman absolute enemy than the Schmittian enemy in the pure sense.

⁵⁴ Gottschalk, *Prison and Gallows*, 19.

⁵⁵ Ibid. 1.

As part of the build-up of the carceral state in the past several decades, penal policy in the US has increasingly embraced incarceration as punishment for deterrent and retributive purposes, while abandoning any attempt to rehabilitate offenders.⁵⁶ As rehabilitation has declined as a goal of the prison system, and less and less is done to prepare prisoners for their postrelease lives, more of them are left without hope of readapting to social conventions and a mainstream life outside the prison walls, and thus are effectively rendered permanent outsiders to American society.⁵⁷

Prison makes members of the most disadvantaged classes in the US disproportionately unlikely to get jobs, vote, participate in civic life, and maintain connections with their families and broader community support networks.⁵⁸ In part, this is because “[r]eleased inmates confront sizeable barriers to getting even the most demeaning forms of employment because they are stigmatized as ex-convicts.”⁵⁹ Ex-cons often have difficulty even getting considered for, much less being hired to fill, jobs on the outside due to prejudice, including the assumption that a conviction equates to conviction for a heinous crime. One result of this difficulty getting hired is recidivism, which in turn contributes to the creation of a permanent convict-enemy class.⁶⁰ While they are in custody, however, criminals are eminently employable: Prison labor in the US is contracted out at subminimum wages, making the prison population a kind of slave labor source.⁶¹ This is

⁵⁶ Ibid. 9.

⁵⁷ Austin and Irwin, *It's about Time*, 90.

⁵⁸ Gottschalk, *Prison and Gallows*, 248.

⁵⁹ Austin and Irwin, *It's about Time*, 147.

⁶⁰ Michelle Singletary, “Ex-Offenders Struggle to Find Work, Overcome Employers’ Doubts,” *Washington Post*, 6 November 2010. Available via <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/05/AR2010110507607.html> (last accessed 16 April 2013).

⁶¹ Gottschalk, *Prison and Gallows*, 29.

expressly permitted by Amendment XIII to the US Constitution, which forbids slavery except in the case of convicted criminals alone.

But the isolation prisoners experience upon release is but the tip of the iceberg. Since the ill-fated experiments with the penitentiary system, particularly in New York and Pennsylvania in the early 1800s, prison in America has commonly been a place where convicts are housed in situations ranging from complete solitary confinement to effective banishment from community and society. Early nineteenth century prison reformers in the US experimented extensively with forms of extreme isolation of prisoners in the penitentiary as means both of punishment and rehabilitation. These techniques were by and large failures, utterly warping many who were subjected to them.⁶² So much was this the case that prisoners so treated were immensely grateful for being required to perform labor, as it at least brought some degree of interest and occupation to otherwise solitary confinement.⁶³ Predictably, such prisoners were denied contact with the outside world.⁶⁴ Their isolation was so great that prisoners at the time were delighted to have visits by jailors or even insects.⁶⁵ This kind of isolating prison system “had all the impact of an external banishment. Convicts were banished to the interior spaces of the prison.”⁶⁶

While this form of punishment was soon largely abandoned, it has returned in the form of increased reliance on solitary confinement, “administrative segregation” and other forms of isolation in supermax prisons. For repeat offenders and others deemed particularly

⁶² Gustave de Beaumont and Alexis de Tocqueville, *On the Penitentiary System in the United States and Its Application in France*, trans. Francis Lieber. (Carbondale, IL: Southern Illinois University Press, 1964), 41.

⁶³ Ibid. 57.

⁶⁴ Ibid. 64.

⁶⁵ Ibid. 83.

⁶⁶ Dumm, *Democracy and Punishment*, 80.

dangerous, this form of internal banishment is ever more popular today. Supermax prisons isolate inmates for extended periods of time, often many years, in small barren cells with minimal access to assistance and instructional programs, reading material, other people, recreation, or the outdoors.⁶⁷ This often leads to complete psychological breakdowns on the part of prisoners so confined, fulfilling the assumption that they are subhuman absolute enemies by in fact making them functionally subhuman.⁶⁸ Inmates in supermax facilities frequently exhibit signs of psychosis, including self-mutilation and suicidal behavior.⁶⁹ Startlingly, this resurrection of eighteenth century isolation techniques has occurred despite knowledge that these practices contributed to psychological breakdowns among inmates when first employed.⁷⁰

Even where supermax techniques are not used, prisons in the United States function largely according to a logic of banishment, by means of which convicted criminals are physically and relationally distanced from their homes, families, communities, and mainstream society itself:

In examining [the] history of shifting rationales for imprisonment, we clearly see that none of them accounts for our persistent and almost exclusive reliance on prison as the appropriate response to serious crime. What does explain it is the American people's strong desire to *banish* from their midst any population of people who are threatening, bothersome, and repulsive.⁷¹

Notably, banishment was a tool developed in ancient Greece to deal with people who were viewed as existential threats to the polis, and who thus were expelled from it either for a

⁶⁷ Austin and Irwin, *It's about Time*, 118.

⁶⁸ Ibid. 135.

⁶⁹ Blomberg and Lucken, *American Penology*, 218.

⁷⁰ Ibid. 216.

⁷¹ Austin and Irwin, *It's about Time*, 9 (emphasis added).

temporary period or permanently.⁷² Because there are no longer empty spaces in the world, however, “America has had to construct its locations of banishment within its borders.”⁷³ European colonizers had used transportation of criminals in the seventeenth and eighteenth century as a form of banishment in which criminals were removed from their societies and from public view and contact.⁷⁴ Colonial Americans too relied upon banishment but primarily only for repeat or recalcitrant offenders, and those banished from their colonies were unlikely to be welcomed into other colonial communities.⁷⁵ In contrast, colonial jails were not used to punish offenders, but rather places where accused criminals were housed pending trial.⁷⁶ They were also used to house and employ productively debtors, vagrants, and the like.⁷⁷

Not originally a central component of prison detention in America, the logic of banishment took firm hold with the institution and refinement of the penitentiary system. “[T]he ideal penitentiary contains a population in near-total isolation from the outside world, with each member in strict separation from the others.”⁷⁸ This makes the penitentiary system a form of “institutionalized banishment from the external world.” The warehouse

⁷² Sarah Forsdyke, *The Politics of Expulsion in Ancient Greece*. (Princeton, NJ: Princeton University Press, 2005), 278-80. Plato refers to exile as well as an alternative to the death penalty as a way to rid a state of serious criminals who are existential threats to the state. Plato, “Laws,” trans. Trevor J. Saunders, in *Plato: Complete Works*, ed. John M. Cooper. (Indianapolis: Hackett, 1997), 1417. And Aristotle notes that the enemy is he with whom one wants nothing to do and thus must be removed from one’s presence: “When men are at enmity with one another, they would rather not even share the same path.” Aristotle, “Politics,” trans. B. Jowett, in *Complete Works of Aristotle: The Revised Oxford Translation*, ed. Jonathan Barnes. (Princeton, NJ: Princeton University Press, 1984), vol. 2, 2057.

⁷³ Austin and Irwin, *It’s about Time*, 12.

⁷⁴ Blomberg and Lucken, *American Penology*, 19-20.

⁷⁵ *Ibid.* 30-31.

⁷⁶ *Ibid.* 32-33.

⁷⁷ Friedman, *Crime and Punishment*, 48-50.

⁷⁸ Charles Stastny and Gabrielle Tyrnauer, *Who Rules the Joint? The Changing Political Culture of Maximum-Security Prisons in America*. (Lexington, MA: LexingtonBooks, 1982), 23.

prison system that subsequently replaced the penitentiary largely did away with the internal banishment that is the hallmark of the penitentiary, which has since been revived with the rise of administrative segregation and supermax facilities, but extended the logic of banishment by virtue of locating prisons in most instances far from populated areas in order to “quarantine” prisoners from upstanding members of society.⁷⁹ “The inmates of the warehouse prison are sealed in a large container and thereby barred from intercourse with, as well as departure to, the outer ‘free world.’”⁸⁰ As Jonathan Simon sees it, Americans increasingly seek security for their urban areas “by sending the young men of those communities into ‘exile.’”⁸¹ Simon argues that the American prison system has adopted a “waste management” template, by which it simply removes criminals from society, increasingly isolating and containing the perceived toxicity of their selves and their behaviors.⁸²

This removal of convicted criminals is increasingly accomplished by locating prisons in remote and isolated rural areas, far from big cities and from the communities and families of most prisoners.⁸³ “[P]risoner administrators and other policy makers have completely abandoned the goal of reducing prisoners’ isolation from outside society.⁸⁴ Thus a serious

⁷⁹ Ibid. 26.

⁸⁰ Ibid. 27.

⁸¹ Simon, *Governing through Crime*, 143.

⁸² Ibid. 152-53.

⁸³ Austin and Irwin, *It's about Time*, 94. There are in addition perverse political incentives to locate prisons in remote areas. Prisoners, who in most cases cannot vote, are nonetheless counted as residents for purposes of assigning legislative districts. One effect of locating prisons remotely from high-population areas, combined with increases in sentences, is that more long-term residents are created in rural districts, often skewing representation in favor — perhaps not coincidentally — of tough-on-crime conservative legislators. In New York, for example, in some upstate counties imprisoned African Americans outnumber free African Americans, and yet the former, relocated from urban environments, contribute not to the relative voting power of their home communities, but rather to that of the rural communities where their prison homes are located. Keith B. Richburg, “Before Census, a Debate over Prisoners,” *Washington Post*, 26 April 2009, A3.

⁸⁴ Austin and Irwin, *It's about Time*, 110.

concern for the well-being of inmates is not only the immediate physical restriction on their movements, but also their isolation from family, relatives and friends, and the “deliberate, moral rejection of the criminal by the free community.”⁸⁵ This enforced distancing from the outside world and a prisoner’s community support structure occurs despite recognition by states that inmates who maintain contact with outside society have much better chances of readjusting to the world when released.⁸⁶ The geographical distancing of prisoners from their families and communities is further exacerbated by the restrictions and inconveniences associated with prison visitation. Harassing treatment of visitors by guards, invasive searches of visitors, and visitation in large communal rooms, combined with the need for many visitors to travel often for many hours to be near the prison and to find lodging in remote locations, all substantially impede contact between prisoners and their families and friends on the outside, rendering them cut off.⁸⁷

Nor does the isolation of convicted criminals end with their sentences. The imprisoned criminal suffers “civic death,” in that he loses rights to vote, hold office, bring certain lawsuits, etc., and this status as a permanently contaminated former citizen threatens his own self-conception.⁸⁸ In some states, ex-felons are not permitted to acquire occupational licenses, including those required for such mundane occupations as hairdressing. Many are rendered ineligible for such key governmental support as public

⁸⁵ Gresham M. Sykes, “The Pains of Imprisonment,” in *Crime and Justices: Volume III, The Criminal under Restraint*, 2nd ed., ed. Sir Leon Radzinowicz and Marvin E. Wolfgang. (New York: Basic Books, 1977), 213.

⁸⁶ New York State Commission on Attica, “Anatomy of a Prison Riot: Attica,” in *Crime and Justices: Volume III, The Criminal under Restraint*, 2nd ed., ed. Sir Leon Radzinowicz and Marvin E. Wolfgang. (New York: Basic Books, 1977), 283, 288.

⁸⁷ Blomberg and Lucken, *American Penology*, 192.

⁸⁸ Sykes, “Pains of Imprisonment,” 214.

housing assistance, student loans, and welfare.⁸⁹ Prisoners in most states are denied the right to vote, not only during their sentences, but often permanently. Only Vermont and Maine permit prisoners to vote while incarcerated.⁹⁰

Florida alone had under its disenfranchisement law prior to Governor Charlie Crist's actions to reverse it banned some six hundred thousand ex-felons from voting for the rest of their lives, a ban which deprived a disproportionate twenty-five percent of African American men of the franchise.⁹¹ Perhaps unsurprisingly, then, Florida Republicans moved quickly after the 2010 elections to reinstate restrictions on voting by ex-felons.⁹² Under new rules in place, even nonviolent offenders will have to wait five years before applying to have their voting rights restored.⁹³

And in the case of sex offenders, most states and the federal government impose additional post-imprisonment requirements. State laws in many jurisdictions limit strictly where convicted sex offenders may live, causing them to live on the streets or in tent cities. In some cases, these laws effectively exclude convicted sex offenders from particular cities, towns or areas entirely. For instance in San Francisco, geography, including the location of schools and small parks, makes the whole city an effective exclusion zone for these offenders.⁹⁴ Thus even after their terms of physical banishment end, criminals who have

⁸⁹ Gottschalk, *Prison and Gallows*, 22.

⁹⁰ Ibid. 379, n. 65.

⁹¹ Ibid. 247.

⁹² Peter Wallsten, "Fla. Republicans Set to Make It Harder for Ex-Felons to Vote." *Washington Post*, 8 March 2011. Available via http://www.washingtonpost.com/wpdyn/content/article/2011/03/08/AR2011030806672_pf.html (last accessed 9 March 2011).

⁹³ Peter Wallsten, "Fla. Republicans Make It Harder for Ex-Felons to Vote." *Washington Post*, 9 March 2011. Available via http://www.washingtonpost.com/wp-dyn/content/article/2011/03/08/AR2011030806672_pf.html (last accessed 28 February 2013).

⁹⁴ Karl Vick, "Laws to Track Sex Offenders Encouraging Homelessness," *Washington Post*, 27 December 2008, A3.

served their sentences remain distanced psychologically and in terms of full citizenship from their neighbors.

Conclusion

The foregoing description of the American prison and penal systems demonstrates that in practice, as well as in concept, the criminal is treated as an enemy of the state — if not always as the existentially threatening but equally human enemy central to Schmitt’s early thought, then worse still, as the subhuman absolute enemy.⁹⁵ In particular, criminals are treated according to a logic of banishment, which not coincidentally is precisely the penalty historically applied to a state’s enemies, beginning in ancient times and continuing at least as long as there were still places on earth understood to be uncolonized or otherwise empty of “civilized” populations. Even in American colonial times, banishment was not applied to ordinary criminals, but only to those deemed existential threats to the community. Today, however, all criminals are categorized in this way, both in popular imagination and in practice, despite that when presented with particular facts of alleged criminal acts — especially nonviolent criminal acts — many citizens appear to favor greater leniency than the law provides.

In this chapter, I have sought to show how American criminal and penal law construct criminals as enemies, both in terms of the way law and society treat them, and

⁹⁵ By way of comparison, consider how states with which America has gone to war have been treated once the war is over. Typically, they are forgiven and become allies, though only so long as they renounce participation with absolute enemy (e.g. Nazi or more recently Baathist) affiliations. But once a convict completes her sentence, she still remains tainted by her conviction, suffers civil death, and is likely to return to prison for a variety of reasons associated with the lasting stigma of being labeled a criminal and intensified restrictions on parolees and other ex-cons. In this sense, the criminal enemy is even more an enemy of the state in the American context than the wartime enemy. Notably, the creation of internal enemies has long been recognized as a foundation of imperialism. See, for example, Niccolò Machiavelli, *Discourses on the First Decade of Titus Livius*, trans. Allan Gilbert, in *Machiavelli: The Chief Works and Others*. (Durham, NC: Duke University Press, 1989), vol. I, 379: “A polity desiring to expand, if it cannot identify enemies abroad, creates them at home.”

because of how they are treated — as a members of a dangerous subaltern class who are punished according to a logic of banishment both during and after their imprisonment.⁹⁶

The substantial overlap between the categories of the criminal in America and the enemy in Schmitt's thought means that when a person is adjudicated guilty of a crime, he becomes in a functional sense the enemy of the American state. That in turn makes the decision whether or not to convict an accused criminal a decision on the friend-enemy distinction, and thus a fundamentally political decision under Schmitt's theories. In the next chapter, I will discuss the mechanics and history of the jury's role in making that political decision, and in the subsequent chapter argue that its power to refuse to decide that the defendant before it is an enemy is an important exercise of sovereignty in the Schmittian sense, worth preserving in a democracy.

⁹⁶ The idea that criminals constitute a subaltern class arrayed against the dominance of the state specifically arises as well in the thought of Antonio Gramsci. Critics of Gramsci in turn would argue that attempts to guard against creating such classes work to destroy equality before the law. See John Fonte, "Why There Is a Culture War: Gramsci and Tocqueville in America," reprinted at OrthodoxyToday.org, available via <http://www.orthodoxytoday.org/articles/FonteCultureWar.shtml> (last accessed 19 February 2010). The criticism that jury nullification operates likewise contrary to equality before the law is discussed in below; see Chapter 7, text accompanying notes 258 to 265, 280 to 283.

CHAPTER 7

JURY NULLIFICATION IN AMERICA

Introduction

Let us take a moment to review the bidding. Having first provided historical background on Carl Schmitt and his theories, I subsequently showed how sovereignty in terms of ultimate decisional authority is diffuse in the American political system, and in turn that this poses special problems for that system that Schmitt's theories of sovereignty and democracy highlight, in particular a tension between the oft-lauded rule of law and the necessity for some political actor or actors to decide what the law is and how it is to be applied. I then outlined Schmitt's theory of the friend-enemy distinction as the core element of the political, addressing as well the somewhat incompletely theorized idea of the enemy in Schmitt's thought. Finally, in the immediately preceding chapter, I detailed the features of the American criminal justice system that construct the criminal as the enemy of the American state — she who most fully challenges the homogeneity built upon respect for the rule of law, and who thus existentially threatens the stability of the otherwise plural and therefore potentially unstable American polity. In this chapter, I outline the mechanics and history of the jury and its nullification power in the context of American criminal law, and provide examples of its use.

The Jury in American Criminal Trials

The Sixth Amendment of the United States Constitution guarantees Americans the right to trial by a jury of their peers in federal criminal cases involving penalties of six

months' imprisonment or more,¹ and subsequent to the ratification of the Fourteenth Amendment, this guarantee has been extended to cover state criminal cases.² Article III of the Constitution is also understood to ensure this right.³ The right to a jury trial is thus the only right that appears both in the body of the original Constitution itself and in the Bill of Rights.⁴ Federal jury verdicts must be unanimous, but the Supreme Court has held that state juries may vote for guilt by as low a margin as 9-3 in noncapital cases in state courts.⁵ While juries ordinarily consist of twelve members, juries in state courts may have as few as six members, but these must return unanimous verdicts.⁶ In practice, "[t]he jury returns its unanimous verdict and does not explain how the result was reached."⁷

The Supreme Court has recognized that the purpose of juries in criminal trials is to protect against government oppression, not necessarily to produce uniform outcomes.⁸ Juries are in addition meant to enshrine "community participation" in the process of determining criminal liability.⁹ Because juries are drawn more or less at random from the local community where a criminal trial is held, they provide an opportunity for minority viewpoints to be heard in that context.¹⁰ While defendants have the right to trial by jury,

¹ U.S. Const., Amend. VI.

² *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968).

³ Conrad, *Jury Nullification*, 4.

⁴ Arie M. Rubenstein, "Verdicts of Conscience: Nullification and the Modern Jury Trial," *Columbia Law Review* 106, no. 5 (May 2006), 959.

⁵ *Ibid.* 180.

⁶ *Ibid.* 181.

⁷ *Ibid.* 203.

⁸ *Duncan*, 391 U.S. 145 at 156.

⁹ *Ibid.*

¹⁰ Conrad, *Jury Nullification*, 202.

they may, however, waive this right, electing instead to be tried by a judge in what is commonly known as a “bench trial.”

In their groundbreaking study of the criminal jury in practice, Harry Kalven and Hans Zeisel found that in a world of plea bargains and bench trials, those cases that are taken to a jury are more likely to be controversial cases, and more likely to involve situations in which facts existed that might incline a jury to sympathize with the defendants.¹¹ In general, Kalven and Zeisel found that juries are empirically more likely to acquit defendants than judges, though this result varies when one examines statistics for particular crimes in particular temporal contexts.¹² More recent evidence, however, suggests that juries may no longer be more lenient than judges in criminal cases.¹³ Given that the bench trial upon defendant’s consent is a relatively new innovation, emerging in the US in the 1920s, and approved by the Supreme Court provided in 1930, it may well be that not enough time had passed for Kalven and Zeisel’s data to reflect enough such trials’ effects on differences in attitude between judges and lay juries.¹⁴ Plea bargaining, and the tendency for risk averse defendants to plead guilty even where they might achieve acquittal, though, pose an even greater threat to the trial by jury than increasing frequency of bench trials.¹⁵

Structurally, however, in the context of sovereignty in America, the effect of jury trials on particular defendants may be less important than the broader effects of jury trials on the dynamics of power in the polity. In constitutional scholar Akhil Reed Amar’s integrated view of the Constitution and the Bill of Rights, the jury was understood by the Founders to

¹¹ Harry Kalven Jr. and Hans Zeisel, *The American Jury*. (Chicago: The University of Chicago Press, 1966), 31.

¹² Kalven Jr. and Zeisel, *The American Jury*, 59.

¹³ Abramson, *We, the Jury*, 254.

¹⁴ Friedman, *Crime and Punishment*, 388-89.

¹⁵ *Ibid.* 390.

have a role under the Fourth Amendment in determining the reasonableness of searches and seizures conducted without warrants, as part of its duty to act as a popular check on government intrusion.¹⁶ For Amar,

the key role of the jury was to protect ordinary individuals against governmental overreaching. Jurors would be drawn from the community; like the militia they were ordinary Citizens, not permanent government officials on the government payroll. Just as the militia could check a paid professional standing army, so too the jury could thwart overreaching by powerful and ambitious government officials.¹⁷

Citing Tocqueville, Amar argues that criminal juries were understood under the Sixth Amendment to have a right of “jury review,” which allowed them effectively to nullify by refusing to convict in cases where the law in question was, in the jury’s view, unconstitutional.¹⁸ This power was indeed, as the Supreme Court has affirmed, meant in part to enshrine local community standards in the application of criminal law through trials.¹⁹ Amar supports his view of the jury’s role by collecting a range of opinions from Founding thinkers, including Thomas Jefferson, the “Federal Farmer,” the “Maryland Farmer,” and John Taylor of Caroline, who noted the centrality of the jury to the execution of laws as a means of keeping such execution at least partly in popular hands.²⁰

As Amar and others have pointed out, although many argue that jury nullification is problematic because it produces verdicts at odds with the facts, criminal trials, as the Supreme Court has held, are not about getting the facts right, but rather about applying a community-based judgment as to how to apply the law in particular factual circumstances —

¹⁶ Akhil Reed Amar, “The Bill of Rights as a Constitution,” *Yale Law Journal* 100, no. 5 (March 1991): 1179-80.

¹⁷ *Ibid.* 1183.

¹⁸ *Ibid.* 1185.

¹⁹ *Ibid.* 1186.

²⁰ *Ibid.* 1188-89.

i.e., about making fundamentally sovereign political decisions.²¹ Indeed, not only *Duncan* but several additional Supreme Court cases have said as much — that the purpose of a criminal jury is not to find the truth, but to ensure democratic sovereignty.²² This purpose will be of significance for my argument below, but first a close look at the phenomenon of jury nullification is in order.

Jury Nullification Defined and Explained

So what is this thing called jury nullification? Thomas Andrew Green defines it as “the exercise of jury discretion in favor of a [criminal] defendant whom the jury nonetheless believes to have committed the act with which he is charged,” which can sometimes result from a jury’s belief that the act committed is not in fact properly considered a violation of law, and in other instances from a jury’s belief that the punishment is inappropriate for the act committed.²³ Nullification sometimes results from juries simply acquitting despite clear evidence, and sometimes in a more nuanced fashion from juries ignoring aspects of the judge’s instructions on law and how it should be applied to the facts. Green outlines a tripartite typology of nullification, in which the jury in the strongest form acquits defendants because the jury considers the act committed not to be properly unlawful, an intermediate form in which the jury acquits because the punishment is considered excessive, and a weak form in which the jury acquits not because the punishment in general is excessive, but because the punishment under the circumstances would be.²⁴ Ultimately, nullification

²¹ Rubenstein, “Verdicts of Conscience, 973-74.

²² Ibid. 983.

²³ Thomas Andrew Green, *Verdict According to Conscience: Perspectives on the English Criminal Trial Jury, 1200-1800*. (Chicago: University of Chicago Press, 1985), xiii.

²⁴ Ibid. xviii.

provides that “jurors in criminal trials have the right to refuse to convict if they believe that a conviction would be in some way unjust.”²⁵

Not all forms of nullification are appraised equally by scholars and other observers, of course. Amar, as noted, distinguishes between jury nullification, in which jurors acquit contrary to factual evidence without making any particularized claim about the validity of the law, from jury review, in which the jury deems a law unconstitutional and refuses to apply it for that reason.²⁶ In this connection, Amar argues that the *Marbury v. Madison* claim that the judiciary says what the law is can be squared with juries doing the same, by analogizing judges to the upper house of a legislature and juries to the lower house in a power-sharing arrangement. In this sense, juries figured in his view as part of a coherent constitutional system designed to protect individual defendants in a “systematically anti-governmental, populist way.”²⁷ But whether exercised in the limited way Amar envisions, or in any of the several ways Green lists, nullification was at least at the outset of the American republic a power intimately connected to the decision whether to functionally disintegrate the bonds between a convict and his community through criminal sanction, one that made juries sovereign in the US criminal context.²⁸

Jury nullification is possible in the US due to a confluence of features of American criminal jurisprudence. First and foremost, the prohibition against placing a defendant twice in jeopardy of life and limb in the Constitution’s Fifth Amendment — the Double Jeopardy Clause — ensures that once a jury acquits a defendant, there can be neither an appeal nor a

²⁵ Conrad, *Jury Nullification*, 7.

²⁶ Amar, “Bill of Rights,” 1191.

²⁷ *Ibid.* 1194.

²⁸ Williams, “After the Gold Rush,” 65.

retrial.²⁹ Thus if jurors acquit, even in a case where the facts are clear and so apparently in contravention of applicable law, the prosecution cannot appeal their verdict or otherwise seek a new trial, at least in the same jurisdiction. Moreover, jurors are not generally required to swear to follow bench instructions on the law, which means that they cannot be punished for contempt of court, at least in most jurisdictions at present, for acquitting by failing to follow bench instructions on the law.³⁰ The constitutionally-based concept that the Sixth Amendment's jury-trial mandate includes the notion that juror deliberations must be kept secret further impedes judicial inquiry into the basis for a not-guilty verdict, and thus makes punishing or preventing nullification more difficult.³¹

Nullification power is additionally rooted in the jury's right to render a general, convict-or-acquit verdict in criminal cases rather than being subjected to step-by-step inquiries as to particular facts such that it might, having agreed that each element of a crime's commission was supported by adequate evidence, feel compelled to convict. It is also safeguarded by the judge's inability to direct the jury to convict on the basis that no reasonable jury could do otherwise.³² These limitations on the bench's ability to guide juries originated with the Magna-Carta era practice of juries rendering verdicts according to their consciences and the norms of their communities, fulfilling both the law-finding role now

²⁹ Friedman, *Crime and Punishment*, 255.

³⁰ Conrad, *Jury Nullification*, 239.

³¹ See *United States v. Thomas*, 116 F.3d 606, 608 (2nd Cir. 1997); *People v. Kribo*, 996 P.2d 158, 165 (Colo. App. 1999). The Ninth and District of Columbia Circuit Courts have adopted standards similar to the Second Circuit's in *Thomas* for determining whether jurors nullify outright, or simply do not believe the evidence supports conviction. In brief, judges cannot inquire too invasively into jury deliberations, though how much inquiry is too much is incompletely defined. Only if a juror is found to be voting against acquittal without any connection to evidentiary doubt may he be removed. Brian Osimiri, "The Legacy of *United States v. Thomas*: Second Circuit's Swing and a Miss Puts Defendants' Rights at Risk," *The Review of Litigation* 30, no. 1 (Fall 2010): 167-69.

³² Andrew J. Parmenter, "Nullifying the Jury: 'The Judicial Oligarchy' Declares War on Jury Nullification," *Washburn Law Journal* 46, no. 2 (Winter 2007): 379.

allocated to judges in the American system, and fact-finding role that remains the jury's.³³ The US Supreme Court has affirmed that judges may not direct guilty verdicts regardless of the strength of the evidence.³⁴ According to the Court, the Sixth Amendment requires an actual jury finding of guilt, supported by an appropriate bench instruction that the jury must find guilt beyond a reasonable doubt. Judges may not substitute their own views about the sufficiency of the evidence in criminal cases where the jury acquits; such directed verdicts are not "sustainable on appeal."³⁵

In addition to these features, because ordinarily US juries must vote unanimously to convict, if there is even a single holdout juror, she can effectively prevent conviction, and cause the trial to end in a hung jury. A defendant whose case ends in a hung jury may be retried, however, at the prosecutor's discretion.³⁶ But while it only takes a single obstinate juror to hang a jury, the fact of face-to-face deliberation significantly diminishes the likelihood of this result.³⁷ Kalven and Zeisel see the possibility of a hung jury, though it causes a mistrial and can, in the prosecutor's discretion, lead to a retrial, as a "valued assurance of integrity, since it can serve to protect the dissent of a minority."³⁸ Still, because of the small number of jurors serving in any given trial, at least some minority viewpoints will often be unrepresented.³⁹ According to Jeffrey Abramson, "hung juries are not necessarily a sign of [democratic] dysfunction. After all, rational people may and do disagree

³³ Ibid. 380.

³⁴ *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 408-09 (1947).

³⁵ *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993).

³⁶ Delmar Karlen, Geoffrey Sawyer, and Edward M. Wise, *Anglo-American Criminal Justice*. (New York: Oxford University Press, 1967), 192.

³⁷ Conrad, *Jury Nullification*, 197.

³⁸ Kalven Jr. and Zeisel, *The American Jury*, 453.

³⁹ Ibid. 497.

about the evidence.”⁴⁰ And unsurprisingly, the Fully Informed Jury Association (FIJA), about which I will have more to say below,⁴¹ argues that hung juries are a good thing in the abstract.⁴²

Recall that the Double Jeopardy Clause prohibits appeal by the prosecution of acquittals, but not by the defense of convictions, because the former would, if sustained, subject defendants to a second trial for the same offense.⁴³ Recall likewise, the court may never direct a conviction verdict, that is instruct the jury to convict, or impose a conviction over a jury’s acquittal.⁴⁴ As a result of these facts, an acquittal, no matter how little supported by the facts, is effectively unreviewable. Thus so long as it serves to acquit defendants, “alleged lawlessness by jurors who refuse to convict despite clear evidence of guilt remains not only unpunishable, but unreviewable and absolute.”⁴⁵ This makes nullification functionally a one-way street: nullification in the sense of failure to follow the law, when it leads to improper conviction, can be undone because judges have several options for resisting improper jury convictions, including directing an acquittal, requiring a new trial, or moderating the penalty.⁴⁶ Nullification may thus more properly be considered

⁴⁰ Abramson, *We, the Jury*, xvi.

⁴¹ See text accompanying notes 188 to 197.

⁴² Fully Informed Jury Association, “If You Are Called for Jury Duty,” available via http://fija.org/docs/JG_If_you_are_called_for_Jury_Duty.pdf (last accessed 20 March 2013).

⁴³ Conrad, *Jury Nullification*, 7. Interpreting the Double Jeopardy Clause of the Constitution’s Fifth Amendment, the Supreme Court has declared that a jury acquittal triggers the prohibition on retrial by the same court for the same offense. *United States v. Ball*, 163 U.S. 662, 669-70 (1896). In a recent Supreme Court case, however, the Double Jeopardy protection was held not to apply where a jury that ultimately hung on lesser charges appeared along the way to have found that the evidence did not support capital or first-degree murder, such that retrial for those charges was constitutionally permissible. *Blueford v. Arkansas*, 132 S.Ct. 2044, 2052-53 (2012).

⁴⁴ Conrad, *Jury Nullification*, 8.

⁴⁵ *Ibid.* 9.

⁴⁶ Kalven Jr. and Zeisel, *The American Jury*, 411 & n. 1.

suspension of law when exercised in the direction of lenity, rather than action in direct conflict with the law.⁴⁷

Under at least some forms of jury nullification instruction, the possibility exists that juries might improperly convict, though this can be ameliorated both by clearer instructions (to the effect that a jury must not convict except on clear evidence) and by trial judges' (and appellate courts') conscientious scrutiny of guilty verdicts for lack of sound evidentiary basis.⁴⁸ Some argue, however, that it is the failure to instruct jurors specifically about jury nullification at all that is the more likely cause of nullification convictions.⁴⁹ Indeed, according to James Duane, the fact that juries know that there are means for judges to overturn improper convictions may contribute to their occurrence, though Irwin Horowitz's research seems to cut the other way.⁵⁰

Importantly, when a jury nullifies, it judges only the specific application of the law to the case before it, not its general propriety. It does not make new law, it simply refuses to apply the law as explained to it.⁵¹ Nullifying juries do not overturn law as the Supreme Court does, but rather refuse to apply law to the specific cases before them.⁵²

Nullification, as noted, functions to infuse criminal trials with community mores. "[T]here are whole communities where support for official norms, and for what the police

⁴⁷ Alan W. Schefflin, "Jury Nullification: The Right to Say No," *Southern California Law Review* 45 (1972): 215.

⁴⁸ Irwin A. Horowitz and Thomas E. Wilging, "Changing Views of Jury Power: The Nullification Debate, 1787-1988," *Law and Human Behavior* 15, no. 2 (April 1991): 172-73.

⁴⁹ James Duane, "Jurors' Handbook: A Citizens Guide to Jury Duty," available via http://fija.org/docs/JG_Jurors_Handbook.pdf (last accessed 20 March 2013).

⁵⁰ Ibid.

⁵¹ Rubenstein, "Verdicts of Conscience," 962.

⁵² Conrad, *Jury Nullification*, 96.

have to do, is shallow or downright negative.”⁵³ And “[i]n one stretched-out sense, many or most crimes are political: they are conscious or unconscious acts of rebellion against the duly constituted order.”⁵⁴ So if a community supports or at least does not detest actions the government labels criminal, jurors might nullify in prosecutions of such actions — perhaps even routinely — in order to substitute for the judgment of the government their own local norms.

“The issue of jury independence usually surfaces where there are laws which are unpopular, especially when those laws are widely applied.”⁵⁵ So for instance in Colorado, federal prosecutors have declined to prosecute medical marijuana purveyors or users under federal antidrug laws because of the near impossibility of successfully impanelling juries that would not simply nullify federal marijuana laws in any cases brought.⁵⁶ I will examine this tendency and its political ramifications more closely in the following chapter.⁵⁷

On the other hand, however, “[c]riminal laws that are supported by a wide consensus of the population are in little danger of being rejected by the average trial jury.”⁵⁸ Or at least this seems likely to be the case so long as such laws are not onerously or discriminatorily applied in the perception of the community from which the relevant jurors are drawn. Situations that might provoke a nullifying verdict include not only cases in which the jury disagrees with the law itself, but also prosecutions of defendants who the jury believes have

⁵³ Friedman, *Crime and Punishment in American History*, 360-61.

⁵⁴ *Ibid.* 365.

⁵⁵ Conrad, *Jury Nullification*, 75.

⁵⁶ Steve Kroft, “Medical Marijuana: Will Colorado’s ‘Green Rush’ Last?” 13 min., 8 sec. *60 Minutes*, 21 October 2012. Available via <http://www.cbsnews.com/video/watch/?id=50133577n> (last accessed 8 April 2013).

⁵⁷ See Chapter 8, text accompanying notes 62 to 73.

⁵⁸ Conrad, *Jury Nullification*, 143.

suffered enough already, cases in which it seems unfair or contrary to the public interest to convict, cases in which police or prosecutors are believed to have exercised their power improperly and in a persecuting way, and situations where the prescribed or expected punishments are seen to be excessive.⁵⁹

While the intersecting features of criminal law in America described above combine to give the jury the power to nullify, at present few governmental entities in the US recognize anything approaching a right, either of defendants or juries, to encourage or render nullification verdicts. In both Indiana and Maryland, by state constitutional provision, judges are in at least some cases required to provide instruction to jurors that they may decide for themselves about the validity and reach of applicable law in criminal cases, but in no other jurisdictions is nullification even this secure.⁶⁰ “Even critics of jury nullification concede that criminal juries have the *raw power* to pardon lawbreaking because there is no device for reversing a jury that insists on acquitting a defendant against the law.”⁶¹ Nonetheless, judges, at least outside Indiana and Maryland, have many tools at hand to curb nullification. Judges have great latitude in most American courts to purge the jury pool of jurors who can be determined to have an intent to nullify. Some even attempt to eliminate jurors made aware of the power to nullify, though thus far this has not been held permissible as a matter of law.⁶²

⁵⁹ Ibid. 153.

⁶⁰ Abramson, *We, the Jury*, 62.

⁶¹ Ibid. 64 (emphasis added).

⁶² Ibid. xx-xxi. In a similar fashion, judges are permitted to “death qualify” jurors in death penalty cases by removing those who express under preimpanelment questioning (known to lawyers as *voir dire*) absolute opposition to imposing the penalty. Yet if this and other even more arcane methods are necessary to ensure the imposition of the death penalty, perhaps this should tell us that public support for it, at least in actual cases rather than in the abstract, is not so strong as polling data tell us. Conrad, *Jury Nullification*, 237. Likewise, if removal of would-be nullifying jurors is necessary to ensure convictions of particular crimes, perhaps this

Nonetheless, a juror's or jury's inclination to nullify can in many instances escape judicial scrutiny, even when judges seek to push the limits of jury deliberation secrecy. Juries, like any other group of humans, make decisions based on a number of factors, including deal-making and personal sentiment.⁶³ Whether or not instructed that they may do so, jurors will in some cases inevitably nullify, reconciling law and conscience; “[t]his reconciliation is what the jury system is about, for better or worse.”⁶⁴ Moreover, if jurors are aware of their power to nullify and willing artfully to conceal their intent to do so, there are almost no techniques judges can employ to prevent them from doing so.⁶⁵ For instance, jurors seeking to nullify might fixate on evidence that on the surface appears to argue beyond a reasonable doubt for conviction but can be picked at to reveal trivial discrepancies in order to create enough “reasonable” doubt to acquit.⁶⁶

Yet the American public is by and large unaware of juries' nullification powers.⁶⁷ As a result, most courtroom disputes regarding nullification revolve around whether a judge will permit defense counsel to advertise to the jury its power to nullify. In contemporary practice, the answer is generally no. It is inconsistent to hold that defendants whose guilt is absolutely clear nonetheless have a right to a jury trial that can result in an unchallengeable acquittal, and simultaneously that jurors may not be informed of the possibility of acquitting

undermines the assumption that the public supports the laws its representatives have enacted that criminalize the activities in question.

⁶³ Friedman, *Crime and Punishment*, 247-48.

⁶⁴ Abramson, *We, the Jury*, 95.

⁶⁵ Conrad, *Jury Nullification*, 164. As I will explain in greater detail below, however, this difficulty has not prevented judges and prosecutors from attempting to wield their power to squelch nullification verdicts. See text accompanying notes 193 to 201.

⁶⁶ James P. Levine, “The Legislative Role of Juries.” *American Bar Foundation Research Journal* 9, no. 3 (Summer 1984): 607.

⁶⁷ Conrad, *Jury Nullification*, 126.

such defendants.⁶⁸ In practice, however, judges not only refuse to inform jurors, or allow them to be informed, of their ability to ignore the law in order to acquit, but indeed employ any number of techniques designed to imply to jurors that they do not have any nullification power, and that if they attempt to nullify, they may be punished.

Judges routinely seek in *voir dire* to convince jurors that they are required to follow bench instructions on the law.⁶⁹ Idaho jurors are required to sign oaths declaring that they will follow the law as instructed by the bench (though not that they must), and in at least one case that state prosecuted a juror who had both disputed the reliability of the prosecution's evidence, and made reference to higher powers than the judge, for perjury for violating this oath. While the charges were eventually dropped, Carol Asher, a former nun and schoolteacher, spent approximately sixteen thousand dollars fighting the charges, and faced up to fourteen years in prison had she been convicted on them.⁷⁰ In a Colorado case, juror Laura Kriho was prosecuted for contempt for allegedly lying under oath during *voir dire* both for failing to disclose a prior but expunged drug conviction, and for allegedly failing to disclose that she would in deliberations resist the judge's instructions on the law.⁷¹ She appealed her conviction, and the appeals court reversed in part because the judge had invaded the jury's secrecy in inquiring about Kriho's conduct during deliberations.⁷²

⁶⁸ Schefflin, "Jury Nullification," 219.

⁶⁹ *Kriho*, 996 P.2d at 162.

⁷⁰ Parmenter, "Nullifying the Jury," 403.

⁷¹ *Kriho*, 996 P.2d at 162-65.

⁷² *Ibid.* 165.

Courts may remove jurors who on *voir dire* express willingness to ignore the law or follow judicial instructions.⁷³ “It is common today for judges to excuse ‘for cause’ those venirepersons who reveal themselves as potential nullifiers during voir dire.”⁷⁴ Moreover, “[r]ecent cases suggest that judges readily excuse for cause those potential jurors exposed to FIJA propaganda.”⁷⁵ Judges sometimes even dismiss jurors mid-trial if their nullification proclivities become known,⁷⁶ and increasingly, prosecutions are attempted against nullifying jurors.⁷⁷ Dismissal of would-be nullifiers is almost never considered a proper basis for overturning a conviction.⁷⁸ In federal criminal trials, judges may remove jurors at their discretion for “good cause,” reducing the jury to an agreed-upon number of jurors greater than six, or in the event of no prior agreement to eleven jurors. Alternate jurors may also be seated to replace jurors who are disqualified from performing their duties.⁷⁹ Were jurors’ understood to have an explicit right to nullify, of course, judicial interference of this kind would be preventable.⁸⁰ Retaining jurors prone to nullification might also be considered a right of defendants, just as prosecutors may not dismiss jurors in death-penalty cases who are inclined against, but not absolutely unwilling to impose, the death penalty.⁸¹

⁷³ Lawrence W. Crispo, Jill M. Slansky, and Geanene M. Yriarte, “Jury Nullification: Law versus Anarchy,” *Loyola of Los Angeles Law Review* 31, no. 1 (November 1997): 42.

⁷⁴ Nancy J. King, “Silencing Nullification Advocacy inside the Jury Room and outside the Courtroom,” *University of Chicago Law Review* 65, no. 2 (Spring 1998): 438.

⁷⁵ *Ibid.* 439.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.* 440.

⁷⁸ *Ibid.* 442-43.

⁷⁹ Frank A. Bacelli, “*United States v. Thomas*: When the Preservation of Juror Secrecy during Deliberations Outweighs the Ability to Dismiss a Juror for Nullification,” *Catholic University Law Review* 48, no. 1 (Fall 1998): 144-46; Fed. R. Crim. P. 23(b), 24(c)(1).

⁸⁰ King, “Silencing Nullification,” 447-48.

⁸¹ *Ibid.* 450-51.

Were it possible to prove that a juror outright lied in order to be impaneled despite having a firm intent to nullify, the Supreme Court has held that a juror who conceals or misstates the truth upon *voir dire* examination may be punished for contempt if she intended and acted to obstruct justice.⁸² Short of such fraud, however, jurors generally cannot be held accountable for their verdicts.⁸³

The situation has not always been thus, however: once upon a time in America, jury nullification was not only assumed to be a right of the jury and of criminal defendants, but was also celebrated as a fundamental feature of American liberty and a pillar of American democracy. In the next section, I will outline the history of jury nullification, beginning with its roots in England, and following its trajectory in America from colonial days through its significant role in the Founding, its decline throughout the nineteenth century, attempts to revive it in the late twentieth century, and up to its present-day status as ground of contestation between contemporary advocates for nullification and judicial and prosecutorial opponents.

A Not-So-Brief History of Jury Nullification

English Origins

The jury now used in America was first invented in England after the Norman conquest. Jury trials, complete with the power of the jury to decide not only the relevant facts, but the applicable law as well, reflect an even older Saxon tradition of community judgment in England incorporated by Norman rulers into their own criminal justice system.⁸⁴

⁸² *Clark v. United States*, 289 U.S. 1, 10 (1933).

⁸³ *Ibid.* 17.

⁸⁴ Green, *Verdict According to Conscience*, 17.

In England, nullification was often mobilized to prevent application of harsh royal penalties — especially death — for crimes most subjects considered petty, such as minor forms of theft. Merciful nullification was, in the medieval period, inscrutable, because the mechanics of jury verdicts were shielded from public inquiry.⁸⁵ In particular, the medieval jury was responsible for *producing* the evidence against the accused, and so could short-circuit judicial examination of verdicts by manipulating the evidence.⁸⁶ Sometimes juries would nullify simply by massaging the facts to fit possible defenses to charges, such as ginning up evidence supporting the need for self-defense in cases of alleged murder, distorting the factual record in order to achieve a more merciful result.⁸⁷

The Magna Carta protected trial by jury, and under some contemporary interpretations was intended to guarantee that juries could decide both law and fact.⁸⁸ Nonetheless as the English jury developed in the Tudor period, its formal role began to be understood as purely one of fact-finding, not declaration of the true law. But at the same time the imposition of greater judicial control over juries led to a backlash in which legal practitioners increasingly asserted once again that juries had the right to determine the law as well as the facts.⁸⁹ Nonetheless, those jurors who appeared to be taking the law into their own hands were routinely menaced if not punished by agents of the crown throughout the Tudor and Stuart periods.⁹⁰ By the end of the fifteenth century, jurors were being held accountable for their verdicts, upon pain of punishment, by the infamous Court of Star

⁸⁵ Ibid. 26-27.

⁸⁶ Ibid. 28.

⁸⁷ Ibid. 38.

⁸⁸ Conrad, *Jury Nullification*, 17, 19.

⁸⁹ Green, *Verdict According to Conscience*, 130.

⁹⁰ Ibid. 143.

Chamber.⁹¹ “The power of juries to correct oppressive or unjust laws was just beginning to be explicitly recognized by the mid-seventeenth century.”⁹²

Whether the jury would return a verdict clearly at odds with the evidence set forth by the prosecution, in the face of judicial charge and threat of punishment, was now the question upon which control of the [criminal] legal process depended. The right of the jury to do so had now to be invented and given a place in political and constitutional theory.⁹³

This (re)invention of the jury’s right to decide the law began with the 1649 trial of John Lilburne, a Leveller leader opposed to Cromwell. Lilburne called upon his jurors to judge both law and fact in his treason trial, and they acquitted him, apparently accepting his argument that they had precisely that right.⁹⁴

This claim to a local right to judge accused criminals according to community standards was perhaps the greatest political threat the Levellers posed to the Cromwell government.⁹⁵ In particular, the Levellers argued that jurors should consider equity, reason, and conscience in determining whether laws should be applied to particular criminal defendants.⁹⁶ “‘Conscience,’ of course, embodied the community’s sense of justice.”⁹⁷ “For the radicals, the criminal law was a matrix of community mores, to be imposed communally — neighbors judging neighbors. . . . For them the criminal law was primarily a process of community self-identification and confirmation.”⁹⁸

⁹¹ Conrad, *Jury Nullification*, 21.

⁹² Ibid. 23.

⁹³ Green, *Verdict According to Conscience*, 150.

⁹⁴ Ibid. 153.

⁹⁵ Ibid. 154.

⁹⁶ Ibid. 166-67.

⁹⁷ Ibid. 185.

⁹⁸ Ibid. 186.

By 1670, the idea that juries had the right to determine the law according to conscience in particular criminal trials was widely disseminated, and was about to be formally acknowledged.⁹⁹ The key turning point was the trial of prominent Quakers William Penn and William Mead in London for unlawful assembly and breach of the peace for preaching Quaker doctrine in the streets. Their defense confessed that they had engaged in public preaching, but denied that to do so was a crime, and challenged the legality of the indictment. The jury refused to convict, despite threats from the bench. When the jury ultimately acquitted, the judge fined its members, and ultimately imprisoned juror Edward Bushell for refusing to pay his fine. On a habeas corpus petition, Chief Justice Sir John Vaughn held that jurors could not be fined or imprisoned for their verdicts, even if seemingly against the law as given by the trial judge, because jurors, being ultimate determiners of the evidence, could have multiple unexaminable reasons for acquitting.¹⁰⁰ Vaughn's opinion in Bushell's case turned in part on the fact that if the court cannot inquire into the jury's fact-finding, it "cannot detect whether the jury verdict was contrary to the courts' instructions on the law."¹⁰¹

In the eighteenth century, many instances of jury nullification occurred in the context of perceived political prosecutions, which might involve overt political issues such as seditious libel, or less obvious instances of the crown prosecuting commoners for political reasons, e.g. for poaching on royal hunting grounds.¹⁰² Seditious libel trials were especially fertile ground for nullification verdicts, as juries were presented with clear evidence of the fact of publication, and then told that the publication constituted seditious libel as a matter

⁹⁹ Ibid. 202.

¹⁰⁰ Abramson, *We, the Jury*, 69-73.

¹⁰¹ Conrad, *Jury Nullification*, 27.

¹⁰² Green, *Verdict According to Conscience*, 270.

of law. Acquittals in these cases offer clear examples of jurors siding with their fellow citizens against perceived political overreach by the crown.¹⁰³ Jury nullification during this period in England led directly to such policy changes as the reduction in severe penalties for various crimes.¹⁰⁴ In the late nineteenth and early twentieth centuries in England, however, legal historians and other scholars tended to diminish the significance of the traditional jury's right to determine the law.¹⁰⁵

American Colonial Practice and Nullification at the Founding

Throughout the eighteenth century in colonial America, jurors were widely permitted to decide both the facts and the law.¹⁰⁶ In colonial Massachusetts, for instance, juries effectively had more say in what the law was than the British Parliament, albeit only in the particular cases they decided.¹⁰⁷ During this time while jury nullification was frequently a tool for preserving religious freedom in England, in the American colonies it was primarily used to resist perceived tyrannical parliamentary law.¹⁰⁸ The most famous instance of nullification in the American colonial period was the 1735 *cause célèbre* trial of colonial New York printer John Peter Zenger for seditious libel. Zenger had published articles critical of the colonial governor of the state, which though apparently true, were nonetheless libelous as a matter of law because they criticized the chief executive of the colony. His lawyer, Andrew Hamilton, encouraged the jury to ignore the judge's instructions and to acquit

¹⁰³ Ibid. 319, 322, 340.

¹⁰⁴ Ibid. 288.

¹⁰⁵ Ibid. 363.

¹⁰⁶ Abramson, *We, the Jury*, 30.

¹⁰⁷ Ibid. 24.

¹⁰⁸ Ibid. 68.

Zenger, which it did, garnering Hamilton and Zenger hero status among colonists who desired independence from the tyrannical British government.¹⁰⁹ But while the most famous, Zenger's was not by any stretch the first or only case of jury nullification in colonial America.¹¹⁰ Notably, and consistent with the English experience, after the Zenger case, prosecutions for seditious libel declined dramatically.¹¹¹ "Although the case did not have the force of precedent, Zenger's trial became a paragon of American ideas regarding jury rights and freedom of speech, and effectively ended colonial prosecutions for seditious libel."¹¹² "The Zenger trial established an early American preference for juries to possess the power, in criminal trials, to check governmental power by disobeying an appointed judge and deciding issues of law for itself."¹¹³

Given the case and its outcome, the Framers almost certainly thought that trial by jury by definition included nullification rights.¹¹⁴ Americans at the Founding understood the jury to be an important bulwark against government authority. In colonial America, "[t]he jury provided the only significant means of democratic expression available to the people."¹¹⁵ "[The] vision of the jury as a rubber stamp is fundamentally at odds with the Founders' conception of the jury as a protective mechanism against the dangers of unjust law."¹¹⁶ Thus, quite plausibly, the Sixth Amendment guarantee of trial by jury in criminal cases was

¹⁰⁹ Ibid. 73-75.

¹¹⁰ Conrad, *Jury Nullification*, 32.

¹¹¹ Ibid. 38.

¹¹² Parmenter, "Nullifying the Jury," 384.

¹¹³ Bacelli, "*United States v. Thomas*," 139.

¹¹⁴ Parmenter, "Nullifying the Jury," 384.

¹¹⁵ M. Kristine Creagan, "Note: Jury Nullification: Assessing Recent Legislative Developments," *Case Western Reserve Law Review* 43 (1993): 1110.

¹¹⁶ Rubenstein, "Verdicts of Conscience," 970.

meant to enshrine the right to trial by a jury empowered to nullify the law in the direction of lenity toward defendants. “The text of the Constitution does not define the scope of a criminal jury’s power. There is no doubt, however, that by the time the Bill of Rights was drafted and ratified, the power to acquit against the evidence was well established.”¹¹⁷

Specifically, “jury” as used in the Constitution probably would have been understood at the time of its drafting and ratification to mean a jury entitled to rule on law as well as fact, since that was what juries were doing before and at the time the Constitution was adopted.¹¹⁸

And indeed, we have direct evidence that many of the Founders did understand nullification to have been part and parcel of juries’ properly exercised powers. “During the early constitutional period many of the founding fathers specifically endorsed the idea of judicial review and linked it to the right of revolution.”¹¹⁹ John Adams famously wrote in his diary, in response to the question whether jurors must abide by a judge’s instructions on the law, that:

Every Man, of any feeling or Conscience, will answer, no. It is not only his right, but his Duty, in that Case to find the Verdict according to his own best Understanding, Judgment, and Conscience, tho in Direct opposition to the Direction of the Court. . . . The English Law obliges no Man . . . to pin his faith on the sleeve of any mere Man.¹²⁰

In addition to Adams, Thomas Jefferson, John Jay, Benjamin Franklin and Alexander Hamilton all wrote in favor of the jury’s power to nullify.¹²¹ In general, the Founders

¹¹⁷ Andrew D. Leipold, “Rethinking Jury Nullification,” *Virginia Law Review* 82, no. 1 (March 1996): 285.

¹¹⁸ Conrad, *Jury Nullification*, 46.

¹¹⁹ Harris G. Mirkin “Judicial Review, Jury Review, and the Right of Revolution against Despotism.” *Polity* 6, no. 1 (Autumn 1973): 55.

¹²⁰ Abramson, *We, the Jury*, 30, quoting John Adams, *Diary and Autobiography of John Adams*, ed. L. H. Butterfield (Cambridge, MA: Harvard University Press, 1961), vol. II, 5.

¹²¹ Conrad, *Jury Nullification*, 48-49, 53; Parmenter, “Nullifying the Jury,” 384.

evinced a deep distrust of judges, preferring juries to decide law and fact in criminal cases.¹²² Juries were understood by the Founders as bulwarks not just against overzealous prosecutors, but also against corrupt judges.¹²³

The Transitional Nineteenth Century

“The power of the jury in criminal trials in the first decades after the constitutional convention appears to have been untrammelled,” and support for juries as independent interpreters of law peaked during the Jacksonian era.¹²⁴ Nullification as a right of the jury survived throughout most of the United States until the 1895 *Sparf and Hansen* ruling by the Supreme Court,¹²⁵ although during the nineteenth century, a line of Supreme Court cases gradually began to chip away at jury nullification power.¹²⁶ In many cases, the right to nullify was even specifically enshrined in state constitutions, in language that in some instances remains, albeit in varying degrees of dormancy, today.¹²⁷ In an 1835 case, Supreme Court Justice Story began the process of modifying the jury’s role from democratically sovereign finder of fact and law, to constrained finder of fact alone, on the basis of an emerging theory of the importance of equal protection of the law.¹²⁸ Story, however, was actually insisting that the jury follow the law in a case in which he feared that it would nullify in order to

¹²² Roger Roots, “The Rise and Fall of the American Jury,” *Seton Hall Law Review* 8, no. 1 (Fall 2011): 7-8.

¹²³ *Ibid.* 14-15.

¹²⁴ Horowitz and Wilging, “Changing Views,” 167.

¹²⁵ Abramson, *We, the Jury*, 75.

¹²⁶ *Ibid.* 37.

¹²⁷ *Ibid.* 76.

¹²⁸ *Ibid.* 78-79.

convict rather than acquit.¹²⁹ Indeed, jury nullification began to fall out of favor in the nineteenth century in part because judges feared that juries could not be trusted to nullify in the direction of lenity without also wrongfully convicting defendants.¹³⁰ Yet as I have noted, there are at least today multiple procedural safeguards against such an outcome.¹³¹

“By the mid-nineteenth century the prevalence of jury instructions charging jurors with the responsibility for reviewing both law and fact began to give way to increasingly constrained instructions.”¹³² But this trend did not go without popular resistance. A Massachusetts example is illustrative: In 1853, Justice Curtis riding circuit in Massachusetts refused to allow defense counsel to argue nullification to the jury in a prosecution under the Fugitive Slave Act. Curtis’s argument against nullification relied in part on a claim that it undermined uniform application of federal criminal law across the nation by encouraging inconsistent local verdicts, and that it thus ran afoul of the Supremacy Clause of Article VI of the Constitution, making federal law superior to conflicting state law.¹³³ The state’s constitutional convention subsequently sought unsuccessfully to amend the Massachusetts constitution to enshrine nullification rights, in part as a reaction to Curtis’s holding (which, however, had relied primarily on federal, not Massachusetts law). Two years later, the commonwealth passed a law to similar effect, but it was ultimately rendered inoperative in a dubiously grounded decision of the Supreme Judicial Court in *Commonwealth v. Anthes*.¹³⁴

¹²⁹ Parmenter, “Nullifying the Jury,” 385.

¹³⁰ Alan Schefflin and Jon Van Dyke, “Jury Nullification: The Contours of a Controversy,” *Law and Contemporary Problems* 43, no. 4 (Autumn 1980): 59.

¹³¹ See text accompanying notes 46 to 47.

¹³² Conrad, *Jury Nullification*, 65.

¹³³ *United States v. Morris*, 26 F. Cas. 1323, 1332 (D. Mass. 1851).

¹³⁴ Abramson, *We, the Jury*, 80-85.

In the 1895 case *Sparf and Hansen v. United States*, the Supreme Court took an appeal from sailors convicted of murder in a trial in which the jury had sought to convict of the lesser charge of manslaughter, but was instructed by the judge that it could not do so because the facts did not support the lesser charge, effectively requiring the jury as a matter of law to either acquit or convict of the more serious murder charge, which carried the death penalty.¹³⁵ Arguably, doing so contradicted the theory in *Bushell's* case by depriving the jury of any role in complicatedly determining the facts in conjunction with the law.

The Court held that while jurors indeed had the power to rule contrary to law, to do so was lawless, and contrary to the rule of law, and thus it was proper for the judge to instruct them that they should not do so.¹³⁶ Only two justices dissented, relying heavily on an alternative reading of history from that of the majority, and arguing strenuously that allowing the jury to rule on the law was both proper and constitutionally protected.¹³⁷ Roger Roots agrees with the dissent's critique, arguing that the *Sparf and Hansen* plurality decision rests heavily on dicta and fictitious history in order to set precedent against a right in the jury to nullify.¹³⁸ Even Gary Simson, a 1970s critic of jury nullification, has acknowledged that *Sparf* is poorly supported by history.¹³⁹

Importantly, the *Sparf and Hansen* decision did not prohibit judges from giving instructions informing jurors that they could nullify, nor prohibit nullification itself. Indeed it acknowledged juries' *power* to nullify. Rather, it held that defendants did not have a *right* to

¹³⁵ *Sparf and Hansen v. United States*, 156 U.S. 51, 59-61 (1895).

¹³⁶ *Ibid.* 102-03.

¹³⁷ *Ibid.* 114.

¹³⁸ Roots, "Rise and Fall," 20.

¹³⁹ Gary J. Simson, "Jury Nullification in the American System: A Skeptical View," *Texas Law Review* 54 (1975-76): 498.

have their juries nullify.¹⁴⁰ Specifically *Sparf*'s only holding with respect to nullification was that it was not reversible error for the court below to instruct the jury that it should follow the law as given by the judge. It did not hold on the terms of the appeal before it that defendants had no right to a nullification instruction, although it has been subsequently applied as though it had.¹⁴¹ One could even read *Sparf* as standing only for the proposition that the jury cannot convict defendants of crimes for which they were not indicted, though this probably stretches the core meaning of the case a bit too far.¹⁴² Nonetheless, as a result of *Sparf*,

[b]y the end of the [nineteenth] century, [] the power of the jury had been thoroughly decimated by a jealous judiciary eager to exert tighter controls over lay participants in the administration of justice. . . . Indirect emasculation of the jury's right to nullify through procedural devices such as the directed verdict, special interrogatories, detailed jury instructions and a restricted reading of the law-fact dichotomy, occurred during this period thereby effectuating a redistribution of legal power.¹⁴³

Of these, the directed verdict and special interrogatories have of course since been deemed unconstitutional exercises of judicial power.

Some speculate that the motivation behind the *Sparf* ruling was a fear that juries would nullify in antilabor prosecutions.¹⁴⁴ Another reason for the attack on jury nullification that led to the *Sparf* outcome was fear on the part of lawyers for wealthy individuals and corporations that juries would convict corporate officers for economic malfeasance, even where such action was lawful, although again this fear discounts procedural safeguards

¹⁴⁰ *Sparf and* 156 U.S. at 106.

¹⁴¹ Parmenter, "Nullifying the Jury," 388.

¹⁴² Schefflin and Van Dyke, "Contours of a Controversy," 62 n. 40.

¹⁴³ Schefflin, "Jury Nullification," 177.

¹⁴⁴ Conrad, *Jury Nullification*, 107.

allowing for appeals and bench overrides of convictions not supported by evidence.¹⁴⁵

Jeffrey Abramson sees nullification's decline as in part stemming from a change in the nature of American democracy from being controlled locally to being uniformly administered by a strong central government.¹⁴⁶ "With the growth of heterogeneity, the function of the legal system itself changed. From seeking to embody shared values and natural justice, law came to express the clash and compromises of competing interest groups."¹⁴⁷ That is, local diversity intensified, and was followed by a national response aimed at cabining this diversity through national, legislated, uniformity in execution of the law. At the same time,

[f]ederal judges worked out a political theory that severed the classical connection between liberty and self-government. In this new theory, too much popular participation in the judiciary was a decided threat to freedom. Liberty was a matter of receiving equal protection from the law, not necessarily a matter of making the law oneself.¹⁴⁸

Jury nullification's wane is also attributable to increasing professionalization of the law through the nineteenth century, and the tendency to restrict nullification, largely pushed by judges, was initially, but ultimately unsuccessfully resisted by legislatures.¹⁴⁹

Nullification in Modern Times

In the early and mid-twentieth centuries, states began eliminating nullification by statute, overriding their common-law practices permitting it.¹⁵⁰ But between *Sparf* in 1895 and the Vietnam War protest cases in the 1960s, federal courts did not address jury

¹⁴⁵ Mirkin, "Right of Revolution," 61.

¹⁴⁶ Abramson, *We, the Jury*, 88.

¹⁴⁷ Ibid. 89.

¹⁴⁸ Ibid. 90.

¹⁴⁹ Horowitz and Wilging, "Changing Views," 168.

¹⁵⁰ Conrad, *Jury Nullification*, 117.

nullification substantively.¹⁵¹ When they did rule on nullification in the war protest context, all federal appellate courts to address the issue held that neither jury nor defendant has a right to be instructed regarding the jury's power to nullify by deciding law as well as fact.¹⁵² The Vietnam War protest cases largely settled the state of the law on jury nullification. While all arose in the federal court system, the theories they espoused have been influential in state courts as well.

The District of Columbia Circuit's opinion in *United States v. Dougherty* is perhaps the most significant modern opinion on jury nullification, and in many ways the last word until the Supreme Court should elect to revisit the issue for the first time since *Sparf*.¹⁵³ Arising out of the trial of several protesters against the Vietnam War who broke into and vandalized the Washington, DC offices of Dow Chemical, it addresses primarily whether juries must or can be informed of their power to nullify, which has been the most common question in litigated nullification cases from the 1960s on.¹⁵⁴ In his opinion for the majority, Judge Leventhal both speaks highly of, and provides historical support for the use of jury nullification.¹⁵⁵ Nonetheless, he makes the argument that though jury nullification can be a good thing, juries ought not be told of their power to employ it, because they might then overuse it. Rather, he argues, it should remain in the twilight of legality, available to the jury,

¹⁵¹ Crispo, et al., "Law versus Anarchy," 12.

¹⁵² Ibid. 23. Accord Irwin A. Horowitz, "Jury Nullification: The Impact of Judicial Instructions, Arguments, and Challenges on Jury Decision Making," *Law and Human Behavior* 12, no. 4 (December 1988): 440; Parmenter, "Nullifying the Jury," 402.

¹⁵³ Roots, "Rise and Fall," 22. In a 1984 case, in what are arguably dicta, the Supreme Court while evaluating effective assistance of counsel stated that defendants have no right to a nullifying jury, essentially reiterating the *Sparf* holding without, however, reexamining the question. *Strickland v. Washington*, 466 U.S. 668, 695 (1984).

¹⁵⁴ Roots, "Rise and Fall," 24-25.

¹⁵⁵ *United States v. Dougherty*, 473 F.2d 1113, 1130-34 (D.C. Cir. 1972).

but only on its own initiative.¹⁵⁶ In part, this is because juries could wreak havoc through nullification in Leventhal's view, by acting as minilegislatures or by paralyzing the criminal justice system through repeated deadlocks. He further argues that the refusal to inform the jury of its nullification power serves to protect jurors by providing cover for their decisions in case they might not be well received by their fellow citizens. A juror can always argue publicly that he was constrained by the law as given in the judge's instructions, and thus did not simply exercise his own will with regard to the defendant.¹⁵⁷

In dissent, Judge Bazelon argues that the lack of candor involved in failing to instruct the jury of its nullification power is both harmful to the democratic system, and unjustifiably hypocritical.¹⁵⁸ Moreover, Bazelon argues, the potential for jury nullification to lead to widespread anarchy is empirically unverified, and so at most a guess.¹⁵⁹ Bazelon claims that nullification is not merely the happenstance result of various judicial constructions and constitutional provisions, but rather an intentionally democracy-preserving constitutional doctrine.¹⁶⁰ Even the worst form of nullification — the failure of southern juries to convict white defendants of heinous crimes committed against African Americans and civil rights workers — proved to be valuable in Bazelon's view, because it led to a popular democratic response in the form of protests, legislation, increased enforcement, etc., that helped overcome the corruption that led to the nullification itself.¹⁶¹

¹⁵⁶ Ibid. 1134-35.

¹⁵⁷ Ibid. 1136.

¹⁵⁸ Ibid. 1139.

¹⁵⁹ Ibid. 1141.

¹⁶⁰ Ibid. 1142.

¹⁶¹ Ibid. 1143.

In another war protest case a few years before *Dougherty*, the defense argued that because juries have the power to nullify, they have a right to be informed of this power.¹⁶² Despite agreeing with the defense that historically there had been a right to jury nullification, the Fourth Circuit held that the *Sparf* case had affirmatively settled the issue the other way.¹⁶³ In a similar case in the Ninth Circuit, that court likewise held that although not all nullification is undesirable, courts are not required to give juries instructions regarding their power to issue verdicts according to their conscience.¹⁶⁴ The First Circuit, in yet another Vietnam War protest case involving celebrity defendant Dr. Benjamin Spock, demonstrated somewhat more respect for nullification, at least indirectly, by holding that propounding special questions to the jury (as opposed to requiring only a general verdict of guilty or not) constitutes judicial pressure to convict, and is contrary to the American jury tradition, as well as the Federal Rules of Criminal Procedure.¹⁶⁵ That court in passing lauded the

principle that the jury, as the conscience of the community, must be permitted to look at more than logic. . . . If it were otherwise there would be no more reason why a jury verdict should not be directed against a defendant in a criminal case than in a civil one.¹⁶⁶

Nonetheless, it did not contradict its fellow Circuit Courts' holdings with respect to advertising the nullification power to the jury.

Although the most recent attempts at systematic invocation of nullification came in connection with the Vietnam War and protests against it, in the early 1990s strong interest was revived in seeking to establish it in various states through legislative means, though all of

¹⁶² *United States v. Moylan*, 417 F.2d 1002, 1005 (4th Cir. 1969).

¹⁶³ *Ibid.* 1006-07.

¹⁶⁴ *United States v. Simpson*, 460 F.2d 515, 519 (9th Cir. 1972).

¹⁶⁵ *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969).

¹⁶⁶ *Ibid.* 182.

these efforts failed.¹⁶⁷ Bills enshrining jury nullification were introduced but failed in seven states in 1991: Washington, Arizona, New York, Massachusetts, Louisiana, Tennessee, and Texas.¹⁶⁸ Advocates of these measures argued, among other things, that nullifying verdicts would provide legislators with popular feedback on criminal laws.¹⁶⁹ California saw a bill introduced in 1996 allowing an instruction to juries that they could vote their consciences in criminal cases, but it too failed.¹⁷⁰

Meanwhile, in at least two states, nullification survives, protected by state constitutional doctrine, albeit in watered down form. Indiana's constitution instructs that criminal juries are to determine both the facts and the law in cases before them.¹⁷¹ The nullification right enshrined in Indiana's constitution was watered down by the courts in the 1950s, however, when they held that while the jury had the right to nullify, judges were permitted at their discretion to instruct them as though they did not.¹⁷² The current doctrine in Indiana is that jurors need not be reminded at every stage of a case that they have the right to nullify. If at any point in a trial the jury has been told, even obliquely, of its right to decide upon the law, this suffices to prevent reversible error and thus a defendant's appeal on this state constitutional ground.¹⁷³

Maryland also retains a constitutional right to nullification, which, however, it weakened substantially by restricting the jury's power to judge the law to cases in which the

¹⁶⁷ Creagan, "Jury Nullification," 1101-02.

¹⁶⁸ Ibid. 1115-22.

¹⁶⁹ Ibid. 1126.

¹⁷⁰ Crispo, et al., "Law versus Anarchy," 59.

¹⁷¹ *Clark v. State*, 561 N.E. 2d 759, 764 (Ind. 1990).

¹⁷² Conrad, *Jury Nullification*, 120-21.

¹⁷³ *Clark*, 561 N.E. 2d at 764.

judge feels there is a sufficient basis for dispute regarding the law's authority. Maryland's constitutional guarantee of the right of juries to nullify was also watered down in the 1970s and 1980s when courts there held that defendants did not have the right to have their attorneys argue nullification to the jury.¹⁷⁴ Nonetheless, as recently as 1980, Maryland appellate courts have upheld the right of the jury to decide upon law and fact in combination, noting both that nullification operates only to acquit, and that it does not run afoul of the federal constitution.¹⁷⁵

While Georgia's state constitution purports to allow nullification verdicts, that state's highest court held in 1898 that despite its constitutional provisions, no jury nullification instruction was required.¹⁷⁶ A FIJA reprint of a 2000 article by Tom Stahl asserts that not only the Indiana and Maryland, but also the Georgia and Oregon constitutions protect jury nullification rights. But although he cites the provisions of each of those four, case law in Oregon as well as in Georgia appears to have diminished their constitutional provisions on nullification to the point that they are no longer practically operative.¹⁷⁷ Kansas experimented with jury nullification in the early 1970s by statute, but its supreme court struck down the instruction informing juries of their power to nullify.¹⁷⁸ Many other states have specific constitutional provisions preserving nullification rights in libel cases only.¹⁷⁹

¹⁷⁴ Conrad, *Jury Nullification*, 120-21.

¹⁷⁵ *Stevenson v. State*, 423 A.2d 558, 564-65, 570 (Md. App. 1980).

¹⁷⁶ Parmenter, "Nullifying the Jury," 391-92.

¹⁷⁷ Tom Stahl, "State Language on Jury Nullification: Citizens Must Claim Rights: Founders Gave Juries the Right to Determine Law." *Spotlight*, 20 March 2000, available via http://fija.org/docs/JG_state_language_on_jury_nullification.pdf (last accessed 20 March 2013).

¹⁷⁸ Parmenter, "Nullifying the Jury," 392.

¹⁷⁹ Stahl, "State Language."

Given that, at least in a limited sense, Indiana and Maryland still allow nullification verdicts, how have their criminal justice systems fared? Nullification as practiced in Indiana and Maryland does not appear to have caused much systemic difficulty for the states, their laws, or prosecutions thereunder.¹⁸⁰ Indeed, limited Maryland-style conscience-of-the-community jury nullification instructions appear not to change verdict outcomes much in simulations, while more explicit advertisement of the nullification power produced noticeable (though not always merciful) results.¹⁸¹ A 1975 survey of Maryland judges showed little dissatisfaction with jury nullification as implemented, albeit perhaps because it was seen as rarely used.¹⁸²

Soon, further evidence of the results of permitting nullification will be available. Starting 1 January 2013, the state of New Hampshire began implementing legislation requiring that courts permit defense attorneys to inform juries that they may judge law and facts and the interrelation of the two in particular cases, making New Hampshire's nullification regime the most permissive in the US.¹⁸³ Reflective of the positions taken regarding nullification nationwide, New Hampshire opponents of the legislation argue that legislators, not jurors, are properly tasked with making law, which jurors should apply uniformly.¹⁸⁴ Proponents, on the other hand, argue that it is inconsistent and deceptive to

¹⁸⁰ Creagan, "Jury Nullification," 1131-32.

¹⁸¹ Horowitz, "Jury Nullification," 442.

¹⁸² Schefflin and Van Dyke, "Contours of a Controversy," 84.

¹⁸³ New Hampshire Bar Association. "Nullification: When Jurors Are More Than Fact-Finders," *NH Bar News* 23, no. 8, 18 January 2013, 1.

¹⁸⁴ Ann Rice, "A Prosecutorial Concern," *NH Bar News* 23, no. 8, 18 January 2013, 4-5.

grant that jurors have nullification power but not to inform them of it or how it should be used, as well as that nullification was historically a right of the criminal jury.¹⁸⁵

Contemporary Battle Lines

Some observers have claimed, albeit without clear evidentiary support, that jury nullification has been on the rise in the last several decades, and that jurors are increasingly taking the law into their own hands.¹⁸⁶ By 1998, Clay Conrad observed that “[m]ore and more frequently, juries [were] finding that the laws they [were] asked to enforce [were] questionable, or even repugnant.”¹⁸⁷ In any event, starting in the 1990s, there has been a resurgence in nullification as well as in judicial resistance to it.¹⁸⁸ In particular the activity of FIJA stands out during this period.

Founded in 1989, the Fully Informed Jury Association (FIJA) is a nullification advocacy group that seeks to educate members of the public about their powers as jurors through advertisements and leafleting targeting potential jurors ahead of key trials. FIJA focuses especially on politically charged cases, and actively encourages would-be nullifiers to engage in deceptive tactics to achieve impanelment by avoiding advertising to the judge or counsel their willingness to ignore the law.¹⁸⁹ FIJA’s pamphlets give prospective jurors

¹⁸⁵ Mark Sisti and Jared Bedrick, “Part of Doing the Right Thing,” *NH Bar News* 23, no. 8, 18 January 2013, 4-5.

¹⁸⁶ Crispo, et al., *Law versus Anarchy*,” 32.

¹⁸⁷ Conrad, *Jury Nullification*, xvii.

¹⁸⁸ King, “Silencing Nullification,” 434-35.

¹⁸⁹ Abramson, *We, the Jury*, xix.

explicit advice about how to get impaneled without revealing their willingness to rule contrary to law.¹⁹⁰ Specifically, FIJA advises that

[n]othing in the U.S. Constitution or in any Supreme Court decision requires jurors to take an oath to follow the law as the judge explains it or, for that matter, authorizes the judge to “instruct” the jury at all. Judges provide their interpretation of law, but you may also do your own thinking. Keep in mind that no juror’s oath is enforceable, and that you may regard all “instructions” as advice.¹⁹¹

This is mostly accurate as a statement of fact, but Supreme Court decisions such as *Sparf* certainly authorize, at least implicitly, bench commentary on the law, if not explicitly holding that such commentary is binding and thus worthy of the “instructions” label. FIJA also provides a roadmap in one of its publications for defendants and their attorneys on how to attempt to trigger nullification verdicts, while at the same time warning against activity likely to lead to contempt charges.¹⁹²

Judges and prosecutors have fought FIJA efforts vigorously.¹⁹³ Among other things, FIJA has been ordered, in a ruling sustained by the Ninth Circuit, not to distribute literature within one hundred fifty feet of San Diego County courthouses.¹⁹⁴ FIJA has been active with respect to trials of Branch Davidians for murder, of alleged possessors of large amounts of marijuana, and of pro-life protestors accused of trespassing, among others.¹⁹⁵ Meanwhile, judges have begun spending more of their time attempting to control jurors and select those who would reliably comply with their instructions.¹⁹⁶ And as part of this backlash against

¹⁹⁰ Fully Informed Jury Association, “If You Are Called”; Duane, “Jurors’ Handbook.”

¹⁹¹ Fully Informed Jury Association, “If You Are Called.”

¹⁹² Fully Informed Jury Association, “If You Are Facing Charges,” available via http://fija.org/docs/If_You_are_Facing_Charges.pdf (last accessed 20 March 2013).

¹⁹³ King, “Silencing Nullification,” 492-94 & nn. 216-24.

¹⁹⁴ Crispo, et al., “Law versus Anarchy,” 38.

¹⁹⁵ Leipold, “Rethinking Nullification,” 255-56.

¹⁹⁶ Conrad, *Jury Nullification*, xviii.

independent jurors, prosecutors have pursued criminal charges against jurors and FIJA leafletters among others, though in almost all cases these prosecutions resulted in dismissals or acquittals.¹⁹⁷

Some instances of this backlash appear especially egregious. For example, eighty-year-old retired Penn State chemistry professor Julian Heicklen was indicted for jury tampering for standing on the plaza outside the federal courthouse in Manhattan and handing out pro-nullification brochures, charges that would seem to implicate First Amendment free speech rights. The case against him was ultimately dismissed on exactly those grounds by federal judge Kimba Wood, who found that a plain reading of the antitampering statute meant that Heicklen would have had to have been communicating with jurors specifically about issues pending before them, rather than providing general information, in order to have run afoul of the law.¹⁹⁸ Heicklen had not targeted jurors, and argued to the court that his activity was protected by the First Amendment, which argument Judge Wood ultimately accepted by reading the jury tampering statute narrowly.¹⁹⁹

In other instances, nullification advocates are not prosecuted, but rather subjected to obloquy, almost always of a particular kind: In San Diego in 1990, abortion opponents placed ads in a local newspaper encouraging jurors to nullify in the trial of pro-life protesters who trespassed on abortion clinic property in violation of law. In resisting the impanelment of any jurors who knew of the ad, the deputy city attorney noted that the only cases of nullification of which he was aware were those in which white juries in the American south

¹⁹⁷ Ibid. 11.

¹⁹⁸ Benjamin Weiser, "Jury Statute Not Violated by Protester, Judge Rules," *New York Times*, 19 April 2012, A18.

¹⁹⁹ Benjamin Weiser, "At the Border of Free Speech and Jury Tampering," *New York Times*, 26 February 2011, A17.

failed to convict KKK members on trial for murdering blacks.²⁰⁰ This comparison is especially of interest, given that references to repugnant race-based nullification verdicts dominate the rhetoric of nullification opponents.²⁰¹

The upshot of these developments is that today, “[f]or the first time in almost three and a half centuries, the principle first announced in *Bushell’s Case* — that jurors cannot be punished for their verdict — is beginning to face attack.”²⁰² Some federal courts now allow dismissal of jurors merely for correctly asserting that they functionally have the power to nullify, without otherwise indicating any intent to exercise that power.²⁰³ Judges also routinely seek to punish attorneys seeking to achieve nullification verdicts.²⁰⁴ Despite rulings that lawyers may not exercise peremptory challenges to remove jurors based on race, prosecutors now increasingly seek to unseat minority jurors by demonstrating that they have an intent to nullify.²⁰⁵ California briefly instituted a jury instruction that sought to inform jurors that they were expected to tell the court if any fellow jurors sought to nullify.²⁰⁶ And appellate courts of late have both stripped trial judges of discretion to inform jurors of their nullification power, and also have sought to deny them the power to admit evidence that might lead juries to nullify on their own.²⁰⁷

²⁰⁰ Abramson, *We, the Jury*, 58.

²⁰¹ See Chapter 8, text accompanying notes 128 to 132.

²⁰² Parmenter, “Nullifying the Jury,” 403.

²⁰³ *Ibid.* 405.

²⁰⁴ *Ibid.* 407.

²⁰⁵ *Ibid.* 408-09.

²⁰⁶ *Ibid.* 409.

²⁰⁷ *Ibid.* 410.

This ongoing resistance to jury nullification arguably threatens defendants' Sixth Amendment rights.²⁰⁸ At least some of the techniques courts have used to oppose nullification appear to violate dicta, if not actual holdings, of Supreme Court opinions unrelated to nullification, but ruling more generally regarding the right to a jury in criminal trials.²⁰⁹ Tactics aimed at squelching nullification also threaten the jury's secrecy.²¹⁰ "No jury can be impartial when they are threatened, investigated, encouraged to 'snitch' on one another, and even prosecuted in an effort to prevent them from bringing their consciences to the courtroom."²¹¹

Developments on the federal level continue to demonstrate judicial hostility to jury nullification. Since the Vietnam War cases, the Second Circuit has declared jury nullification to be an illegal act, though it limited courts' ability to intrude into the secrecy of jury deliberations in order to ferret out nullifying jurors.²¹² The District of Columbia Circuit, an especially influential appellate court, has likewise continued to hold that jury nullification is not a right of defendants or juries, and that refusal to instruct thereon is proper.²¹³

The Second Circuit has been especially active in leading the charge against would-be nullifiers. In *United States v. Thomas*, perhaps the most significant case regarding jury nullification in recent years, the Second Circuit held that insistence on casting a nullification vote is sufficient ground for dismissing a juror if such insistence can be detected. But because of the need to safeguard jury secrecy, the record must be "clear beyond doubt" that

²⁰⁸ Ibid.

²⁰⁹ Ibid. 412.

²¹⁰ Ibid. 413.

²¹¹ Ibid. 415.

²¹² *United States v. Baker*, 262 F.3d 124, 131 (2nd Cir. 2001).

²¹³ *United States v. Washington*, 705 F.2d 489, 494 (D.C. Cir. 1983).

the juror is refusing to apply the law, rather than merely disagreeing about the sufficiency of the evidence, leaving at least some wiggle room for savvy would-be nullifiers.²¹⁴ In the trial below, there had been testimony by several jurors that the alleged nullifier expressed concerns about the sufficiency of the evidence against defendants, and this sufficed to make dismissal of the dissenting juror improper.²¹⁵ Intent to nullify for the Second Circuit amounts to jurors' refusing to abide by their oaths to render a true verdict according to the law and evidence, and so constitutes just cause for removal under Fed Rule of Criminal Procedure 23(b);²¹⁶ thus within strict limits, judges may, if necessary, inquire into jury deliberations in an attempt to determine whether a juror is intent on nullifying.²¹⁷ But too much inquiry into jury deliberations would undermine the jury system itself, and judges can neither engage in excessive invasion of jury secrecy, nor dismiss jurors who make a credible claim to disbelieve evidence, nor dismiss jurors solely to avoid deadlock.²¹⁸

Clarifying its holding in *Thomas*, the Second Circuit has subsequently held that jurors can be dismissed for refusing to deliberate at all if reported to be doing so by fellow jurors, but not if they are simply not persuaded by the evidence, and refuse to vote to convict while still being willing to engage in deliberation.²¹⁹ At the same time, the court reemphasizes the holding in *Thomas* that judges cannot go too far in inquiring of jurors regarding the nature of

²¹⁴ *United States v. Thomas*, 116 F.3d 606, 608 (2nd Cir. 1997).

²¹⁵ *Ibid.* 611.

²¹⁶ *Ibid.* 614.

²¹⁷ *Ibid.* 621.

²¹⁸ *Ibid.* 623-24.

²¹⁹ *Baker*, 262 F.3d at 131-32.

their deliberations, without, however, providing much specific guidance as to how far is too far.²²⁰

Illustrative of the Second Circuit's clampdown on nullification verdicts is a recent wrenching case from New York City, *United States v. Polouizzi*. An accused possessor of child pornography appeared to have collected images and videos out of an obsession with child abuse sparked by himself having abused sexually as a child in Sicily, and at least in part an attempt to try to identify the abusers and aid police in catching them (though he ultimately was too ashamed of revealing his own past to do so). His trial judge, Jack Weinstein, sought to allow a retrial after conviction in which the judge himself intended to advertise the right to nullify to the jury. On appeal from his grant of a retrial, without addressing the nullification issue at all, the Second Circuit vacated the retrial order, holding that since the evidence presented to the jury would be the same as in original trial, no retrial was justified.²²¹

Following the first trial, nearly all the jurors had informed judge that they believed the defendant needed mental health treatment, and that if they had known he would be mandatorily sentenced to prison, they would have voted to acquit, effectively nullifying in order to achieve appropriate penal results.²²² The judge at that point resolved to order a retrial, during which he planned to inform the new jury of the mandatory sentencing in instructions, citing the Sixth Amendment as support for the jury's right to know these facts.²²³ The Second Circuit had already once overturned the retrial order and remanded for

²²⁰ Ibid. 132.

²²¹ *United States v. Polouizzi*, 393 Fed. Appx. 784, 784 (2nd Cir. 2010).

²²² *United States v. Polouizzi*, 687 F. Supp. 2d 133, 154 (E.D.N.Y. 2010).

²²³ Ibid. 155.

further consideration of sentencing on other grounds.²²⁴ The trial court on remand again granted a new trial, in part because of the appellate court's ruling that defendant was overindicted, but in part as well because he planned yet again to inform jury of mandatory minimums.²²⁵ The trial judge's view that the Sixth Amendment required notice to the jury regarding sentencing relied on the fact that such information was historically given to the jury in practice at the time of the Sixth Amendment's adoption and was thus central to the original intent of guaranteeing criminal jury trial rights.²²⁶ In so holding, Judge Weinstein even respectfully requested the Second Circuit to reconsider whether the *Thomas* opinion might be contrary to Supreme Court precedent, which, of course, the Second Circuit declined without comment to do.²²⁷

One final recent case provides an example of how jury nullification is often opposed by the bench in conjunction with rhetoric evincing concern over lack of bench control with regard to courtrooms and proceedings.²²⁸ It also helps connect nullification's historical roots in America to the ways in which courts reinterpret history in order to minimize nullification's significance. In an especially full-throated opinion arguing against jury nullification, Massachusetts District Court Judge William Young removed a juror for refusing to apply the law as instructed to a case in which a defendant was being prosecuted for possession of cocaine with intent to distribute. Though doing so was unusual, Judge Young was, according to the Federal Rules of Criminal Procedure, entitled to remove a juror for

²²⁴ Ibid. 156.

²²⁵ Ibid. 157.

²²⁶ Ibid. 167.

²²⁷ Ibid. 198; *Polunizki*, 393 Fed. Appx. at 784.

²²⁸ See Horowitz and Wilging, "Changing Views," 172.

misconduct, including unwillingness to consider the evidence in light of the law.²²⁹ After first determining that a recalcitrant juror's refusal to apply drug laws because he believed them to be unconstitutional amounted to an attempt to nullify,²³⁰ Judge Young opined that judges' role in dictating the law to the jury is part of a delicate balance that ensures the survival of the jury as an institution, apparently not viewing the Sixth Amendment as sufficient to safeguard jury trials.²³¹ While admitting that the jury's determination of law was perhaps more important before the development of a professional legal class,²³² Young went on to recite mistaken historical claims to the effect that nullification had ceased to be within the jury's purview in Massachusetts by 1810.²³³

The *Luisi* opinion continues by lauding Justice Samuel Chase's arguments against nullification, omitting to mention that these very arguments led in part to his impeachment.²³⁴ Young then quotes from both John Marshall's opinion in *Marbury v. Madison* and John Adams's contribution to the Massachusetts Constitution to the effect that "ours is a government of laws not of men," implying that jury nullification is inappropriate because it puts men in charge rather than the law itself, ignoring in the process the fact that both Marshall and Adams strongly supported nullification.²³⁵ While writing favorably of the jury's role in democratizing the legal process,²³⁶ he argues that nullification jeopardizes not

²²⁹ Tim Lynch, "Juror Becomes Fly in the Ointment," *Cato @ Liberty Blog*, available via <http://www.cato.org/blog/juror-becomes-fly-ointment> (last accessed 1 April 2013).

²³⁰ *United States v. Luisi*, 568 F. Supp. 2d 106, 110 (D. Mass. 2008).

²³¹ *Ibid.* 111.

²³² *Ibid.*

²³³ *Ibid.* 113. Compare text accompanying notes 132 to 134, demonstrating that Massachusetts was still debating the viability of jury nullification in the middle of the nineteenth century.

²³⁴ *Luisi*, 568 F. Supp. 2d at 113.

²³⁵ *Ibid.* 113-14, 120. See text accompanying note 120; Abramson, *We, the Jury*, 76-77.

²³⁶ *Luisi*, 568 F. Supp. 2d at 116.

only the rule of law, but democracy itself.²³⁷ Further, Young claims, any “notion that nullification will change the law is drivel. Those who would characterize it as a noble form of civil disobedience are deeply delusional.”²³⁸ Famous cases of nullification leading to positive change, including the Zenger case, are, in Young’s view, outdated and unrepresentative, while southern civil rights cases are more truly representative of the nature of run-of-the-mill nullification.²³⁹

Judge Young’s *Luisi* opinion is just a single example, but it demonstrates the degree to which judges often oppose nullification, even to the extent of distorting historical evidence in an attempt to demonstrate its harmfulness to the American political system. Such opinions turn the view of the Founders on its head: for them, nullification was a means by which popular sovereignty could be expressed in the context of criminal trials, a context otherwise dominated by government actors, specifically prosecutors and judges. Moreover, the Founders, while asserting that ours is a government of laws and not of men in the sense that no one is above the law, not even government actors, also understood that law is not self-executing or self-interpreting, and believed that ordinary citizens acting as a jury had a critical role to play in interpreting the law in criminal trials, and in either executing it or not according to their consciences.²⁴⁰ These twin themes, the importance of exercising popular sovereignty over the decision whether to label someone a criminal (and thus an

²³⁷ Ibid. 120.

²³⁸ Ibid. 121. Cf. Abramson, *We, the Jury*, 61: “Philosophically, jury nullification is a close cousin to the theory of civil disobedience.”

²³⁹ *Luisi*, 568 F. Supp. 2d at 121.

²⁴⁰ John Adams, a strong supporter of jury nullification, cannot have meant by “government of laws not of men” that nullification would amount to the latter rather than the former. Lynch, “Fly in Ointment.” Alan Schefflin suggests that the phrase may instead refer to law being made through democratic procedures according to constitutional principles, and that no person is above the law, none of which would invalidate jury nullification. Schefflin, “Jury Nullification,” 210.

enemy), and recognition that law is a tool operated by human deciders, rather than an automatic machine for generating verdicts, resonate strongly with Carl Schmitt's theories. I will examine these homologies in the following chapter. First, however, I discuss prominent examples of nullification in American practice.

Examples of Jury Nullification

As a general matter, jury nullification thrives where formal law diverges from public opinion, whether nationally or locally. This does not, of course, imply that where a jury refuses to convict despite clear evidence of lawbreaking, and because it disfavors the law as applied rather than favoring the defendant, it reflects a *majority* sentiment that the act committed is not properly considered a crime. But as a general rule, it is unlikely that a jury would outright acquit a defendant (rather than hanging due to one or more holdout jurors) absent substantial agreement in the local community that the law does not reflect community values. And indeed, the evidence suggests that where juries routinely nullify, they are expressing disfavor with government efforts to regulate behaviors deemed permissible by the community in question.

In their landmark 1966 study of the American criminal jury, Kalven and Zeisel found that where juries demonstrated significant disagreement with trial judges polled after the fact as to the proper verdict, in only one third were those disagreements limited to conflicting evaluations of the factual evidence. In the remaining two thirds of the cases, judge-jury disagreements turned on jury value judgments regarding either the defendants or the law.²⁴¹ Moreover, they found that “[i]n the world of jury behavior, fact-finding and value judgments

²⁴¹ Kalven Jr. and Zeisel, *The American Jury*, 116.

are subtly intertwined.”²⁴² That is, although cases of disagreement could be categorized as primarily relating to facts or law (or the defendant himself), in most instances some interplay between the two was at work in guiding the jury’s decision contrary to how the judge would have ruled if the defendant had chosen a bench trial. Nonetheless, in most such cases, jurors convinced themselves that they were ruling based on the evidence, not their personal views of the law.²⁴³ Kalven and Zeisel opine that this is true precisely because judges conceal from jurors their power to nullify, such that jurors while motivated by opinions about the law (or defendants) seek to couch their decisions in terms of insufficiency of the evidence.²⁴⁴

Kalven and Zeisel’s study showed “no crime category in which the jury [was] totally at war with the law, as it probably was in the [nineteen] twenties with respect to the prohibition laws, and as it is said to have been in the eighteenth century with respect to prosecutions for seditious libel.”²⁴⁵ They might well have added as a situation in which jurors waged a kind of war against the law that in colonial America, juries nullified to prevent the British from convicting alleged smugglers seeking to avoid taxes, leading the British in turn to try smugglers in juryless maritime courts, which then led to a specific grievance in the Declaration of Independence.²⁴⁶ During Prohibition, of course, juries often failed to convict, and even more frequently reached compromise verdicts convicting on lesser offenses contrary to the facts as a way of ameliorating the much-disfavored law’s effects.²⁴⁷ Examples of routine nullification short of total war against the law include cases involving prosecutions

²⁴² Ibid. 164.

²⁴³ Ibid. 495.

²⁴⁴ Ibid. 498.

²⁴⁵ Ibid. 76.

²⁴⁶ Parmenter, “Nullifying the Jury,” 383.

²⁴⁷ Conrad, *Jury Nullification*, 111.

for sale of liquor to minors,²⁴⁸ prosecutions for homicides and assaults where a credible but perhaps not legally cognizable claim of self-defense was at issue,²⁴⁹ prosecutions for violently resisting arrest where the arresting officer appears to have acted out of line with jurors' expectations of governmental restraint,²⁵⁰ prosecutions for crimes allegedly committed against unsympathetic victims, including those seen to have been sexually immoral according to juror values,²⁵¹ prosecutions for offenses in general seen as not serious enough to warrant criminal sanction,²⁵² prosecutions for violation of unpopular laws, especially antvice laws prohibiting victimless activities,²⁵³ prosecutions in which the prescribed punishment was deemed too severe,²⁵⁴ prosecutions where the facts indicated police or prosecutorial abuse or overreach,²⁵⁵ and prosecutions for crimes against members of discriminated-against groups.²⁵⁶

Obviously some of these categories of frequent nullification are of particular concern: the idea that sexually active rape victims or members of racial minorities harmed by white Americans might see their attackers acquitted because of prejudice is repugnant to norms of fairness and equality, and this presents the most significant challenge to advocates of nullification. I will return to this point below, but it is clear that nullification can indeed

²⁴⁸ Kalven Jr. and Zeisel, *The American Jury*, 95.

²⁴⁹ Ibid. 223-26.

²⁵⁰ Ibid. 236-39.

²⁵¹ Ibid. 249.

²⁵² Ibid. 259-85.

²⁵³ Ibid. 286-97.

²⁵⁴ Ibid. 306-12.

²⁵⁵ Ibid. 318-23.

²⁵⁶ Ibid. 339-44.

often reflect racist or other discriminatory values.²⁵⁷ Thus, for instance, the acquittal of Los Angeles police officers accused of beating Rodney King in violation of the law is seen as likely example of racially motivated jury nullification, given the clarity of the evidence of misconduct.²⁵⁸ Cases in the American South in which juries refused to convict white defendants of murder and other heinous acts against blacks and civil rights workers, including the infamous trial of Emmett Till's murderers, further show the morally repugnant side of jury nullification.²⁵⁹ Nullification in those cases, however, was at least in part the result of a jury system in the south that absolutely excluded blacks from participation, not only on juries, but in the legal system in general, other than as defendants.²⁶⁰ Nor is there anything about nullification that necessarily generates undesirable outcomes such as this in all cases. For instance, nineteenth century juries frequently refused to convict in cases brought under the Fugitive Slave Act, demonstrating the conscience of their communities against slavery as a form of intensified racial discrimination.²⁶¹

In many instances, nullification serves not to acquit the privileged, but to express leniency toward those who are underprivileged. Nullification would sometimes be used to acquit women who committed infanticide when they were economically or otherwise unable to raise children and abortion was outlawed.²⁶² And even when abortion was flatly illegal as opposed to morally contested, juries in general would often refuse to convict abortionists

²⁵⁷ Friedman, *Crime and Punishment*, 375. See text accompanying notes 279 to 282.

²⁵⁸ Abramson, *We, the Jury*, ix.

²⁵⁹ *Ibid.* 61-62.

²⁶⁰ *Ibid.* 111.

²⁶¹ Conrad, *Jury Nullification*, 80.

²⁶² Friedman, *Crime and Punishment in American History*, 231-32.

unless their patients died.²⁶³ Many trials of anarchists, Bolsheviks, and labor organizers under laws forbidding advocacy of criminal syndicalism ended in hung juries, a sign of nullification impulses on the part of one or more jurors.²⁶⁴

Today, nullification is routinely deployed in cases where conviction could lead to significant punishment under three-strikes laws or other mandatory sentences perceived to be excessive, as well as in assisted suicide and drug and firearms possession cases.²⁶⁵ Many juries in Los Angeles and San Francisco in particular are believed to have deliberately nullified in cases implicating a three-strikes punishment.²⁶⁶ Similarly, juries in the eighteenth century often nullified simply to avoid imposition of the death penalty.²⁶⁷ Juries were notably reluctant in early nineteenth century America to convict young persons who committed minor offenses, as they were concerned over the effects on them of time in the penitentiary with other, older, more hardened offenders.²⁶⁸ Drug possession prosecutions and other perceived minor or victimless crimes are especially ripe for nullification where the jury is made aware — in court or through general knowledge — of the harsh penalties likely to be imposed upon conviction.²⁶⁹

Jury nullification often expresses a clear political message. Nullification in part led to the failure of the Embargo Act during Thomas Jefferson's presidency when juries refused to

²⁶³ Ibid. 349.

²⁶⁴ Ibid. 367-68.

²⁶⁵ King, "Silencing Nullification," 433-34.

²⁶⁶ Parmenter, "Nullifying the Jury," 395-96.

²⁶⁷ Ibid. 386.

²⁶⁸ Beaumont and Tocqueville, *Penitentiary System*, 138.

²⁶⁹ Conrad, *Jury Nullification*, 148.

convict alleged violators.²⁷⁰ As we have seen, trials of Vietnam War draft resisters and protesters often triggered attempts by defense attorneys to achieve nullification verdicts.²⁷¹ In some of these instances, juries nullified even without being made directly aware of their power to do so.²⁷² In cases arising from both the Korean and Vietnam Wars, empirical research demonstrates a significant correspondence between popular disapproval of those wars, and the degree to which juries were willing to acquit draft resisters during each of them.²⁷³

Many controversial criminal cases in recent memory resulted in probable nullification verdicts. Acquittals of Jack Kevorkian for violating Michigan law against assisted suicide, of Washington, DC Mayor Marion Barry for cocaine use, and of O.J. Simpson for murder of his ex-wife were all likely examples of jury nullification, although only in the first instance was the jury clearly expressing disapproval of law.²⁷⁴ In the O.J. Simpson case in particular, defense lawyer Johnnie Cochran made a clear, albeit somewhat subtle appeal to the jury to nullify by calling out the jury's power to implement law according to its members' consciences.²⁷⁵

Other particularly infamous cases also appear to have been instances of nullification verdicts. The trial of the Menendez brothers for murdering their parents, in which the brothers made uncorroborated claims of abuse by their parents and were acquitted, may have been an example of nullification, though it is hard to see how this instance does not

²⁷⁰ Mirkin, "Right of Revolution," 60.

²⁷¹ Abramson, *We, the Jury*, 59.

²⁷² Conrad, *Jury Nullification*, 135.

²⁷³ Levine, "Legislative Role," 621.

²⁷⁴ Abramson, *We, the Jury*, x.

²⁷⁵ John T. Reed, "Penn, Zenger and O.J.: Jury Nullification — Justice or the 'Wacko Fringe's' Attempt to Further Its Anti-Government Agenda?" *Duquesne Law Review* 34, no. 3 (Summer 1996): 1125.

qualify as reasonable doubt among jurors as to self-defense.²⁷⁶ Branch Davidian defendants involved in the standoff with the FBI in Waco, Texas may well have been acquitted of murder in the deadly raid on their compound due to nullification on the basis of government persecution, as nullification proponents distributed fifty thousand fliers outside the courthouse where they were tried.²⁷⁷ But one must be careful: sometimes what might appear on the surface to be a nullification verdict in fact turns on questions of sufficiency of the evidence. The outcome of the Simpson case is arguably ambiguous on this front, for instance. And in another more recent example the holdout juror in Illinois Governor Rod Blagojevich's first criminal trial, which ended in a mistrial due to a hung jury, stated publicly that her refusal to vote to convict was entirely based on her reasonable doubts about the evidence, in particular prosecution witnesses' potential incentives to testify falsely.²⁷⁸

Probably the strongest arguments against nullification refer to various cases involving racial animus in which the jury acquits defendants who are members of groups with whom the jury is sympathetic even though they have clearly committed harmful crimes.²⁷⁹ Nonetheless, “[h]istorically, independent juries have more often been agents of change opposed to racism than the tools of racists.”²⁸⁰ And other factors, including refusal to impanel members of minority races on juries, and racism by other actors such as prosecutors, court officers, and even judges have contributed to race-based nullification

²⁷⁶ Crispo, et al., “Jury Nullification,” 35-36.

²⁷⁷ Ibid. 35.

²⁷⁸ Associated Press. “Holdout Juror at Blagojevich Trial Explains Vote.” *Washington Post*, 27 August 2010. Available via http://www.washingtonpost.com/wp-dyn/content/article/2010/08/27/AR2010082701414_pf.html (last accessed 27 August 2010).

²⁷⁹ Conrad, *Jury Nullification*, 167.

²⁸⁰ Ibid. 169.

verdicts.²⁸¹ Racist prosecutors can even “throw” a trial by signaling to juries that they should acquit.²⁸² In short, while jury nullification can certainly be deployed to racist ends, this is not a particularly strong critique of nullification itself, which in point of fact is only a tool — one that can be used for good or ill (though recall, it can only ever be used to acquit a defendant, and so spare her from the heavy hand of the law). Whether it is more dangerous than beneficial is an open empirical question, although the many examples given herein I believe demonstrate that it is not. In any event, race-based nullification verdicts are symptoms of greater systemic problems, and not themselves the disease.

Conclusion

In this chapter, I have outlined the mechanics and history of jury nullification in American criminal cases, with emphasis on particular examples to provide context for the remainder of my argument. In short, as should by now be clear, the practice of allowing juries to decide both the law and the facts in criminal cases has a rich historical pedigree, and appears to have been assumed by the Founding Fathers to have been part of the nature of the jury itself. With the development of a professionalized bar, however, judges and prosecutors sought with increasing success to prevent juries from deciding on their own how and whether to apply criminal laws to defendants. While the intersection of defendants’ right to a trial by jury, even where the facts are not substantially in dispute, the secrecy of jury deliberations, and the prohibition on double jeopardy ensure that criminal juries in the US retain a vestigial power to acquit in the teeth of the evidence, most judges refuse to allow juries to be told of this power, or to allow defense attorneys to seek nullification verdicts

²⁸¹ Ibid. 169-86.

²⁸² Ibid. 185.

openly. And indeed, with the rise of FIJA and increased interest in nullification in general, judges and prosecutors increasingly seek to punish nullifying or would-be nullifying jurors. In the next chapter, I apply Carl Schmitt's theories of sovereignty and the friend-enemy distinction as the central political axis to the practice of jury nullification, and argue that in squelching it, we have abandoned in America an important element of popular sovereignty in favor of "rule of law" liberalism of a kind that Schmitt would characterize as part and parcel of the "cloak and dagger" game of liberal politics that hides actual decisions on exceptional cases by government actors behind a claim that they are merely acting subordinate to the workings of the law itself.

CHAPTER 8

JURY NULLIFICATION AS POPULAR SOVEREIGNTY OVER THE FRIEND-ENEMY DISTINCTION

Introduction

Having in the prior chapter explained the mechanics and history of jury nullification in American criminal law, I now connect that practice to Carl Schmitt's theories of sovereignty and the centrally political friend-enemy distinction. I argue that the jury is the actor in the American criminal justice system best positioned to exercise democratic popular sovereignty in Schmitt's terms, and moreover that when it is empowered to nullify, it engages in sovereign decision making precisely at the key political locus — the moment of determining who will remain a noncriminal friend, and who will become a criminal enemy. In this chapter, I discuss application of Schmitt's theory of sovereignty as decisional authority at the micro level, show how jury nullification aligns with Schmitt's theory of democratic sovereignty exercised over the political friend-enemy distinction in the criminal law context, point out some arguable discontinuities between Schmitt's theory and nullification, and show how nullification can correct democratic deficiencies in the American system caused by an excessive reliance on the rule of law that covers over the actual operation of governmental sovereignty in the criminal context. I conclude by showing that nullification plays a key role in preserving democratic sovereignty over the friend-enemy distinction, one that America's Founders intended to be exercised vigorously, not because "the people" were to be sovereign entirely, but because they were to exercise sovereignty at this particularly important juncture. I argue that this role has been diminished primarily by the actions of governmental actors — judges and prosecutors in connection with criminal trials, and legislators and law enforcers in connection with the proliferation of regulatory

crimes — who have gradually accrued this power to themselves in the name of the rule of law in a process that has generated a multitude of criminal enemies in America, many of whom, if judged democratically, would not be constructed as such.

Sovereignty and Microsovereignty

The core of Schmitt's theory of decisional sovereignty involves its exercise by a single leader of a state, over all exceptional or emergency events, for a substantial period of time. So can one apply this theory to the decision of a criminal jury? The jury operates microscopically by comparison, along two dimensions: First it decides whether an exception exists and what to do about it (acquit or convict) only in a specific criminal case, typically as to one defendant (or in rare cases more than one, if they are tried together for the same acts); it thus does not exercise sovereignty over an entire state, but rather over a tiny subset of its citizens. Second, the jury disbands forever after exercising its limited sovereignty; it is thus a temporally fleeting sovereign actor.

Schmitt asserts that all legal orders are based on a decision which is an irreducible and animating political basis of such orders. The decision is basic in the sense that it is not a mere judicial decision or a decision by a parliamentary majority to enact a statute, but is a decision constitutive of the legal order[, e.g.] of liberalism.¹

Jury nullification clearly does not involve a decision that is constructive in any complete sense of the legal order in general, but only informs it. It is itself constructive only of an outcome in a particular case.

Thus in order to consider jury nullification as a sovereign act, one must extend Schmitt's core definition of the state of exception as one in which the state is either endangered or one that is fundamentally constructive of its legal order, and adopt a more

¹ Dyzenhaus, *Legality and Legitimacy*, 39.

flexible understanding of exceptional circumstances giving rise to decisions that, while serious, do not involve the state as a whole existentially.² Can one appropriate Schmitt's grand theory for such small matters? While not all Schmitt scholars agree, many have applied him in just such ways. Discussing the decisional aspects of child custody cases, Michael Salter and Susan Twist argue that the concept of microsovereignty — application of his theory of sovereign decisionism to more mundane situations and less powerful actors than heads of state — is directly implied in Schmitt's work.³ And consistent with Salter and Twist's focus on legal matters, scholars applying Schmitt in microcosmic contexts have been especially willing to do so with respect to the law and its interpretation and implementation, a position that coheres well with Schmitt's own focus on law and the necessity to decide about it at all levels.

So, for instance, liberal decisionist Hermann Lübbe appropriated Schmitt's decisionism within a rule-of-law framework in an attempt to reconcile sovereignty of law and sovereignty of human actors by arguing that "legitimacy based on legality, or commonly agreed procedures, has to supersede a 'pure legitimacy' staked upon claims to the truth These kinds of legitimacy, according to Lübbe, relate to each other like normal political life to the state of exception."⁴ Thus formal legal legitimacy trumps, at least in normal situations, sovereign decision. But implicit in this relation of ordinary legal procedures to normal political life, and pure legitimacy to the exception, is the idea that decisionism remains available as a second-choice means of compensating for procedural legal lacunae. Every situation upon which a decision grounded in pure legitimacy becomes necessary is a small

² See Schmitt, *Political Theology*, 6.

³ Salter and Twist, "Micro-Sovereignty."

⁴ Müller, *Dangerous Mind*, 126.

state of exception, and exercising such exceptional decisionism incrementally helps stave off the need for real political states of exception or emergency. In this way, decisional sovereignty, if exercised at a micro level, can actually serve to bolster the liberal rule-of-law state and forestall the need for a Leviathan-like sovereign decider.⁵ In a similar vein, David Dyzenhaus describes English legal scholar H.L.A. Hart's "penumbra of uncertainty," which refers to the necessary marginal indeterminacy accompanying any positive law, as a "kind of mini state of emergency for a positivist theory of law," that requires a decision, though not necessarily by a state sovereign.⁶

Concrete applications of the theory of decisional sovereignty to micro contexts have proliferated among Schmitt scholars. Daniel Williams has described the discretionary power US military authorities subordinate to the President exercise over criminal enemies detained in Guantanamo Bay as a form of microsovereignty.⁷ Austin Sarat uses Schmitt's theory of sovereignty to explain the political ramifications of executive clemency exercised through the pardon power, seeing sovereign decisions in exercises that do not amount to acts in time of emergency, but rather are exceptional.⁸ Executives exercising pardon power are, in his view, engaged in core sovereignty, as the right to deploy decisional power in particular over life and death in addition to the power to commute prison sentences.⁹ The parallels to jury nullification as a similar kind of exceptional sovereign decisionism in microcosm are fairly obvious. The limited sovereignty inherent in the exercise of jury nullification power mirrors that of the executive pardon power in many ways, including especially in its particularity and

⁵ Müller, *Dangerous Mind*, 127.

⁶ Dyzenhaus, *Legality and Legitimacy*, 15.

⁷ Williams, "After the Gold Rush," 58.

⁸ Sarat, *Mercy on Trial*, 71-72.

⁹ *Ibid.* 16.

non-precedential effect.¹⁰ Finally, Leonard Feldman argues more generally that the emergency as described by Schmitt need not always equate to total emergency, but may be applied to analyze petty emergencies as well.¹¹ Feldman's own analysis of sovereignty is deployed to encompass any results of the ordinary changeability of the world that cannot be anticipated in advance through static legislation, and thus must be addressed through ad hoc human decision.¹²

Even commentators not steeped in Schmittian theory unwittingly cast jury nullification in terms of microsovereignty. Following Washington, DC Mayor Marion Barry's trial, the judge, expressing displeasure with the acquittal apparently against clear evidence, argued that it was both inappropriate and anarchic for a jury to act as a minidemocracy or minilegislature in refusing to apply the law to the defendant's conduct.¹³ And nullification advocate Clay Conrad urges defense attorneys to deploy language designed to inform the jury of its microsovereign role, arguing that

[v]enire-members should be aware that the jury is the only entity in the entire edifice of government with the power to convict a citizen accused of crime, and that *so far as the defendant is concerned*, they are more powerful than Congress, the Supreme Court and the President all put together.¹⁴

He also advises defense attorneys to object to prosecutors' attempts to characterize themselves as representing the people rather than the government, in order to make clear to

¹⁰ King, "Silencing Nullification," 460.

¹¹ Feldman, "Banality of Emergency," 138.

¹² Ibid. 148.

¹³ Abramson, *We, the Jury*, 66.

¹⁴ Conrad, *Jury Nullification*, 277 (emphasis added).

the jury that it is the popular representative in the courtroom, empowered to resist prosecutorial abuse.¹⁵

Understanding decisional sovereignty as aptly descriptive of exercises of political discretion at levels below that of the ruler of a state helps shed light on the role of prosecutors in the American criminal justice system. In America, lead prosecutors, often known as district attorneys, act with a great degree of autonomy in deciding which cases to prosecute and which not to prosecute.¹⁶ Their decisions, not surprisingly, are often politically inflected, both in the ordinary sense of having political motivations and consequences, and in the Schmittian sense in that they involve deciding whom to ask a jury to declare to be a criminal enemy, and whose potential crimes to let pass.¹⁷ But as Conrad points out, unlike jurors, prosecutors are not directly of the people — in the federal system they are appointed, and while they are elected in many states, this makes them representatives of the people granted broad discretion over an extended time, akin to legislators in that sense, rather than representatives drawn at random directly from the community and acting only on a single case before disbanding.

Other political theorists, although writing substantially prior to Schmitt and not advertent to his specific definition of sovereignty, have described juries as engaged in sovereign activity when convicting or acquitting in historical contexts in which nullification power was widely assumed, if not yet confirmed at law. As Thomas Hobbes noted in *Leviathan*, in a claim echoed and amplified by Schmitt, “[a]ll Laws, written and unwritten, have need of Interpretation,” and that interpretation “dependeth on the Authority

¹⁵ Conrad, *Jury Nullification*, 280-81.

¹⁶ Karlen, et al., *Anglo-American Criminal Justice*. (New York: Oxford University Press, 1967), 25.

¹⁷ *Ibid.* 28-29.

Sovereign.”¹⁸ Writing some nineteen years before *Bushell’s Case*, Hobbes further noted that juries were judges “not onely of the Fact, but of the Right” meaning the rightfulness of the accused’s actions and of the application of criminal law to him. He went on to note that juries have the functional power not to follow the judge’s instructions on the law in the course of determining not only the facts, but also whether the facts amount to a valid crime, because so long as they do not violate their consciences or become corrupted by reward, the judge cannot punish them for so doing.¹⁹ Besides Hobbes, Tocqueville, whom Schmitt also cited favorably, cast the jury as a popular sovereign actor:

The jury is the most powerful and the most direct application of the dogma of the sovereignty of the people. Because the jury is nothing but the people made judge of what is allowed and of what it is forbidden to do against society. From this point of view the jury is an eminently republican institution (democratic or aristocratic depending on the class from which the jurors are chosen). All governments which, in practice if not in theory, are not based on the sovereignty of the people, have been obliged to destroy the jury, or to modify it in such a way that it no longer represents public opinion. That is, notably, what Bonaparte did.²⁰

On Tocqueville’s view, in America, the people “form the jury which punishes breaches of the law. . . . Therefore, in reality it is the people who rule.”²¹

Like Hobbes and Tocqueville, the Founders understood the jury’s power to acquit in the teeth of the evidence as a fundamental element of popular sovereignty in American democracy. There is strong evidence that the Founders believed that the jury’s role as bulwark against government’s infringement of liberty arose from its nullification powers.²²

¹⁸ Thomas Hobbes, *Leviathan*, ed. C.B. Macherson. (London: Penguin Books, 1985), pt. II, ch. 26, 322.

¹⁹ *Ibid.* pt. II, ch. 26, 328.

²⁰ Alexis de Tocqueville, Journal Entry, 11 October 1831, available via <http://www.tocqueville.org/ny5.htm> (last accessed 6 April 2013).

²¹ Tocqueville, *Democracy in America*, 201.

²² Parmenter, “Nullifying the Jury,” 398.

For the revolutionary and founding generations, the criminal jury reliably stood between the individual and government, protecting the accused against overzealous prosecutions, corrupt judges, and even tyrannical laws. . . . Jury control over the law no doubt decentralized justice, politicizing it to some extent But these were welcome features of jury trials.²³

Moreover,

[t]he [colonial and early American] jury served freedom not only by getting the facts right but also by getting the people right. Local citizens were empowered to control the actual administration of justice — thus, the jury was our best assurance that law and justice accurately reflected the morals, values, and common sense of the people asked to obey the law.²⁴

That is to say, the American jury at the founding was understood as an institution that quite deliberately assigned a sovereign role to subsets of the people in particular cases: the role of bending the law to ideas of justice shared at the popular level, and incapable of being codified as law because of the need for such norms' flexible application to particular cases.²⁵ Indeed, there is substantial evidence that the Framers saw juries as in fact precisely entitled

²³ Abramson, *We, the Jury*, 87.

²⁴ *Ibid.* 28.

²⁵ This kind of decisional sovereignty as flexible application of justice as against rigid law sounds as well in Aristotelian ideas. Because law cannot make correct universally applicable predictions in advance about all situations, “it is right, when the legislator fails us and has erred by over-simplicity to correct the omission — to say what the legislator himself would have said had he been present, and would have put into the law if he had known.” It is in this connection that Aristotle gives the famous example of the flexible, leaden, Lesbian rule, used to measure fluted columns, for instance, because it is adaptable to the particularities of the things it measures. Aristotle, “Nicomachean Ethics,” trans. W.D. Ross, in *Complete Works of Aristotle: The Revised Oxford Translation*, ed. Jonathan Barnes. (Princeton, NJ: Princeton University Press, 1984), vol. 2, 1795-96. “Even when laws have been written down, they ought not always to remain unaltered. As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars.” Aristotle, “Politics,” vol. 2, 1241a. Aristotle further opines that states ruled according to general, predetermined law rather than judgment and decision regarding particular cases are states best ruled by kings, but that in fact the many are less corruptible than the few, and that the better polity employs judgment rather than fixed law. *Ibid.* 1285a. Because some things cannot be comprehended in law, deliberative judgment of the kind juries exercise when given authority over law as well as fact is necessary for good rule. *Ibid.* 1285a. Plato likewise holds that “it is hardly feasible to produce laws oneself to cover every case, serious or trivial; one can scarcely leave the courts no discretion at all about the fine or punishment that ought to be imposed on a criminal.” Plato, “Laws,” 1285a. “[I]n a country where the regulation of the courts is as satisfactory as can be achieved and the jurymen to be have received a good education and been examined by all kinds of tests, it is right and proper to grant them complete discretion on all points to do with the punishment or fines that convicted criminals should suffer.” *Ibid.* 1285a.

to exercise sovereignty as minilegislatures in particular cases, contrary, for instance, to the Barry trial judge's characterization.²⁶

Though contemporary judges often oppose nullification on the grounds that it will lead to anarchy,²⁷ jury nullification can at least equally well be seen as a populist counterpart to aristocratic judicial review, and as an alternative to revolution by virtue of preventing enforcement in appropriate individual cases of laws that if uniformly applied might trigger large-scale popular resistance.²⁸ Juries are better equipped politically to exercise discretionary nonenforcement than law-practicing elites (lawyers and judges), in part because juries are not elected officials and are not answerable to anyone; that is, they do not have institutional pressures operating against them — pressures ordinarily operating only in favor of conviction.²⁹ Not surprisingly, nullification seen as sovereign decisionism tends to be coincident with popular dissent from particular laws.³⁰ The reason for having jury trials at all in criminal cases is “to subject law to a democratic interpretation, to achieve a justice that resonates with the values and common sense of the people in whose name the law was written.”³¹ Thus the nullifying jury not only decides in micro context about whether an exceptional case exists before it such that ordinary law might properly be suspended, but also decides whether to suspend it by acquitting, all within the context of applying popular community norms instead of formal law. Thus “the jury version of democracy stands almost alone today in entrusting the people at large with the power of government [F]or

²⁶ Roots, “Rise and Fall,” 28.

²⁷ Bacelli, “*United States v. Thomas*,” 142-43.

²⁸ Mirkin, “Right of Revolution,” 68.

²⁹ Parmenter, “Nullifying the Jury,” 422-23.

³⁰ See Horowitz and Wilging, “Changing Views,” 172.

³¹ Abramson, *We, the Jury*, 6.

most of us the jury remains our only realistic opportunity to participate in governing ourselves.”³² “What jury nullification *is* about is particularized justice; it is about citizen oversight of prosecutorial discretion; and it is about limiting the power and intrusiveness of the legislature and of the criminal sanction.”³³ Jury nullification can be seen as sovereign decision on exceptional cases in this context in that it can prevent misapplication of the law in ways not anticipated by lawmakers.³⁴ Nullification power is also especially crucial in political trials because it is in these that governmental and popular sovereignty come into their most direct conflict.³⁵

The concern that nullification undermines equal protection has some bite, given that defendants accused of the same crime in circumstances where the evidence of guilt is equally clear might obtain differing verdicts depending upon the attitudes of their respective juries toward themselves, their prosecutors, and the crime charged.³⁶ But at the end of the day, unless all instances of any given crime will be both detected and prosecuted according to the same terms, and tried before the same judge or jury, who will rule upon them consistently despite human fallibility, there is and can be no such equal protection at criminal law. Moreover, overemphasizing equality under the law vitiates discretionary decision-making in particular factual contexts, a development Schmitt derides. “For Schmitt, the impact of ‘who decides’ spills remorselessly into every juristic arena.” But for liberal legal theorists, discretion and personal judgment become an unwelcome intrusion of the political into the

³² Ibid. 2.

³³ Conrad, *Jury Nullification*, xxii.

³⁴ Schefflin and Van Dyke, “Contours of a Controversy,” 91.

³⁵ Schefflin, “Jury Nullification,” 191.

³⁶ Simson, “Skeptical View,” 518-19.

legal realm.³⁷ Such liberal legal theorists, however, overlook other sites of discretionary sovereignty. Jury discretion is no worse than police or prosecutorial discretion as microsovereign action, and indeed is more benign because it is permitted to operate only in favor of members of the public rather than the government.³⁸ Thus to the extent that rule-of-law liberals decry the jury's nullification power, they do not so much further equality under the law as favor sovereignty in governmental rather than popular hands. In Schmittian analysis, decisional sovereignty is not avoidable, because law is not self-executing. The question instead is who decides, and whether the makers of such sovereign decisions are made patent, or are obscured in the cloak-and-dagger game.

Arguably, rather than because of equal protection issues, judges resist nullification because it trenches on their power, accrued throughout the nineteenth and twentieth centuries, to say what the law is.³⁹ Were the results of this trend merely greater power for judges, this might be troubling, but not especially so. But the consequences of squelching nullification are not just a shift in sovereignty from lay popular juries to professionalized bench and bar.

[T]he transformation of jurors from deciders of both law and the facts into mere evaluators of facts. . . . has wrought drastic ramifications upon the development of law during the past century. Indeed, it may be said that the elimination of the jury's traditional lawfinding role has paved the way for a wholesale enlargement of government in American personal affairs. Today's gargantuan criminal justice landscape, with its hundreds of penal institutions and expansive offender registries, could not have been possible but for the jury's decreased role as a check on the power of the state. And because juries are no longer allowed to openly cast votes against bad laws, the criminal codes of every American jurisdiction have exploded in length, triviality, and complexity.⁴⁰

³⁷ Salter and Twist, "Micro-Sovereignty."

³⁸ Schefflin and Van Dyke, "Contours of a Controversy," 87.

³⁹ Roots, "Rise and Fall," 25-26.

⁴⁰ *Ibid.* 5. See text accompanying notes 156 to 164 for a discussion of the proliferation of regulatory crimes of the sort to which Roots alludes here and of the role juries could potentially play in resisting that tendency.

Some have indeed argued that the increase in judicial expertise throughout the nineteenth century justifies letting judges have exclusive say on the law, and denying juries this role.⁴¹ But this analysis fails to understand precisely what Schmitt's theory of sovereignty makes clear, that expertise-driven power to decide on exceptional cases is a form of sovereign power, allocated by the Founders to juries rather than judges, which allocation has been inverted with the decline of nullification, a point actually made by the dissenters in *Sparf*.⁴²

In sum, jury nullification is sovereign action because it comprises the jury's powers to decide what the law is and how to apply it in criminal cases.⁴³ As Schmitt also argued, "[i]n a democracy, the people are sovereign." Thus "[t]he jury, as representative of the people, constitutes democratic self-rule."⁴⁴ "Bringing the law closer to the people may not make it more just in all cases, but it will make it the law of the people, which is what it should be in a constitutional democracy."⁴⁵

Having argued for an understanding of jury nullification as an instance of Schmittian decisional sovereignty at the micro level, I next discuss the role of juries as popular delegates engaged in democratic popular sovereignty. In so doing, I emphasize Schmitt's understanding of properly functioning democracies as homogeneous states where the people fundamentally rule, whether through acclamation or through acts of tumult or at the extreme revolution and reconstitution.

⁴¹ Simson, "A Skeptical View," 504.

⁴² *Sparf and Hansen* 156 U.S. at 174.

⁴³ Schefflin and Van Dyke, "Contours of a Controversy," 178.

⁴⁴ *Ibid.* 93.

⁴⁵ *Ibid.* 96.

Nullification, Democracy, and Tumult

While visiting America, Alexis de Tocqueville observed an instance of what we might consider the worst kind of jury nullification. In a footnote, Tocqueville vividly describes a jury acquitting defendants despite clear evidence that he characterizes in terms of despotism of the majority. A Baltimore newspaper published editorials opposing the war of 1812, and a mob of citizens who viewed this position as treasonous killed one of the offending journalists. All those tried for the murder were ultimately acquitted by a jury of their peers, despite that — or more accurately because — their roles in the killing were well known to the community.⁴⁶ One might expect that, having observed an instance of jury nullification in which animus toward the victim rather than opposition to the law motivated the acquittals, Tocqueville might, like rule-of-law liberals today, have come to oppose the jury's power to acquit contrary to clear evidence. Instead, Tocqueville's attitude toward the law and the criminal jury in the context of a democracy was more nuanced and complex.

The American legal system, on Tocqueville's read, was constructed largely to impede majority democratic rule — that is, in Schmitt's terms, it is seemingly aligned with the liberal element of the US polity.⁴⁷ In one sense, then, it failed in the Baltimore case, because the mob, presumably representative of majority sentiment, ruled in contravention of the law. And yet in another sense, even this sort of tumultuous overriding of established law — here against murder, and by extension in favor of the freedom of publishers to express unpopular views — was consistent both with Tocqueville's beliefs about the importance of localized government and popular sovereignty, *and* with the idea that the law operates to resist majoritarian tendencies. Tocqueville thought American democracy would best survive if it

⁴⁶ Tocqueville, *Democracy in America*, 294, n. 4.

⁴⁷ Kramnick, "Introduction," xxx.

continued to avoid centralization of government, which in turn would foster individual apathy, by remaining dedicated to localism, which jury nullification — even of the sort Tocqueville witnessed in Baltimore -- would further by keeping verdicts in line with local mores.⁴⁸ Nullification operates in the opposite direction of the kind of governmental centralization that “isolates [individuals] and then submerges them one by one into the mass of the community.”⁴⁹

Indeed, the tendency of nullification to promote local values over state sovereignty is bound up with its history: In medieval England, juries exercised their nullification power to counter centralized sovereign authority with local community standards. As the king became more powerful, he relied less and less on juries, and consolidated his own authority over criminal trials.⁵⁰ There is thus a kind of zero-sum tradeoff between jury power and the power of the crown or other state sovereign, that plays out even today. Ordinary Americans still regard juries as being reflective of local community values, and as acting on the basis of them, despite that rule-of-law judges and lawyers would object that this undermines uniformity and equality under the law.⁵¹ Local jurors are thought better able to judge cases arising from their communities than complete strangers because they can apply laws in harmony with the common sense and moral values of their localities.⁵²

Tocqueville recognizes that the law as a countermajoritarian bulwark is, in America, operated by many hands.⁵³ Among the relevant actors in the American legal system,

⁴⁸ Ibid. xxxiv.

⁴⁹ Tocqueville, *Democracy in America*, 103.

⁵⁰ Green, *Verdict According to Conscience*, 105.

⁵¹ Karlen, et al., *Anglo-American Criminal Justice*, 62.

⁵² Abramson, *We, the Jury*, 18.

⁵³ Tocqueville, *Democracy in America*, 85.

“American aristocracy is found at the bar and on the bench.”⁵⁴ Even in the early nineteenth century with the jury’s powers at their peak, Tocqueville could see lawyers and judges as an emerging professional class, exercising elite forms of power in the criminal legal context. The jury, however, played a complementary role, bringing the people back into the professionalizing legal system. “[I]n America,” according to Tocqueville, “people obey the law not merely because they made it but also because they can alter it, if it ever happens to harm them.”⁵⁵ This claim has relevance not so much to the legislative process, which in point of fact does not directly involve the people in altering their laws but rather requires that representatives sensitive to their wishes alter the law for them, but especially to the role of citizens on criminal juries, through which they are empowered to alter the law, though only in individual cases, to prevent its doing unjust harm. Not surprisingly then, in discussing the tyranny of the majority that the law is in place to resist, Tocqueville compares a nation to a jury, and opines that refusal to obey an unjust law is not denial of the majority’s right to command, but rather an appeal to the sovereignty of the human race over the sovereignty of the people of the state — that is, jury nullification as a rejection of applicable law is itself countermajoritarian sovereignty in action.⁵⁶ Or put differently, Tocqueville identifies the jury empowered to nullify with his conception of the rule of law itself. By

⁵⁴ Ibid. 313.

⁵⁵ Ibid. 282. The idea that the jury represents the people more closely while the judge (and prosecutor) represent elite and institutional interests mirrors Akhil Reed Amar’s argument that juries empowered to refuse to apply unconstitutional laws serve as a kind of “lower house” in the criminal law context that checks the “upper house” powers of the bench (and bar). See Chapter 7, text accompanying notes 27.

⁵⁶ Tocqueville, *Democracy in America*, 293. Like jury nullification, the pardon power is routinely criticized as being antidemocratic in the sense that it represents government by men not by law. Sarat, *Mercy on Trial*, 27. Indeed, Sarat notes that juries that do not impose death penalties where they are permitted engage in the same kind of merciful sovereignty, *ibid.* 265 n. 72, and later notes that juries that decide not to convict are doing much the same. *Ibid.* 286 n. 22. Accord Green, *Verdict According to Conscience*, 347, 348: “The core of the power to decide ‘law as well as fact’ was the jury’s right to nullify the law in particular cases without rejecting it as a general matter.” As such, the nullification power is analogous to the pardon power in that it involves exercising sovereignty counter to the majority will as expressed through law.

understanding American law in this way, he actually blends in his understanding what Schmitt sees as the distinct and contradictory elements of rule-of-law and popular sovereignty, or writ large, of liberalism and democracy.

At the same time as it operates counter to the majority will of the citizens of the nation or of the state, nullification is still an expression of popular sovereignty, only at closer proximity to smaller communities of citizens. “[Q]uestions about the law’s justice or the wisdom of enforcing it against a particular defendant can and should not be avoided in any system designed to leave law’s final enforcement to the people.”⁵⁷ But as discussed in Chapter 4, “the people” is an elusive and shifting concept in American democracy. In the context of a jury applying the law according to its members’ consciences, “the people” means a small subset of the local community delegated the power to engage in critically evaluating the fit between law as passed by state or federal legislatures (or law as derived through judicial interpretation or executive practice at either level), and justice as understood locally.

Put another way, juries are not the agents of the people, elected and subject to popular pressures (which agents may find ways to ignore, or to shape through political rhetoric). Instead,

[t]he hypothesized linkage between public opinion and jury decisions is not the result of public pressure keeping jurors in line, as might be the case with politicians who bend to popular will to protect themselves from the wrath of voters. Jurors have no tangible self-interest in rendering verdicts, so they can ignore commonly held views with impunity. Rather, the jury responds to public opinion because it *is* the public; its voice is everyone’s voice (despite some degree of unrepresentativeness resulting from jury selection procedures). The events and ideas that shape the public’s mind simultaneously affect the perspectives of jurors. The polling of jurors is in some measure a poll of the public.⁵⁸

⁵⁷ Abramson, *We, the Jury*, xxi-xxii.

⁵⁸ Levine, “Legislative Role,” 608.

Further, as a temporary body with no political ambition, the jury is free to do what it believes is right. It is thus immune from political process failures of the kind associated with legislating and enforcing law.⁵⁹

Jurors are, on this understanding, representatives of people affiliated locally in part through relatively homogeneous attitudes toward law and justice because of the close personal ties that local affiliations produce. These affinities of attitude toward centrally political matters — as we have seen, deciding who is a criminal enemy in the sense that she does not share important views as to justice and obedience to law, and thus must be banished from political community with her neighbors, is a core political act in Schmittian terms — are in turn fostered and developed in the context of jury deliberations. Because of these factors, Tocqueville viewed the jury as a source of instruction in civic life, and as a means of popular participation in the administration of justice, on a par with suffrage itself.⁶⁰ Likewise for John Calhoun, the jury was a preeminent deliberative body because of the (now no longer universal) requirement that it return a unanimous verdict. In his view, the unanimity requirement would lead to rational debate and discussion about the most fundamental moral and political matters in order to apply both the law and community standards to the facts at hand, and to arrive at a just verdict.⁶¹

But juries empowered to decide as to law and fact do not only serve as laboratories for democratic deliberation. They also serve to allow the governed to check the sovereignty of those who govern. “Adjudication by juries is a means of rendering the lawmakers, law

⁵⁹ Schefflin and Van Dyke, “Contours of a Controversy,” 113.

⁶⁰ Max Lerner, “Tocqueville’s Democracy in America: Politics, Law, and the Elites,” *The Antioch Review* 25, no. 4 (Winter 1965-66): 558.

⁶¹ John C. Calhoun, “A Disquisition on Government,” in *A Disquisition on Government and Selections from the Discourse*, ed. C. Gordon Post. (New York: Macmillan, 1953), 50-51.

administrators, and law enforcers accountable to the larger body politic.”⁶² It can serve as a feedback mechanism, informing branches of government of public distaste for law as written or as applied.⁶³ “If a law is frequently nullified, it probably is not reflective of people’s will and the jurors, as representatives of the people, are saying so.”⁶⁴ Even an avowed nullification opponent such as Andrew Leipold recognizes that nullification can serve a valuable feedback role in encouraging repeal of harsh or outdated criminal law, or at least more judicious prosecutions thereunder.⁶⁵

This feedback mechanism is especially important where the public might not have strong reasons in the abstract to object to generally applicable laws, and especially might not be sufficiently concerned with them to bring pressure to bear on elected officials to end criminal prohibitions or enforce them loosely, but where members of the public exposed to these laws and their consequences in concrete circumstances find themselves opposed to such laws as applied, and have the opportunity as defendants to fight them by appealing to the jury’s conscience, and as jurors to nullify them so as to express to elected representatives that such laws as applied are inappropriate in light of community values. While some argue that the reelection drive and popular vote together serve to constrain lawmakers,⁶⁶ this argument ignores the fact that reaction to general laws may be quite different than reaction to their particular application, and moreover that the public is rarely focused on particular criminal enactments and particular lawmakers’ roles therein. Indeed, to the extent that the costs of relocation are not prohibitive, juries’ refusal to enforce particular kinds of law in

⁶² Levine, “Legislative Role,” 634.

⁶³ Schefflin and Dyke, “Contours of a Controversy,” 69.

⁶⁴ Ibid. 91.

⁶⁵ Leipold, “Rethinking Nullification,” 298.

⁶⁶ Simson, “Skeptical View,” 508.

local circumstances according to community norms may actually facilitate greater local attitudinal homogeneity. People may consciously move into communities in which they understand that the prevailing values accept and tolerate acts that would otherwise be considered violations of law, on the theory that they will be able to engage in these acts with impunity, as where someone who would be helped by medical marijuana moves to a college town with a reputation for marijuana tolerance and failed attempts to convict ordinary users of possession.⁶⁷

It is in these ways that the jury in America serves as a safety valve that curbs the courts' and legislatures' power to punish "well meaning or morally blameless defendants" and protect the people from oppressive or tyrannical law or law enforcement, but it can only play this role if it is able to rule at least in part on the applicability of law.⁶⁸

[T]he jury trial often functions as . . . an opportunity for ordinary people to advance their political causes and [] jury verdicts in considerable measure reflect the balance of power among conflicting points of view. The jury is thus a mechanism that permits the infusion of popular opinion — a unique forum for citizens to express their ideas about public policy and actually put them into practice.⁶⁹

When jurors nullify, even in the limited sense of convicting of lesser included crimes, or finding ways to reduce punishment of criminals where facts are not at issue, they substitute community values in individual cases for one-size-fits-all legislation.⁷⁰ On the other hand,

[w]hen jurors feel they have been coerced into returning an unjust conviction, or when they feel obliged to implore the court to be merciful because they believe the defendants have been treated unfairly, the jury has not been empowered to truly perform the function for which juries are intended: to protect the accused against an oppressive act of government.⁷¹

⁶⁷ Conrad, *Jury Nullification*, 189.

⁶⁸ *Ibid.* 5.

⁶⁹ Levine, "Legislative Role," 606.

⁷⁰ *Ibid.*

⁷¹ Conrad, *Jury Nullification*, 156-57.

This protection does not only benefit defendants, but benefits the state as a whole by mooring law to community ideas of justice. “To keep the law from becoming too rigid and losing touch with the society it regulates, some method for achieving flexibility is necessary.”⁷² And while this need for flexibility does not by itself require empowered juries, “[w]e value the jury because it can introduce common sense and conscience when the law and governmental officials may not be in touch with those values.”⁷³

Nullification also serves separation of powers interests because it allows the people to check the judiciary directly.⁷⁴ “Criticisms of the jury are radically undemocratic, striking at the very root of citizen autonomy and self-government: the ability of the average citizen to make good, informed, rational and unprejudicial judgments.”⁷⁵ Resolution of legal disputes necessarily involves evaluations from a moral stance of right and wrong, and there is no clear reason why the jury, more closely positioned as it is to the citizenry, should be excluded from incorporating such moral views in particular cases, *especially* when such moral views are in conflict with rulings by judicial elites.⁷⁶

With this role of the jury as representative of community values in mind, consider again that the jury’s power to override law can only be reliably exercised in the direction of lenity toward criminal defendants. Nullification thus helps ameliorate “over-legislation, overuse of plea-bargaining, mass incarceration, and the growing threat of wrongful

⁷² Schefflin and Van Dyke, “Contours of a Controversy,” 71.

⁷³ Ibid. 88.

⁷⁴ King, “Silencing Nullification,” 454.

⁷⁵ Conrad, *Jury Nullification*, xxi-xxii.

⁷⁶ Butler, “Racially Based Jury Nullification,” 705.

conviction.”⁷⁷ “Because the jury serves as the ‘conscience of the community,’ it is uniquely suited for patrolling the gap between law and justice to ensure that the latter is not unduly sacrificed for the former.”⁷⁸ Given the one-way direction of the jury’s power to ignore the law, this clearly implies that the gap between law and justice refers to law’s tendency to lead to overprosecution and excessive punishment. Nullification simply does not operate to support vigilantism, absent the complicity of bench and bar, in which instances there is a political problem at work much more extensive than the jury’s actions.

All of this functionally combines to make nullification not only an exercise of microsovereignty with respect to the friend-enemy distinction, but also to make it a tool of resistance to the government in the mode of microrevolution. Recall that the Framers did not intend the fictive “people” to be sovereign. But nonetheless they clearly intended the people as represented by juries drawn temporarily from among them to engage in microsovereignty arrayed against government actors.

The [Supreme Court’s] sentencing cases demonstrate that the principles underlying the right to a jury trial, namely prevention of despotic application of law and the introduction of democratic elements into the justice system, must be protected against encroachment. Jury nullification is ideally suited to further these ends; indeed, without nullification, the jury is largely powerless against despotic law, and its democratic value is merely symbolic.⁷⁹

But the Framers did not intend the jury to act in merely symbolic ways. It was, in their understanding, meant to be the means of involvement of citizens directly in their government at the critical moment at which government determines a citizen to be an enemy of the state. The Founders saw jury nullification as a popularly based means of

⁷⁷ Roots, “Rise and Fall,” 28.

⁷⁸ Parmenter, “Nullifying the Jury,” 421.

⁷⁹ Rubenstein, “Verdicts of Conscience,” 982.

accomplishing change to the law as an alternative to revolution.⁸⁰ The Founders' solution to the problem of the threat of violent revolution was "to write a constitution that elaborated a series of intermediate, quasi-revolutionary steps that would become operational before the 'right of revolution' could be utilized," and jury nullification constituted one of these quasi- or microrevolutionary steps.⁸¹ In this way, empowered juries could help maintain the fragile balance of sovereignty in the diffuse American system.

One can thus characterize nullification as resistance to uniform application of law in terms of Machiavelli's conception of the tumult — an occasion when the people (or some subset thereof) run riot, not in a way that centrally endangers the state or citizens, but in a way that actually *strengthens* the state by pointing out critical corruptions in the mechanisms of government and demanding their correction. Similarly, "[j]ury nullification can have a stabilizing effect on government by preventing the application of unjust laws that might otherwise give rise to revolt."⁸² In Machiavelli's view, when custom and law become out of step with one another, a society is in existential danger.⁸³ One way to remedy this disconnect is to provide limited mechanisms for popular resistance to the law, in favor of upholding custom. As Machiavelli sees it, it is better to give the people legally sanctioned means of challenging violations of their liberty by fellow citizens or rulers so as to avoid the kind of destructive violence that causes the whole republic to fall.⁸⁴

Critics of jury nullification, as we have seen, routinely argue that it is tantamount to anarchy. But "[a]dvocates of the 'anti-anarchy' position over-dramatize what jury

⁸⁰ Mirkin, "Right of Revolution," 38.

⁸¹ Ibid. 38.

⁸² Parmenter, "Nullifying the Jury," 423.

⁸³ Niccolò Machiavelli, *Discourses on First Decade*, vol. I, 241.

⁸⁴ Ibid. vol. I, 211.

nullification means.”⁸⁵ And Machiavelli would agree. In his view, republics are not unregulated where we can observe instances of good conduct, good education, and good laws, even if there is dissent or tumult. Dissension in such republics is conducive to public liberty rather than productive of violence. Disorderly tumults that scare people who read of them are not in fact destructive, but rather constructive of better laws.⁸⁶ Popular disturbances can lead to positive change.⁸⁷ “[W]here the matter is not corrupt, uprisings and other disturbances do no harm. Where it is corrupt, well-planned laws are of no use, unless indeed they are prepared by one who with the utmost power can enforce their observation.”⁸⁸

Here Machiavelli’s thought approaches Schmitt’s: if a single ruler is sovereign, the character of the citizens matters little, but where the citizens rule, it is of vital importance that they share a commitment to core values constructive of homogeneity. When the mechanisms of the state lose touch with those values to an extent that the rift cannot be repaired through tumult, popular sovereignty may need to burst through the procedural barriers of normal times and enact full-fledged revolt. In Schmitt’s theory, street demonstrations — i.e. tumults — can serve as a form of popular acclamation (which can express a yes or a no to government acts, and to the extent followed by the government obviate revolution).⁸⁹

⁸⁵ Schefflin and Van Dyke, “Contours of a Controversy,” 87.

⁸⁶ Machiavelli, *Discourses on First Decade*, vol. I, 203.

⁸⁷ *Ibid.* vol. I, 215.

⁸⁸ *Ibid.* vol. I, 239-40.

⁸⁹ Dyzenhaus, *Legality and Legitimacy*, 57. Notably, at its most extreme point, revolution against the existing state order for Schmitt develops into a political formation of enmity. “Revolution, in contrast to reformation, reform, revision and evolution, is a hostile struggle. Friendship is almost impossible between the lord of a world in need of change . . . and the liberator, the creator of a transformed new world. They are . . . *by definition* enemies.” Schmitt, *Political Theology II*, 125, (emphasis in original).

According to Giorgio Agamben, Machiavelli's tumult refers to disturbances in ancient Rome caused either by external war or by internal insurrection or civil war, and is properly defined as "the caesura by means of which, from the point of view of public law, exceptional measures must be taken."⁹⁰ From this point of view it is possible to see jury nullification not only as itself a form of constrained or channeled tumult in terms of popular reaction to law out of joint with the will of the *demos*, but also as an exceptional measure in reaction to the tumult that such law out of joint produces. The latter pattern applies when juries react to prosecutions of protesters or other tumultuous political actors by acquitting them, despite that they have broken the law.

Tumult of the overt kind seems to be a particularly important feature of American democracy. Tocqueville saw American politics as tumultuous by nature,⁹¹ adding that "[a] nation whose only requirement of its government is the preservation of good order is already enslaved at heart."⁹² Some states even incorporate amorphous rights to rebel against the government in their charters. For instance, New Hampshire's state constitution guarantees the right to revolution, as follows:

Government being instituted for the common benefit, protection, and security, of the whole community, and not for the private interest or emolument of any one man, family, or class of men; therefore, whenever the ends of government are perverted, and public liberty manifestly endangered, and all other means of redress are ineffectual, the people may, and of right ought to reform the old, or establish a new government. The doctrine of nonresistance against arbitrary power, and oppression, is absurd, slavish, and destructive of the good and happiness of mankind.⁹³

⁹⁰ Agamben, *State of Exception*, 42, translating and quoting Adolph Nissen, *Das Iustitium: Eine Studie aus der römischen Rechtsgeschichte*. (Leipzig: Gebhardt, 1877), 76.

⁹¹ Tocqueville, *Democracy in America*, 283.

⁹² *Ibid.* 628.

⁹³ N.H. Const. Art. 10.

Tumult can lead to real political change, as when civil disobedience and other forms of protest in the American south led to the Civil Rights Act.⁹⁴

Whether formally recognized or not, tumult and revolution are fundamental aspects of political life. “The instituted society is always subject to the subterranean pressure of the democratic, instituting society. Such a pressure posits limits to the tendency toward the political dispossession of the people from its political powers.”⁹⁵ Jury nullification fits this pattern. “Although liberal constitutionalism struggles to subdue extraordinary acts within a closed and self-referential system of abstract legal norms in order to stifle the originating power of the people and to tame democracy, it cannot entirely evade the underground presence of popular sovereignty.”⁹⁶ “Jury independence is a sunspot in the law, appropriately flaring up when the criminal law exceeds the limits of social consensus, dying away when the law has been reformed, only to flare up anew when legislative ambition overtakes its legitimate bounds.”⁹⁷ In this sense, nullification is tumult. It does not destroy and rebuild the government, it simply protests a perceived disconnect between the people and the government — between popular justice and governmental law — in individual cases. Moreover, jury nullification is a localized form of tumult that supports a kind of federalism, empowering jurors as representatives of local communities against overweening federal (or state) intervention contrary to local community standards.⁹⁸ It thus can be used to give local communities the power to resist law short of outright rebellion, without disturbing state or

⁹⁴ Patrick O. Gudridge, “Emergency, Legality, Sovereignty: Birmingham, 1963,” in *Sovereignty, Emergency, Legality*, ed. Austin Sarat. (Cambridge, UK: Cambridge University Press, 2010), 84.

⁹⁵ Kalyvas, *Politics of the Extraordinary*, 176.

⁹⁶ Ibid. 177.

⁹⁷ Conrad, *Jury Nullification*, 108.

⁹⁸ Parmenter, “Nullifying the Jury,” 425.

national law.⁹⁹ In short, it can provide incentives to state or federal governments to repair rifts between the will of the people and formal law, but without requiring full-scale destruction and rebuilding of the polity, and always in a context of setting defendants free.

Having detailed the microsovereign, directly representative, and tumultuous nature of jury nullification, in following section I will apply Carl Schmitt's theories of sovereignty and the political to nullification, noting important discontinuities as well as significant homologies between them.

Nullification in Schmittian Analysis

There is no evidence that Schmitt was aware of jury nullification, much less that he analyzed it according to his theories of sovereignty or of the political. As already noted, he envisioned sovereignty as almost exclusively a power vested in a single leader of a state, or, alternatively albeit complexly, in the "people" however defined of a democratic state. And as also noted, he sought to distinguish between the ordinary criminal and the enemy in terms of his definition of the political, though this distinction may not apply as well to the American criminal context as to continental European practice. This dissertation thus applies Schmitt's general theories outside his intended context, and produces certain discontinuities with respect to orthodox Schmittian analysis. In this section I will tease out ways in which jury nullification as an exercise of sovereignty over the generation of criminal enemies maps onto Schmitt's thought, as well as ways in which it does not. This in turn will help illuminate how nullification as a component of popular sovereignty once played an intended role in the American political structure that it now no longer fully performs, and

⁹⁹ Ibid. 427.

how the loss of a robustly politically sovereign jury has implications for the balance in the American polity between democracy as popular sovereignty and liberalism as the rule of law.

Recall that “[o]n Schmitt’s account, politics is *before the law*.”¹⁰⁰ This is another way of saying that sovereign decisions precede and underlie any formal law, and that the law itself cannot decide in all cases, but must sometimes recede in favor of sovereignty exercised by human actors. In this light, and despite that jury nullification is limited in scope and in time, it arguably constitutes a “pure act of sovereignty” in Schmitt’s terms.¹⁰¹ In part, this is because Schmitt saw criminal matters as especially important sites of sovereign political decision making. In the classic bourgeois *Rechtsstaat*, of which America is an example, “there must be a procedure for every type of disagreement and dispute.”¹⁰² That is, in most cases, the rule of law suffices in the liberal polity to resolve conflict. Yet Schmitt identifies in the context of truly *political* disputes — that is those that are disputes regarding who the state’s friends and enemies are, including in American practice explicitly criminal matters — a need even in the bourgeois *Rechtsstaat* for special consideration of the political nature of such disputes (a need that goes unmet when government actors deny the decisionist aspects of dispute resolution, claiming instead that the law can handle them by itself without the need for exercise of sovereign power). And the American jury’s role in ruling on such disputes in a way that mixes decisions on facts and law comports with what happens when the sovereign decides what to do in a state of exception, at least as Schmitt’s interpreters have understood that process. In the state of exception, fact and law blur in an undecidable threshold.¹⁰³ In jury nullification, where the jury issues a verdict contrary to fact and law, but without stating

¹⁰⁰ Seitzer and Thornhill, “Introduction,” 9.

¹⁰¹ See Schmitt, *Constitutional Theory*, 155.

¹⁰² *Ibid.* 176.

¹⁰³ Agamben, *State of Exception*, 29.

in its verdict whether it refuses to believe the facts or refuses to apply the law, it too blurs fact and law in issuing a decision.

For Schmitt, this is “the actual problem of political justice.”¹⁰⁴ He notes that while this problem emerges rarely in private disputes, it is certainly a regular feature of criminal law. “The issue, in other words, is the consideration of the political character of legal disputes in reference to organizational or other peculiarities, through which the *Rechtsstaat* principle of conformity to *general* judicial formality is weakened.”¹⁰⁵ In this connection he identifies examples including political crimes such as high treason.¹⁰⁶ Nullification, at least with respect to centrally political crimes, is thus fairly considered a sovereign political act according to Schmitt’s theory even in a polity chiefly characterized by adherence to the rule of law.

In contrast to the operation of criminal law in the *Rechtsstaat*, a democratic concept of law is self-consciously political. It “means that law is everything that the people intend,” without limitation. Thus “[i]njustices and even inequalities are possible. . . . For in the absolute democracy the will of the people is sovereign and . . . highest law.”¹⁰⁷ This insight notably mirrors the claims of nullification opponents that allowing juries to decide to ignore the law in exceptional cases leads to nonuniform verdicts. Indeed, Schmitt seems to be saying, the trade-off for popular sovereignty is a certain level of inequality, reflecting the actual decisions of the people, in whatever form they may be rendered. Schmitt certainly understood that juries — which were relatively rare in Germany when he wrote — could be means of bringing the people in a democracy into the political process. For Schmitt, the

¹⁰⁴ Schmitt, *Constitutional Theory*, 176.

¹⁰⁵ *Ibid.* 177.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.* 286.

participation of laypersons as jurors is one way of signifying a participation of the people in adjudication, where “the people” here are *not* those who govern, e.g. professional civil servants, elected officials, etc., but rather the locus of ultimate sovereignty.¹⁰⁸ And though Schmitt does not appear to be referring directly to any specific understanding of the jury’s potential role in exercising sovereignty in the criminal law context, he does note that “[o]ne can control adjudication by way of the political concept of law,” and that “[o]ne can further demand that justice should be ‘in accord with the people.’”¹⁰⁹

Schmitt specifically connects this demand for people’s justice in a democratic state to effectuation of the popular will in criminal trials, which could in theory be done through lay juror delegates.¹¹⁰ Speaking directly to the role of the people in a state constituted according to popular sovereignty, Schmitt argues that

If a democratic state requires that justice be “*people’s justice*,” the will of the people is made the defining perspective for settling litigation. That is a simple matter when the will of the people is only expressed in the general norms of the Rechtsstaat statutes. In a democracy, however, the people are sovereign. They can violate the entire system of constitutional norms and settle litigation like the prince in an absolute monarchy The people are the highest judge, just as they are the highest legislature.¹¹¹

Omitted from this picture, which at least superficially appears to accord with jury nullification in the American criminal context, is any detailed discussion of the specific mechanisms through which the people might settle litigation like princes, although action through participation in lay juries seems a reasonable route, provided such juries consist of delegates rather than representatives.

¹⁰⁸ Ibid. 285.

¹⁰⁹ Ibid. 299

¹¹⁰ Ibid. 301.

¹¹¹ Ibid. 300.

Schmitt does, however, put more meat on the bones of “people’s justice,” illustrating it thus:

[T]aken most generally, people’s justice can signify a popular justice in the sense of an agreement of court judgments with the legal sensibility of the people. So long as judges are dependent on statutory law, it is first of all a matter for the legislature to make popular laws, and, in this way, to create the foundation for a popular justice. During the interpretation of statutes, in particular the application of indeterminate statutory concepts, the judge should conform to the fundamental legal views of his time and his people. In normal times and with a people that is homogeneous culturally, socially, and in terms of religious doctrine, that is not a difficult task. If this homogeneity diminishes, then reliance on fundamental legal views of the people is not a solution to the difficulty.¹¹²

There is a good deal to unpack here. First, note that Schmitt emphasizes in this passage the primacy of formal law as enacted by the legislature, even in a democratic polity characterized by popular sovereignty. He further places interpretation of the law in the hands of judges. But then he clarifies this scheme by reference to “normal times.” In a properly constituted democracy, popular sovereignty’s primacy comes at the founding moment, and then (mostly) is quiescent, with the people’s role reduced to one of approving (or disapproving) of government action through acclamation.¹¹³ But we have also seen that Schmitt envisions a role for the people in determining the propriety of particular applications of law through participation in juries. Setting aside the complications that arise from translating Schmitt’s views from Weimar Germany to the American criminal law context, I believe the best way to make sense of Schmitt’s seemingly contradictory arguments here is to read them in light of the aforementioned Machiavellian tumult.

To see how this argument works, consider first that for Schmitt in the passage above, homogeneity is a prerequisite for judges to properly interpret the law passed by the people’s representatives, and that where homogeneity is lacking, there are no relevant

¹¹² Ibid.

¹¹³ See Chapter 3, text accompanying notes 137 to 139.

fundamental legal views of the people for the judge to apply in his interpretation. This itself is a hint that while Schmitt is focused on homogeneity in racial, linguistic, ethnic or religious terms, the importance of homogeneity turns as well on normative views regarding law and justice. Thus, though Schmitt himself might not agree, a democratic polity can apparently be grounded upon shared legal and normative values. Assuming homogeneity among the people, however, a judge *should* be able to interpret the laws in accordance with the homogenous political views thereof. But arguably in the American context judges do not do so, and, to the extent appointed for life, and socialized into a professional law-interpreting elite, have little incentive to do so.¹¹⁴ Nonetheless, assuming sufficient homogeneity among the people for popular sovereignty to be operative, if dormant, “normal” operations of the criminal law do not require popular intervention. The opposite of normal being the exceptional, however, in exceptional circumstances, it seems reasonable to conclude according to Schmitt’s theory, a jury might have to take the reins with respect to deciding whether a defendant will be made a criminal enemy.

Again, this comports with the Machiavellian idea of the tumult. Where the law and popular ideas of justice are sundered, the time has come for the quiescent people to exercise their dormant sovereignty. Reading Schmitt through Agamben, and applying his ideas to the American criminal law context, nullifying juries exercise *auctoritas* (as distinct from *potestas*) when they nullify, that is, in Agamben’s terms “a power that suspends or reactivates law, but is not formally in force as law.”¹¹⁵ Just as acts committed during the *iusitium* — the state of

¹¹⁴ One might expect that elected judges would be more in tune with popular views of justice, but by and large their campaigns do not turn on how they would interpret or apply various laws, but rather how tough they would be in sentencing convicted criminals. That is, judicial elections in the US, where held, typically are won or lost — if at all on democratic terms rather than based on fundraising success — on the terrain of how harshly a candidate will treat criminal enemies, not on whether he will properly apply the law in exceptional cases so as to avoid creating criminal enemies in contravention of community mores.

¹¹⁵ Agamben, *State of Exception*, 79.

exception in reaction to tumults — occur in a juridical void, and are legally unexaminable, similarly jury nullification in America is legally unexaminable as a result of criminal procedural rules.¹¹⁶ Thus instances of nullification can be seen as what Schmitt calls “apocryphal acts of sovereignty,” which “take[] place at the margins of normal constitutional life.”¹¹⁷

Let us return for a moment to Tocqueville’s description of the American jury, which, written as it was during nullification’s heyday, is instructive as to the political position of the jury in that context. Tocqueville saw juries as having a political function beyond just being a judicial instrument.¹¹⁸ For him, the jury system gives control of the society to the ruled. “Thus the man who judges in a criminal trial is the real master of society,” and the jury plays this role in the American system.¹¹⁹ “[T]he jury is above all a political institution; it must be considered as one form of the sovereignty of the people.”¹²⁰ Cognizant that Tocqueville and Schmitt are using “sovereign” and “political” in somewhat different ways, the parallel between Tocqueville’s explanation of the American jury’s role and Schmitt’s focus on the exercise of sovereign political power is nonetheless striking. In particular, note the emphasis in Tocqueville on the unity of rule and the ruled. This especially coheres with Schmitt’s theory of democracy, which in his view is substantially fulfilled in the identity between rulers and ruled.¹²¹ The jury in this sense appears to be the most ready site, short of the moment of

¹¹⁶ Ibid. 50.

¹¹⁷ Renato Cristi, “Schmitt on Sovereignty,” 185, translating, quoting, and commenting on Carl Schmitt, *Verfassungslehre*. (Berlin: Duncker & Humblot, 1965), xii.

¹¹⁸ Tocqueville, *Democracy in America*, 315-16.

¹¹⁹ Ibid. 318.

¹²⁰ Ibid. 319.

¹²¹ Mouffe, “Paradox,” 163.

revolution, of democracy as popular sovereignty in action, and, as discussed in Chapter 6, popular sovereignty enacted at a centrally political moment.

All these parallels notwithstanding, there are some ways in which jury nullification seems not to fit so well with Schmitt's theories. Perhaps the most obvious point in this regard is that sovereignty, for Schmitt, is not something ordinarily exercised at the local level in competition with the laws of the state and directives of its sovereign (be that a single leader or the homogeneous people). Indeed, the idea that people on juries representing differing values across localities within a state could impose those values in cases tried by the state would appear itself to contradict the homogeneity requirement, especially if, as I have here, one understands homogeneity in terms of a shared adherence to a body of law. In the context of a state led by a single sovereign, Schmitt might not have favored jury nullification because it would interfere with political determinations by a powerful president, but in a homogeneous democratic state, he would presumably have no problem with its corrective effect on liberal elements, if any, in such a state.¹²²

To the extent that juries enforcing local norms are seen as aligned against the norms of the majority of a state, however, nullification might undermine democratic homogeneity. Or, given Schmitt's willingness to accept federalism provided it subsists within a homogeneous democracy, nullification might again be a symptom rather than the disease: where a jury must acquit to express community dissatisfaction with the law of the state as a whole, it is demonstrating that the state is no longer homogeneous, at least with respect to the law in question. To the extent that juries nullify to check government out of touch with the popular will, they are engaged in a form of popular sovereignty, but to the extent that they do so to check the state itself, they act in conflict with Schmitt's view that the minority

¹²² See Dyzenhaus, *Legality and Legitimacy*, 81.

is bound by the majority's vote. As much as anything, this discontinuity between Schmitt's theory and the practice of nullification by American juries is reflective of America's federalism and fractured, diffuse sovereignty, and thus can be attributed to the elements of the American state that do not cohere well with Schmitt's ideal democratic practice.

There are other, more peripheral senses in which Schmitt might find application of his theories of sovereignty and the political to jury nullification to be inapt. First, his central interests tend to lie well outside details of how ordinary criminal procedure works.

“[E]mphasis on mere functioning and mere procedures could not have been more alien to Schmitt.”¹²³ But that does not necessarily mean that he would not have recognized the decisionist and friend-enemy constructive aspects of criminal juries, but rather that these aspects would have interested him much more than the constitutional factors that make it possible for jurors to exercise these powers.

Schmitt's disapproval of parliamentary discussion might lead one to believe that jury nullification too, because based on deliberation and attempts by jurors to convince one another regarding evidence and outcomes, is flawed in similar ways. Jurors, however, do not represent party interests, and are not repeat players in negotiations such that they can engage in tradeoffs or “business calculations and negotiations” of the kind into which parliamentary discussion deteriorates in Schmitt's view.¹²⁴

Schmitt also opined that “[f]or the distinctly political questions directed to the people as a whole, especially in regard to the existential distinction of friend and enemy, technical, specialized information and details of technical expertise must be settled by the competent

¹²³ Müller, *Dangerous Mind*, 201-02.

¹²⁴ See Schmitt, *Constitutional Theory*, 341.

and responsible technical experts.”¹²⁵ This would seem to parallel in some ways the technical legal instructions given to juries, which they must ignore in order to nullify, and which judges and lawyers seek to keep within their professional provinces. And yet Schmitt does not go so far in this context as to assert that these technical questions, once settled for communication to the people, are decisive of the political questions the people must decide. For if the technical resolves the political, then the political (and the sovereign people) loses primacy. Such a conclusion would fly in the face of Schmitt’s theory writ large.

Finally, Schmitt claims that it “would be senseless to wage war for . . . purely juristic . . . motives,” which might be understood to imply yet again that the mere criminal should not be confused with the political enemy.¹²⁶ However the American attempt to fight crime seems to rise above “purely juristic” motives, as witness, at least in the US context, such language as the “war on drugs” or “war on terror.” Schmitt, taking note of such rhetoric, might well conclude that contemporary America has improperly conflated the criminal and the enemy. Such a belief does nothing to vitiate the fact of American practice. If America indeed treats the criminal as enemy or absolute enemy, this might or might not be a mistake according to Schmitt, but if that is the reality of the matter, then the jury that renders sovereign decisions decides who is friend and who is enemy within that system, however potentially mistaken it is as a matter of Schmitt’s theoretical distinctions.

Consequences of Nullification as Sovereignty over the Friend-Enemy Distinction

Thus far I have addressed primarily the relationship of Schmitt’s theory of sovereignty to the jury’s act of acquitting defendants who appear clearly to be factually guilty

¹²⁵ Ibid. 304.

¹²⁶ Ibid. 36.

in order to express the view that the defendants, the circumstances, or the law in general or as applied warrant exceptional treatment. In this section I focus on the effects of juries' sovereign decisions on the fundamentally political friend-enemy distinction.

Recall that jury nullification operates to overturn statutes in the legal sense, but only as applied to particular criminal cases. Like other friend-enemy decisions, such as the decision to go to war against another state, jury nullification “does not refer to any normative benchmarks beyond the concrete situation in which the decision about the enemy is taken.”¹²⁷ Jury nullification works in the opposite direction of purely normative law in the abstract, by deciding on concrete cases after the fact rather than categorizing them in general and in advance. It can, however, also serve as an arbitrary declaration of particular friends and enemies when applied in an unprincipled manner — that is, it can be motivated by and express not a legal determination, such as disavowal of a given law or its purposes and refusal therefor to deploy it to generate enemies, but also a more nakedly political determination that a particular defendant is not to be considered an enemy based solely on who she is, or on her conduct's political (in Schmittian terms) expressiveness.

The intent of the jury, which is of course unknowable with certainty, but can in many cases be correctly guessed at based on context, can be understood in Schmittian terms as either an intent to refuse to declare a criminal enemy — where the jury rejects the law or its application — or an intent to protect a defendant by characterizing him as a noncriminal friend through acquittal — as where the jury bases its verdict on an affinity, race-based or otherwise, for the person being tried, or a lack of affinity for the defendant's victims. Considered in this light, one could conceive of jury nullification as a means by which popular sovereignty as enacted by the jury could work to police democratic homogeneity in Schmitt's

¹²⁷ Howse, “Legitimacy to Dictatorship,” 65.

terms, by insisting that “friends” (conceived of in identity group form) and only friends will escape punishment even for heinous crimes. In these instances homogeneity seems to have a primarily racial dimension, though other possibilities are conceivable.

On the other hand if we take seriously the Schmittian argument that the friend-enemy distinction is never one properly made by identifiable groups within society, but instead belongs to the sovereign people in a democracy, then such verdicts are not truly political exercises because they seek to retain as “friends” those who have pursued private group enmity through violations of criminal law. Again, the clearest way out of this dilemma in a plural society such as America is to remind ourselves that we are not a homogeneous democracy in the sense of the classic Schmitt categories of race, ethnicity, language or religion. Rather, in an extension of Schmitt, we are, if homogeneous at all, homogeneous in terms of respect for the laws of the land, in the context of a broader concept of justice. It is this homogeneity that jury nullification as rejection of inappropriate or inappropriately applied law polices. Schmitt might, then, laud jury nullification as refusal to apply the law to declare an enemy, but decry it when it amounts to declaration of a friend based on affinity with the defendant himself.

Interestingly, this sheds further light on a primary argument of nullification opponents, who tend to focus on situations in which juries acquit out of bias, though this is only one of many categories of nullification possible.¹²⁸ When juries nullify out of racial or other bias in a community context that is already heavily racialized or otherwise divided, these verdicts occur in a situation in which the rule of law already has failed. They are not

¹²⁸ Darryl K. Brown, “Jury Nullification within the Rule of Law,” *Minnesota Law Review* 81, no. 5 (May 1997): 1171.

themselves the cause of the problem, but rather a symptom.¹²⁹ “Closely examined, [] those instances are likely to involve circumstances in which the rule of law would fail regardless of juries’ involvement. It fails not for lack of authority by legally trained jurists, but for lack of a supportive, sustaining political and moral culture.”¹³⁰ In other words, it fails because the democracy is insufficiently homogeneous in terms of commitment to legal values. And while often nullification critics focus on instances in which defendants who are members of privileged classes and commit crimes against members of underprivileged classes are acquitted by juries expressing class affinity with the defendants, race- or other class-based nullification can work in the other direction. According to Paul Butler, many urban prosecutors believe that they routinely lose criminal trials they should win given the evidence because of race-based jury nullification operating to acquit black defendants.¹³¹ Butler argues that black jurors’ acquittal of black defendants is an appropriate response to a criminal justice system that is inherently biased against black citizens, as evidenced by, among other things, incarceration rates both by race and for nonviolent crimes, especially drug-related crimes.¹³²

Regardless, however, whether nullification serves to acquit members of dominant or subaltern groups, if it is deployed in this way, it undermines democratic homogeneity in terms of adherence to law, and to a particular political system as a way of life, in favor of privileging homogeneity based on race or other group affiliation. So in Schmittian terms, one might identify race-based and other group-based forms of friend-identifying nullification as improper, while celebrating nullification based on community views of the law as

¹²⁹ Ibid. 1193-95.

¹³⁰ Ibid. 1196.

¹³¹ Butler, “Racially Based Jury Nullification,” 678.

¹³² Ibid. 679, 691.

fostering homogeneity. And at the same time, applying Schmitt, nullification's political benefits would seem to outweigh its potential for misuse, as again, group-based nullification is not the result of nullification itself, but of homogeneity failures that nullification brings to light for potential correction.

We have seen that judges often oppose allowing juries to fulfill this role, arguing that to do so is contrary to the rule of law. But even judges, when applying or interpreting the law, must decide about its meaning, thus engaging to at least that degree in rule of men not of law, albeit couched always in terms of ruling on the law itself rather than on the defendant.¹³³ Nothing, however, about the characterization of a decision as being “on the law” guarantees that such a decision will not be motivated by a judge's attitude toward the defendant, any more than the jury's acknowledged role in ruling on factual evidence can be fully cleansed of personal or political motivations regarding the defendant, lawyers for either side, the judge, the police, or the law itself.

To the extent that centrally political decisions on the friend-enemy distinction in the criminal context are taken out of the jury's hands, by insisting that the jury act according to the law as presented by the judge rather than bringing to bear its own views as to the blameworthiness of the defendant's actions, political power is placed in other hands. Specifically, contemporaneously with the decline of nullification since the late nineteenth century, prosecutorial power has expanded at the expense of such other actors in the criminal system as judges, defense attorneys, and juries.¹³⁴ Indeed, a “prosecutor today can effectively eliminate a person from the community for a generation,” thus exercising her own sovereignty over the characterization of such a person as an enemy requiring functional

¹³³ Ibid. 707.

¹³⁴ Simon, *Governing through Crime*, 35.

banishment.¹³⁵ Prosecutors, who operate at a significant remove from immediate popular control, are thus now the predominant actors involved in determining who will be pursued as a criminal enemy of the state, and who will not be subjected to prosecution, and therefore remain a friend. Law enforcement through criminal sanction is always selective, and thus discretionary.¹³⁶ In terms of Schmitt's theory, such law enforcement amounts to governmental rather than popular exercises of sovereignty to construct criminal enemies, and thus represents a failure of popular sovereignty.

Ironically, while prosecutorial discretion is largely tolerated, and amounts to discretion to seek to construct enemies or not, “[o]nce discretion in some government function is associated with leniency toward criminals and increased risks for victims, it becomes [characterized as] illegitimate.”¹³⁷ Jury nullification *only* operates in the direction of refusing to declare an enemy (or declaring a friend). It thus is deemed illegitimate by governmental actors who compete with the people for sovereignty in the American system. Likewise governors and presidents are often excoriated for exercising their pardon powers, again because these only operate in the direction of leniency. One way to look at this irony is to understand that mercy — whether engaged in by juries or leaders of states — is an inherently risky enterprise.¹³⁸ It is “beyond the complete discipline or domestication of law, something essentially lawless. It is this lawlessness that law both authorizes and finds troubling.”¹³⁹ Notably, rule-of-law liberals find both the pardon power and jury nullification equally troubling, though the former is rooted in executives' explicitly granted powers, and

¹³⁵ Ibid. 40.

¹³⁶ Friedman, *Crime and Punishment*, 5.

¹³⁷ Simon, *Governing through Crime*, 184.

¹³⁸ Sarat, *Mercy on Trial*, 28.

¹³⁹ Ibid. 30.

the latter emerges only in the secrecy of jury deliberations, and in most contexts is no longer exercisable by jurors as a matter of right.

For Austin Sarat, exercising mercy in criminal matters contrary to complete equality under the law “means acknowledging the limits of law and justice, and of the ability to guarantee genuine moral deliberation rather than arbitrariness, fairness rather than discrimination.”¹⁴⁰ Put differently,

One person’s risk of discrimination is another’s opportunity for leniency. One person’s fear of prejudice is another’s hope for subtle moral deliberation. And neither law nor any set of fixed moral norms can forbid the former or ensure the lat[t]er. This is the risk that embracing mercy requires we take.¹⁴¹

Put more starkly in Schmittian terms, embracing mercy in the context of jury nullification is also a means of giving back to the sovereign people through those of them who serve on juries a role in making the centrally political decision on friend and enemy, which is dangerous both for the *Rechtsstaat*, and for its commitment to rule of law. For Schmitt, “[t]he loss of the political is [] one and the same thing as the loss of the friend/enemy distinction.”¹⁴² If criminal convictions can properly be seen as enemy-generating exercises, then the loss of jury nullification turns out to be a form of removal of political power from the people participating as jurors in criminal trials.

Slavoj Žižek has argued that “if those still excluded by the rationalist consensus of the liberal establishment could assert their humanity, [] the political itself [would] break through.”¹⁴³ Such a political breakthrough might be something to fear, as Agamben fears the merger of exception and law in the person of a human sovereign as the moment at which

¹⁴⁰ Ibid. 32.

¹⁴¹ Ibid. 160.

¹⁴² Dyzenhaus, *Legality and Legitimacy*, 57.

¹⁴³ Müller, *Dangerous Mind*, 222-23, citing Slavoj Žižek, “Carl Schmitt in the Age of Post-Politics,” in *The Challenge of Carl Schmitt*, ed. Chantal Mouffe. (London: Verso, 1999), 30.

“the juridico-political system transforms itself into a killing machine.”¹⁴⁴ But the scope and temporal limitations of jury nullification should help ameliorate any such fears, and moreover, the fact that juries can only nullify in the direction of mercy makes them a more cautious means of distinguishing particular friends from particular enemies according to norms of justice. In a similar vein, Leo Strauss, analyzing Schmitt’s *Concept of the Political*, argues that “[t]he political is threatened insofar as man’s dangerousness is threatened. Therefore the affirmation of the political is the affirmation of man’s dangerousness.”¹⁴⁵

A perfectly effective criminal law would, in providing for perfect security, eliminate man’s dangerousness and thus the political, in favor of a total security state that substitutes government actors’ sovereignty for that of the people, thus stripping the state of its democratic element — possibly in ways that obscure that whatever popular sovereignty remained in the American system was being usurped. Jury nullification, even if used in objectionable ways, preserves some of man’s dangerousness (and even approves of it in specific instances) and thus fends off the total state, while at the same time not elevating that dangerousness above the level of the tumult. It is thus consistent with the Framers’ intended fragile balance of sovereignty, which was originally to include elements of popular sovereignty without making such sovereignty primary.

In this way, jury nullification can serve the same functional purpose as civil disobedience.¹⁴⁶ In Andreas Kalyvas’ view, including nullification or other forms of civil disobedience within the formal legal system would make them vulnerable to the same laws

¹⁴⁴ Agamben, *State of Exception*, 86.

¹⁴⁵ Leo Strauss, “Notes *Concept of the Political*,” 112. See also Meier, *Lesson of Carl Schmitt*, 80.

¹⁴⁶ Kalyvas, *Politics of the Extraordinary*, 285-86.

both seek to challenge, neutralizing their vital force.¹⁴⁷ In a sense, this is what happened over time in the American context, as the right of the jury to act outside the law, itself protected by the law, gradually eroded to the point of being a power the jury is not even to be informed it has. In any event, Kalyvas, interpreting Schmitt, argues that “phenomena such as civil disobedience, irregular and informal movements, counterinstitutions, protests, insurgencies, street fighting, and illegal upheavals,” and, I would add, jury nullification, “are as (if not more) important to democracy as normal politics.”¹⁴⁸ They “testify to the creative capacity of collective actors to develop spontaneous self-organized counterinstitutions.”¹⁴⁹

Nullification proponents tend to agree with this characterization. Nullification is a process that can bring the popular will back in to a process that is dominated by prosecutors who have a generally unreviewable discretion with respect to whether to prosecute particular defendants, how to charge them, and when, if at all, to end prosecutions.¹⁵⁰ Prosecutorial discretion effectively short-circuits democratic accountability.¹⁵¹ And while a jury is not rightly speaking accountable to its community, it is so intrinsically *of* its community that it is capable of exercising democratically based sovereignty over the decision to construct an enemy or not, in Schmitt’s terms.

In the next section, I argue that nullification can even be seen as consistent with the rule of law, provided one looks beyond a strictly positivist, liberal understanding of that concept, and that it can do so precisely by acting as a check on a particular democratic

¹⁴⁷ Ibid. 287.

¹⁴⁸ Ibid. 297.

¹⁴⁹ Ibid. 299.

¹⁵⁰ Gottschalk, *Prison and Gallows*, 91.

¹⁵¹ Simon, *Governing through Crime*, 33.

deficiency that is endemic to the representative system and to the growth of the power of the American state as against its people.

Nullification as Rule of Law Counter to Expansion of the Regulatory State

Though I have generally accepted for the sake of argument the idea that jury nullification operates as a democratically sovereign antithesis to liberal ideas of the rule of law, nullification need not be understood as contrary to the rule of law, as the discussion of Tocqueville's thought above illustrated.¹⁵² While legal formalism, and indeed Kelsenian liberalism, see law's application as a mechanical and thus nonproblematic matter, a conception of the rule of law borrowed from Ronald Dworkin would hold that law includes unwritten community values as part of its structure, and in particular with respect to the means by which formal law should be interpreted and applied.¹⁵³ Jury nullification, as application of community standards in particular cases to written law, comports with this Dworkinian conception.¹⁵⁴ And even the Supreme Court has, albeit in passing, "repeatedly described the criminal jury as an important check on biased prosecutors and judges," and thus as an agent of law arrayed against governmental actors who threaten rule-of-law values in a paradoxical way by too closely adhering to the law detached from its social and political contexts.¹⁵⁵

The Dworkinian move with respect to redefining the rule of law brings the will of the people back into the process without affirming a specifically Schmittian concept of sovereignty, and without stressing the political significance of the friend-enemy distinction.

¹⁵² Brown, "Jury Nullification," 1155. See text accompanying notes 53 to 56.

¹⁵³ Ibid. 1160-63.

¹⁵⁴ Ibid. 1164.

¹⁵⁵ Ibid. 1170-71 & n. 97, citing cases.

And thus while it might appeal to rule-of-law liberals willing to expand the notion of what law is beyond formalist boundaries, it still does not, in my view, fully address deep systemic problems with the American criminal justice system. To illustrate how this is so, I now apply jury nullification seen through Schmittian analysis to a category of prosecutable actions known as regulatory or strict liability crimes.

These are not the kinds of crimes that the public fears, and thus pushes government to prevent through punishment and isolation of (enmity towards) those who commit them, but rather are acts that are made criminal largely for the convenience of the government in enforcing its regulations.¹⁵⁶ Not coincidentally, regulatory crimes began proliferating at an accelerated pace starting during and after the New Deal, with the dramatic expansion of federal governmental powers.¹⁵⁷ They have tended both, without much public warning, to proscribe behavior that was entirely legal (and customarily common) prior, and to involve extensive and especially complicated provisions whose content is practically inaccessible, and certainly counterintuitive, to ordinary citizens.¹⁵⁸

In Schmittian analysis, regulatory crimes recall the “four-hundred-year-long process of mechanization” that Schmitt traces back to Hobbes, that empowers the state with tools of communication, information, and violence enabling a mechanistic-technical functioning that Schmitt sees as resonant with the Kelsenian-positivist conception of the rule of law as a function of the state that, cloak-and-dagger style, appears to be purely automated, but in fact requires often unacknowledged sovereign decisions.¹⁵⁹ In particular, Schmitt feared that a legislature empowered without limit to generate laws would eventually destroy the unity of

¹⁵⁶ Friedman, *Crime and Punishment*, 119.

¹⁵⁷ Ibid. 264-65, 282.

¹⁵⁸ Ibid. 284-85.

¹⁵⁹ Schmitt, *Leviathan*, 42.

the laws, such that they would lose touch with the values of the state and become fundamentally commands, rather than norms that ordinary people could intuit based upon their homogeneity along whatever front.¹⁶⁰

If proliferating regulatory crimes are a problem for the state in Schmitt's view, then again jury nullification appears to be a solution he might embrace, with the continuing caveat that it operates only in very limited ways. FIJA leaders have long expressed the belief that were jury nullification advertised to jurors, convictions for regulatory (also known as *malum prohibitum*) crimes would decline precipitously.¹⁶¹ Nullification advocates often argue that it is needed as a form of resistance to the government "oppressing the people with excessive and often ridiculous laws and regulations."¹⁶² Or, as Roger Roots puts it,

Today's fabric of criminal codes is both lengthier and more complicated than it would be if jurors were instructed of their right to nullify inequitable laws. This is because modern lawmakers no longer generally worry over whether their enactments can be sold to and understood by lay jurors. The ancient maxim that ignorance of the law is no excuse may have been workable in an era when it was at least conceptually possible to know what the law was. But today's criminal and regulatory statutes — with their many sections and subsections, their exception clauses and their complicated application provisions — make the law a great mystery even to the most learned legal scholars. Even the finely honed legal minds on the nation's highest courts regularly disagree over what the law is.¹⁶³

Roots's and other nullification advocates' reactions, illuminated by Schmitt's reference to a tendency on the part of modern states to proliferate laws out of touch with popular conceptions of justice, point back to the same process failure I have examined already with respect to ever-increasing criminal penalties and to the passage of criminal laws that meet

¹⁶⁰ See Balakrishnan, *The Enemy*, 248.

¹⁶¹ Conrad, *Jury Nullification*, 161.

¹⁶² Constitution Party of Idaho, "It's the Jury, Stupid!" 9 February 2009, available via <http://libertychallenge.org/archives/its-the-jury-stupid/> (last accessed 19 February 2010).

¹⁶³ Roots, "Rise and Fall," 16.

with popular approbation in the abstract, but revulsion when they are applied concretely to family, friends and neighbors.¹⁶⁴

Even in the context of representative democracy, at some level of development, legislators and executive branch actors make laws not solely because their constituents, the people, demand them, but as support for other laws, public policies, etc., and these laws, if truly unknown to the vast majority of the people, are utterly untethered from any concept of popular sovereignty that does not simply assume the people's acclamation. One way to ameliorate this democratic dysfunction is to allow the people back in at the moment when such laws are being applied to particular defendants who, if convicted, become enemies of the state. Jury nullification, once assumed to be a right fundamental to the concept of the American criminal jury, could accomplish this.

Conclusion

Machiavelli, in a democratic mode, claimed that “the people, if it is deceived about generalities, is not deceived about particulars.”¹⁶⁵ The American people have long been generally unaware of the extent of the laws under which they live. But when brought as jurors face-to-face with prosecutions under them, and if empowered to express their judgments not only as to whether the defendants before them have committed the acts of which they are accused, but also whether such defendants' contraventions of law are indeed worthy of conviction and punishment, and indeed of their being functionally constructed as enemies, they are remarkably well positioned to do justice according to their own lights.¹⁶⁶

¹⁶⁴ See Chapter 6, text accompanying notes 49 to 53; Chapter 7, text accompanying notes 53 to 54.

¹⁶⁵ Machiavelli, *Discourses on First Decade*, vol. I, 295.

¹⁶⁶ In line with this observation, jury nullification can also serve to ameliorate the American tendency to conflate the ordinary criminal with the enemy or the absolute enemy. One who commits a regulatory crime,

In this chapter, I have argued that when jurors do exercise their power to determine the law and its applicability to particular criminal defendants, they engage in popular sovereignty as Carl Schmitt defined it, and so, albeit in micro form, engage in a centrally democratic act. Moreover, they do so at the moment at which the state seeks to render defendants its enemies, meaning that they have the opportunity — some would say duty — to issue the most political of judgments. When judges and prosecutors seek to strip jurors of this role, they uphold, in the name of the rule of law, the sovereignty of the state as against the sovereignty of the people. After generations of war against the jury's nullification power, we are left with a state that increasingly proliferates regulatory and victimless crimes that are in deep tension with popular ideas of justice, and that as a result proliferates internal enemies — to the extent that it leads the world in imprisonment rate. In the concluding chapter, I will bring together the strands of the argument to show that while sovereignty remains fractured and diffuse in the American polity, tea party and other activists who insist on the foundational primacy of popular sovereignty are not entirely off the mark. It is just that the means by which such sovereignty was to have been exercised most fully — popular participation in criminal juries empowered to act contrary to the law in the direction of lenity — has been whittled away to the vanishing point.

the nature of which does not actually violate the homogeneous adherence to shared legal values, might be acquitted because it simply doesn't make sense to lump him together with those who existentially threaten the state, and certainly not with those who are essentialized as habitual or career criminals, and thus subhuman absolute enemies.

CHAPTER 9

CONCLUSION

To recap the argument of this dissertation in brief, Carl Schmitt's theories of sovereignty and the political provide valuable insights into the arrangements of American democracy — both its failures and its successes. His complicated understanding of sovereignty helps show why American democracy is always unstable as it surfs the tension between rule-of-law liberalism and popular sovereignty to decide on exceptional or emergency circumstances, including what to do about them when they arise. His focus on the friend-enemy distinction as the centrally political axis, when applied to the functional operation of criminal law in the American context, shows that our convict population in fact comprises internal enemies.

Combining these two strands of Schmitt's theory, I have sought to show that jury nullification, by which American juries were once fully empowered to decide in exceptional criminal cases both that an exception exists and whether to react to it by acquitting a potential criminal enemy against whom the evidence is clear, but which is now denigrated as anarchic action contrary to law, was a means by which the Founders intended to retain elements of popular sovereignty as a check on the tendency of government to acquire too much power against citizens.

The American jury is capable of representing the best and worst of what democracy has to offer a polity.¹

The direct and raw character of jury democracy makes it our most honest mirror, reflecting both the good and the bad that ordinary people are capable of when called

¹ Abramson, *We, the Jury*, 1.

upon to do justice. The reflection sometimes attracts us, and it sometimes repels us. But we are the jury, and the image we see is our own.²

Reflective as it is of the people, the jury is capable of engaging in a limited form of popular sovereignty in Schmitt's terms: it can decide, in individual cases, whether to give effect or not to criminal law as promulgated through liberal, rule-of-law procedures by diffusely sovereign actors beholden only indirectly to the American people itself, however imagined.

But as we have seen, the jury has increasingly been denied this role due to the professionalization of judges and lawyers, and their acquisition to themselves as institutional sovereign actors of the sole right to say what the law is. Juries now can act to refuse to declare enemies, or to declare friends, only in the shadows of criminal law. To the extent that one values equality of results in criminal trials over allowing the people to engage in decisions reflecting community norms in evaluating law, one will likely conclude that I have put too much faith in juries. I argue, however, that the danger of unequal results — already present due to police, prosecutorial and judicial discretion — is worth risking due to the importance of retaining some role for ordinary citizens in deciding which of their fellows will be subjected to the full force of criminal sanction.

It was not always so, and I believe I have shown that the Framers did not intend it to be so. The American system is indubitably muddled on Schmitt's view of sovereignty, combining as it does claims that the people are the ultimate source of power that remains latent next to the ordinary operation of government with liberal rule-of-law proceduralism. But I part ways with Schmitt's maximalist view that this tension is fatal, and must be resolved either by erecting a completely procedural state that hides sovereignty from view and thus presages tyranny, or by openly placing sovereignty in some human hands such that

² Ibid. 250.

the rule of law and individual rights are never capable of being protected from unfettered and potentially arbitrary discretion. Instead, with such left-leaning Schmitt scholars as Chantal Mouffe and Andreas Kalyvas, I have sought to apply Schmitt to the American context to show that there is a way to retain a balance between liberalism and democracy.

By giving back to the criminal jury its original role in deciding whether and how to apply the law at all, it would be possible, I believe, to restore the Framers' intended balance among sovereign actors. Sure, sovereignty would still be complexly diffuse. But when exercised in the direction of lenity by criminal juries, it would always be visible in that limited context. Despite the secrecy of the basis of a jury's verdict, its result, and — assuming an empowered jury — the source of that result, are clear. Moreover, giving the jury back its role to resist the steady creep of regulatory and other laws that are enacted largely out of clear view of ordinary folk, by refusing to apply such laws to defendants, would go a long way to addressing the complaints of tea party adherents among others. While they are wrong to claim that America is a nation founded solely or even primarily on popular sovereignty, they are absolutely right that elements of that sovereignty central to the founding balance have been lost.

Specifically, the “trial by jury” that we all are guaranteed has come to bear a meaning the Founders would not recognize. What once was sovereign jury discretion regarding the law now rests with professional, elite judges. And its exercise is nearly impenetrable by the ordinary citizen who is not trained in the arcana of the law. Restoring the jury's right to nullify won't fix everything. But it could bring the people back in, and provide a wake-up call short of outright revolution to institutional actors from legislators, to prosecutors, to police, to judges. It could also serve to reduce the number of fellow citizens subjected to the horrors of the American penal system, and rendered criminal enemies thereby.

In short, I cannot say it better than Andrew Parmenter does below: the nullification-empowered jury, while no panacea for America's ills, could play an important role in giving ordinary people sovereignty to say no to the mechanistic operation of criminal law, particularly where that law is poised to render defendants enemies — even to the point of being subhuman absolute enemies to be put to death, locked away for long periods of time, and stigmatized forever as less than worthy of full citizenship.

If America is committed to a jury system, it must believe in its jurors; if America is committed to a democracy, it must believe in its people. If I must present myself to an executioner, I would lay my neck under the axe long before I laid it under the guillotine. A guillotine, like the law, can malfunction because it is a mere mechanism. The human executioner, like the jury, must make the decision to strike. If they cannot deliver that blow in good conscience, they should not be compelled to do so.³

The risks to the survival of the American polity of continuing to subject citizens to a guillotine operated seemingly inevitably by unseen hands — the law, we are told, but Schmitt shows us that this cannot really be — are, in my view, greater than the risks of letting the people decide, if sometimes unreliably or inappropriately, when to refuse to strike the enemy-making blow.

³ Parmenter, "Nullifying the Jury," 428.

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