ALWAYS UNDER LAW?

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INTRODUCTION

This essay is adapted, with some stylistic and organizational but little material change, from my Dewey Lecture entitled "Layers of Law," given at the University of Minnesota Law School on November 14, 1994.[1] In a prior work, I had argued that one cannot cleave wholeheartedly and simultaneously to both of the two ideal notions of higher law and popular sovereignty, without conceiving that the popular sovereign conducts its higher lawmaking in a normative spirit that I called jurisgenerative.[2] I began the present work with an aim of turning the previous argument around. Agreeing with the many who assign to the notion of popular sovereignty, as that notion figures in constitutional-democratic political thought, an evocative or idealizing or quasi-mythical status, I wanted to suggest something about this notion's function in our political thought. Although "popular sovereignty" is perhaps more often taken to express the idea that the people have the right to make the law be whatever in fact they decide, no further questions asked, I wanted to suggest that this notion's deeper signification is the expression of a wish to believe something opposite: that whoever at any time actually does lay

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1. This remains an exploratory and speculative piece, in keeping with the spirit of this journal. Under advice (let us call it) from the editors, I have held footnote citations to the barest minimum. Nevertheless, I owe many intellectual debts, including but certainly not limited to Pierre Schlag and Steven Winter for both their published writings and their comments on this draft; to Frank Goodman, Samuel Freeman, Heidi Hurd, and Howard Lesnick for comments at and following a workshop session at the University of Pennsylvania Law School; to Martin Flaherty and James Fleming for comments on a previous draft; and to various contributors to Sanford Levinson's recent collection of essays on higher lawmaking (which I've been studying closely in a course I am currently teaching), Sanford Levinson, ed., *Responding to Imperfection: The Theory and Practice of Constitutional Amendment* (Princeton U. Press, 1995); and to students in that course. To several trenchant commentators at the N.Y.U. Colloquium on Constitutional Theory and at a discussion sponsored by the editors of the journal *Constellations*, I wish to say that there was not time to make this piece reflect what I learned from our sessions before it had to go to press. This work is not finished yet.

2. Frank I. Michelman, *Law's Republic*, 97 Yale L.J. 1493, 1499-1503 (1988).

down higher law to the country does so in a spirit of answering to some commonly and publicly perceived or commonly and publicly derivable standard of right.[3] I don't know whether the essay as it now stands delivers on the stated aim. In the final section, added after I gave the lecture, the argument takes a turn I hadn't at all anticipated when I began.

I. THE THESIS STATED

How do we think our scheme of government is justified?

This is not a simple question, at least not as I intend it, and I have to begin by explaining what I mean by it.

Start with the phrase "our scheme of government." By this I mean something quite broadly defined, roughly what John Rawls seems to mean when he speaks of constitutional democracy.[4] I shall use that term, and I shall mean by it our familiar broad model of a liberal-individualist political order based on higher law, representative government, and popular sovereignty. That's not as innocuous as you might think, though, for I mean "constitutional democracy" to signify commitment in full earnest to all three of those familiar defining terms. And it may strike you, as I thus lay them down—as very likely it has struck you before—that these three commonplace terms of the constitutional-democratic confession are not self-evidently harmonious. "Higher law" seems in some way to stand against both popular sovereignty and representative government. As for the latter pair, "popular sovereignty" speaks of government not only for the people but by them, and that is not obviously the same thing as government of them by officials or representatives. Sorting out some of the relations among these regulative notions, especially those between higher law and popular sovereignty, while trying always to keep faith with each as regulative, will be a part of my business here.

I approach this sorting out though the question I've already put: How do we think constitutional-democratic government is justified? Now, you might say right off, maybe not everyone

3. Needless, I hope, to add: The sight of someone expressing through myth a wish or belief in something's being the case is most definitely not a sign that the ideal something is the case or even is believed to be. It could well be the converse: a sign of suspicion and concern that it isn't and perhaps can't ever be quite so. Nevertheless, one might question whether indulgence in the quasi-mythology of popular sovereignty, with its inevitable insinuation (as I believe) of an existent fact of morally responsible government, is an altogether healthy way for a country to express a sense either of political ideals or of performative shortfall from them.

4. John Rawls, *Political Liberalism* xvi, xviii & *passim* (Colum. U. Press, 1993).

thinks it is; so who is this "we" of whom I speak so complacently? I could give you the innocuous, the disarming response. I could say that in speaking here of "we" I just mean whoever reading this does in fact incline to the belief that constitutional democracy is probably the right (or, if you prefer, the best) broad model for a scheme of government for their society. But actually I intend something a little more contentious. I say "we" suspecting that *you*, reader, at least some of the time, believe in the probable rightness (or best-ness), for your society, of constitutional democracy in some recognizable form (although perhaps not exactly the form in which it's currently prescribed and practiced in your country).[5]

So . . . How do you think—how do we think—constitutional democracy is justified? In casting this in terms of "how do we think," I'm not intending to pose an issue in normative political theory. I'm not inviting answers of the form: a substantively sufficient justification of constitutional democracy is (say) the argument set forth by John Rawls in *A Theory of Justice*.[6] I'm intending rather to pose a question about *facts* of constitutional-democratic thought—about how, in fact, we think about government, bearing in mind that one fact about how we think about it could very well be this: that we think about it in ways that are themselves counterfactual—idealizing, imaginative, utopian—maybe more so than we usually notice or admit. Accordingly, the inquiry here is meant as descriptive, not prescriptive. Its form is that of exposition. It is an effort to catch hold of, to look into, habitual thoughtways and conceptualizations that enter quietly and unselfconsciously, but also perhaps problematically, into people's largely unexamined convictions that constitutional democracy is an apt broad model for schemes of political justice for a society of beings conditioned and situated as we every-daily think we are.

I'll begin by proposing a thesis in this expositive vein (one that standing by itself may not seem very surprising) that we can call the always-under-law thesis. In order to set forth the thesis, I need to stipulate a couple of definitions. Let us, therefore, understand "constitutional essentials" (I draw the term from John Rawls) to mean legal provisions for the structure and process of

5. I expect it will turn out for some readers that you will start to think, as you work your way through what follows, that you are not a constitutional democrat in my sense, because you find me taking too much in earnest either the popular-sovereignty or the higher-law commitment posed by the model. Nevertheless, I ask you: Are you really prepared to subordinate either of those commitments to the other?

6. John Rawls, *A Theory of Justice* (Belknap Press, 1971).

government—votes and elections, allocations of powers among branches and offices, and so forth—and also for limitations upon government, for "rights and liberties of citizenship that [government is] bound to respect."[7] And let us, further, define "higher lawmaking" as any of (i) legislation of a country's scheme of constitutional essentials,[8] or (ii) legislation of standards to govern type (i) lawmaking, or (iii) legislation of standards to govern type (ii) lawmaking, or (iv) . . . *etc. ad inf.* (So type (n) lawmaking is always "higher" than type (n-1).) Then the expositive "always-under-law thesis" is this: Constitutional-democratic thought is always taking for granted that whoever is engaged in higher lawmaking for a country (and I don't care how high up the (n)s you want to go) is, in that engagement, answering to some still higher law that is already there, in place; for every (n) there is an (n+1). Constitutional democrats take this for granted insomuch as (a) we think that only if it's so can our scheme of government be justified, and (b) we think our scheme of government is justified.

In constitutional-democratic political thought, then, higher lawmaking is a matter of law-all-the-way-up. Despite that titillatingly paradoxical formulation, though, the always-under-law-thesis may very well be renderable in a way that makes it unsurprising. Consider a body of thought that posits a set of abstract, universal, human ("natural") rights, such that a scheme of constitutional essentials that fails to secure these is, in this body of thought, *ipso facto* unjustified. The always-under-law thesis can, I think, be shown to hold for this body of thought.[9] But this is a common form of constitutionalist thought. So why be surprised at the thesis?

It is we *democratic* constitutionalists—we consitutional *democrats*—for whom the thesis is problematic. For us, while higher

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7. Rawls, *Political Liberalism* at 227 (cited in note 4).

8. We could perhaps better define type (i) higher lawmaking as that which is addressed to the slightly broader domain that Rawls calls political "fundamentals," see id. at 214-15, which takes in, in addition to constitutional essentials, "questions of basic [distributive] justice," see id. at 214, 228-29, but this refinement is unnecessary for our purposes here.

9. As applied to it, the thesis could mean something like this: The ledger of abstract-universal natural rights is underdeterminative for concrete schemes of constitutional essentials because, depending on local historical, cultural, etc. conditions, there are various such schemes that can satisfy this (natural-right-fulfilling) criterion of justification. But this is true, as well, for intermediate sets of standards (still locally variant but decreasingly so) to govern selection among concrete constitutional schemes, or (moving up the scale of abstraction-universality) for selecting among more locally variant, less abstract-universal, sets of standards. At higher and higher levels, these increasingly abstract-universal sets of standards (to govern selection among lower-level sets of standards) approach asymptotically, without ever reaching, the ultimate abstract-universal—the at-the-last ineffably abstract and universal—ledger of natural rights.

law may be a regulative notion, no less so is popular sovereignty. And the always-under-law thesis *is* paradoxical when extended, as I'm going to insist constitutional-democratic thought has to do, to the case of higher lawmaking by a sovereign people. In fact, the result of this extension is a double, a two-faced paradox: a contradiction of the sovereign character of the self-governing people combined with a contradiction of the politics-transcending character of the higher law.

We commonly take the idea of the sovereignty of the people to imply that the collective will of the governed (somehow-or-other gauged and expressed) strictly *constitutes* the highest law of the state. Popular *sovereignty*, in other words, we commonly take to imply that the people acting to resolve their country's higher law cannot then themselves be acting under the sign of law. The people's sovereign act of higher lawmaking law must itself, as sovereign, be above and beyond all law. That, I say, is how we usually *think* we think about popular sovereignty. The always-under-law thesis, however, contradicts this ordinarily unreflective take on how participants in constitutional democracy think about the provenance of higher law. Part III of this essay is meant to show that constitutional democrats conceive higher lawmaking to be always under law, even when the higher lawmakers are the people themselves. At the same time, though, and correlatively, the exposition shows that, in constitutional-democratic thought, the law that even the highest politics is under is itself a politically immanent creation, not a deliverance of transcendent, trans-political reason.

The exposition will carry us into some familiar puzzles about who or what we have in view when speaking of a sovereign "People." Few, after all, would defend literally the proposition that the terms of government are ever actually set by an active, express, affirmative consensus of the entirety of a country's politically franchised population. One needn't dismiss popular sovereignty as a flat-out lie (and I wouldn't) in order to see that this can hardly be a term of scientific description of real-world politics. Popular sovereignty is surely in some part a mythic idea, one whose function is as much evocative or expressive as it is descriptive.

II. FROM POLITICAL JUSTIFICATION TO GOVERNMENT UNDER LAW

A. JUSTIFICATION

What we're trying to do here is to have a look at ourselves thinking, when what we're thinking about is how a certain something is justified. What that something is we'll soon be discussing, but perhaps we had first better ask: But what is "justification," anyway? All I mean by the term is something aptly said in response to complaint. Look at it this way: No matter who we are, we inevitably from time to time experience government as an external force, an intervention in our lives. So there is always and everywhere the potential for complaint against government. Justification is what can be said to allay such complaint, actual or potential. Constitutional democrats think we can often allay complaints against *specific acts* of government by showing how these issued properly from a *scheme* of government—a scheme of constitutional essentials—that itself measures up to a set of general normative requirements for schemes of this kind.

B. HIGHER LAW

In what I just wrote, you see in action one of the typical arrangings of constitutional-democratic political thought. This thought—our thought—arranges acts of political ordering in a two-place hierarchy. In the first place, there are schemes of government ("constitutions"). In the second place there are (issuing from the constitution in force), "ordinary" political acts of legislation, administration, and adjudication.[10]

Expectant upon any detection of an intentional act of political ordering is a question of justification. Constitutional-democratic thought divides the question of justification for enactment of a scheme of government from that of justification for any subordinate, ordinary governmental act. Suppose we say that to justify *directly* a political act is to show the correspondence of *this very act* (not just some higher-level act that authorized this one) to ideals of justice or conduciveness to general human goods.[11]

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10. Of course a constitutional scheme may prescribe hierarchical orderings among the varieties of ordinary acts it authorizes and organizes, but these subordinate hierarchies need not concern us here.

11. I'm trying to stay noncommittal here as between deontological and consequentialist modalities of political-moral evaluation. A higher-law scheme's expected consequences bear on its (dis)justification just insofar as one's moral view makes the consequences count for evaluations of this kind.

In constitutional-democratic political thought, demands for direct justification are principally directed to the scheme of constitutional essentials; "ordinary" acts of government we are usually content to justify indirectly, by verifying that they have issued properly from an accepted scheme of constitutional essentials.[12] We may think a particular tax, for example, is bad policy or even in some degree unjust; but if the tax was imposed by a law issuing properly from an accepted scheme of constitutional essentials, then we accept coercive collection of the tax as (at least prima facie) justified. We allow the governmental product to inherit justification from a supposedly justified constitutional scheme.[13]

"Higher lawmaking" in these pages means lawmaking addressed to the scheme of constitutional essentials, the scheme whose justified character (supposing it has one) is thought to be inheritable by specific acts of government that issue from it. It is specifically this kind of higher lawmaking action that, I claim, constitutional-democratic thought must treat as always directly answering to some pre-existing, publicly ascertainable (and also, as matters will develop, politically grounded or immanent) standard of right or good. Which claim is, of course, the nub of my answer to the question I posed at the beginning: How do we think our scheme of government is justified?

C. Reasons of the Governed

I have to say something, now, about how constitutional-democratic thought tends to approach the question of standards of rightness and goodness for higher-law schemes. So consider this: Sometimes (not all of the time, I hope for your sake) your thoughts may turn to questions of the justifiability of basic political arrangements, schemes of constitutional essentials. At those times, I expect, you see your social world as populated by per-

12. I say "principally" and "usually" because there's also in this thought the sense that a scheme of constitutional essentials may itself call—and perhaps, in order to be itself justified, it must call—for direct moral justification of certain classes of specific acts of government. For example, it's widely held that among the regnant American constitutional essentials is a requirement that the enacted procedures leading to certain kinds of deprivations be fundamentally fair. The point is that we don't think schemes of constitutional essentials must, in order to be justified, *always or sweepingly* impose such requirements and when they don't it's to their own putatively justified character that we look to justify the concrete acts that issue from them. (For example, this is how most American observers have been recently accustomed to treat most aspects of legislation dealing with labor relations, trade regulation, and taxation.)

13. This duality of scheme and product bears comparison with other big dualisms that are recurrent in liberal political thought: process versus substance, the right versus the good, law versus politics, constitutional (or deliberative) versus ordinary (or strategic) politics.

sons who are conscious and regardful of themselves both as individuals and as what philosophers call "subjects." This means you then see yourself and others as individuals severally possessed of minds and lives of their own and severally possessed, furthermore, of worthwhile (not to say supremely worthwhile) capacities for taking some substantial degree of charge of their own minds and lives, making and pursuing their own judgments about what to do, what to strive for, what is good, and what is right. These attributions to persons of individualized self-possession and subjectivity are certainly challengeable. It's not hard in our age to stir up philosophic or psychoanalytic or social-theoretic doubts about them. These doubts, however, do not usually seem to stop most of us from making precisely such attributions, virtually automatically, at the times when we are thinking practically about matters of political justice.[14]

It seems to me clear, at any rate, that a view of persons as individual subjects strongly shapes constitutional-democratic thought about constitutional justification. This view of persons prompts a certain sense of what it must mean to defend against imaginable complaint the intrusions and constraints of government in people's lives. Justification then must include, at a minimum, a showing that all of the affected subjects—all of the persons subject to the range of governmental actions in question—have what are actually, for them (whether they appreciate this at the moment or not), good reasons to consent to the scheme of constitutional essentials from which the actions issue.

I intend what I've said to this point as a rather modest and unsurprising claim about the form of constitutional-democratic political thought. I've so far said only that, for each of us (qua constitutional democrat), a minimum condition for higher law justification is our own readiness to attribute to all affected subjects a set of reasons for consent to the scheme of government that we somehow manage to see as both "theirs" and "good." This sense that schemes of constitutional essentials are justifiable only by appeal to reasons aptly attributable to all affected persons is, I am saying, deeply present in constitutional-democratic political thought. I am going to call this the demand for justification by reasons-of-the-governed.

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14. I'm speaking here, as many will doubtless see, of what John Rawls calls a political conception of justice and the person. See Rawls, *Political Liberalism* at 11-22, 29-35 (cited in note 4). Whether there are good grounds for resisting the impulse I describe, or for regarding it as pathological, is beside the point of this essay. See Frank I. Michelman, *The Subject of Liberalism* (book review), 46 Stan. L. Rev. 1807, 1809-10 (1994) (briefly describing controversy over this matter).

Justification by reasons-of-the-governed is a relatively weak demand—at least by comparison with a further justificatory demand, for government under law, which I am about to claim is also a fixture in constitutional-democratic political thought. Getting clear the difference between the two demands is the next step in my exposition.

D. Government Under Law

Imagine, if you will, a country governed by officials organized as legislative assemblies, executive agencies, and courts of law. Acts of government by these officials can frequently have important, shaping impacts on the operative content of the country's higher-law scheme of constitutional essentials. Official acts may resolve what had theretofore been open or contested questions regarding that operative content, or they may in some other way help redetermine or modify that content.

It will help to have before us an illustrative higher-law controversy to which we can refer from time to time, preferably one with which everyone is thoroughly familiar. So go back with me to New Years Day, 1973, prior to the Supreme Court's decision in *Roe v. Wade*. As of that time, the question of constitutional protection (in any degree) for a woman's freedom to control the course of a pregnancy was by no means resolved in the affirmative. It was an open question of higher law, in the clear sense that respectable arguments appealing to higher law principle and precedent were available to presumptively sincere contestants on both sides.

This then-open question of higher law might conceivably have been resolved by a formal constitutional amendment, enacted by supermajorities of Congress and state legislatures as provided by Article V of the Constitution—for example, a "human life" amendment declaring a fetus from the moment of conception to be a constitutionally cognizable "person." Most of us allow, though, that inevitably there are other avenues than formal amendment to resolutions of many open or contested questions of higher-law meanings. We see, in fact, how the concretely operative scheme of constitutional essentials undergoes some degree of redetermination or modification whenever, as frequently happens, judges or other public officials have occasion to interpret the scheme in the course of carrying out their duties under it. Which, of course, is what rather dramatically happened in a series of decisions by the Supreme Court running from, let us

say, *Griswold v. Connecticut*[15] to *Planned Parenthood v. Casey*[16]; a series which, by the prevailing account in *Casey*, has now made it settled higher law in this country—a settled component of our operative scheme of constitutional essentials—that women's freedom of reproductive choice during pregnancy enjoys a certain measure of protection against government.

So we're focused now on the class of official acts by which office-holders (a class in which I include judges) resolve or modify the operative content of extant higher law. And I ask you now to suppose with me that whenever any member of any official body commits one of these acts that has an effect of resolving or modifying the operative scheme of constitutional essentials, or contributes toward an act having such an effect (for example, by casting a vote), these officials always, each and every time, each and every one, act sincerely in accord with what they severally, just then, see as good reasons for consent attributable to all of the governed.

But now suppose, further, that the reasons are disorganized, in the following way. The various officials don't always all concurrently attribute the same set of underlying reasons for consent. In fact, they can frequently be found attributing various different sets of reasons, having diverse and conflicting implications for contested questions of higher-law meaning and content. What is more, individual officials don't reliably attribute the same or even evidently consistent sets of reasons from one day to the next, from one official act to the next.[17]

Whatever you might find worrisome about this sort of situation, it's not that any official is ever, on any given occasion, failing to cite plausible reasons-of-the-governed to justify his or her exercise of power. The problem is not a *want* of cited reasons but rather a *surplus*. This surplus of cited reasons defines the difference between the demand for justification by reasons-of-the-governed and the demand for government under law.

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15. 381 U.S. 479 (1965).

16. 112 S. Ct. 2791 (1992).

17. Constitutional lawyers are wearily familiar with such disorganization, but here is an illustration to convey the idea. Yesterday, Judge *A* voted to uphold against constitutional challenge a law flatly prohibiting abortions. The judge reasoned that the law carries out a commitment lying at the core of people's reasons for consent to the scheme of government, namely, to protect the powerless against abuse by the powerful. Today, Judge *A* rejects (or yesterday, Judge *B* rejected) a child's claim to a constitutional right to the government's protection against parental violence. The judge reasoned that granting the claim would contradict a commitment lying at the core of people's reasons for consent to the scheme of government, namely, to protect individual liberty and privacy against majoritarian oppression.

The demand for government under law is the demand for *consistent* regulation, by some *public and unified* set of *durable, antecedently binding* principles of justice and right, of *all* determinations, interpretations, and resolutions of a political society's operative scheme of constitutional essentials. There is an evident logic behind this demand, and it flows once again from that minimum condition for constitutional justification that I've previously laid before you: that is, attribution to all affected persons of a set of good reasons of their own for consent to the scheme of government.

To see the logic, all you have to do is bear in mind two things: One, what has to be justified is something concrete: an actual, on-going scheme of constitutional essentials, an historically specific, coherently identifiable practice of government. Two, the "subjects" of this justification—the putative holders of reasons for consent—are similarly concrete; they are the living, breathing members of the population of the country, all of whom stand exposed to the powers authorized by this one, actually operative scheme. Constitutional-democratic political justification must, then, concretely consist in establishment of *a* set of reasons why this people (these people)—in their conditions as they make them out given their ways of understanding self, freedom, society, and value—can rationally see they have for submitting to the actual scheme in force over them.[18]

It is this concreteness of the demand for justification by reasons-of-the-governed that explains the demand for a *law* for government to be under—meaning by "law" *a* set, a sensibly unified and consistent set, of public, durable, antecedently binding principles to govern all determinations regarding the constitutional essentials. The demands for unity, publicity, durability, and antecedence—in a word, for lawness—are there because to permit power-wielding officials to resolve or modify the constitutional essentials on the fly (so to speak), free of obligation to conform their resolutions to a unified set of extant, publicly established standards, would be, in effect, to set loose the exercise of governmental power from any actual set of reasons the actual people could really have for supporting the scheme of government to which they are subject.

18. I'm not here making an anti-unversalist, pro-particularist (historicist, relativist) claim. The argument holds regardless of what we say about the samenesses or differences among people(s) in the respects pertinent to judgments of the rightness or best-ness of a scheme of government for them.

In sum: For constitutional democrats, the moral defensibility of an actual practice of government must depend on conscious resolution within (or for) the sponsoring society of some set of enduring and contentful principles of constraint on government—principles expressing *the* reasons that *a* people are supposed to have for submitting to *this* scheme of government. These principles, then, will stand as fundamental—central, definitive, constitutive—for the political order in question, the pledge of its morally justified character. What all this amounts to is that justified constitutional-democratic government must be government "under law."

III. THE SELF-GOVERNING PEOPLE

At this stage of the exposition, the task is to face up as directly as we can to the fact, and its implications, that constitutional democrats hold the notion of popular sovereignty—government of the people by themselves—to be fully regulative for constitutional democracy, on a plane with the notion of higher law. This is what's so intriguing about constitutionalism of the democratic kind: how we try to maintain the demand that the government act under a higher law while at the same time always tying this higher law's validity to the democratic acts of a political society or "people."

Part II traced a logical path from a demand for justification of government by reasons of the governed to a demand for government under law. Suppose, now, that we can also confirm something that I've already intimated (and that may seem highly plausible on its face): that the laying down to a country of a scheme of constitutional essentials is itself an act of government. At that point, if we safely reach it, we'll have established the always-under-law thesis. Won't we?

For remember what the thesis is. The thesis is—to restate it verbatim—that it's a constant (if usually unspoken) premise in constitutional-democratic political thought that "whoever is engaged in higher lawmaking for a country (and I don't care how high up the (n)s you want to go) is, in that engagement, answering to some still higher law that is already there, in place." And isn't that established if we've confirmed: (1) that the demand that government be under law is a constant in constitutional-democratic political thought, and (2) that acts of higher lawmaking are acts of government?

But hang on a minute, you may say. The argument, you may say, runs into a special complication in the case we're consider-

ing, by reason of the special identification in this case of the higher lawgiver with the people themselves. Prescription of higher law *by a people to themselves*, you may say, just is not the kind of act or event to which the logic of the demand for government under law is applicable.

After all, the reasons a people have or consider themselves to have for submitting to a scheme of government may not be fixed once and for all. It seems likelier that these would be changeable over time, in ways that would call for corresponding change in the operative scheme of constitutional essentials. Of course, it doesn't necessarily follow that it has to be the people themselves who decide when a change in their reasons requires change in their operative political constitution; self-government is a normative choice or ideal, not (politically speaking) a logical necessity.[19] Deep democrats may demand to know who better—who other—than the people themselves should or even can determine when their reasons have changed, and in what ways, and what needs to be done by way of constitutional alteration to take due account of whatever change in reasons has occurred. But whatever one says about that question, there will remain a formidable challenge to the claim for extension of the always-under-law thesis to the case of higher lawmaking by the people themselves: Supposing, as popular-sovereignty theory calls us to do, that the decider of these questions about the people's reasons *is* the people themselves, are these not then matters of a sort that logically must be exempt from any "under law" requirement?

The challenge is apt. The logical path we traced from "reasons of the governed" to "always under law" does, indeed, seem to run out when the higher lawmakers are conceived to be the governed themselves. If, then, the always-under-law thesis does extend to this case of self-government by the people, it must do so for additional reasons. Now, additional reasons for making the extension do, in fact, exist. While it is arguable that such reasons are already contained in the very idea of self-government,[20] I want to take a somewhat different tack here and suggest that they arise from the conceptual need to confer an identity on "the People" that is continuous across an event of higher lawmaking, leaving them the same People after as they

19. Philosophically speaking is another matter: whether, for example, there can be (individual) freedom without (political, popular) self-government "all the way up." But that is not the chosen topic of this essay.

20. See Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4, 25-27, 47 (1986).

were before the event. Without such a conferral of continuous identity, we cannot affirm popular sovereignty.

Popular sovereignty signifies what Lincoln said (although he may not have meant his phrase in just our sense): government of the people not only for the people but by the people. It signifies self-government, the condition of a people living under a regime of higher law, of constitutional essentials, that they themselves make or adopt. Popular sovereignty, accordingly, conceives of higher lawmaking events as deliberate acts of a capital-P People legislating.

What is more, the idea envisions a People legislating not only to the official agents—congresses, presidents, courts—whom they constitute by their higher lawmaking acts, but to themselves as the self-same (self-governing) People as those who legislate. This point—that the People sovereignly conceived as giving law must be identically and therefore sovereignly conceived as taking law—is crucial to the exposition, so I'm going to pause over it for a moment.

A People legislating a constitution legislate to themselves, qua People. They do so at least insomuch as every constitution (worthy of the name) is a law containing a binding rule about how itself (including the rule of which we just now speak) may be revised. In the Constitution of the United States, this rule—saving the views of the Yale non-exclusivists[21]—is Article V, requiring (in several alternative permutations) concurrent supermajorities of both houses of Congress to propose an amendment, or of the states to instigate a convention for proposing amendments, and then a supermajority of state legislatures or ratifying conventions to ratify a proposed amendment. Apparently, then, there is a dimension of political freedom that we both attribute to the chartering People (represented as the authors and ratifiers of Article V) and deny to the People as thus chartered—that is, the freedom to decide upon procedures of higher lawmaking. The charterers ("We the People of the United States") seem to stand, then, on a different plane of authority from the chartered ("our posterity"), as creators to creatures. How is it possible to construe such an event as one of self-government?

There are possibility conditions for this, I now want to suggest, but they are stringent. For a People to be self-governing

21. See, e.g., Bruce Ackerman, *Higher Lawmaking*, in Levinson, *Responding to Imperfection* at 63 (cited in note 1); Akhil Reed Amar, *Constitutionalism in the United States: From Theory to Politics* in id. at 89.

means for them to legislate to themselves as the self-same People as those who legislate. This means that the lawmaking act emanates from a People whose collective character or "political identity" (to use Bruce Ackerman's nice term) not only continues through the process of enactment undissolved and self-identical but also, by the same token, pre-exists the process.[22]

We need to say, then, what it is we think confers political identities on empirical human aggregates, identities of a sort that allows us to check for the sameness of the identities of the People who lay down constitutional law and the People to whom it is laid down. What do we think this people-constituting, identity-fixing factor could possibly be? Must it not finally come down to an attitude of expectation or commitment shared by constituent members of the putative capital-P People? Of expectation of the presence among them of some substantially contentful normative like-mindedness, or at the very least of commitment to searching out the possibility of this? An expectation of, or commitment to, some cultural or dispositional or experiential commonality from which they can together try to distill some substantially contentful idea of political reason or right?

Think, now, about how matters look from the standpoint of the People on the downstream side, so to speak, of an event of higher lawmaking. As a self-governing people, *they* cannot accept law from anyone save . . . themselves. But it seems they can know themselves as themselves—can know themselves as, so to speak, a collective political *self*—only by knowing themselves as a group of sharers, joint participants in some already present, contentful idea, or proto-idea, of political reason or right. This means they can know their lawgivers as legitimate—as sharing political identity with them—only through *the lawgivers'* perceived or supposed participation in some political-regulative idea that's sufficiently distinct to be identifiable—identifiable, that is, as the same one as theirs. What we're saying here, in effect, is that a population's conception of itself as self-governing, as legislating law *to itself*, depends on its sense of its members as, in their higher lawmaking acts, commonly and constantly inspired by and aspiring to some distinct regulative idea of political justice and right, but an idea that itself has sprung from the politics of the self-same self-governing People.

22. See Bruce Ackerman, *We the People: Foundations* 204 (Belknap Press, 1991). Ackerman writes, it seems to me paradoxically, of "an entire People . . . break[ing] with its past, and construct[ing] a new political identity for itself."

What I believe has now been established is this. Constitutional democrats attribute higher lawmaking to "the People themselves,"[23] conceived as *self*-governing; and it's precisely *because* they do so that they cannot ever conceive higher lawmaking either as total revolution or as writing on a clean slate. To put the matter in a somewhat different way: Higher lawmaking is always, in constitutional-democratic concept, a product of a framed political interaction, an interaction framed by some already present, politically grounded, idea of political reason or right.

IV. THE PEOPLE'S COURT

Let us now ask: Is this political-normative idea that constitutional democrats can't help thinking must frame and regulate every (justified) event of higher lawmaking by the People properly called an instance of *law*? We approach the question indirectly, by noticing that a "yes" answer carries with it certain odd-looking implications, and then to trying to figure out how we might be able to make sufficient sense of these implications to entertain seriously the premise from which they spring.

To start to see what these odd-looking implications are, we can recur to our illustrative case. The scheme of American constitutional essentials operative today protects some measure of freedom on a pregnant woman's part to control her pregnancy. This is now a settled component of the scheme, at least according to the prevailing view in *Casey*. Imagine, now, a reversal of this component by a so-called "human life" constitutional amendment, duly enacted by one of the procedures provided by Article V of the Constitution. Since a part of our business here is coming to terms with the idea of popular sovereignty, we shall regard the amendment, as that idea requires, as undoubtedly an act of the People themselves.

Suppose, now, that we give the name "law" to the political-normative idea that (according to my foregoing exposition) constitutional democrats think must be there, in place, to regulate every instance of higher lawmaking by the People. Then it seems we would have to regard our human life amendment as not only an expression of the People's legislative will but as also, at the same time, the People's rendition of something like a judgment

23. See *The Federalist* No. 40; Ackerman, *We the People* at 177-78, 192 (cited in note 22).

at law.[24] This conjunction of legislation and adjudication is unusual, but is it unthinkable? Could we not see the higher-law enactment—the constitutional amendment—issuing as a kind of remedy from a legal decision, bound and determined by legal argument presented to the People's court?

There immediately appears a fairly glaring trouble with this construction of the case, which we can present in terms provided by Bruce Ackerman. The amendment would plainly be meant as an alteration in the country's concretely operative scheme of higher law, a reversal of the *Casey* settlement. The amendment would furthermore have, at least potentially, a palpable degree of the quality that Ackerman calls transformative. Its seismic effects across a broad swathe of the higher law could turn out to be considerable. Now, "transformation" is a brave term—one well suited, one might say, to sovereignty. "Transformation" insinuates, in Ackerman's language, a "radical break" from the political past, a "drastic change," a new beginning.[25]

But according to Ackerman and many others, *legal* arguments are demands for *fidelity* to a political *past*—meaning, wherever and insofar as the People are supposed sovereign, fidelity to the past lawmaking acts of the People.[26] The paradigmatic addressee of a legal argument is a court staffed by judges, and judges in popular-sovereignty theory are agents of the People whose special trust is "preservation" of the People's past higher lawmaking. (Just ask Alexander Hamilton[27] or John Marshall[28].) On these terms, it would seem, there cannot be such a thing as a

24. There surely is some affinity between John Rawls's notion of public reason, see Rawls, *Political Liberalism* Lecture VI at 212-54 (cited in note 4), and the notion I'm exploring here of a politically grounded "law" that (I say) constitutional democracy supposes higher lawmaking by the People to be always under. A friend who read this asked whether there's any conflict between Rawls's remark that the restraints or obligations of public reason are not a matter of law (see id. at 213), and my suggestion that the higher-lawmaking People are supposed to be rendering something like a judgment at law. I don't think so. Rawls means to say, I believe, that there is no positive legal obligation on citizens to judge public questions by and only by the light of public reason; public reason is "an ideal conception of citizenship," id., not a subsisting legal obligation. There is nothing to the contrary in my unfolding account of constitutional democratic political thought. According to my account, it's not (in this thought) a matter of subsisting legal duty that the People treat questions of the constitutional essentials as matters of judgment under a standard; it's rather a (very possibly counterfactual) presupposition of the idea of the justified character of the governmental order.

25. See, e.g., Ackerman, *We the People* at 204-05 (cited in note 22).

26. See, e.g., Bruce A. Ackerman, *The Storrs Lectures: Discovering the Constitution*, 93 Yale L.J. 1013, 1053, 1070-71 (1984).

27. See *The Federalist* No. 78.

28. See *Marbury v. Madison*.

legal argument to justify potentially transformative higher law changes.

Do we move too fast? Here is one possibility I suppose we ought to consider: Perhaps it's both conceivable and acceptable for a legal argument to aim at a transformative result, even understanding legality as fidelity to popular sovereignty, as long as the addressees of the argument—the judges in the case (so to speak)—are the People themselves and not their subordinate judicial agents. But that would still leave the question of what it would mean, then, to call the motivating argument a legal one. What analogy, what noteworthy similarity, would we be perceiving between judicial decision in a constitutional case and the higher-law resolutions of the People themselves?

Apparently, the noteworthy similarity would have to be that both judicial decision and popular higher lawmaking are ideally meant to depend upon exercises of judgment according to an ascertainable, politically grounded standard of right. Now, one might suggest that a name for a publicly ascertainable, politically pedigreed standard of right to govern debate over what is now to be done politically is *law*; and argument appealing to such a standard would, then, be legal argument.

But of course this doesn't resolve our difficulty, it only restates it. The difficulty comes in trying to attribute to a single act of higher lawmaking the two properties of fidelity (legality) and freedom (transformativity). If by calling the act a legal one we mean it is to be approached and construed as a collective exercise of judgment under a pre-existent governing standard that's somehow already politically endorsed as a part of the higher law, then to speak in the same breath of transformation—or even, more modestly, alteration or change—is to fail to report with precision what is going on. Isn't it?

Well, perhaps not. Perhaps not, if we understand "transformation" in a relative sense. It is relative to what I'll call the "layer" of constitutional law that's operative at any given moment for the practices of officials and citizens. For we've now begun, in effect, to think of constitutional law as multi-layered, as itself containing relatively "lower" and "higher" layers. So that one can always argue by appeal to a higher layer—to some more ultimate (alleged) precept or precepts of American political morality, for which the Constitution stands and which accordingly carry the force of law—in defense of some projected "transformation" of the lower, currently operative legal layer.

We would find ourselves, then, with an account of the argument for the "human life" amendment—call it the "amendment under law" account—running roughly as follows:

> "Right now, in the post-*Casey* moment, we have in force an operative layer of constitutional law containing, as one component, a measure of protection for the procreative freedoms of pregnant women. Such is the higher law that right now binds and obligates the subordinate official agents of the sovereign People, judges of course included. But there is also right now awaiting recognition [so would run this account] a higher, more ultimate layer of constitutional principle that, if recognized, would warrant a contrary legal conclusion. This higher layer of constitutional principle is itself cognizable as binding law. It is, however, thus cognizable only by one court, the court of the People acting by way of constitutional amendment. Pending such a cognition by the People, the currently operative layer of constitutional law continues in force."

This sort of multi-legal-layer account would provide a way to begin to make sense of the notion of a (fidelity-inspired) legal argument or legal judgment, aiming at constitutional transformation. But whatever sense the account makes may prove fragile when we start to follow up in earnest its implications.

For consider: However mistaken any of us might think the judgment-of-higher-principle that formal adoption of a human life amendment would represent (on the always-under-law account), no more than a tiny handful of us would dream of denying that this action lies within the subject-matter jurisdiction, so to speak, of the People acting under Article V. Yet among those of us who would thus freely concede this jurisdiction to the People, a sizeable fraction would also join the *Casey* plurality in denying it henceforth to the Supreme Court. How would we, then, explain ourselves? If there is some respect in which the People, acting within their rightful jurisdiction, can renovate constitutional essentials, and a parallel authorization is denied to judges sworn to uphold the Constitution, then that seems to undermine the suggestion that the People's higher lawmaking actions are always ideally meant to be products of judgments governed by upper-layer constitutional principles.

But maybe it doesn't. A constitutional system might, for various reasons, contain jurisdictional rules barring one or more classes of tribunals from pursuing the demands of law all the way up. Our system does contain such rules, most obviously its commonplace rules of intra-judicial hierarchy. Again to illustrate: Almost everyone would agree that there *was* a period of time

after 1973 when the Supreme Court quite properly held itself open to legal argument aimed at persuading it to put aside, to overrule, what it later came to call the central holding of *Roe v. Wade*,[29] but that there never was a time when any lower federal court could properly have entertained that possibility, independent of the Supreme Court's lead. This example suggests that there may be some way to extend our "always under law" account of higher lawmaking to make the account explain why some ministrations of upper-layer higher-law content are reserved to a tribunal apart from the Supreme Court, that of the People themselves, while still construing what the People do, whenever they lay hands on the higher law, as the rendition of interpretative judgments.

V. JUSTIFICATION AND APPLICATION

Within the frame of an always-under-law account of higher lawmaking, what could possibly explain special jurisdictional reservations to the People from professionally expert tribunals sworn to render judgment according to law? The likeliest answer, I think, is practical doubts that interpretation of higher-law norms can always be held securely distinct from selection or identification of the norms themselves, or, in other words, practical doubts that acts of interpretation can always be held securely distinct from acts of legislation.

Theory differentiates between acts of norm-origination and acts of norm-interpretation; theory differentiates between originary discourses of justification and secondary discourses of application.[30] If these theoretical differentiations were secure, and experienced as secure, in actual constitutional-democratic practice, then it would seem that the following would be a necessary and sufficient condition for popular sovereignty, for self-government by the People of a country: *The people "themselves" are the originators or the endorsers of all the norms composing the country's higher law.* In order for popular self-government to exist or be the case, originary questions would have to be reserved to the People. By the same token, however, all questions of interpretation and application could be left to judicial or other subalterns without compromising popular sovereignty.

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29. See *Casey*, 112 S. Ct. at 2791 *& passim.*

30. See, e.g., Jürgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?* in Jürgen Habermas, *Moral Consciousness and Communicative Action* 195, 206 (MIT Press, Christian Lenhardt & Shierry Nicholsen tr. 1990).

What's striking about the account herein of the popular-sovereignty component in constitutional-democratic political thought is that it doesn't at all play in that way. On the one hand, according to this account, the People are not envisioned as ever originating norms;[31] the extension to the case of popular higher-lawmaking of the always-under-law thesis says that the People's higher-law ministrations are always interpretative, never originary. On the other hand, according to this account, the People's self-government is perceived as compromised when subordinate officers (judges) are allowed to enter certain reaches of norm-interpretation; jurisdiction in these reaches is reserved to the People. It seems, then, that this account implies a relativization—or perhaps a denial of the significance or detectability in practice—of the origination/interpretation and justification/application distinctions that theory posits.

31. Although, it must be conceded, all norms are envisioned as having originated with the People.