Facts, Fictions and Other Artifices: “Constituent Authority” as the Work of Imagination

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Essay

Facts, Fictions and Other Artifices: “Constituent Authority” as the Work of Imagination

ZORAN OKLOPCIC

Increasingly preoccupied with the imaginative dimension of modern constitutionalism, contemporary theorists are still more inclined to treat the foundational ideals of modern constitutional government as the work of some abstract social imagination, rather than to turn their gaze inwards—and reflect on the ways in which their own creations contribute to those ideals’ survival. The aim of this Essay is to explore what might such, more self-reflective, and inevitably more meta-theoretical exercise entail, by paying attention to the tension that runs through Rick Kay’s seminal work on constituent authority—which in a certain sense illustrates the predicament of most constitutional scholars: torn between the imperatives of scholarly sobriety and patriotic loyalty—which makes them more inclined to rationalize the authority of established constitutional fictions—and their residual intellectual curiosity, which encourages them to foreground the inventive, artificial and imaginative character of constitutional government, in general.
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Facts, Fictions and Other Artifices:
“Constituent Authority” as the Work of Imagination‡

ZORAN OKLOPCIC *

INTRODUCTION

The fiction that replaced the divine right of kings is our fiction, and it accordingly seems less fictional to us. Only the cynical among us will scoff at Lincoln’s dedication to “government of the people, by the people, and for the people.” Sober thought may tell us that . . . [no government] can literally be by the people. But sober thought will also tell us that the sovereignty of the people, however fictional, has worked.1

[T]raditional authority is based on what we could call the mystique of the Institution . . . [W]e know that Authority is a fiction, but nevertheless this fiction regulates our actual, real behaviour; we regulate social reality itself as though the fiction were real. But the cynic . . . does not really accept its symbolic efficacy, he merely uses it as means of manipulation. The efficacy of the fiction takes its revenge on him when a coincidence of the fiction with reality occurs: he then performs as “his own sucker.” . . . The totalitarian, too, does not believe in the symbolic fiction . . . he knows very well that the Emperor is naked. . . . Yet in contrast to traditional authority, what he adds is not “but nevertheless” but “just because”: just because the Emperor is naked we must hold together the more, work for the Good, our Cause is all the more necessary.2

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‡ For Rick Kay, the most global among American constitutionalists; a constitutional imaginer extraordinaire—in admiration.

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Imagination is a social practice, a communal activity, an aspect of life, a form of work, or an unnamed phenomenon that involves individual cognition in ways that remain unspecified. It is a process that occurs in a society, to a society; something that is exercised for the sake of a political community, or by a community itself. For the most part, its accounts are re-interpretations of its existing theories of imagination, affirmations of its importance, and meditations on the imagination of others, such as Hobbes, Locke, Rousseau, Schmitt, and other canonical constitutional thinkers. Amidst the growing number of scholarly works on the phenomenon of imagination, one is yet to encounter those that directly confront imagination as the quotidian activity of imagining—not imagination as a historical phenomenon, but imagination-in-action. Even those that explicitly embrace the inevitably imaginative character of theory, and who exhort others to exercise their imaginations more freely, rarely seem to take their own advice. Imagination—like Sartre’s hell—seems to be (for) the other people.

Like imagination, “constitution” is not only a name for a done deed, an artefact, but also for an activity of constituting. If so, what do we imagine when we imagine the activity of constituting? Constitution as construction? If so, what would that make of constitutional imagination? A subjective dimension of the inter-subjective practice that goes under a rather familiar name of “social construction”? A simple answer to this question is: not really. A more elaborate answer must address a couple of related questions.

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3 For a similar point, at a more general level, see EDWARD S. CASEY, IMAGINING: A PHENOMENOLOGICAL STUDY 221 (2d ed. 2000) (“It is a revealing fact that some of the very same philosophers who publicly denounce imagination make abundant use of imagining in their actual practice . . . . The result is a paradoxical pattern of denial-cum-acknowledgment in which an express denigration is accompanied by a covert recognition of the special utility of imagination in the very process of philosophizing.”).

first: what do we mean by construction? Are there acts of imagination that cannot be reduced to the acts of construction?

According to Ian Hacking, “[t]he core idea behind construction, from Latin to now, is that of building, of putting together.” What is being put together is something whose existence is taken for granted, however we call it: bricks, elements, parts, components, building-blocks, and so on. From that perspective, we constitute constitutions by constructing them from a set of generic elements. What they are is a matter of perspective: some scholars will focus on constitutional norms, some on institutions, some on functional and territorial divisions of power, some on the distribution of personal, material, and spatial jurisdiction, and some on underlying principles and their “basic structures.”

Though it is certainly possible to imagine constitutions as (social) constructions that consist of pre-existing elements, the choice of these elements is a matter of something else: a perspective, an approach, a point of view from which we “observe” these, and not those elementary building-blocks in our world of constitutions. But why “observe” and not observe? The first answer to this question is short and simple: observation—as the outcome of observing—depends on the parameters that define our specific observation protocols and which cannot be reduced to a rather misleading notion of “perspective.”

II

A longer and more complicated, if ultimately more illuminating answer, starts off with an illustration whose aim is to demonstrate the constituent power of our observational frames. Altering their circumference defines not only the extent of our observation—that is, how far, or how much we “see”—but, more importantly, the character of what ends up being observed: what, exactly, we “see.” By way of example, consider first the effects of changing the scope of our observational frame in a more natural environment—say, in a forest in which, all of a sudden, you become aware of a swarming multitude of ants before your feet.

If you narrowed the circumference of your gaze, you’d naturally be forced to focus your attention on individual ants. Seeing a pine needle atop of one ant’s back, how would you describe that scene? As the process of the transportation of the needle by virtue of a moving ant, or as a situation in which a little ant exists as a willful agent, holding, bringing, taking, dragging the object in question, and in doing so contributing to the success of the overall endeavor?

In turn, while you might still refer to such ants as attempting, persevering, or succeeding, a more panoramic scene would appear if you

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expanded your circumference. You would start considering how different patterns in their movement and interactions give rise to the emerging pattern on the ground: a new anthill—the effect of manifold activities that can be attributed to no single ant in particular. Or, in more formal terms: "the narrowing of the circumference thus encourage[s] . . . the stress upon the ‘efficient cause’"—it encourages, in other words, the focus on an agent that causes the act in question.

Expanding the circumference, in contrast (looking at the proverbial bigger picture) situates that actor’s willful agency within a broader landscape of (inter-)action. Within that landscape, the references to that agent’s “will” reveal themselves as one of the oblique ways to describe the purpose of agency within a broader field of struggle. We see the same logic at work behind the vocabularies we use to make sense of some of the most violent global phenomena, such as the conflicts over territorial sovereignty. We have no qualms about personifying the formal holders of the right to self-determination.

However when we happen to imagine them, we tend to speak of them as the peoples that willingly and willfully accept, reject, aspire, struggle, fight, decide, or otherwise act like giant humanoid actors. Notice, however, that we may only do so if we zoom in on those struggles. That is, if we observe them from close up, from close enough to forget, that is, about the broader environments in which we’d detect not the acts of will, but rather the effects of spatiotemporal reconfiguration that can be attributed to no sovereign will in particular.

The problem with these suggestions is not that they are not intimately connected with the practice of imagination, but rather that they still don’t say much about the ways one might more deliberately and purposefully exercise imagination as the participant in the scholarly practice of constitutional theory. In order to do so, it is necessary to begin by making three important distinctions: (1) “between process and the product, between the way one gets there, and the result,” both of which are alluded to by the “-tion”-suffixed verbal nouns such as constitution, or imagination; (2) between imagination as a purposeful activity and the acts of imagining; and (3) between the imagined activities of scholars—from those that do not appear as imagined at all (such as theorizing, conceptualizing, or defining)—to those, which only seem to make sense if we are able to imagine what they involve in action.

At different levels of abstraction, such activities will typically include: (i) delineating, such as drawing a line that separates an inside from an outside, trivially, but also in more concrete, and kinetically complex ways;

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7 HACKING, supra note 5, at 36.
(ii) cutting (e.g. carving out a national homeland from a territory of a sovereign state with the help of a foreign or detaching a pre-existing territorial unit from a federation); (iii) moving, from one standpoint to another; (iv) zooming and focusing, and, at some point something which is perhaps most economically described metaphorically; and (v) choosing an optical, recording, or some other instrument that will determine the outcome of the observer’s observations.

III

While the vocabulary of modern constitutionalism constantly reminds us of a necessity to cut—to cut off (de-cidere) and cut out (ex-capere)—we never really create new “ideas and structures from scratch.” In doing so, we rarely confront the question of what is constitutionalism, to begin with. It could be an ideal (like communism), an era (like nationalism), a system (like socialism), a tendency (like majoritarianism), a phenomenon (like populism), a state of affairs (like antagonism), an achievement (like pluralism), or a logic (like capitalism). In the case with Rick’s constitutionalism, it is a general pre-disposition: a risk-averse attitude which “prefers the awkwardness of rigidly bound state action to the possibility that government will overshoot the mark in dealing with new circumstances” and is ready “to concede the costs of suboptimal public responses to change as an acceptable price to pay for the security obtained.”

Rick’s constitutionalism takes for granted the “liberal view” on “the optimal conditions for developing human welfare,” which “supposes that human thriving is most likely to be obtained in a life that is largely self-defined.” Though it would be possible to critique this view, for ignoring that the questions of “how to live one’s life . . . [have] already been answered, implicitly or explicitly, in every social formation . . . [including those] that embrace[] the pluralism of forms of life,” what’s important to notice is something that might otherwise be easy to ignore: beyond preventing over-reach, mitigating broadly-defined evils, regulating narrowly-defined objects, and restraining other public actions, the basic existential function of Rick’s constitution is not to serve the interests of a sovereign people as its trans-generational collective author. Rather, it is to

make the life of the people it governs—whoever they may happen to be, in one way or another—better.

If so, could we, perhaps, imagine what it looks like? We should be able to. Rick’s essays are full of industrial equipment—“explicit machinery for periodic constitutional revision,”12 “the machinery for electing and convening the convention,”13 “the active machinery of government,”14 “structural machinery of constitutionalism,”15 “state machinery,”16 the “decision-making machinery that claims to represent the consent of the human population,”17 the non-existent “machinery for submitting national lawmaking to a popular vote,”18 the “institutional machinery constituting the Canadian state,”19 and the “old machinery of colonial legal authority.”20

Not only are constitutions the creatures of our imagination, but we construct them, and live ‘under’ them.21 Constitutions are structures which exist in 3D!

Could some such structure be what Rick might have had before his eyes when he made an effort to stress that the constitutions which “define[] the institutions and procedures required to effect genuine acts of the government created” do not simply lay down the law, but that they actually “constitute[] in the literal sense?”22 Though intriguing, it is actually hard to imagine that “ordinary or primary” sense of the term “constitution” would refer to anything else but some more or less ceremonious proclamation that the rules and principles inscribed in the parchment are from that moment on “in force” as the supreme law of the land.

Not only is that idea hard to imagine, but it is quite possible that in languages other than English—including my native Serbo-Croatian—the only way to make sense of the notion of “constitutions that literally constitute” is to invent a new verb on the spot (“ustavi koji doslovno ustavljaju?”) which probably wouldn’t make much sense either—at least not the one which I manufactured a moment ago—and which reads that

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13 Id. at 728.
15 Kay, American Constitutionalism, supra note 9, at 16.
20 Kay, Constituent Authority, supra note 12, at 733.
21 Id. at 743.
22 Kay, Constitutional Chrononomy, supra note 10, at 32 (emphasis added).
“constitution literally block,” or, more archaically, “literally establish a dam.”

IV

A constitution is an artifice—as is constituent authority. The material we have for constructing it may be “malleable,” and though it “may be many things,” constituent authority “is not anything we want it to be.” Ultimately, it depends on the “prevailing attitudes” of those on the ground, and which ultimately depend on their own “perception” of it. In order to provide an adequate description of constituent authority it is important to consider those attitudes through examination of “complicated and ill-defined practices” and “processes of constitution-making and constitutional application.” Which “prevailing attitudes” to consider? And “prevailing” where?

Rick’s answer is that it is “reasonable to assume we are dealing with some group of individuals associated with some territory.” But why? We don’t get an answer to that question because Rick pre-empts it with starting that sentence with “although we can imagine other possibilities,” which, on first look appears as a concession (true, “we can imagine” constituent authority otherwise) but which can also be read as if you don’t think this account of constituent authority is reasonable, you are free to imagine “other possibilities,” so suit yourself. None of this is to say that making that assumption is unreasonable—only that to the extent we think that making it is reasonable, it is in light of some “other possibilities” that we must have already considered—which is to say, imagined.

So while it may be reasonable to conclude that “[t]he continuing normative force of constitutions” depends on attributing them to the acts of will of territorially delineated political communities, that conclusion may not be so reasonable if we assumed that a number of those communities belong to a federal state, whose integrity they contest, or within a supranational organization, as the peoples of its member-states. Which one to focus on is not a matter of what is reasonable, but of a motivated preference, which involves not only the choice of a spatiotemporal frame within which the attitudes of those on the ground are to be observed, but also those that involve further where to look, how, and in what capacity. If, for example, you:

23 Kay, Constituent Authority, supra note 12, at 761.
24 Id. at 756.
25 Id. at 720.
26 Kay, Constitutional Chrononomy, supra note 10, at 32.
27 Kay, Constituent Authority, supra note 12, at 739.
28 Id. at 738 (emphasis added).
29 Kay, Constitutional Chrononomy, supra note 10, at 39.
imagine you’re a Martian, looking down on Earth, and you look into national constitutional courts and you hear what they’re saying and then you look into Luxembourg at the Court of Justice and you hear what they’re saying . . . you can’t make any sense of it, you can’t reconcile it. They all think they’re sovereign, they all think they’re supreme.\textsuperscript{30}

One does not have to imagine being a Martian, or someone who is looking at the EU from outer space; one can also choose to approach the situation \textit{from within} one of the jurisdictions on the ground. If that jurisdiction is “national”—then that’s that: “national monism is correct.”\textsuperscript{31} And vice versa: “[i]f we are within the EU jurisdiction,” then the “EU monism is correct.”\textsuperscript{32} This would still make Rick’s claim true, but only relative to the contingent preferences of the one who is doing the “considering.”

At that point, it becomes obvious that what shapes Rick’s, and everyone else’s account of constituent authority includes not just the objective constraints—which prevent it from being \textit{anything} we want it to be—and not just our more or less self-aware attempts to determine “many things” that constituent authority could be—but also \textit{something}, which we inevitably do \textit{want} it to be.\textsuperscript{33} That does not mean that we have stopped observing what is going on the ground, only that the “observed quality . . . that enables [persons] to produce [a] . . . constitution” (as Rick defines “constituent authority”) will not be independent from mostly unchosen ways of looking at things, but many of which are—upon reflection—eminently under the control of “observer”-theorist.\textsuperscript{34}

What influences those ways, as we’ve just seen a moment ago, is a number of choices each of which could be made differently: a standpoint (somewhere from outer space, from which you can gaze both at the European Court of Justice in Luxemburg and national apex courts, wherever they are), orientation (first toward Luxemburg then toward national apex courts) as well as a number of other acts of imagination.

As an illustration of how constitutional theory looks in practice once seen as a mental effort that involves (more or less deliberate) activity of imagining, it’s useful to go back to Abbé Sieyès and Carl Schmitt—not only because their work, for better or worse, remains critical to


\textsuperscript{31} Pavlos Eleftheriadis, \textit{Pluralism and Integrity}, 23 \textit{RATIO JURIS} 365, 373 (2010).

\textsuperscript{32} Id.

\textsuperscript{33} Kay, \textit{Constituent Authority}, supra note 12, at 761 (emphasis added).

\textsuperscript{34} Id. at 720. See also Kendall L. Walton, \textit{Mimesis as Make-Believe: On the Foundations of the Representational Arts} 15 (1990) (“If I find myself musing, spontaneously, about a candy-striped polar bear jumping over the moon, I may nevertheless realize that I could, if I wanted to, imagine instead a polka-dotted grizzly jumping over a star, or that I could stop imagining altogether.”).
contemporary constitutional theory—but also because Rick uses them as sparring partners in his own work on constituent authority.

In trying to show what separates them imaginatively, my aim is not to take issue with Rick’s overall assessment of either of them, nor with an important tension that Rick detected which—far from trivial or inconsequential—still remains ignored in recent conversations about constituent power:

The classic invocations of “constituent power” stress that it requires no justification, legal or moral. “Every attribute of the nation,” said Sieyès, “springs from the simple fact that it exists,” and Schmitt said that the will of the “constitution-making power is existentially present: its power or authority lies in its being.”

This cannot be the whole story.\(^{35}\)

Though what constitutes the “whole story” will always be a matter of dispute, Sieyès’s three-part drama begins with a scene in which we encounter a group of “isolated individuals” who, in “seeking to unite,” are already a “nation.”\(^{36}\) In the second “epoch” (which we’ve reached by fast-forwarding to a point in which we encounter an already sizeable nation) whose members, wishing to give their union “consistency” begin exercising their “constituent power” in “local parishes”—and in the third epoch—by sending their delegates to the regional assemblies, who in turn send their own to a nation-wide constituent assembly, which ends up exercising the “constituent power” which is today subject of so many theoretical conversations.\(^{37}\)

All this happens within a compressed time frame with Sieyès expanding and refining our gaze each step of the way: from what is ostensibly a scene in the state of nature, on to a more panoramic landscape that features numerous “parishes,” and finally onto the most-encompassing view, which presents us with what is effectively the administrative map of actual France—divided into “forty thousand parishes,” no more no less.\(^{38}\)

In contrast, Schmitt presents us with a scene in which “the people” are assembled for whatever purpose, to the extent that it does not only appear as an organized interest group, for example, during street demonstrations and public festivals, in theaters, on the running track, or in the stadium, this people engaged

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35 Kay, Constituent Authority, supra note 12, at 721 (internal citations omitted).
37 Id. at 136.
38 Id. at 140.
in acclamation is present, and it is, at least potentially, a political entity.\textsuperscript{39}

What we witness, in both cases, are different ways of doing what every constitutional theorist must do somehow: turn events and processes into figures, which others can more easily get a handle on. What we “observe” in both cases, are not simply events or processes, but the recordings of events and processes, which either move too fast for us to see the bloody history of wars and civil wars that shaped France into the receptacle of one nation (as with Sieyès) or which are cut too short for us to “observe” what happens next after the revolutionary moment of “acclamation.”\textsuperscript{40}

What we hope to see next—at least if we sympathize with the specific aspirations of the members of this entity—is to “evoke powerful emotions” and provoke a “coordinated action that cold-blooded calculation would not have produced”—especially when an “initial event is especially vivid and information on the true strength of a regime is scarce.”\textsuperscript{41} Whether this “reality simplifying heuristic” indeed has potential to accelerate the turn of events, and perhaps even reduce the amount of violence typically involved in such events—it will “lead people to overestimate the vulnerability of their own authoritarian regimes” and bring conflict to a next phase in which it will become more obvious whether the original event triggered a revolution that’s coming to its end, or a potentially endless civil war.\textsuperscript{42}

\section*{V}

At this point it is important to notice a fundamental difference between this “political entity” and a “political entity” that appears on the pages of Schmitt’s \textit{Concept of the Political} four years later—at a point when he lost


\textsuperscript{40} \textit{Emmanuel Joseph Sieyès, Views of the Executive Means Available to the Representatives of France in 1789, in Political Writings: Including the Debate Between Sieyès and Tom Paine in 1791}, at 37 (Michael Sonenscher ed. & trans., 2003).

\textsuperscript{41} Henry E. Hale, \textit{Regime Change Cascades: What We Have Learned from the 1848 Revolutions to the 2011 Arab Uprisings}, 16 ANN. REV. POL. SCI. 331, 336 (2013).

\textsuperscript{42} Id. at 336.
interest in a constitutional theory that rests on “abstractions” and “normative ideals.”\textsuperscript{43} Unlike the former, this second “entity” is not an ensemble of actors in the plural (the people who are engaged in act of acclamation) or an emblematic actor (the people, as potential political entities, possess the will for an independent political existence). In contrast to the one that appears on the pages of \textit{Constitutional Theory} and which is set on a stage as an ensemble of protagonists who exercise their constituent power, the “entity” that appears in \textit{The Concept of the Political} is an ensemble of a different kind: not an ensemble of actors, but an ensemble of members.

Rather than set on a stage as an actor in a scene, this ensemble is engineered into theoretical existence. It is a set of elements which satisfy a particular \textit{membership function}, not a concrete manifestation of the friend-enemy distinction. Rather than the incarnation of the ontological category of the political, Schmitt’s political “entity” is an ensemble of those who allow the “entity” to satisfy the following three criteria: (1) to embody “the utmost degree of intensity of a union or separation”\textsuperscript{44}; (2) to be oriented toward the “most extreme possibility”\textsuperscript{45} of existential conflict with an enemy; and (3) to exist as “a totality of men that fights at least potentially”\textsuperscript{46} and stand in opposition to a corresponding totality. Though we don’t know how many of those who belong to this entity must themselves conform to these criteria we must assume that a preponderant majority, if not all of them, will.

How is this account different from another famous one, of Sieyès, who defines the nation (people) as a “body of associates?”\textsuperscript{47} The traditional answer of constitutional theory: Schmitt’s political “entity” evokes an ethnocentric conception of a constitutional subject, while Sieyès’s conception evokes a civic, aspirational ideal of common political community. However, the difference between the two is also a difference between two kinds of sets. Sieyès’s “body of associates” is a \textit{crisp set}, whose membership is defined through the application of a binary criterion—the “associates” either belong or don’t belong to the “same legislature.”\textsuperscript{48} In contrast, Schmitt’s “entity” is not a crisp, but a fuzzy set—a figure that could have been reconfigured had Schmitt decided to scan the multiplicity of attitudes on the ground by calibrating the measuring protocols of his optical module differently.

\textsuperscript{43} \textit{See generally} CARL SCHMITT, \textit{THE CONCEPT OF THE POLITICAL} (George Schwab & J. Harvey Lomax trans., 1996) (1932) (examining the nature of “the political”).
\textsuperscript{44} \textit{Id.} at 26.
\textsuperscript{45} \textit{Id.} at 35.
\textsuperscript{46} \textit{Id.} at 87.
\textsuperscript{47} SIEYÈS, \textit{What is the Third Estate?}, supra note 36, at 97.
\textsuperscript{48} \textit{Id.}
What follows from this, at the very minimum, is a very sensible question: What do theorists hope to achieve—and for what reasons do they think it beneficial to take a very small number of people who may be understood as acting jointly, and treat them synecdochally—pars pro toto, as the stand-in for all the members of a polity? Rick’s answer: “Sooner or later . . . people will ask what it is about the creation of a constitution that obliges them to respect it. [Even though] [p]erceptions of the founding events . . . are liable to change over time . . . for a constitution to endure over decades or centuries, it will be necessary for [a respectful] attitude toward the constitution-makers to persist.”

However, “a constitution [that could] endure over decades or centuries” is a rather strange expectation to have. Especially in a world in which most constitutions don’t live long enough to reach adolescence (let alone senescence), and where those that do, such as the British constitution, don’t even know all the names of its many founding step fathers.

The only constitution to expect to live for another two hundred years is, of course, the American—and definitely not the Japanese (imposed by an occupying power, and dictated personally by Douglas McArthur), or the Canadian (flown over from Britain, and delivered by the Queen of England, as more or less according to the plans of Pierre Elliott Trudeau), or the Bosnian (extorted from the leaders of the warring parties by Richard Holbrooke in Dayton, Ohio).

Most constitutions around the world actually die very young—and yet somehow manage to fulfill at least some, if not all of their basic duties in the nineteen short years they spend on this earth. Why add to the stress level of the local populations, who in addition to everything else, now need to worry about investing extra effort in making something that they probably don’t need in the first place: a more durable constitution? How likely is it that their allegiance—whatever it is—actually does contribute to its success?

Rick says that the “success of the United States government has been substantially established on a wide and deep popular attachment to the

49 Kay, Constituent Authority, supra note 12, at 757.
50 Id.
Constitution and to the idea of constitutional government in general—in part due to “a belief that the Constitution does limit governmental action and that the courts will, when called on to do so, apply those limitations.”

But does such attachment really exist, given the marked absence of constitutional representations from American popular culture? The number of streets named “Constitution,” or paintings featuring the act of forming the Constitution, or local government departments which feature “Constitution” in their name, or the amount of public support for its public celebration is minuscule in comparison to those featuring other patriotic ideals.

Given the paucity of the Constitution’s representations in American culture—and a particularly lackluster attitude toward the official commemorations of its significance—it is fair to ask what Rick means by the success of the United States government and whether that success has more to do with the actual success that government has had in making a material difference in the lives of its citizens, or can be (especially in the early days of the Republic) attributed to the Constitution itself.

Which is to say: the success owed not to “undiscriminating and blind worship” of a visible artefact that evokes reverent awe (as Hannah Arendt famously suggested) but to a visible improvement—“fields a few years ago waste and uncultivated [now] filled with inhabitants and covered with harvests, new habitations reared, contentment in every face, [and] plenty on every board”—as the “effect [that] was the intent of the Constitution,” and a sign that “it has succeeded.”

VI

A Constitution, says Rick, is an “artifice” whose “success . . . depends on the ability, at any given time, to posit a narrative about its creation that is both politically acceptable and, if not historically accurate, at least historically plausible.” Like all narratives, foundational narratives are

55 Kay, American Constitutionalism, supra note 9, at 49.
56 Id.
60 Kay, Constituent Authority, supra note 12, at 760–61. According to Robert Cover, narrative relates “our normative system[s] to our social constructions of reality and to our visions of what the world might be.” Robert M. Cover, Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 10 (1983). For a more skeptical view on the role of narrative in constitutional imagination, see Edward S. Casey, Imagination, Fantasy, Hallucination, and Memory, in Imagination and Its Pathologies 65, 81 (James Phillips & James Morley eds., 2003) (“[I]t is very difficult to superimpose a narrative form on
multifunctional devices. While they remain instrumental to the attempts to justify institutional authority and explain constitutional legitimacy, in doing so they also always have the potential to function as coping mechanisms, enjoyment catalysts, and distraction devices.

As coping mechanisms, the task of foundational narratives is not to justify and legitimize, but explain and rationalize. As is the case with all autobiographical narrations, their task is to reconcile us with our traumatic past that continues to reverberate in our frustrating present, or with our frustrating present that can be overcome in light of our glorious past. From that perspective, foundational narratives are part of an ongoing cognitive-behavioral therapy of more or less traumatic political disorders.

While perhaps put too flippantly, Jean Baudrillard’s insight about what is wrong with the obsession of contemporary constitutional theorists with narrative and its role in the formation of collective identity points in the right direction: “Identity is . . . absurdity. You dream of being yourself when you’ve nothing better to do. You dream of that when you’ve lost all singularity.”61 More charitably, successful foundational narratives will reconcile us with our situation, reduce our political frustrations, and bring us together as a people and give us hope, patience, courage, generosity, energy, and insight—or even wisdom—individually.

There is a reverse side to that, though. Rhetorically successful narratives will also catalyze, if marginally, the effectiveness of constitutional democracy as a regime of affect-management. Here, the task of narratives is to maintain the picture of democratic institutions as instrumental to the processes of collective self-government, while at the same time concealing how they would appear in relief: not as the instruments of opinion- and will-formation of a demos (that transform individual preferences into collective decisions of a demos), but as the instruments of affect-modulation (that, depending on the situation may with different degrees of success intensify, focalize, suppress, neutralize, divert, disperse, or otherwise organize the flows of eros that have the potential to turn demos into an ethnos).

VII

Constitutions, Rick also says, are the “creatures of our intelligence and imagination,” but “from time to time,” there is some value in reminding ourselves, “of the fictions that support [our institutions], and [of] our stake what we imagine. For such a form to ‘take,’ a certain continuity in content and manner of presentation is required. In the absence of such continuity, isolated episodes may appear, but they will not fit together to constitute anything like a story.”).

61 JEAN BAUDRILLARD, PAROXYSM: INTERVIEWS WITH PHILIPPE PETIT 49 (Chris Turner trans., 1998).
in behavior that conforms to those fictions.”62 Though Rick concludes that our “final belief” must be in a fiction,63 in his account of constituent authority he ends up producing at least seven different figures of the people:

(1) the people as the “‘imaginary collective body of the group’ capable of signifying the assent of the real human beings who are to be governed by the constituted power”;

(2) the people capable of “authentic representation,” and having successful “surrogates”;

(3) the people as a “society” which has “formed an awareness of belonging together that can support majority decisions and solidarity efforts”;

(4) the people as a (corporate) person, detected on the basis of criteria, and capable of acting “with all the attributes of personality, conscience and will”;

(5) the “people capable of exercising constituent authority” but incapable of being defined by a “precise algorithm”;

(6) the people whose “perfectly unmediated voice” is “necessarily a fiction,” and whose will may only have infrequent, “crude expressions,” and which can never be expressed with “nuance or qualification”, and finally

(7) constituent “people,” as the supplier of the “necessary consent of the governed to the law to be made by the constituted powers.”

These are not the same figures. Still, each of them conforms to the ideal of the “political rightness of self-government,”67 not dissimilar from Frank Michelman’s definition of “[p]opular political self-government”: a government where the people, themselves, “decid[e] . . . the contents . . . of

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62 Kay, American Constitutionalism, supra note 9, at 49.
63 Id.
64 Kay, Constituent Authority, supra note 12, at 743.
65 Id.
66 Id. at 742.
67 Id. at 743.
68 Id. at 742.
69 Id. at 747 (emphasis added).
70 Id. at 738.
71 Id.
the laws that organize and regulate their political association,”72 where governors, govern “in accordance with the interests of the people,” “on sufferance of popular majorities,” in conformity with “the electoral and representational schemes for toting those majorities,” and “geared to a fair reflection of interests in the population”—which, gives us a reason to believe that they will “attend decently well to the interests of the governed . . . government for the people.”73

And that, at a minimum, involves a “measure of responsiveness,” but that doesn’t tell us whether a “measure of responsiveness” that government owes to its citizens involves “continuing responsiveness . . . to [their] preferences,”74 nor does it tell us how large or small that measure should be, nor what that responsiveness consists of—to begin with. So, it is quite possible to consider the same people as theoretically “decisive in democratic determinations[,]” but at the same time give “no weight to what actual people think in any specific political moment.”75 This is especially true if—as Kim Lane Schepple suggests—the notion that “the present and the preferences of actually existing people should have no particular moral weight” is “cooked into [the] training” of constitutional theorists.76

On closer look, the indispensability of popular sovereignty to liberal democracy has been far from established in the literature. An eminent volume on constitutionalism from the late 1970s, mentions neither popular sovereignty, the people, nor the community as concepts,77 which most contemporary theorists, preoccupied with the questions of constitutional identity, self-constitution, and constituent power, cannot seem to imagine as imaginary. Likewise, contributors to a widely regarded volume on “constitutionalism in transition” from the 1990s, make no mention of popular sovereignty in their discussions of the structure, functions, and forms of limited, mixed, republican, and democratic constitutions.78

72 FRANK I. MICHELMAN, BRENNAN AND DEMOCRACY 5–6 (1999).
73 Id. at 11 (emphasis added).
76 Id.
77 Gordon J. Schochet, Introduction: Constitutionalism, Liberalism, and the Study of Politics, in CONSTITUTIONALISM 5 (J. Roland Pennock & John W. Chapman eds., 1979) (noting in the introduction that the understanding of a “constitution” is formed by “a set of formal political institutions rather than an ideology”).
78 CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES (Richard Bellamy & Dario Castiglione eds., 1996). There are a few exceptions in the volume that did mention popular sovereignty. See J.H.H. Weiler, European Neo-Constitutionalism: In Search of Foundations for the European Constitutional Order, in CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL PERSPECTIVES 105, 105 (Richard Bellamy & Dario Castiglione eds., 1996) (confronting the legitimacy of the European constitution); Ulrich K. Preuß, Two Challenges to European Citizenship, in CONSTITUTIONALISM IN TRANSFORMATION: EUROPEAN AND THEORETICAL
If Bernard Yack is right, the doctrine of popular sovereignty invests “final authority in an imagined community”79 whose historical act of will set the foundations for the existing constitutional order, but remains agnostic on who rules in its name in the meantime.80 While Yack agrees that popular sovereignty “promotes a more egalitarian picture of political order . . . [and] can easily become the starting point for justifications for more democratic forms of government,”81 he also claims that it would be “a mistake . . . to identify the modern doctrine of popular sovereignty with commitment to democratic forms of government”82—a position similar to that of Daniel Lee, who argues that “popular sovereignty has essentially nothing to do with democracy.”83

If so, liberal (constitutional) democracy is not necessarily a popular form of government. And vice versa: liberal democracy may be a form of popular government even when its constitutive principle appears antithetical to the principle of popular sovereignty. Would Rick agree with this proposition? Though I am not sure that he would, that conclusion could be inferred from Rick’s remarks on the predicament of “unelected constitutional courts” in contemporary constitutional democracies.84 These “unelected constitutional courts” enjoy “a high regard from the population” as the institutions whose authority derives from a popularly-adopted constitution, yet are easily seen as “non-democratic” within a broader system of government that is essentially “mixed.”85 What can we infer from this? At least five things, I think:

(i) that it is possible for an institution to be both “non-democratic” and “popular”;
(ii) that a “non-democratic” institution can still be legitimate if it belongs to a system of government which is sufficiently well regarded—which is to say “popular”;
(iii) that “popular” government and “democratic” government are not coterminous;

80 Id.
81 Id. at 518–19.
82 Id. at 518.
84 Kay, Democracy, Mixed Government, and Judicial Review, supra note 14, at 199.
85 Id. at 221–22.
(iv) that liberal democracy may be both democratic as well as popular government even though it doesn’t subscribe to the principle of popular sovereignty; and

(v) that liberal democracy may be a “mixed” form of government—that is “popular” because it’s democratic and vice versa, or that is “democratic” as well as “popular.”

This is what Rick might have had in mind when he concluded that contemporary constitutional democracies still conform to

[the constitutional scheme designed by the American founders . . . [who] intended to separate the active machinery of government from the choices of the populace, so that the public voice, pronounced by the representatives of the people, [who presumed that such government] will be more consonant to the public good then if pronounced by the people themselves, convened for the purpose’. But [who] also meant to provide machinery that could not long function in contradiction with deeply held desires of the population . . . . [On this scheme] it was sufficient that a republican government ‘derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure and for a limited period, or during good behavior’. All our modern ‘constitutional democracies’, even those with constitutional courts that have slipped the bonds of the constitutional text, satisfy that definition.\(^{86}\)

Theoretically speaking, Rick is probably right. But whether modern constitutional democracies satisfy this definition depends on the assumption that it is indeed the case that they actually “could not long function in contradiction with deeply held desires of the population.”\(^{87}\) Whether that is, indeed the case, depends not only on one’s sense of what counts as “contradiction” in this context, but also on what counts as the “desires of the population”—as well as on one’s assumption about how long its institutions can go on ignoring them. And that, in turn, depends which desires one considers to be typically “deeply held,” and which ones, not.\(^{88}\)

\(^{86}\) Id. at 226 (citations omitted).

\(^{87}\) Id.

\(^{88}\) Id. If it is indeed true that “democratic decision-making” is “becoming riskier” because of the growing expectations that it reflects “the unmediated preferences of the population”—as Rick seems to believe—that will be a problem that risk may be worth taking if those unmediated preferences reflect
But there is a practical angle to this entire issue. It is one thing to say that all constitutional democracies still, in principle, count as forms of government, which are in some broad sense, “of” and “by” the people because they still cannot “long function in contradiction with deeply held desires of the population.” But this still doesn’t settle the issue of whether such forms of government ought to count as the governments, which are for the people, whose constitution in order to count as “the people’s law . . . must meet [the] need” of the people.90

VIII

The references to the “people,” (their “will,” “sovereignty,” “authority,” and “decision”) and “democracy” muddle the issue. They distract us from the connotations of the adjectives “popular” and “democratic,” which range is not unlimited, and which are not completely dependent on the terms they qualify. Instead, they seem to have a hard core, which travels with them wherever they go, and which—in a number of instances—prefigures the meaning of those terms, as well as our attitudes toward what they signify.

For instance: the idea that national parliaments tend to be consumed by “intemperate passions and . . . fluctuations” (as Alexander Hamilton suggested) will make far more sense if we imagine a typical national parliament as “a popular assembly” instead of a democratic legislature—not just because we’ve replaced a term that primarily connotes a gathering (assembly) with one that refers to the more serious business of making laws (legislature)—but also because we’ve imagined that body as “democratic,” which is to say, a kind of body that tends to “impose procedures on [itself] that help to ensure that [its members] act carefully, not hastily; wisely, not foolishly.”93

Though theorists differ in how they see the role of a sovereign people in a modern constitutional democracy, most of them don’t really think that it was the people which spoke the American constitution into existence—or which demonstrated its sovereign will by deciding to leave the European

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89 Id. at 226.
92 Id.
Union, or which dethroned Evo Morales in an act of democratic revolution.

Though hardly enthusiastic about the idea of an actually existing, sovereign, and politically-unified political community, many contemporary constitutional theorists still refuse to look beyond the horizons of popular sovereignty. Rather than explicitly responding to the objections of those who see the ideals of popular sovereignty as outdated, counterproductive, or dangerous, many—if not most—contemporary constitutionalists simply continue as usual. Though well aware of the objections that could be raised against the notions of popular sovereignty in theory as well as in practice, their unstated response seems to conform to the formula: “I know very well, but nevertheless . . . .”

Among the scholars who’d be inclined to say so, there are those who know very well that a constitutional order is not authored by the people, but nonetheless believe that the ideals of popular sovereignty manifest themselves whenever a mass of citizens takes part in democratic elections, overthrows a despotic government in a revolution, or makes a decision in a referendum that results in secession.

Then there are those who encourage others to see the people as the author of a constitutional order for the reasons that have nothing to do with the ideals of popular sovereignty, and even though they know very well that the people never existed and never will—but who nevertheless, when the moment comes, cannot resist missing an uprising against a dictator as an act of popular revolution, the result of a referendum as the manifestation of popular will, or the adoption of a new constitution as an act of popular self-determination.

And then, finally, there are those who know very well that the people don’t exist, that there is no such thing as the sovereignty of the people, but who nevertheless defend these conceptions because they have a privileged insight into its true significance and its indispensable contribution.

Which one is Rick Kay—is hard to say. On the one hand, Rick doesn’t maintain a critical attitude toward fictions at all times. “We construct rules, institutions, relationships, values and then we live in them. The character and success of our lives,” he says, “are genuinely determined by those creatures of our own intelligence and imagination.” At the same time, he

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96 Kay, American Constitutionalism, supra note 9, at 49.
sides with Wallace Stevens, believing that “[f]inal belief must be in a fiction.” The fiction of what?—and for what?—remain open questions.

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97 R. D. Ackerman, Believing in Fiction: Wallace Stevens at the Limits of Phenomenology, 3 PHIL. & LITERATURE 79, 80 (1979).