THE PEOPLE: A PRE-PRIMER FOR CRITICALLY REEVALUATING REPRESENTATION & COURT POWER IN THE PRESENT

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The American polity is experiencing an array of challenges that some characterize as constituting an acute crisis of American identity, governance, and government.[1] In particular, questions pertaining to the representative character and content of the People[2] have assumed center stage in politics and law. What exactly is an American? Who or what are the People? Is there an authentic, viable American political identity or community? Or do the deep ruptures and balkanization that seem to pervade law and politics—ranging from pandemics, national security, impeachment, and the environment, to issues of an everyday, local nature—indicate a crisis of legitimacy, cohesion, and national community?[3] What exactly is the role of the U.S. Supreme Court in this milieu? Although there are competing

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1. *See, e.g.*, E. J. DIONNE JR. ET AL., IS AMERICAN DEMOCRACY IN CRISIS?: THE MUNK DEBATES (2018).

2. The "People" as employed in this writing is indicative of an objective signifier that draws on and perpetuates the notion of a homogenous, unitary signified, as presented, for example, in the initial U.S. Constitution. The "people" is indicative of a subjective signifier that reflects the diversity of the actual people(s) incorporated/excluded in positing the People. *See* DANIEL CHANDLER, SEMIOTICS: THE BASICS 14 (2d ed. 2007) ("Focusing on *linguistic* signs (such as words) . . . a sign [is defined] as being composed of a 'signifier' (*signifiant*) and a 'signified' (*signifié*).). "Contemporary commentators tend to describe the signifier as the form that the sign takes and the signified as the concept to which it refers." *Id.* An identity signifier, for example, is composed of a signifier, for example, Black, Gay, or Latino, and a signified concept, for example, racial, sexual, or ethnic identity.

3. *See* Julia Azari, *It's the Institutions, Stupid: The Real Roots of America's Political Crisis*, FOREIGN AFF. (July/Aug. 2019), https://www.foreignaffairs.com/articles/united-states/2019-06-11/its-institutions-stupid [https://perma.cc/MV9E-UTUK]; *Freedom in the World 2019: Democracy in Retreat*, FREEDOM HOUSE, https://freedomhouse.org/report/freedom-world/freedom-world-2019/democracy-in-retreat [https://perma.cc/RN25-MYNC] (last visited April 18, 2020); Sheryl Gay Stolberg & Nicholas Fandos, *Pelosi Declares Nation is in a 'Constitutional Crisis,'* N.Y. TIMES (May 9, 2019), https://www.nytimes.com/2019/05/09/us/politics/pelosi-constitutional-crisis.html [https://perma.cc/4T35-BNQD]; Simon Tisdall, Opinion, *American Democracy Is in Crisis, and Not Just Because of Trump*, GUARDIAN (Aug. 7, 2018), https://www.theguardian.com/commentisfree/2018/aug/07/american-democracy-crisis-trump-supreme-court [https://perma.cc/WLB3-UK5Y].

interpretations of what the People signify, these notions of representation are deeply contested. Today, who or what the People signify and what is representation are important questions to revisit.

In light of the foregoing questions, this brief work employs a critical conceptual approach to frame and examine Court power, and lay groundwork for (re)assessing its impact on government, governance, and representation. More specifically, the Court's ultimate power to interpret and pronounce the fundamental law[4] rests upon a key notion that merits critical analysis, i.e., the People. This Article thus analyzes the People as a political, legal, and ideological process and construct, and examines its impact on law and democratic society premised on representational politics.

Among other issues, the Court has explicitly tasked itself with maintaining the integrity of its power and constitutional order through the exercise of judicial review and supremacy. Review and supremacy have been and continue to function as key facets of Court power and identity.[5] Each plays a profound role in affecting and effecting the character and content of the population that resides within the ambit of the Constitution. Review and supremacy, however, are essentially elitist, anti-democratic modalities employed to interpret the fundamental law by an elite, unaccountable, life-tenured Court. Elitism and non-representativeness are thus key characteristics of Court power.[6] The elitist nature of the Court is reflected in its place in the constitutional order and its character—that is, it is a non-democratic, life-tenured, unaccountable institution composed of nine people who constitute a highly discrete and insular institution, and who occupy positions at the highest echelons of society.[7]

The Court's institutional character, identity,[8] and interests[9] thus play a key role in the overarching constitutional order and interpretation of the fundamental law. The Court has claimed, explicitly and implicitly, the power of review and supremacy to effectuate its authority.[10] The Court exercises and reifies its power by interpreting the fundamental law, creating a corpus of knowledge that is a lodestar and ballast for maintaining the integrity, stability, authority, and legitimacy of the constitutional order that underpins

4. "Fundamental law" in this writing refers to interpretation of the U.S Constitution.

5. *See* Martin Shapiro, *The Impact of Supreme Court Decisions: The Supreme Court Speaks*, 23 J. LEGAL EDUC. 77, 84 (1970); Otis H. Stephens, Jr., *John Marshall and the Confluence of Law and Politics*, 71 TENN. L. REV. 241, 242–43 (2004).

6. *See* William J. Daniels, *The Supreme Court and Its Publics*, 37 ALB. L. REV. 632, 656–57 (1973); P. M. Williams, *The Supreme Court and Politics*, 5 OXFORD J. LEGAL STUD. 91 (1985).

7. *See* ARTHUR F. BENTLEY, THE PROCESS OF GOVERNMENT: A STUDY OF SOCIAL PRESSURES 288–89 (1908).

8. *See* Rogers M. Smith, *Identities, Interests, and the Future of Political Science*, 2 PERSP. ON POL. 301, 302(2004).

9. *See* GAETANO MOSCA, THE RULING CLASS 114 (Hannah D. Kahn trans., 1939).

10. *See* Cooper v. Aaron, 358 U.S. 1 (1958); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123 (1999); Larry D. Kramer, *Foreword: We the Court*, 115 HARV. L. REV. 5, 6–16 (2001).

the polity.[11] In employing review and supremacy, the Court utilizes a basic concept of its own making, i.e., the People.

The People is a primary mechanism to examine in critically assessing Court power. On its face, the People seems a straightforward signifier. The

> Preamble declares who is enacting this Constitution—the people of 'the United States.' The document is the collective enactment of all U.S. citizens. The Constitution is 'owned' . . . by the people, not by the government or any branch thereof. We the People are the stewards of the U.S. Constitution and remain ultimately responsible for its continued existence and its faithful interpretation.[12]

Yet upon closer inspection, this is not the case.[13] The Court itself has acknowledged that the People is mostly a term of art employed in select parts of the Constitution[14] and has provided differential interpolations of the People in its jurisprudence.[15]

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11. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810); *see also* Larry Alexander, *The Constitution as Law*, 6 CONST. COMMENT. 103 (1989); Raoul Berger, *Constitutional Law and the Constitution*, 19 SUFFOLK U. L. REV. 1 (1985); William W. Van Alstyne, *The Idea of the Constitution as Hard Law*, 37 J. LEGAL EDUC. 174 (1987).

12. Erwin Chemerinsky & Michael Stokes Paulsen, *Common Interpretation: The Preamble*, NAT'L CONST. CTR.: INTERACTIVE CONST., https://constitutioncenter.org/interactive-constitution/interpretation/preamble-ic/interps/37 [https://perma.cc/ZPD4-TTEZ] (last visited April 18, 2020) (emphasis omitted). Yet,

> [i]n the Preamble and in the Constitution itself, . . . the term 'people' is found only twice, plus seven times in the amendments; in the Constitution there is no significant current use of 'person' (although five pre-amendment uses may be referred to), while in the amendments proper there is a maximum use of only six such instances; and, finally, in the entirety of the Preamble, Constitution, and amendments, the maximum use of 'people' and 'persons' is therefore found in 15 instances. For a 'government of the people, by the people, for the people,' it seems almost sacrilegious that our fundamental document contains this term only twice, and only nine times if the subsequent amendments are added; and even if 'persons' is thrown in, the significant total rises only to a maximum of 15.

Morris D. Forkosch, *Who are the "People" in the Preamble to the Constitution?*, 19 CASE W. RES. L. REV. 644, 649 (1968).

13. *See, e.g.*, Opinion of Edmund Randolph, Attorney General of the United States, to President Washington (Feb. 12, 1791), *in* MATTHEW ST. CLAIR CLARKE & D. A. HALL, LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES: INCLUDING THE ORIGINAL BANK OF NORTH AMERICA 86, 88 (Washington, Gales & Seaton 1832) ("The preamble, if it be operative, is a full constitution of itself, and the body of the constitution is useless; but that it is declarative only of the views of the convention, which they supposed would be best fulfilled by the powers delineated; and that such is the legitimate nature of preambles.").

14. United States v. Verdugo-Urquidez, 494 U.S. 259, 265 (1990) ("'[T]he people' seems to have been a term of art employed in select parts of the Constitution. . . . [Its uses] sugges[t] that 'the people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.").

15. *See* District of Columbia v. Heller, 554 U.S. 570, 580 (2008) ("[T]he people' . . . unambiguously refers to all members of the political community, not an unspecified subset.");

The People, unlike the physical peoples that constitute the American populace, can be viewed as an act of imagination. As an ideological and political construct, the People has been operative since before the founding, and has been employed by elites other than the Court. In *Federalist No. 2*, for instance, John Jay's exposition of the People is used to argue for the primacy, inevitability, and organic nature of the Union, and a singular American People:

> it would conduce more to the interest of the people of America that they should, to all general purposes, be one nation, under one federal government . . . .
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> It has until lately been a received and uncontradicted opinion that the prosperity of the people of America depended on their continuing firmly united, and the wishes, prayers, and efforts of our best and wisest citizens have been constantly directed to that object . . . [that there is] safety and happiness in union . . . .
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> Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who . . . have nobly established general liberty and independence.
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> This country and this people seem to have been made for each other, and it appears as if it was the design of Providence, that an inheritance so proper and convenient for a band of brethren, united to each other by the strongest ties, should never be split into a number of unsocial, jealous, and alien sovereignties.
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> To all general purposes we have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection.[16]

This conception of the People, which Jay argues is the lodestar of the Constitution, is severely inaccurate and neglects the multifarious communities and sub-communities of human beings who were not considered fully human under the law at the time of the founding, such as women, children, African slaves, and white men without property.[17] However, notions of peoplehood are not static; the People has been expanded by the Court to include previously non-recognized persons as well as non-human entities such as corporations.[18]

The People is thus a complex sociocultural, legal, and political construct that provides a primary basis for legitimizing the Court's power. The Court has provided nuanced and, at times, seemingly contentious or differential

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see also Note, *The Meaning(s) of "The People" in the Constitution*, 126 HARV. L. REV. 1078–79 (2013).

16. THE FEDERALIST NO. 2, at 31–33 (John Jay) (Clinton Rossiter ed., 1961).
17. *See* Forkosch, *supra* note 12, at 662, 711.
18. *See* Santa Clara County v. S. Pac. R.R., 118 U.S. 394, 396 (1886).

notions of the People in the fundamental law.[19] Thus, Justice James Wilson's observation and question, i.e., "'The PEOPLE of the United States' are the first personages introduced [in the Preamble]. Who were those people?,"[20] are quite relevant to assessing Court power in the present. Indeed, the Court has ostensibly interpreted the People in a direct manner. The People is the wellspring of power and the ultimate authority in the constitutional order:

> [T]he Constitution itself is in every real sense a law—the lawmakers being the people themselves, in whom, under our system all political power and sovereignty primarily resides, and through whom such power and sovereignty primarily speaks. It is by that law, and not otherwise, that the legislative, executive, and judicial agencies which it created exercise such political authority as they have been permitted to possess. The Constitution speaks for itself in terms so plain that to misunderstand their import is not rationally possible. 'We the people of the United States,' it says, 'do ordain and establish this Constitution' . . . Ordain and establish! These are definite words of enactment, and, without more would stamp what follows with the dignity and character of law.[21]

The Court has also stated that,

> [I]n our system, while sovereign powers are delegated to the agencies of government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. It is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration, the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws.[22]

The Court has been consistent in claiming that, "The Constitution of the United States was made by and for the protection of the people of the United

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19. *See Verdugo-Urquidez*, 494 U.S. at 265; Kwong Hai Chew v. Colding, 344 U.S. 590, 589 (1953) ("The Bill of Rights is a futile authority for an alien seeking admission for the first time to these states. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders . . . includ[ing] those protected by the First and Fifth Amendments and by the due process clause of the Fourteenth Amendment."); United States *ex rel.* Turner v. Williams, 194 U.S. 279, 291 (1904) ("No limits can be put by the courts upon the power of Congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land, and unlawfully remain therein.").

20. Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 463 (1793), *superseded by constitutional amendment*, U.S. CONST. amend. XI; *see also* Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) ("Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the Government of the United States or on any of its Departments.").

21. Carter v. Carter Coal Co., 298 U.S. 238, 296 (1936).

22. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

States,"[23] and that it "was ordained and established by the people of the United States for themselves, for their own government . . . as they supposed best adapted to their situation and best calculated to promote their interests."[24] Yet, how the Court construes the People in the fundamental law is independent of the actual physical peoples that are subject to the singular pronouncements of the Court. Critical analysis thus provides insight into how the Court constructs the People, and the consequences that has for representative democratic politics.

Power relies upon discourse and language—a language that has the consequence of de-emphasizing and re-conceptualizing the "reality" of those that are the subject of discourse. In the case of Court power, it is interesting to note its posture toward the Preamble of the Constitution, textually and in "spirit":

> Although that Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power conferred on the government of the United States or on any of its Departments. Such powers embrace only those expressly granted in the body of the Constitution, and such as may be implied from those so granted. Although, therefore, one of the declared objects of the Constitution was to secure the blessings of liberty to all under the sovereign jurisdiction and authority of the United States, no power can be exerted to that end by the United States, unless, apart from the Preamble, it be found in some express delegation of power, or in some power to be properly implied therefrom. . . .
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> > [A]s observed by Chief Justice Marshall . . . "the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words."[25]

The Court has, in essence, placed itself in the position as supreme expositor of what constitutes the letter and spirit of the law via its interpolation of the People. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, for instance, the Court arguably reconfigured the "reality" of poor women via the interpolation of its previous interpretation of the abortion right that it "found" in the constitutional text.[26]

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23. League v. De Young, 52 U.S. (11 How.) 185, 203 (1851).

24. Barron v. Mayor of Balt., 32 U.S. (7 Pet.) 243, 247 (1833); *see also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 402–03 (1819); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 324–25 (1816).

25. Jacobson v. Massachusetts, 197 U.S. 11, 22 (1905) (quoting Sturges v. Crowninshield 17 U.S. (4 Wheat.) 122, 202 (1819)).

26. *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992). Arguably, the Court's utter disconnectedness with the realities of the majority of the American people is so stark that it simply cannot understand the basic problems and challenges that so-called ordinary people face:

> [T]he District Court found that for those women who have the fewest financial resources, those who must travel long distances, and those who have difficulty explaining their whereabouts to husbands, employers, or others, the 24-hour waiting period will be 'particularly burdensome.'
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> *These findings are troubling in some respects, but they do not demonstrate that the waiting period constitutes an undue burden*.

The perspective of the Court and its prerogatives take precedence and prevail in constitutional law. The Court is privileged to operate in a self-contained, self-defined textual and linguistic universe.[27] As Justice Antonin Scalia notes, for instance,

> what is remarkable about the joint opinion's fact-intensive analysis [in Casey] is that it does not result in any measurable clarification of the 'undue burden' standard. Rather the approach of the joint opinion is, for the most part, simply to highlight certain facts in the record that apparently strike the three Justices as particularly sufficient in establishing (or refuting) the existence of an undue burden.[28]

The Court, as test-maker, controls how terms are defined and the methods of testing.[29] Legal models and reasoning produced by the Court become the standard to convert the people's reality into the Court's interpretation of the real via the People. The real, the actual, is adjudged and manufactured on the basis of the Court's notion of the People. As Arthur Bentley notes,

> all depends on the shifting of the activities underlying them. Fundamentally there is no reason why a thing should be done one way rather than another, except as we find it in the very activities themselves. The person accustomed to our marriage laws looks upon them as 'natural,' and thinks other nations' laws are 'queer' and needing explanation. Our own he accepts as though they did not need explanation at all. And yet no outside test will give one the advantage over the other. The test must be in the activity itself.[30]

In all configurations of power, however, there is no objective "metalanguage . . . that [can] ground political and ethical decisions that will be taken as the basis of its statements. There is no metalanguage; there are

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Id. at 886 (emphasis added).

27. *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 651 n.10 (1966) (stating that Congress lacks the power "to enact statutes so as in effect to dilute equal protection and due process decisions of this Court."); *see also* Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (plurality opinion) ("*Stare decisis* is a cornerstone of our legal system, but it has less power in constitutional cases, where, save for constitutional amendments, this Court is the only body able to make needed changes.").

28. *Planned Parenthood*, 505 U.S. at 991 (Scalia, J., concurring); *see also id.* at 980 ("The inherently standardless nature of this inquiry invites the district judge to give effect to his personal preferences about abortion. By finding and relying upon the right facts, he can invalidate, it would seem, almost any abortion restriction that strikes him as 'undue'—subject, of course, to the possibility of being reversed by a court of appeals or Supreme Court that is as unconstrained in reviewing his decision as he was in making it.").

29. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) ("Every analysis in this area [of the Establishment Clause] must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'" (first citing Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968); then citing Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

30. BENTLEY, *supra* note 7, at 293. *See generally* JACQUES DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in WRITING AND DIFFERENCE 278 (Alan Bass trans., 1978).

only genres of language, genres of discourse."[31] All "testing, all confirmation and disconfirmation of a hypothesis takes place already within a system."[32] As Jean François Lyotard and Jean-Loup Thébaud observe, "no maker of statements, no utterer, is ever autonomous. On the contrary, an utterer is always someone who is first of all an addressee . . . he is someone who, before he is the utterer of a prescription, has been the recipient of a prescription, and that he is merely a relay; he has also been the object of a prescription."[33] An essential question that arises, then, when analyzing Court power in the context of elitism and the legal process is, who exactly are or what constitutes the People? Herein lies a basis for the legitimacy and authority of the Court to declare what the fundamental law is.

The People, in whose name the Court interprets the Constitution, can be viewed as an elitist construct, a signifier and process dominated by discrete and insular elites, grounded in an interest of sustaining the integrity and perpetuation of the overarching constitutional system and power of the Court. In sustaining Court power, Rogers Smith notes, there is an ethical dimension to consider as well when examining the People:

> What kinds of stories inspire people to embrace membership in a particular political community? . . . Ethically constitutive stories claim that membership in a particular people is somehow inherent in who the members truly are, in ways that are ethically valuable. Most racial, religious, ethnic, cultural, linguistic, historical, and gendered senses of community membership, among others, are ethically constitutive accounts.[34]

John Jay, for instance, provides an ethically constituted imagined People for public consumption during the founding:

> It is not a new observation that the people of any country (if, like the Americans, intelligent and well-informed) seldom adopt and steadily persevere for many years in an erroneous opinion respecting their interests. That consideration naturally tends to create great respect for the high opinion which the people of America have so long and uniformly entertained of the importance of their continuing firmly united under one federal government, vested with sufficient powers for all general and national purposes.
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> The more attentively I consider and investigate the reasons which appear to have given birth to this opinion, the more I become convinced that they are cogent and conclusive.

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31. JEAN FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, JUST GAMING 28 (Wlad Godzich trans., 1999). As Wittgenstein notes, "If a thought were correct a priori, it would be a thought whose possibility ensured its truth. A priori knowledge that a thought was true would be possible only if its truth were recognizable from the thought itself (without anything to compare it with)." LUDWIG WITTGENSTEIN, TRACTATUS LOGICO-PHILOSOPHICUS 13 (D.F. Pears & B. F. McGuiness trans., 1975).

32. LUDWIG WITTGENSTEIN, ON CERTAINTY 16 (G. E. M. Anscombe & G. H. von Wright eds., Denis Paul & G. E. M. Anscombe trans., 1969).

33. LYOTARD & THÉBAUD , *supra* note 31, at 31.

34. Smith, *supra* note 8, at 309.

> Among the many objects to which a wise and free people find it necessary to direct their attention, that of providing for their *safety* seems to be the first. The *safety* of the people doubtless has relation to a great variety of circumstances and considerations, and consequently affords great latitude to those who wish to define it precisely and comprehensively.[35]

The Court engages in the same act of imagination, also putting forth ethically constitutive interpretations of the peoples via the People to create a nexus betwixt it, the populace, and Constitution.

To begin disaggregating the People, one must examine the context in which it is posited, and how it frames and constrains the relationship between people and government. The People is a multidimensional concept. It is the repository of a formal identity. It is the basis of the Constitution—it undergirds the ideas, such as rule of law, authority of government, and legitimate governance, that operationalize government. For the Court, promoting and protecting public confidence in government is central to continued faith in the rule of law and the integrity of the constitutional order.[36] Constitutions "are but a special form of law. They are specially guarded habitual activities of the society, enforcing themselves on all would-be variants . . . . In the United States, constitutions have a special technique, different from statute law, but in subject-matter they overlap at many points."[37] The state, of which the Court is an integral part, acts in the name of the People it serves. "People's beliefs that they owe primary allegiance to some political memberships, along with the conviction of others that they are likely to hold such beliefs, have major consequences for how people understand their political interests, how they act, and how others act toward them on a range of politically significant matters."[38]

When taken as a self-evident concept or construct, the notion of the People functions as a relatively stable notion that expresses itself through a "General Will."[39] In the realms of representation and public policy, however, the People is a highly problematic concept. In the interpretation of the fundamental law, it is empirically the case that the justices are very far

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35. THE FEDERALIST NO. 3, at 36 (John Jay) (Clinton Rossiter ed., 1961).

36. *See, e.g.*, RICHARD H. FALLON, JR., LAW AND LEGITIMACY IN THE SUPREME COURT 20–46 (2018); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 516–518 (2005).

37. BENTLEY, *supra* note 7, at 295.

38. Smith, *supra* note 8, at 304; *see also* Larry D. Kramer, Marbury *and the Retreat from Judicial Supremacy*, 20 CONST. COMMENT. 205, 221 (2003).

39. *See generally* Philip J. Kain, *Rousseau, the General Will, and Individual Liberty*, 7 HIST. PHIL. Q. 315 (1990); *Jean Jacques Rousseau*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/rousseau/ [https://perma.cc/2GDE-2AWT] (last visited April 18, 2020). ("Rousseau argues that in order for the general will to be truly general it must come from all and apply to all. This thought has both substantive and formal aspects. Formally, Rousseau argues that the law must be general in application and universal in scope. The law cannot name particular individuals and it must apply to everyone within the state. Rousseau believes that this condition will lead citizens, though guided by a consideration of what is in their own private interest, to favor laws that both secure the common interest impartially and that are not burdensome and intrusive. For this to be true, however, it has to be the case that the situation of citizens is substantially similar to one another.").

removed from the lives of the American people. Socioeconomically, culturally, and politically, the justices have very little in common with the population they ostensibly represent and serve.[40]

> [T]he educated elite of America have a different set of opinions and values than the rest of the country—not always, but as a rule. The divide between the educated elite and the rest of the nation, on a wide range of legally relevant issues, is bigger than that between men and women, and possibly bigger than divides based on race or religion. . . . [B]y granting the Judiciary the kind of authority it has to invalidate legislation passed by elected bodies, [we] give the educated elite a veto over actions that have been approved politically by the representatives of the American citizenry. The Judiciary[, some scholars note,] is not unlike the House of Lords.[41]

From the foregoing perspective, one can begin to observe that the United States "exists as a sovereign nation with its officially stated Constitution, its economic and foreign policies, its demarcated, patrolled boundaries. 'America,' however, exists as image or idea, as dream or nightmare, as romance or plague, constructed by discrete individual fantasies, and shaded by collective paranoias and mythologies."[42] The concept of a General Will cannot be comprehensibly summarized in the limited space of this Article, but it is problematic in representation and policy. This is the case because, as Bosteels notes, there is no People before the act by which a people becomes the People. The "people are never one or homogenous but many and internally divided . . . far from constituting a stable identity derived from a preordained essence that would have been racially, ethnically, linguistically, culturally, or ontologically definable," the People serves as a mechanism "that produces its own subject, while reminding us that without an element of subjectivation there can be no politics."[43]

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40. *See* Danielle Root, Jake Faleschini & Grace Oyenubi, *Building a More Inclusive Federal Judiciary*, CTR. FOR AM. PROGRESS (Oct. 3, 2019, 8:15 AM), https://www.americanprogress.org/issues/courts/reports/2019/10/03/475359/building-inclusive-federal-judiciary/ [https://perma.cc/NVU2-UTMA].

41. Michael W. McConnell, *What Are the Judiciary's Politics?*, 45 PEPP. L. REV. 455, 458–59 (2018). When the founders articulated the superstructure for an American political and national community and refer to the People, "they think of it always as legitimately represented by its 'natural' leaders," whom medieval philosophers and political theorists designated as "*selecti*, *ephori*, and so on." MOSCA, *supra* note 9, at 380. "The idea that each separate individual should have an equal share in the exercise of sovereignty" is a recent invention. *See id.* at 381. As Gaetano Mosca noted,

> [i]n spite of the gradual adoption of universal suffrage, actual power has remained partly in the hands of the wealthiest classes, and in larger part still, especially in so-called democratic countries, in the hands of the [upper] middle classes. Those classes have always had the upper hand in the controlling cliques of political parties and in electioneering committees, and they have supplied in large part, the reporting and editorial staffs of the daily press [and] the personnel of the bureaucracies and army officers.

Id. at 389.

42. Bharati Mukherjee, *Beyond Multiculturalism*, *in* MULTI-AMERICA: ESSAYS ON CULTURAL WARS AND CULTURAL PEACE 454, 454–57 (Ishmael Reed ed., 1998).

43. Bruno Bosteels, *Introduction: This People Which Is Not One*, *in* ALAIN BADIOU ET AL., WHAT IS A PEOPLE? 1, 20 (2016). For an example of subjectivation, see *Griswold v.*

The question then becomes a political and ideological one, subject to critical analysis on how a polity, and the People (or a subsection of it), is conceptualized in law and politics. The question of who exactly constitutes the People is one of power and privilege. In *Federalist No. 10*, Madison explicitly articulates the elitist foundation for government: governance to protect the opulent minority (the People) from "the superior force of an interested and overbearing majority"[44] (i.e., the people). The minute subsection of the polity that possesses the ability to define—and associate itself as a protector of—the People is correlated with elite sociocultural, political, and economic status.[45] Public Policy discourse and its translation into practice thus reflect the politics that attaches to defining the American People. In immigration, e.g., the notion of an American People is partially a product of the Court's deference to the Executive's substantial control over laws governing which types of people qualify to enter and remain in the United States.[46] The notion of the People is thus not necessarily a representative concept in a democratic sense of the term.[47]

Court discourse reifies its interpretation of a non-democratically constituted People in its jurisprudence, espousing the authenticity of the People via a normative association of its interpretation with an objective referent, i.e., the People rather than the people.[48] The philosopher Alain Badiou defines the notion of a People as "in reality mean[ing] nothing more than 'the inert mass of those upon whom the state has conferred the right to call themselves'" members of a nation.[49] Legitimizing the normative association for a subset of the polity to be or have the power to define the People is partially effectuated by identification of what type of person or group is the basis of the interests of the elite at the upper echelon of power.

Connecticut, 381 U.S. 479, 484 (1965) (holding that "specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance.") .

44. THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter ed., 1961).

45. *See* Michele Benedetto Neitz, *Socioeconomic Bias in the Judiciary*, 61 CLEV. ST. L. REV. 137 (2013).

46. *See* United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950) (stating that "exclusion of aliens is a fundamental act of sovereignty" and that "[t]he right to do so stems not alone from legislative power but is inherent in the executive power to control the foreign affairs of the nation."). The courts, before and after *Knauff*, have been deferential to the executive in the realms of national security and immigration, partially based on Congressional delegation of its immigration power to the executive. In *Kleindienst v. Mandel*, the Court stated that, within the immigration context, the courts should not "look behind the exercise of [executive] discretion" when it is exercised "on the basis of a facially legitimate and bona fide reason." 408 U.S. 753, 770 (1972); *see also* U.S. CONST. art. I, § 8, cl. 4 ("The Congress shall have Power . . . [t]o establish an uniform Rule of Naturalization"); Galvan v. Press, 347 U.S. 522, 531 (1954).

47. *See* Ortiz M. Walton, *Toward a Non-racial, Non-ethnic Society*, *in* MULTI-AMERICA: ESSAYS ON CULTURAL WARS AND CULTURAL PEACE, *supra* note 42, at 451, 452.

48. John Agnew, *Mapping Political Power Beyond State Boundaries: Territory, Identity, and Movement in World Politics*, 28 MILLENNIUM: J. INT'L STUD. 499, 499–521 (1999).

49. Alain Badiou, *Twenty-Four Notes on the Uses of the Word "People*,*" in* WHAT IS A PEOPLE?, *supra* note 43, at 21, 23–24.

The Court assumes this role for the judicial branch. This is why the Court was able to state, in the case of abortion, that

> Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present *whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution*.[50]

The will of the People is an essential aspect of the legitimate exercise of power to declare a singular interpretation of the fundamental law. In expressing the character and content of the people through the People, "the people [the Court] claims as its authority . . . becomes a passive mass that [it] configures, universally."[51] The polity is fractured into distinct communities and identities, while certain minute subsets of the whole have the privilege of identifying the People, simultaneously defining Inside/Outside, People/Other, despite the fractured nature of the peoples in actuality.[52] The People thus function as the bedrock of justification for the State to act on behalf of People. The Court is government, and government is the State. The legitimized expression of the General Will through the electoral system, on all levels of government, still does not reconcile this internal constitutive exclusionary process, in that

> it is never really the case that all of the possible people who are represented by 'the people' show up to claim they are the people! So 'we, the people' always has its constitutive outside . . . . It is this surely not the fact that the 'we' fairly and fully represents all the people; it cannot, even though it can strive for more inclusive aims.[53]

Representation, substantively, is ablated in the exercise of Court power. The Court is able to pronounce judgment on every facet of a subject's legal position as the final word on the fundamental law, where one either views the outcome as "good" or "bad."[54]

The People, then, in a democratic society, is not a homogenizing concept by which distilling a general will takes place, but rather "a set of debates

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50. Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 866–67 (1992) (emphasis added).

51. Badiou, *supra* note 49, at 25–26.

52. *See* Duncan S. A. Bell, *Mythscapes: Memory, Mythology, and National Identity*, 54 BRIT. J. SOC. 63, 64 (2003).

53. Judith Butler, *"We, the People": Thoughts on Freedom of Assembly*, *in* WHAT IS A PEOPLE?, *supra* note 43, at 49, 51.

54. *Compare* Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857), *superseded by constitutional amendment*, U.S. CONST. amend. XIV (holding that, under the Fifth Amendment, African slaves were property, and law that deprives a slave owner of property without due process is unconstitutional), *and* Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that "separate but equal" accommodations based on race do not violate the Fourteenth Amendment), *with* Brown v. Bd. of Educ., 347 U.S. 483 (1954) (holding that laws establishing racial segregation in public schools are unconstitutional).

about who the people are and what they want."[55] This dimension is absent in Court discourse regarding the People in the larger democratic process and political system. When an unaccountable elite hold plenary or a preponderance of power, influence, and control over public policy, the process of democratic representation is stretched thin considering that,

> [t]he people who are the 'we' do something other than represent themselves; they constitute themselves as the people, and this act of self-making or self-constitution is not the same as any form of representation . . . . This act of self-designating and self-constituting forms as assembly that articulates itself as the 'people.' Popular sovereignty is thus a form of reflexive self-making that is separate from the very representative regime it legitimates.[56]

In the administration of justice, then, the Court cannot "concern itself with correcting every injustice . . . . [It must always] consider the big picture."[57]

The Court tends to cast the polity as a passive, singular-willed body of citizens with homogenous interests. This is the opposite of a "we the people" that "does not describe that plurality but seeks to bring about the social plurality that speaks it."[58] The Court's discourse is the bedrock of its power; perceptions of its legitimacy hinge on the integrity of the textual interpretations of the fundamental law proffered for public consumption. "[L]anguage implies a specific metaphysics of life. The interpretation defines our relations to . . . other human beings and to the self."[59] To effectively perpetuate review and supremacy, Court power selectively formalizes the expression of the People's will. This is an inherently political and ideological process. "Many of the Court decisions, perhaps all of them, [have] political repercussions of one kind or another."[60] Thus, the question of who are the People "is never the affirmation of a pre-given identity, never a self-fulfilling prophecy—it is always the production of an image of identity and the transformation of the subject assuming the image."[61] Thus, the Court transforms the American population into the People when it expresses the latter's will.

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55. Butler, *supra* note 53, at 53. *See generally* James L. Gibson & Michael J. Nelson, *Is the U.S. Supreme Court's Legitimacy Grounded in Performance Satisfaction and Ideology?*, 59 AM. J. POL. SCI. 162 (2015).

56. Butler, *supra* note 53, at 51–52. *See generally* MORGAN MARIETTA, A CITIZEN'S GUIDE TO THE CONSTITUTION AND THE SUPREME COURT: CONSTITUTIONAL CONFLICT IN AMERICAN POLITICS (2014).

57. WOODWARD & ARMSTRONG, *supra* note 36, at 272. The quote refers to the case of *Moore v. Illinois*, 408 U.S. 786 (1972).

58. Butler, *supra* note 53, at 52; *see* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 18 (1962).

59. Jeff Huysmans, *Security! What Do You Mean?: From Concept to Thick Signifier*,4 EUR. J. INT'L REL. 226, 231 (1998).

60. WOODWARD & ARMSTRONG, *supra* note 36, at 418.

61. HOMI K. BHABHA, THE LOCATION OF CULTURE 64 (1994).

The question of who is the People remains a political and ideological one, rooted in power. Take, for example, the case of *Warth v. Seldin*,[62] in which the Court reiterated and upheld

> limits on the class of persons who may invoke the courts' decisional and remedial powers . . . when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction[, and] even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. Without such limitations—closely related to Art. III concerns but essentially matters of judicial self-governance—the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.[63]

Justice Potter Stewart expounded upon *Warth*'s reasoning, concluding that, "the case called for a value judgment, not a legal one. The challengers were asking the courts ultimately to rule on economic differences that kept low-income minorities from living near affluent whites. 'What they are really asking us to do is overrule the capitalist system,' Stewart said."[64]

Warth is an exemplar of how the People, its will, and fundamental rights take on a highly specific, restricted, and select interpretation. Sociocultural and economic stratification are a norm, a natural trait of the People. Justice Lewis Powell noted that, "poor minorities were the victims, not of zoning law, but of the economics of the housing market, something the courts could do nothing about."[65] Whether or not one agrees with the Court's ruling, it is a vivid instance of the immense power to mold the people and shape its contours by positing the People in its jurisprudence.

62. 422 U.S. 490 (1975).
63. *Id.* at 499–500.
64. WOODWARD & ARMSTRONG, *supra* note 36, at 444.
65. *Id.* Justice William Brenan, on the other hand, noted that, for "the poor to sue, they had to be rich . . . it was the ordinance being challenged—not neutral economic factors—that insured that the housing market would never change." *Id.* at 445.