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Antinomy as Critique: Popular Sovereignty a Practice and Theory

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Antinomy as Critique: Popular Sovereignty a Practice and Theory

DISSESTATION

submitted in partial satisfaction of the requirements
for the degree of

DOCTOR OF PHILOSOPHY

in Political Science

by

Leah Ann Hemze

Dissertation Committee:
Associate Professor Kevin Olson, Chair
Associate Professor Daniel Brunstetter
Associate Professor Keith Topper

2015
DEDICATION

To

My Family.
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CURRICULUM VITAE

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FIELD OF STUDY

Popular Sovereignty, Political Theory
ABSTRACT OF THE DISSERTATION

Antinomy as Critique: Popular Sovereignty a Practice and Theory

By

Leah Ann Hemze

Doctor of Philosophy in Political Science

University of California, Irvine, 2016

Professor Kevin Olson, Chair

This dissertation identifies tensions within the practice of state sovereignty that have emerged in relation to contemporary democratic practices. Specifically, the dissertation articulates, if not resolves, the tension between the historically constructed, absolute and indivisible sovereign that is the focus of our theoretical understanding of sovereignty, and the amorphous and partial, popular sovereign that is revealed through a detailed analysis of policy construction and execution in the United States.

In the dissertation I argue that characteristics we attribute to popular sovereignty in our intellectual practices are at odds with the institutional practice of sovereignty. The unity, constituent power, and free flow of information that form the cornerstones of popular sovereignty in this intellectual tradition are also, I claim, sources of highly problematic tensions within political practice. These tensions take the form of what I call “antinomies of popular sovereignty.” They are material contradictions within democratic practice that simultaneously limit these practices and give them vital energy. My goal here is to identify several of these antinomies, show how they foil the effective practice of
popular sovereignty, and suggest paths to better navigating (though not eliminating) them in the future.
Chapter 1

Introduction

The aim of this dissertation is to identify tensions within the practice of state sovereignty that have emerged in relation to contemporary democratic practices. Specifically, it will attempt to articulate, if not resolve, the tension between the historically constructed, absolute and indivisible sovereign that is the focus of our theoretical understanding of sovereignty, and the amorphous and partial, popular sovereign that is revealed through a detailed analysis of policy construction and execution in the United States.

I will argue that characteristics we attribute to popular sovereignty in our intellectual practices are at odds with the institutional practice of sovereignty. The unity, constituent power, and free flow of information that form the cornerstones of popular sovereignty in this intellectual tradition are also, I will claim, sources of highly problematic tensions within political practice. These tensions take the form of what I will call “antinomies of popular sovereignty.” They are material contradictions within democratic practice that simultaneously limit these practices and give them vital energy. My goal here is identify several of these antinomies, show how they foil the effective practice of popular sovereignty, and suggest paths to better navigating (though not eliminating) them in the future.

Though I will observe a distinction between intellectual and institutional practices of sovereignty for much of the analysis, their clear division exists only analytically. I will therefore delineate and draw contrasts between a historical conception of sovereignty that
is part of an intellectual tradition emerging most clearly with modern European political theorists (1500-1800), and an institutional sovereign that manifests in political and juridical activities. It is important, however, to remember that these practices are mutually constitutive, each informing the other through long historical processes. Just as it does not make sense to assume an ontological division between people and their ideas and their social institutions, it does not make sense to think of sovereignty’s intellectual traditions as ontologically separate from its institutional instantiations.

A key challenge this analysis faces thus is to bridge the gap between these sets of practices while respecting their analytical distinction. Overcoming this challenge, however, allows one to see that the institutional sovereign relies on a set of imaginings born of sovereignty’s intellectual past. Moreover, despite the fictional character of these imaginings they are foundational to sovereignty ontologically and functionally. A sovereign neither exists, nor functions, without the drawing of artificial boundaries and the creation of imaginary categories.

The dissertation will focus on three contemporary case studies--the unlawful combatant in Guantanamo, economic deregulation and the crisis of 2008, and recent conflicts between democratic politics and national security. While examining these cases, it is important to keep early modern and modern conceptions of sovereignty in the background because these conceptions form the core of the imaginings that animate discussions about sovereignty today. The following description of modern sovereignty is thus intended to help clarify the arguments to be made in the dissertation, not to signify the prominence that historical analysis will play in it.
**Historical Construction of Sovereignty in Political Theory:**

The modern conception of sovereignty, constructed most clearly by early modern political theorists Jean Bodin and Thomas Hobbes, has two primary characteristics. It is absolute and indivisible. The absolute quality of the sovereign is necessary, according to this modern conception, because it is only when the sovereign's power is unhindered that it can establish law. The law cannot, for these thinkers, maintain its status as law if it can be arbitrarily overturned by those to whom it applies. The law can likewise never apply to the sovereign itself. For the sovereign to be absolute, and thus efficacious in its law making capacity, it cannot be subject to the laws. If the sovereign was subject to its own laws the sovereign's ability to make law would be limited. The sovereign could not, for instance, make a law that contradicted previously established law. But more importantly, the sovereign cannot make a law which applies to itself because this presents a theoretical impossibility. As Hobbes famously stated, if the sovereign is subject to the laws of the state, he is subject to "himself" and to be subject to oneself is "not subjection, but freedom."¹ The sovereign cannot be subject to the laws because it is the sovereign who is exclusively responsible for establishing them. This exclusive law making capacity logically requires the sovereign to escape the law’s application.

The theoretical and practical implications of the sovereign’s relation to the law fit neatly within the work of Bodin and Hobbes because of the second primary assumption that they share. That is, that the sovereign is an indivisible entity. If the sovereign's power were to be fractured the clear line between lawmaker and subject is disrupted. Moreover, a sovereign that consists of multiple, distinct parts can have competing visions of the

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creation and execution of legislation. Once the boundaries of the sovereign as an object and actor become difficult to identify, so too do the boundaries of law.

The emergence of popular sovereignty in political theory has rightly posed some difficulties to these works. Both John Locke and early theorists of American Government, such as Thomas Jefferson, viewed divisions within government as necessary for preserving the liberty of man. The three branches of government established in the United States protected the individual in theories of American governance through a process that has popularly been called checks and balances. In this vision the legislative, judicial, and executive capacities are divided amongst different persons so that no one individual is allowed to act in an arbitrary fashion, disadvantaging some individual or group.

Despite these revisions to the theory of law making, the ontological character of the sovereign as well as its central imperative remains virtually untouched in these theoretical developments. While it is posited that various representatives and officials should form the government and take on the day to day activities of law making, the sovereign maintains a single, ontologically coherent body. The preservation and security of this body is what ensures that legitimate government can be maintained that in order to ensure legitimate government in perpetuity. The narratives about the constitution of this unitary body transform, but the importance of its unity remains central. Though there has been a contemporary push to move away from absolutist concepts, continued interest in theorist like Carl Schmitt and Giorgio Agamben, demonstrate the allure of the absolute sovereign as a theoretical construct and object of criticism.
The greatest effort at articulating the process by which the popular sovereign is constructed was undertaken by Jean-Jacques Rousseau. For Rousseau, the people, which constitute the state, are brought together by what he calls the general will. The general will consists of the interests that each private individual has in common with all others; this is ultimately the reciprocal commitment each individual makes with the others to abide by the laws of the community. In Rousseau's writings the principle of the social contract thus binds the individuals of the state together, who collectively embody the materiality of the sovereign.

To secure the existence of the sovereign is then in this analysis to secure the fundamental political bond between individuals. By this equivalency, the primary imperative of the sovereign, which has been implicitly assumed if not directly stated in the writings of earlier theorists, is reaffirmed. That imperative is, simply put, for the sovereign to preserve and perpetuate itself. While the importance of preserving the sovereign remains clear, it is less clear what constitutes its preservation. Both Locke and Rousseau, hesitatingly, make a distinction between the business of governance and creation of government, between particular laws and the principles of lawmaking, and between the administrative state and the sovereign. What lies at the core of these distinctions is the recognition that there is sometimes an uneasy fit between the act of governing and the principles by which the government is established.

Emmanuel-Joseph Sieyes described these differences using the idea of a constituent versus constituted power. The constituent powers are those powers that constitute the state; in Rousseau's vision it is the general will or the sovereign. Constituted powers are those that are constituted by the creation of that state: the
legislative body or the executive. The legitimacy of a constituted body is determined by the extent to which it acts in accordance with the responsibilities given to it by the constituent power. Using these concepts the preservation of the sovereign requires preserving the constituent power. While this idea can be uttered in simple enough terms, the difficulties presented by the original problem are not resolved. Does preserving the constituent power mean to preserve the spirit of the founding of the state? To protect those principles that justified the state's creation? Is it to protect the actual persons who constituted that body? Are these persons the real, specific people involved in the state's creation, or the ideal, constructed in statements like "We the people..."? Finally, is it to protect the administrative state at all costs?

Many scholars and public figures criticized state responses to 9/11, arguing that policies such as the Patriot Act used the idea of national security to justify the use of totalitarian measures. In this way, the Bush administration and its congressional colleagues undermined the very principles of the nation for the stated benefit of ensuring its security. To use Sieyes' language to make criticisms of these acts more clear, the constituted powers enacted policies that violated the popular conception of a free people, putting the constituent power, and thus the legitimate sovereign, at risk.

What these critiques too often do not address are the instances where national security and popular sovereignty are at odds with each other, instances where ensuring the ability of individuals to freely participate in governance requires the violation of some types of participation. Highlighting the importance of this is not meant to condone or condemn policies like the Patriot Act, but merely to suggest that this paradox is central to the existence of popular government. Without a state that not only protects, but also
constitutes, at least in part, the processes of participation the sovereign, as an ideal, popular actor withers away.

In the narratives constructed by political theorists like Locke and Rousseau, this conflict between constituted and constituent powers is resolved by the destruction of the illegitimate state and the construction of a new one. While this solution has theoretical elegance, and is certainly appealing during moments of great social upheaval, it lacks practicality as a perpetual mechanism for correction. Elements of the state are deeply entrenched in all social spheres, to the extent that they can be removed, this removal would constitute a major disruption to individuals' lives. It might be more productive, I think, to accept that there will be tensions between the preservation of the sovereign, as a set of institutional practices, and the preservation of its principles.

The institutional practice of sovereignty—law making, the creation and maintenance of bureaucratic bodies, the use of practical security measures—will at times be at odds with the ideas that form the foundation of popular sovereignty’s intellectual tradition. It will at times prevent participation, close off politics, and subvert the flow of information. These are, however, necessary consequences of popular sovereignty as an institutionalized practice.

The force of this dissertation is that it confronts the tensions between institutional and intellectual sovereignty without either a complete rejection of the theoretical vision of sovereignty, or an impractical and unempirical call for radically new institutional practices. Instead, by looking at sovereignty’s conceptual legacy in tandem with its recent instantiations, it establishes a set of problematics that are fundamental to popular sovereignty as it exists in the 21st century.
Antinomy as Critique

The dissertation uses three examples of contemporary American policy making to demonstrate the irresolvable tensions between the modern conception of sovereignty and the exercise of sovereignty in open, democratic institutions. Each of these cases presents an antinomy because while the modern conception of sovereignty proves inadequate to describe its recent instantiation, the fictions of that concept are required of sovereignty’s legitimated institutional practice.

By focusing on three concrete examples I am able to provide a detailed legal history that does not overlook the consequences of the amorphous and partial nature of the contemporary sovereign. Critical theorists examining the historical moment that animates the dissertation (2000-2010) have been quick to argue that the reemergence of an absolute sovereign is the central feature of politics during this period. While it is clear that the figure of the absolute sovereign does become more present in rhetoric and the language of policy, a close examination of events reveals that despite this the image is never manifest in reality. Placing these short histories within a theoretical context, however, ensures that the genealogical importance of the concept is not rejected simply because of identifiable gaps between the ideal and practical sovereign.

I have used Kant’s structure of the antinomy as inspiration for constructing and probing at the tensions that emerge when the theory and practice of popular sovereignty are considered at length in tandem. While my object is distinct from Kant’s – I do not intend to be faithful to Kant’s construction of reason and the understanding, nor do I want to borrow his epistemological and ontological conclusions—there is, I believe, a helpful
affinity between the empirical and rational philosophies Kant is seeking to reconcile and the concerns I am addressing related to popular sovereignty.

Kant’s chapter entitled the “Antinomy of Pure Reason” is one of the key contributions of the first critique. The argument provides a guide for navigating two seemingly opposed philosophical orientations – rationalism and empiricism. At the heart of the argument is the claim that both rational and empirical philosophy have historically overstepped the bounds of their own insights, leading philosophers of both sorts to make metaphysical arguments that support opposed but contradictory claims about the world. In this dissertation, I use this key insight to explore the boundaries of political theory, broadly, and theories of popular sovereignty, specifically, with the hope of maintaining rather than completely rejecting the contributions of political theorists.

Though Kant does not identify specific philosophical works for which his critique stands as a remedy, he makes references to the opposition between “Platonism and Epicureanism,” and alludes to countless other “metaphysicians” who were subjected to the illusions he describes.2 It has been argued by some that the antinomies were drawn from mediation on correspondences between Leibniz and Samuel Clarke, a Newtonian thinker. I think this is a fair assessment, and the commentary provided in the chapter on the Antinomies provides a helpful tool for moving beyond the rational/empirical divide.

The language of the Critique, however, locates the rationalist and empiricist impulse within the broader psychological framework that is developed throughout the text. In this way, one can read the arguments between Leibniz and Clarke not as an

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historical accident, but as the product of the structure of the human mind, seductive to a point of unavoidability. I would like to capitalize on this approach.

The framework presented in earlier chapters of the Critique divides the mind into two primary knowledge producing structures: the understanding and reason. According to Kant, “cognition starts from the senses, goes from there to the understanding and ends with reason, beyond which there is nothing higher to be found in us to work on the matter of intuition and bring it under the highest unity of thinking.” The senses passively receive intuitions, the understanding then categorizes these intuitions, and reason provides the “highest” unity to these categories.

According to Kant, intuitions are given to us in experience as a manifold, the understanding provides unity to this manifold in both space and time through the application of the rules of experience. Experience is unified in time by the understanding through the relation of cause and effect:

the relation between the two states must be thought in such a way that it is thereby necessarily determined which of them must be placed before and which after rather than vice versa. The concept, however, that carries a necessity of synthetic unity with it can only be a pure concept of understanding which does not lie in the perception, and that is here the concept of the relation of cause and effect, the former of which determines the latter in time, as its consequence, and not as something that could merely precede in the imagination (or not even be perceived at all).

The understanding unifies experience in time by seeking the conditions that fully explain a given experience. In short, by applying the rules of cause and effect.

In space, the understanding unifies the given manifold of intuitions by relating it to conceptual objects. Kant describes the process:

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3 Ibid., 387.
4 Ibid., 305.
Understanding is, generally speaking, the faculty of cognitions. These consist in the determinate relation of given representations to an object. An object, however, is that in the concept of which the manifold of a given intuition is united… In order to recognize something in space, e.g. a line, I must draw it, and thus synthetically bring about a determinate combination of the given manifold, so that the unity of this action is at the same time the unity of consciousness (in the concept of a line), and thereby is an object (a determinate space) first cognized.\(^5\)

The understanding thus provides for the unification of a determinate space by providing the conditions that allow for its unification.

The rules of the understanding provide the conditions that allow for cognition of what is given to us in both space and time. Reason, in opposition to this, has a, as Walsh described it, “preoccupation…with the unconditioned.”\(^6\) Kant argues that “…the proper principle of reason in general (in its logical use) is to find the unconditioned for conditioned cognitions of the understanding, with which its unity will be completed.”\(^7\)

While the function of the understanding is to seek the conditions that allow for the cognition of discrete objects that endure in time, Reason seeks to find the systematic unity of these conditions. Kant explains that this systemic unity can only be generated from an unconditioned, supreme principle, which stands above the dispersed, fragmented experiences provided by the understanding and completes their unification.

The antinomies are revealed when either reason or the understanding attempts to reach beyond its own domain. Reason does this “when it tries to liberate from every condition, and to grasp in it unconditioned totality, that which can always be determined only conditionally in accordance with rules of experience.”\(^8\) The understanding does this

\(^5\) Ibid., 249.
\(^7\) Kant, 392.
\(^8\) Ibid., 496.
by encouraging dogmatic empiricism which moves beyond merely saying that “one
knows nothing” of what is beyond the senses and instead “boldly denies whatever lies
beyond the sphere of its intuitive cognitions.”9 The consequences of this dogmatic
metaphysical thinking brought about by the poor application of both reason and the
understanding are far reaching:

Each of the two says more than it knows but in such a way that the first
dogmatic empiricism] encourages and furthers knowledge, though to the
disadvantage of the practical, the second [dogmatic rationalism] provides
principles which are indeed excellent for the practical, but in so doing
allows reason, in regard to that of which only a speculative knowledge is
granted us, to indulge in the ideal explanations of natural appearances, and
to neglect the physical investigation of them.10

Dogmatic empiricism by overstepping empirical experience denies the possibility for
religion and morality. Dogmatic rationalism likewise rejects intuitive knowledge,
misapplying the principles of reason to the objects of experience.

This insight of both Reason and the Understanding overstepping their rightful
domains is one that I think is particularly helpful when untangling the relationship
between the ideal and practical sovereign. Throughout this dissertation, I use this insight
as a guide to navigate the tensions that arise in the examinations of my case studies.

The First Antinomy

There is a helpful affinity between the categorical structures explored in each of
the four antinomies and popular sovereignty, in as much as the antinomies, like theories
of popular sovereignty, are concerned with what is absolute, complete and necessary on
the one hand, and what is conditioned, partial and contingent on the other. However,
since my aim here is to primarily borrow elements of the structure of Kant’s argument, I am limiting my analysis to just the first antinomy.

The first antinomy’s focus on the beginning of the world also provides a particularly nice complement to a discussion on popular sovereignty since origin stories have figured prominently in the historical articulation of democratic theory.

The first antinomy, like the other three, seeks to demonstrate the conflict between the cosmological positions produced by the overextension of both reason and the understanding. The conflict is revealed by two proofs—the thesis and the antithesis. The thesis makes the claim that the world is infinite – both in space and in time. The antithesis makes the contrary claim that the world is finite. I am limiting the discussion below to Kant’s comments on time for both clarity and brevity. Kant’s arguments on space use a parallel logic and offer little additional value in terms of outlining the structure of the antinomy, so I have chosen to leave them out.

The thesis of the first antinomy, born from illusions produced by reason, claims that, “The world has a beginning in time….” The antithesis, likewise created by the overzealous application of the understanding, makes the contradictory claim that “The world has no beginning…, but is infinite with regard to…time…” 11 Both the thesis and antithesis are supported using apagogic arguments. An apagogic argument proves its case by demonstrating the impossibility of its contrary. The thesis of the first antinomy thus begins by first assuming its opposite—that the world has no beginning. Implicit in this, according to Kant, is the claim that an eternity has already elapsed. This implies further that an infinite series has been completed (an elapsed eternity, is equivalent to a

11 Ibid., 470-471.
completed infinite series). Since by definition an infinite series cannot be completed, “a beginning of the world is a necessary condition of its existence.”  

The antithesis, likewise, begins by assuming its opposite—that the world has a beginning. According to Kant, the idea that the world has a beginning assumes that there was a “preceding time in which the world was not, i.e., an empty time.” Nothing, however, can arise from empty time since its only characteristic of existence is its non-existence. Hence, according to Kant “many series of things may begin in the world, but the world itself cannot have any beginning, and so in past time it is infinite.”

Though my use of the antinomy structure lacks the formalism of Kant’s arguments, it retains an interest in exploring the limits of institutional democratic practices and theories of popular sovereignty by wrestling with the implications of each that emerge when meditating on a set of historically important philosophical questions. Is sovereign power absolute? What does it mean for the people to be sovereign? What is the relationship between power and knowledge? When answering each of these questions theory pulls in the direction of absolutism, while practice provides discrete, imperfect answers. My approach respects both of these insights without rejecting either at the outset. Instead, the limits of both theory and practice are demonstrated by the dialogue between the two and, what Kant would describe as, the absurdities that must be accepted if we accept each on their own terms.

To resolve the antinomies Kant points to Transcendental Idealism, which he spent the first chapters of the critique attempting to prove. According to Kant, Transcendental

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12 Ibid., 470.
13 Ibid., 471.
14 Ibid.
Idealism consists of this: “everything intuited in space or in time, hence all objects of an experience possible for us, are nothing but appearances, i.e., mere representations.”\textsuperscript{15} From this view it is not possible to access things-in-themselves. The objects of experience are real, according to Kant, as appearances, but this does not give us insights into their inner nature that is beyond what is sensible.

Transcendental realism, in opposition to this, “makes mere representations into things in themselves.”\textsuperscript{16} Both the empiricist and rationalist that are engaged in the debates that comprise the antinomies are transcendental realists, in as much as they both assume the world to be a thing in itself. This illusion, according to Kant, though natural, leads to the conflicts described in the antinomies.

In the first antinomy, the rationalist understands the world (the totality of the time series) as a thing in itself in need of completion. As a consequence of this, he insists that it must have a beginning. Likewise, the empiricist assumes that the rules which govern appearances give him absolute truth about the nature of the world. He thinks thus that the world cannot have a beginning because this would violate the rule that all things given are conditioned by what came before. If the world (the totality of the time series) is given, then it too is conditioned.

Transcendental idealism provides relief from this by removing the illusion suffered by both the empiricist and rationalist. The world as it is given and appears to us – as never ending regress in time—is not a thing in itself. Neither is, however, the objective world demanded by reason. That world, which assumes the totality of the series of experiences, mistakes the way by which perception occurs, for the nature of what is

\textsuperscript{15} Ibid., 511.
\textsuperscript{16} Ibid.
perceived. The sum total of the series of experiences is thus not an object, but rather the way in which we understand objects.

In this light, according to Kant, the conflicting ontologies of the world presented in the antinomies disappear. The infinite world conjured into existence by the understanding’s speculation does not exist. Nor does the finite series of all experience that had been assumed in reason’s objectification of the world.

From the perspective of transcendental idealism it is precisely this last hidden possibility that answers the dilemma of whether the world is finite or infinite. Kant argues that if you take away the transcendental illusion that the world is “a thing in itself, then the contradictory conflict of the two assertions” disappears. The world does not exist as “an in itself infinite whole” nor does it exist as an “in itself finite whole.” Since the world does not exist “independently of …my representations” and my representations never adequately capture the world as either a finite or infinite whole, then the object in question does not exist, and thus does not have any magnitude to speak of.\(^{17}\)

In some ways, borrowing this contribution of Kant’s is nothing new. In fact, most, if not all of the theorists I engage with in subsequent chapters are benefactors of this revelation and would not take issue with some version of this claim, particularly as it applies to politics. To say that the people, the state or the sovereign is not a thing-in-itself but a representation, would be easy for most contemporary philosophers. There may disagreement over in what the representation consists or how it is constructed, but by and large there is agreement over the fact that the elements of politics and society are not natural things in themselves, but constructions. What revisiting Kant provides is way to

\(^{17}\) Ibid., 518.
uncover the absolutist impulses that remain in critiques of liberal philosophy and a language to discuss the totalizing nature of the act of theorizing itself.

In Section Nine of the Antinomy of Pure Reason, Kant outlines what he calls the regulative principle of reason. Reason regulates the understanding through its desire to achieve completion. Reason directs the understanding by compelling it to continuously seek the conditions of existing, and when properly applied insists that it stop at the bounds of what can be experienced. It is this regulative quality of theory that I would like to use as the guide for navigating the antinomies of popular sovereignty. Theories of popular sovereignty compel the practice to continuously seek the principles that allow for its legitimation.

In each of the case studies described below this process is explored through the lens of a particular historical moment. Each of these historical moments presents an antinomy that allows for the careful unraveling of the theoretical and the practical.

**States of Exception:**

The second chapter of the dissertation uses the history of the unlawful enemy combatant legislation to articulate the first antinomy of popular sovereignty. The first antinomy is characterized by opposition between the absolute sovereign that is present in popular sovereignty texts and the partial, dynamic sovereign that emerges in the institutional practice of democracy. The institutional sovereign demonstrated by a careful examination of the juridical history of the unlawful enemy combatant has permeable boundaries and an amorphous character. This vision of sovereignty is at odds with the modern conception of the sovereign that is present in theoretical texts. Whereas the modern conception is a highly abstract, simple view that constructs an absolute and
indivisible sovereign, the institutional sovereign is a layered complex construction with permeable boundaries. Its form and content are never determined, and ultimately never wholly distinct from those elements outside itself.

What makes this an antinomy, rather than simply a conceptual problem, is the ontological unity of the theoretical vision of popular sovereignty and its institutional practice. The absolute character of the popular sovereign implicitly assumes the establishment of universals and the construction of “the people.” Without universality the sovereign is indistinct from any other power wielding institution or organization and is incapable of enacting or enforcing the law equitably. Without the construction of the people the sovereign has no legitimate foundation.

In recognizing the value the theoretical vision of sovereignty offers, this chapter navigates the antinomy by offering a way forward that satisfies the spirit of popular sovereignty while recognizing how expectations about the correspondence between the theoretical and practical can lead to an unhelpful divide between the two that can be difficult to overcome if the demands of each are not balanced.

In addition to introducing the first antinomy, this chapter serves to describe sovereignty in contemporary American policy making and critique critical theorists, such as Carl Schmitt and Giorgio Agamben, who have argued that the figure of the absolute sovereign is fundamental to the creation and execution of law.

**WikiLeaks, Whistleblowers and National Security**

The third chapter examines the relationship between popular participation and institutional democracy. By looking at organizations like WikiLeaks.org that espouse a philosophy of radical transparency, the chapter addresses how calls for whistleblowers to
leak classified information through extra-institutional means appeal to a populist sensibility. The rhetoric of WikiLeaks, like that of other populist movements, articulate the people through its construction of the state and other status quo institutions as monolithic, corrupt organizations whose reason d’être is to monopolize power in the hands of the few at the expense of the many.

The chapter explores these populist calls for resistance in light of the institutional structures that support them, and compares these structures with those that compose the national security system. While not dismissing the calls radical transparency advocates, the chapter demonstrates how the organizations that are responsible of hiding information from the public have historically provided opportunities for public oversight and intervention during moments when their fidelity has been compromised and their legitimacy questioned. In so doing, the chapter demonstrates the open character of these institutions, and how they have conflicting intentions and motivations.

By analyzing WikiLeaks and movements like it through the lens of populism, the chapter disentangles claims for open government made by those articulating a radical transparency philosophy from the methods utilized by activists and organizations calling for these changes. This chapter takes seriously the theoretical appeals for a direct relationship between the people and government, but uses the empirical history of the radical transparency movement and several critical moments in the history of the national security apparatus in the United States to demonstrate the consequences of theory that is not balanced with practice. Like in the previous chapter, this chapter is motivated by Kant’s efforts to overcome these tensions by respecting the limits of both.

**The Constituent Power and the Epistemology of Sovereignty**
The fourth chapter formulates third antinomy. The third antinomy exposes the
tensions that arise from popular sovereignty’s epistemological demands. Using the
deregulation of the economic sphere and the financial crisis of 2008 illustratively, this
chapter discusses how practical epistemological problems are at odds with the inherent
epistemological needs of the theory of popular sovereignty. Implicit in the demands of
law makers and theorists alike is the need for government agencies to act on behalf of the
public interest through the execution of legislative and regulatory mandates. For the
government to do this in practice requires it to have a clear understanding of not only the
public’s interests, but how policy can ensure that those interests are obtained. What the
financial crisis of 2008 demonstrates is that government officials as well as the public
often do not possess the expertise necessary to link their desires or interests to specific
policies. Instead, they operate with incomplete knowledge under conditions of great
uncertainty.

This chapter probes at the consequences of this uncertainty when placed in the
context of bureaucratized democratic institutions by discussing the unique role of the
knowledge of experts in legitimizing government practices. Again, this chapter leverages
the spirit of Kant’s work by arguing that the principle of certainty in action, though
unattainable, should animate the efforts of bureaucrats and lawmakers.

Conclusion

The fifth chapter examines these three antinomies together to better understand
sovereignty as an institutional practice, and to add to the intellectual tradition of political
theories of sovereignty. In addition to this, the conclusion suggests how Kant’s insights in
the *Critique of Pure Reason* may provide guidance on the role of political theory as well as its limits.
Chapter 2
States of Exception: The Sovereign Decision in Guantánamo Bay

The events of September 11, 2001 initiated a sequence of executive and congressional acts that sought to limit the rights available to individuals that were deemed “terrorists” or “enemy combatants.” Just one week after the attacks a joint resolution—the “Authorization to use Military Force” (AUMF)—was passed by congress; this resolution allowed the president to use all “necessary and appropriate” force against those who were believed to be involved in the “terrorist attacks.”  

Under the authority of the AUMF the president issued an Executive Order on November 13th that specified the procedures that would be used in the detentions of suspected terrorists. This order, which asserted that detainees could not seek remedy in any domestic or international court, was the impetus for the indefinite detentions in extra-territorial prisons—most notable among these Guantánamo Bay.

Giorgio Agamben, and other critical theorists borrowing his philosophical contributions, criticized these detentions arguing these imprisonments are manifestations of the state of exception—the moment or space where the limits of the law are exceeded. In Agamben’s analysis the responses by the president and congress construct the terrorist as the homo sacer, the figure to which the exception applies, and as such strip him of any legal remedy and expose him completely to the will of the Sovereign—the executive of the United States. In this chapter, in addition to examining the executive and legislative reactions to the attacks I look at the responses made by the judiciary. From this perspective, these paradigmatic cases reveal limitations in Agamben’s formulation of

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sovereignty and the state of exception. Agamben, borrowing from Carl Schmitt, has an absolutist conception of sovereignty: within the state of exception the sovereign’s power is unlimited and the law’s suspension is total. The history of the 9/11 legislation demonstrates, however, is that sovereignty and the state of exception are always partial, historically constituted and contested, and likewise the suspension of the law is never complete.

This chapter uses this challenge to the sovereign in the work of both Agamben and Schmitt to identify the first antinomy. The first antinomy is born of the tension between the absolute sovereign on the one hand and the practice of sovereignty revealed in Guantánamo Bay on the other. As mentioned above, the events following 9/11 provide a picture of a sovereignty that is at odds with absolutism. The sovereign revealed through the detainment in Guantánamo is amorphous, divided and contested.

**The State of Exception and *Homo Sacer***

In *Homo Sacer*, Agamben identifies the state of exception as the dominant paradigm of the modern state. Central to Agamben’s argument is explaining how the exception applies to the life of those who are subject to it. Agamben uses as his starting point Carl Schmitt’s contention “[s]overeign is he who decides the exception.”19 The exception in Schmitt’s formulation is a situation where the normal rules do not apply, a situation so severe that conventional laws cannot ensure the maintenance of the juridical-political order. The sovereign is thus he who can identify moments of “extreme peril”—

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moments that represent “a danger to the existence of the state” and call for a suspension of the current legal order.\textsuperscript{20}

When an exception is enacted, or decided, by the sovereign the law is suspended. Schmitt describes the authority of the sovereign during these conditions as absolute:

What characterizes an exception is principally unlimited authority, which means the suspension of the entire existing order. In such a situation it is clear that the state remains, whereas law recedes…The decision frees itself from all normative ties and becomes in the true sense absolute. The state suspends the law in the exception on the basis of its right of self-preservation.\textsuperscript{21} Within the state of exception the “entire existing order” is suspended. The sovereign has absolute authority in this space, because the law no longer applies.

Refiguring Schmitt’s logic of sovereignty, Agamben explains the centrality of the exception by describing its most general conceptualization—as a border to the legal order. The state of exception in these terms consists of more than simply moments of crisis during which the law is suspended. The state of exception consists also of the space between nature and law, and order and chaos. Agamben explains that “[t]he state of exception is thus not so much a spatiotemporal suspension as a complex topological figure in which not only the exception and the rule but also… nature and law, outside and inside, pass through one another."\textsuperscript{22} The state of exception is, for Agamben, a zone of indistinction in which it is impossible to distinguish that which is within the law from that which is without. To put this more plainly, in the state of exception it is the law, either by executive decree or legislative act, that articulates its own suspension, and in so doing it becomes the rule and the exception to the rule. Anything that is subject to the law in the

\textsuperscript{20} Ibid., 6.
\textsuperscript{21} Ibid., 12.
exception is thus included only through its exclusion. In this way, though it is through the law that the state of exception is created, the law is negatively related to the exception; where the exception applies the law does not.

The state of exception has multiple modes of instantiation—the exception applies to specific geographical spaces, such as a battlefield, in which the law's application is limited to its suspension (the law in this case supports rather than condones killing another person), it also more abstractly applies to criminal acts, which are included (literally) in the law through their exclusion from normal legally sanctioned behaviors—however, for Agamben, the most important of these is the exception that applies to life. Explaining how life relates to the law through its inclusion/exclusion, Agamben writes, “[i]f the exception is the structure of sovereignty, then sovereignty is not an exclusively political concept, an exclusively juridical category, a power external to law, or the supreme rule of the juridical order…it is the originary structure which law refers to life and includes it in itself by suspending it.”

The only way in which life comes to occupy a space within the law is through its exclusion or suspension. Agamben calls this figure to which the law applies through his inclusion/exclusion the homo sacer—the man who can be killed but not sacrificed. The life of the homo sacer is excluded from the law because its taking constitutes neither a crime nor a sacrifice. Agamben explains that the “…law applies to him in no longer applying, and holds him in its ban in abandoning him outside itself.”

Homo sacer is the man whose life is not protected by the law, the man who because of his criminal status has been abandoned by the legal order. What remains of the criminal who is made the

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23 Ibid., 28.
24 Ibid., 50.
*homo sacer* by the law is bare life—life stripped of any legal, social, or religious content. *Homo sacer*—the man sentenced to death or in his Greek origins literally abandoned by the city—is the man who has no legal protections and whose death is not mourned culturally or spiritually.

The creation of bare life—or the *homo sacer*—is, for Agamben, the primary act of sovereignty in contemporary politics. Looking both at discourses of citizenship and human rights, Agamben argues that beginning in modernity, sovereignty consists most fundamentally in identifying the boundaries of legal man. Agamben explains that after the French Revolution, “[c]itizenship…does not simply identify a generic subjugation to…authority, nor does it simply embody… [a] new egalitarian principle” instead “citizenship names…[a] new status of life as origin and ground of sovereignty.”

Following this historical break it was the *people* in France and other democratic nations who legitimized the actions of the state. Sovereignty was thus no longer an attribute of god, but was instead something embodied by the community. The consequence of this is that the question of “which *man* is a *citizen*, and which is not” is an increasingly important political concern. Those who are a part of civil society—in other words those who are citizens, are not only guaranteed certain protections, but are understood as being foundational to the state and its actions.

The emergence of groups of stateless refugees between the two world wars and later in the 20th century questioned the connection between rights and citizenship, a fact which led to a deliberate separation of the rights of man from the rights of the citizen. As Hannah Arendt argued in the *The Origins of Totalitarianism*, following the First World


War and the disintegration of the multi-ethnic empires in Southern and Eastern Europe states were formed in areas that lacked the “very conditions” which allowed for the “rise of the nation state: the homogeneity of population and rootedness in the soil.” These newly constructed nations typically included only one or some of the ethnic groups populating the land. Becoming strangers in their own homes the members of the excluded groups often immigrated to Western Europe where they became stateless people. They were not citizens of the state to which they had immigrated, but they were also “undeportable because there was no country…in which they enjoyed the right to residence.” The rights of these stateless people thus could not be articulated through the language of citizenship. These individuals were not nationals or citizens of any state; they were “human beings and nothing else.”

According to Agamben, the discourse that emerged to protect the rights of these stateless people is intimately attached to bare life. As Agamben states, humanitarian efforts that detach natural rights—universal rights given to all—from legal articulations of political man operate within a depoliticized space that can only “grasp human life in the figure of…bare life.” Humanitarian efforts that are not a part of the political process will thus only reproduce the current order and maintain the conditions they seek to combat. Agamben cites as examples human rights efforts that focus on only the barest essentials for life. Men in this case are not social or political beings, but only biological ones, with the right to be fed and protected from acts such as genocide.

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28 Ibid., 276.
29 Ibid., 302.
In place of the human rights discourse, which Agamben rejects, he suggests that the conditions of individuals such as the stateless refugee be addressed with “a long overdue renewal of categories…in which bare life is no longer separated or excepted, either in the state order or in the figure of the human rights discourse.” Agamben argues in other words that the political and social demands of those who have been cast out of the community be articulated with the use of new categories that do not reinforce or reestablish that which is inside from that which is outside the law. This ambition, however, is left unattended by Agamben’s work. Though he is thorough in his critiques, he does little to explain how this would be articulated outside of either the legal understanding of rights, or the rights of man advanced by the humanitarian movements.

**Agamben and Guantánamo**

The limitations of these two discourses are of critical importance in locating the enemy combatant, or the terrorist, within the law. If appeals to the enemy combatant’s inalienable human rights reduce him to bare life then he is forever trapped within the state of exception implied by his legal status. In *State of Exception* Agamben comments directly on the construction of the enemy combatant. The category, Agamben argues, “radically erases any legal status of the individual thus producing a legally unnamable and unclassifiable being. Not only do…[they] not enjoy the status of POWs they do not even have the status of persons charged with a crime according to American laws…in the detainee in Guantánamo, bare life reaches its maximum indeterminacy.”31 Agamben identifies the detainee as an individual stripped of *all* legal and social character. This detainee lacks more than even the Jews in Nazi Germany who, according to Agamben,

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“lost every legal identity, but at least retained their identities as Jews.”\textsuperscript{32} The enemy combatant thus is representative of a new type of subjectivity that has no legal or social grounds; it is a subjectivity that lies outside what it is to be human.

Judith Butler in her analysis of the indefinite detentions explains the logic that leads to this conclusion:

If we assume that everyone who is human goes to war like us, and that this is part of what makes them recognizably human, or that the violence we commit is violence that falls within the realm of the recognizably human, but the violence that others commit is unrecognizable as human activity, then we make use of a limited and limiting cultural frame to understand what it is to be human.\textsuperscript{33}

In Butler’s assessment the very classification of violence as terrorist violence, which is distinct from the human violence that entities like the United States might commit, names the individuals who commit it as non-human. In this way, the terrorist loses the ability to appeal not only to the rights he or she might have as a legitimate (and legal) soldier, but also the rights he or she might have as a human.

While the early responses to the attacks operate in much the way Agamben and Butler describe, later responses complicate the image produced in both of the above mentioned texts. The executive and legislative bodies did work in legal and extra-legal ways to position terrorists outside the law and humanity, but ultimately individuals deemed enemy combatants were able to negotiate the application and consequences of their legal classification.

\textbf{The Executive Order: Declaring a State of Emergency}

Following the attacks on September 11, 2001, George W Bush and his administration immediately began constructing the event as a crisis. In his first address to

\textsuperscript{32} \textit{Ibid.}
\textsuperscript{33} Judith Butler, \textit{Precarious Life}, (Brooklyn: Verso, 2004), 89.
the country, Bush opens his speech saying “Today, our fellow citizens, our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts.”34 On September 18th Congress responded by drafting a resolution that authorized the president to use force against those involved in the events of 9/11; this resolution, which would later become the “Authorization for Use of Military Force” (AUMF), allowed the president to “use all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks…”35 Two months later on November 13th President Bush issued an executive order establishing the policies regarding the detentions and trials of individuals who were determined to be complicit in the attacks. In the order the President explains the need for such measures:

Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.36

Bush begins the order by emphasizing the threat to the nation, drawing attention to the “potential deaths, injuries, and property destruction.” Bush characterizes the situation as an “extraordinary emergency,” a matter that is both “urgent” and “compelling.” These comments which conclude the findings section offer more than a simple examination of the events; they instead create an emergency that allows for the president to suspend the

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36 “Detention, treatment, and trial of certain non-citizens in the war against terrorism.” 66 FR 57833.
rules that would normally apply. Bush’s statement thus constructs a state of exception within which his authority exceeds that inscribed by law.

The authority granted by the state of emergency is used to construct a subject—the unlawful enemy combatant—to which neither international nor domestic laws apply. Bush describes this subject as

any individual who is not a United States citizen with respect to whom I determine from time to time in writing that...there is reason to believe that such individual...is or was a member of the organization known as al Qaida...has engaged in, aided or abetted or conspired to commit, acts of international terrorism, or acts in preparation therfor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy, or...has knowingly harbored one or more individuals described.\(^{37}\)

The state of exception is a useful conceptual frame for understanding the production of the unlawful enemy combatant in this passage. First, the category of the enemy combatant is created by the president, not only does the president articulate the criteria for the enemy combatant, but it is the president who determines on an individual basis to whom it shall apply. Moreover, the executive once the individual is defined in this way may determine which legal processes are appropriate to suspend his case.

The order specifies that for the unlawful enemy combatant “military tribunals shall have exclusive jurisdiction...the individual shall not be privileged to seek any remedy...in...any court of the United states...any courts of any foreign nation...or...any international tribunal.”\(^{38}\) This provision includes the unlawful enemy combatant in the law through his expressed exclusion. But the unlawful enemy combatant, and by association the terrorist, is excluded in another sense. Because the category of the unlawful enemy combatant is derived from the state of emergency—the enemy

\(^{37}\) ibid.\(^{38}\) ibid.
combatant is he who is responsible for the threat to the state—he is positioned outside of society generally, and is thus not only outside of the law, but outside of all that is civilized and orderly. He is as Bush states one who attacks “freedom” and “our way of life,” or as Butler argues one who commits violence that is “unrecognizable as human activity.” The enemy combatant is thus stripped of both his legal status and his classification as a member of society.

**Hamdi and Hamdan: Questions of Citizenship and Sovereignty**

Several years after the executive order was delivered individuals interned under its authority began challenging their imprisonment in court. In 2004, the Supreme Court heard the case of Yaser Esam Hamdi, an American citizen who had been captured in 2001 in Afghanistan. Hamdi was being held in a naval brig in the United States, but had been interned in Guantánamo for two months in 2002 before his citizenship status had been discovered. The Supreme Court ruled in favor of Hamdi, arguing that his detention had failed to offer him the due process guaranteed to citizens by the constitution. In making the decision the Supreme Court looked at several key issues, each of which questioned the exception and the validity of its execution. The Supreme Court first examined whether American citizens could be classified as enemy combatants, and if they could, whether the powers of the government were equivalent to what they would be when detaining an alien combatant. Implicit here is a concern over the potential conflict between the citizen, who is endowed with certain legal protections, and the exception, which assumes a suspension of the law. The court also questioned where the locus of sovereignty resided. They asked, in particular, if the president had the authority to create
an exception to the law for enemy combatants, or if it was the joint responsibility of the legislative and executive branches.

In the plurality opinion Justice O’Connor acknowledged that special measures may be taken during a state of emergency, but maintained that citizenship entails certain rights. Justice O’Connor writes,

We reaffirm today the fundamental nature of a citizen’s right to be free from involuntary confinement by his own government without due process of law, and we weigh the opposing governmental interests…the law of war and the realities of combat may render…detentions both necessary and appropriate…[b]ut it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship…We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decision maker…At the same time the exigencies of the circumstances may demand that…enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.\(^{39}\)

In Justice O’Connor’s opinion the procedural protections granted to the citizen enemy combatant exceed those outlined in the executive order, as well as those suggested by the government in their arguing of this case. Her opinion, however, maintains the legitimacy of the suspension of certain legal procedures. She cites the admissibility of “hearsay” as well as the “presumption” of guilt as possible modifications that could be made for citizen-detainees.\(^{40}\)

Two other conceptions of the relationship between citizenship and the exception are articulated in the dissenting opinions. The first, expressed by Justice Scalia, argued that the constitution demanded that normal legal procedures only be suspended for citizens during instances of “Rebellion or Invasion.” Scalia recognized that there are special “wartime practices” for “aliens,” but argued that citizens are to be “treated as


\(^{40}\) \textit{Ibid.}
traitors subject to the criminal process.” In Scalia’s understanding there are different requirements for the exception as it applies to citizens and non-citizens, aliens may be subject to military processes, but citizens are allowed the same criminal procedures available to any American accused of a crime. In Justice Thomas’ dissenting opinion Hamdi’s citizenship has no impact on his enemy-combatant classification, or its legal implications. Thomas argues that “the Executive’s decision that a detention is necessary to protect the public need not and should not be subjected to judicial second guessing…at least in the context of enemy-combatant determinations.” Thomas’ opinion legitimizes the sovereignty theorized by Schmitt and Agamben: the sovereign decision is final, according to Thomas, and the enemy combatant is, consequently, exposed completely to its will.

Hamdi’s status as a citizen of the United States put limits on the negotiation of the exception, but also expanded the category from its original articulation in the executive order. Though Hamdi enters the court as an enemy combatant, and was treated as such by the executive, the suspensions called for in Bush’s executive order are intended to be applied to “non-citizens.” Most surprising, however, is the response to this by the courts, the judges do not agree that because Hamdi is a citizen he is not subject to the provisions of the order, only Scalia makes this argument. O’Connor argues that certain procedures can be suspended, suggesting that one must take into account both the detainee’s citizenship as well as his enemy combatant status, and Thomas argues that in cases such as these citizenship is irrelevant.

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41 Ibid. Emphasis original.
Though each of these subtle rearticulations of the exception is important in its own right, the process by which these changes occur is of equal interest. It is not the decision of the executive that determines Hamdi’s fate; instead it is members of the court who decide after hearing arguments presented by both the government and Hamdi himself. Though one may cite Schmitt arguing that it is the court who is sovereign here, to do this is to ignore the novel complexities introduced with the separation of powers. The decision in this case is the product of deliberation and debate both within the courtroom and between the other political branches and the public. Likewise, the authority of the court decision is limited in scope, and is open to contestation through other political means.

The appropriate locus of sovereignty in matters such as deciding to suspend legal proceedings for enemy combatants is explicitly questioned in Justice Souter’s concurring opinion, and becomes a central issue in *Hamdan v Rumsfeld*. Souter argues that in Hamdi’s case “the government has failed to demonstrate that the Force Resolution authorizes the detention.” Two years later in June of 2006 Justice Breyer makes a similar point in the concurring opinion of *Hamdan v Rumsfeld*. Hamdan, a Yemeni man captured in Afghanistan in 2001, was not a direct participant in any terrorist activity, but was brought to Guantánamo because of his role as driver and bodyguard to Osama Bin Laden. After hearing Hamdan’s case Breyer argued that “[c]ongress has not issued the Executive a ‘blank check’.” Breyer asserts further that the Uniform Code of Military Justice (UCMJ) has in fact “denied the President the legislative authority to create military commissions of the kind at issue here,” and concludes that “[n]othing prevents

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42 Ibid.
the President from returning to Congress to seek the authority he believes necessary,” emphasizing that “no emergency prevents consultation with Congress, judicial insistence upon that consultation does not weaken our Nation’s ability to deal with danger. To the contrary, that insistence strengthens the Nation’s ability to determine—through democratic means—how best to do so.”

43 The decision to detain someone indefinitely—the issue in Hamdi’s case—and the decision to hold military tribunals that use unlawful procedures—the general concern in Hamdan v Rumsfeld—are, according to Souter and Breyer, decisions left to the legislative branch. Breyer describes this process as more democratic, a point which may be debatable, but reveals nonetheless the fact that the “decision,” in this case, is a complex process that involves many political actors.

**Military Commissions Act of 2006: The Exception and the Enemy Combatant**

In September 2006, responding to the Supreme Court’s ruling in *Hamdan*, Congress passes the Military Commissions Act of 2006 (MCA). The act reiterates much of what was included in Bush’s executive order—it “establishes procedures governing the use of military commissions to try alien unlawful enemy combatants”—and also responds specifically to concerns expressed in previous court opinions. The act identifies parts of the UCMJ that are to be suspended in the military tribunals for unlawful enemy combatants. The act states,

> The following provisions of the title [UCMJ] shall not apply to trial by military commission...Section 810...relating to speedy trial...Section 831...relating to compulsory self-incrimination...Section 832...relating to pretrial investigations.  

44 The act also specifies in greater detail the legal limitations to be placed on the enemy combatant. The act continues “[n]o alien unlawful enemy combatant...may invoke the

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43 *Hamdan v Rumsfeld.*  
44 *Military Commissions Act, 10 USC §948.2006*
Geneva Conventions as a source of rights,” and commands that “[n]o court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of…an enemy combatant.” These provisions in the spirit of the executive order directly address the court holdings, calling for a suspension of the UCMJ and further limiting the jurisdiction of the court.

**Boumediene v Bush: Contesting the Exception**

If accepted, the suspension of habeas corpus for unlawful enemy combatants codified in the MCA would have prevented the Supreme Court from hearing any further Guantánamo cases (both Hamdi and Hamdan filed for writs of habeas corpus in order to be heard by the court). In June 2008, however, the court heard the case of Lakhdar Boumediene, an Algerian national who allegedly plotted to bomb U.S. and British Embassies in Sarajevo, and ruled that the suspension of the writ in the MCA was illegal. In the majority opinion Justice Kennedy identifies two criteria that determine the scope of the writ’s application: the “nature of the sites where apprehension and detention took place,” and the “citizenship and status of the detainee,” The government argued that detainees could not file for a writ because they were captured abroad and held outside of the United States’ sovereign territory. The government argued thus that the law could be suspended outside of the territorial boundaries of the state. In response to this Kennedy states

The United States has maintained complete and uninterrupted control of [Guantánamo] bay for over 100 years. Yet the Government’s view is that the Constitution had no effect there, at least as to noncitizens, because the United States disclaimed sovereignty in the formal sense of the term. The necessary

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implication of the argument is that by surrendering formal sovereignty...while at the same time entering into a lease that grants total control over the territory back to the United States, it would be possible for the political branches to govern without legal constraint. Our basic charter cannot be contracted away like this. Even when the United States acts outside its borders, its powers are not “absolute and unlimited” but are subject “to such restrictions as are expressed in the constitution.”

Kennedy denies the government’s formal definition of sovereignty which is linked to legally recognized territorial boundaries in favor of a definition that is associated with control. This definition limits the ability of the government construct the exception in narrowly spatial terms. Unlike the requirements of a formal conception of sovereign territory, Kennedy’s definition requires that anytime the state has control of an area it complies with applicable laws.

In addressing the second question—the impact of citizenship and legal status on the suspension of the writ—Kennedy reconfigures how the subject of the enemy combatant relates to the exception. Kennedy argues that “the status of these detainees is a matter of dispute,” while the government argues that they are non-citizens and a threat to the state, “the detainees deny they are enemy combatants.” Kennedy continues explaining that “[a]lthough the detainee is assigned a “Personal Representative…that person is not the detainee’s lawyer or even his ‘advocate’. The Government’s evidence is accorded a presumption of validity.” All of this Kennedy argues constrains the “detainee’s ability to rebut the factual basis for the Government’s assertion that he is an enemy combatant,” an ability that cannot be denied. In the language of Bush’s executive order and the MCA being classified as an enemy combatant immediately suspended the legal remedies available to a detainee. Kennedy’s argument that the writ of habeas corpus cannot be

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48 Ibid.
49 Ibid.
suspended on the grounds that detainees must be able to contest their classification
delegitimizes the enemy combatant category as a potential boundary to the exception.
When the category can be contested, what matters is not that the state has declared one to
be an enemy combatant, but that the individual has committed illegal acts. Kennedy’s
ruling thus can be seen as an effort to reassert normal legal conditions. Rethinking
Sovereignty and the Exception

If one looks solely at the post 9/11 legislation and the orders issued by President
Bush, the framework erected by Agamben has much explanatory power. Congress and
the president acting as sovereign identify a crisis and enact an exception—the law does
not apply to those whom the executive determines to be enemy combatants. The
responses by the court, however, complicate the picture. In Agamben’s analysis *homo
sacer* is abandoned by the law. We would expect then that individuals subject to the
exception would have no legal remedies available, but this is not the case for those
interned in Guantánamo. Though the enemy combatant is expressly denied access to
domestic and international courts in the law, the detainee enters the court through his or
her enemy combatant status, and it is precisely this status that becomes the subject of
debate when the case is heard.

This inconsistency between Agamben’s work and the internment of individuals in
Guantánamo presents two possibilities. The first is that these detentions do not qualify as
instances of the exception—while the unlawful enemy combatant may share some
similarities with categories like the Jew in Nazi Germany, the exception does not apply
because the detained individuals are ultimately able to go to court. The second possibility
is that Agamben’s framework must be retooled in order to successfully characterize the
unlawful enemy combatant. Agamben’s construct must be reimanged in a way that attends to the ambiguity of sovereignty and the exception in these cases.

There are good reasons to favor the latter approach. The cases examined in this chapter are not simply real world legal examples that fail to reflect the subtlety of Agamben’s argument. Rather, the problem is much more the reverse. These cases demonstrate that Agamben’s conception of sovereignty is highly abstract and formal, and as such fails to attend to the complexities of sovereignty under modern legal conditions. Agamben’s analysis looks only at the logical consequences of the law as it is written; it does not account for the practical consequences of the law as it is enacted. This formalism is revealed when we try to understand the Guantánamo detentions through the lens of Agamben’s conceptualization of sovereignty.

In Agamben’s work there is an assumption that codified rules transcend the legal documents in which they are transcribed creating real social boundaries with determinate effects. Thus when the sovereign—the state, or in this case the legislature and executive—creates a category of people within the law it creates a subject with a particular character that can only be changed by the sovereign itself. This subject has no identity—or life—outside the law, he is only what the sovereign determines him to be. This is, to be fair, largely Agamben’s point; the modern state, in his words produce “bare life” life without any legal or social character. While it is clear that statutes such as the MCA intend to do as much, without accounting for the real political conditions one confuses what is written for what is. The post 9/11 legislation did enable the executive to take drastic actions in their pursuit of alleged terrorists, but it did not create subjects incapable of expressing themselves legally.
In an essay commenting on Agamben’s *Homo Sacer*, Ernesto Laclau criticizes Agamben’s claim that contemporary politics is reducible to the production of bare life. For Laclau, the public and its demands play a much greater role in the enactment of the exception; in this way, Laclau argues, a view which sees “sovereignty as hegemony” offers a better picture of modern politics. A hegemon unlike the sovereign discussed by both Schmitt and Agamben cannot be reduced to a single object or subject. Society and social agents, like the hegemon, according to Laclau, “lack any essence” whatever fixity they do have “merely consists of the relative and precarious forms of fixation which accompany the establishment of a certain order.”

Laclau offers some useful and important criticisms of Agamben’s work. The actions of any contemporary government consist of more than simply the actions of a small group of people; even if one discounts the efficacy of democratic processes the opportunities for influence and intervention through other means abound—individuals set the political agenda through grassroots movements, interest groups, the media, and a multitude of other avenues. It is important thus to see that power is exercised by a multiplicity rather than a singularity. However, this criticism cannot stand as the last word either; it has flaws of its own that tend to be symmetrical to those of Agamben. By dismissing sovereignty altogether Laclau underestimates the importance of the sovereign (whatever, or whoever it may be), in deciding the, the even if only ill defined boundaries of the law. Dismantling the fiction of a singular, absolute sovereign is important, but it is also essential to address the construction of the law as well as its consequences.

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Given the symmetrical shortcomings of these two views a better approach would be to incorporate Laclau’s concerns into a concept of sovereignty that takes it substance largely from Agamben. If we look at the sovereign in this light we get an image much like the image of the U.S. state described by Wendy Brown in *States of Injury*. Brown argues:

The contemporary U.S. state is both modern and postmodern, highly concrete and an elaborate fiction, powerful and intangible, rigid and protean, potent and without boundaries, decentered and centralizing, without agency, yet capable of tremendous economic, political, and ecological effects. Despite the most unavoidable tendency to speak of the state as an “it,” the domain we call the state is not a thing, system, or subject, but a significantly unbounded terrain of powers and techniques, an ensemble of discourses, rules, and practices, cohabitating in limited, tension-ridden, often contradictory relation with one another.\(^\text{52}\)

Seen from this perspective, the sovereign is not an agent, subject, thing, or even system, but is instead an unbounded terrain of powers, techniques, discourses, rules and practices, which Brown notes, are often contradictory. The sovereign in the Guantánamo cases, then, would consist not only of the president, judges and legislators—who supported and rallied against the MCA—but also the practices of protest, the discourses of human rights, and a myriad of other elements that contradicted the intentions of those acting in the name of the state. This is not to say that there is nothing outside the sovereign or the state, but only that it is constantly in flux and with no fixed boundaries, or limits to what constitutes it.

The multifarious character of the sovereign has important implications for the exception. If the sovereign is constantly in flux and always ambiguously defined, so too is the exception. He who is subject to the exception—the *homo sacer*—likewise is never

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entirely stripped of his legal rights. The boundary between who is inside and outside the law can always be manipulated; furthermore what it means to be subject to the exception is under constant rearticulation. There is then a sense in which the exception is only partial both because one’s subjection to it may be fleeting, or intermittent, and also because its severity, implications, and existence are open to revision. If one looks at what happened to the three individuals whose cases were explored in this paper, one can see as much. For each individual what it ultimately means to be an enemy combatant is very different.

Yaser Hamdi was released to Saudi Arabia in October of 2004 on the condition that he renounce his United States citizenship. In Hamdi’s case his legal status was altered by the court ruling—he was released from Guantánamo and was permitted to return to his adopted home—but the executive maintained some control over the outcome of his case requiring that he strip himself of his status as a citizen of the United States. The importance of this final intervention by the executive is unclear. While it is unarguable that Hamdi lost many privileges allowed by his classification as a citizen—the rights that exceeded those of an alien detainee were no longer available to him—it is not clear the extent to which this matters after his release. Prior to his capture by the U.S. Hamdi’s citizenship was immaterial; it only came to matter after he was detained by the government. His renunciation of citizenship may thus be only symbolic as its material consequences are likely insignificant.

Salim Hamdan was formally charged under the provisions of the MCA in May of 2007 and sentenced by a military court to five and a half years (five of which had already been served) in prison in August of 2008. Hamdan returned to Yemen in November of that year to finish his sentence, and was released by the Yemeni government in January of 2009. Throughout his imprisonment Hamdan remained classified as an enemy combatant and the United States government maintained that it was within their authority to keep him interned indefinitely. For Hamdan certain procedural elements of a criminal trial were suspended and the United States, at least rhetorically, continued to assume absolute control over his material conditions and bureaucratic status. These actions by the U.S., however, are tempered by the restrictions placed on the state by the court; the court did assert that the executive needed the permission of congress to hold the detainees. The sovereign that is constructed with this ruling is complex—it is thus difficult to point to the subject that is capable of deciding the exception—the legislature decides the instances under which the exception manifests, the executive decides to whom it shall apply, but the judiciary determines the appropriate structure of its enactment. The circularity of this structure allows for the exception constantly to be revised in incoherent and contradictory ways, as we have seen.

In November of 2008 Lakhdar Boumediene’s case was reviewed by a U.S. federal judge who determined that he had been illegally detained and absolved him of any wrongdoing. He was released to France in early May of the next year. The Supreme Court ruling in Boumediene’s case required the state not only to formally charge and try him under certain conditions in a military tribunal, but also to allow his case to be heard

by a judge within the United States. The Supreme Court made it such that the executive could not decide Boumediene’s fate; whether or not Boumediene stayed in Guantánamo, or as it happened, was released became the decision of an independent federal judge. While it is true that this federal judge falls under the umbrella of the state, it is likely that the decision made by the judge was not only distinct from the decision a military tribunal would have made, but also that it was based on a different set of assumptions about the enemy combatant and nature and scope of sovereignty. This decision thus not only lead to the release of Boumediene, but also disrupted the logic of his imprisonment as an enemy combatant. No longer could he be held simply because he had been determined by the executive to be a terrorist, now like any other prisoner his internment had to be justified in and legitimized by an independent court.

In each of these cases the judiciary (with the help of the various actors that made the Supreme Court hearings possible) by putting limitations on who could be classified as an enemy combatant, requiring specific procedures be followed, and insisting that the case be reviewed by an independent judge restricted the space that the state of exception could occupy.

This continuous modification of the legal status of the prisoners in Guantánamo was not the only way the courts manipulated the executive suspension of the law; though the subject of the enemy combatant was often assumed to be the locus of the exception many other boundaries were articulated. The exception was defined negatively, as the space outside of citizenship, it was also defined in solely spatial terms, as the area outside of the United States’ formal sovereign territory. Both of these examples suggests that while the exception may be a necessary part of law in that it constitutes the extent of the
law’s reach, it need not apply to a given subjectivity, such as the terrorist—the enemy combatant—or the Jews in Nazi Germany. Whether or not the exception manifests as the *homo sacer* is itself the consequence of deliberation and debate.

**Conclusions**

These landmark cases are particularly illustrative of the discursive acts through which the exception appears and changes, but they constitute only a small part of the process. Making possible each of these cases—as well as Bush’s order and the legislation passed by congress—are an uncountable number of acts made by the public. The public impacts the acts of government not only through its electoral voice (the importance of this, however, should not be underestimated), but also through its role in constituting relevant categories. The figure of the terrorist, which made the application of the unlawful enemy combatant possible, did not emerge through its mention in government documents; it had a historical legacy that was both legal and social and could not be reduced to governmental discourse.

This process however, should not undercut the contributions of Agamben, nor should it dismiss entirely the role absolutism plays in the legitimation of the popular sovereign. One of Agamben’s most important contributions to political theory is his recognition that the state has increasingly become an instrument in naming those who are outside the law. In Agamben’s analysis, legitimate and practical access to the political process has been limited in contemporary politics by the rhetoric of human rights and citizenship. This insight serves as an important site of investigation when examining and criticizing the modern state and its actions. It invites opportunities to evaluate the actions of the state in the light of other broader democratic principles.
Likewise, the absolute sovereign, though perhaps a fictitious imagining, allows for the envisioning of *a people* with a shared set of values and interests. A group, which, when acting in concert legitimizes the actions of government. In the detainments in Guantánamo the absolute sovereign when imagined as the people can thus also be seen as empowering. As framed by Agamben, the sovereign is a hollowed out figure that lacks any real subjectivity or materiality, when constructed in this way it can only diminish the power of people – as in the construction of bare life. Absolute acts in the name of the people, however, may be in the spirit of empowering and protecting the people.

Framing this tension as an antinomy allows for sovereignty to provide the spirit of legitimation for democratic organizations, while simultaneously allowing space for criticism when institutions deviate from the public interest. The ideal of the universal, absolute public interest, from this vantage, can motivate democratic practices and serve as a source of reform and critique. However, the institutions themselves are respected such that when they engage in questionable activities practical opportunities to intervene are not discounted or discredited due to assumptions about the monolithic character of the state. The next chapter discusses the intersection of institutionalized democratic practices and the absolute, popular sovereign at greater length.
Chapter 3


WikiLeaks first garnered international attention in April 2010 when it released a video of U.S. forces firing on a crowd and killing at least 18 people in Baghdad in 2007. Alongside the unedited video taken from the vantage of one of the two helicopters responsible for the assault was an edited version that drew attention to the casualties inflicted by the American shooters and minimized focus on an Iraqi carrying what may have been a rocket-propelled grenade. This version released under the name “Collateral Murder” has been viewed by millions of people across the globe, and helped articulate growing opposition to the Iraq war.

The “Collateral Murder” video highlights a tension that runs deep in radical transparency projects like WikiLeaks. The projects are founded on the principle that democratic societies require citizens to have unlimited and unfettered access to governmental documents, proceedings and activities. These projects use websites and other means to disseminate pieces of this information that are otherwise hidden from public view; personal emails and correspondences, and classified strategic planning documents are all equally valuable and subject to release on one of their platforms.

Despite the vast array of documents and information acquired and distributed by organizations like WikiLeaks, the dissemination of the information is always curated in some fashion. Even if the “Collateral Murder” video had not been edited to focus the viewer’s attention on the more damning elements of the footage, it only captures a few brief moments from a particular perspective. Moreover, the websites themselves require
discretionary decisions to be made. Choices about what to link to and how to organize it determine in fundamental ways which information will be accessed. That the “Collateral Murder” video was manipulated to more effectively convey a certain message only highlights the fact that editorial decisions are always being made.

In this chapter, I incorporate these concerns about radical transparency into a broader discussion of popular sovereignty that examines the tension between the impulse for free, uninhibited action by the people and the empowering effects of democratic institutions. By examining the radical transparency movement alongside the national security apparatus in the United States, I argue that despite the claims made by radical critics like WikiLeaks the agencies composing the national security apparatus are legislatively bound and subject to supervision. Moreover, though some of their clandestine activities have been rebuked by the public, the institutions themselves have been subjected to extensive formal and informal review and continue to maintain popular support.

As I will demonstrate, quite the opposite is true for radical transparency organizations. The WikiLeaks organization is composed of elite activists who rely primarily on information disclosed by whistleblowers. Though activists use the name of “the people,” they offer no meaningful opportunities for participation and review and have no popular mandate. The psychological motivations of whistleblowing are likewise at odds with the spirit of their critique. The whistleblower typically acts anonymously (a primary function of WikiLeaks is to facilitates this) in a state of isolation and perceived victimization.
To illustrate the shortcomings of the WikiLeaks project I construct two primary arguments. First, I argue that WikiLeaks and other radical transparency projects are best described as populist movements, always at risk of excluding popular participation. Radical transparency movements like earlier populist movements appeal to being *of the people*, but their deliberate antagonism with institutionalized practices of participation question the democratic legitimacy of their activities. These movements are composed of narrow institutional structures, with limited opportunities for public engagement, that place faith into two central personalities—the leader and the whistleblower.

Second, using literature from psychoanalysis and industrial psychology, I demonstrate the weaknesses of relying on the whistleblower’s leaks as the primary mechanism for the dissemination of sensitive documents. The whistleblower described in this literature suffers from an overwhelming sense of disempowerment and acts out in what was described by C. Fred Alford as a “narcissistic rage.” Supporters of whistleblowing are quick to valorize the act by pointing to choice moments where the information disclosed was of critical import to the public. This, however, simply assumes the public’s general agreement with the ethicality of the act and ignores the problematic motivations for whistleblowing.

I contrast these critiques of the radical transparency movements with an examination of the national security system in the United States. I utilize Stephen Holmes’ reading of Bodin to demonstrate how organizations like the National Security Administration in the United States may support democratic objectives while limiting the public’s access to information. Holmes argues that limitations placed on the public and the government by institutions may “enhance” democratic powers by providing the
stabilizing conditions for meaningful participation. I use this insight to examine how the institutions that compose the intelligence community provide the public with opportunities to review and approve their activities. In my analysis, I look at both the Watergate Scandal and the Iran/Contra Affair and argue that despite significant violations of the public trust, that national security system proved capable of responding to these violations with investigatory measures that worked to reform and reveal the failures of the institution.

The analysis included in the chapter does not seek to evaluate the legitimacy of the activities included in exposed documents, but rather the processes by which they are revealed. Demonstrating a capacity for public engagement with the national security system does not thus condone any particular activities, but rather demonstrates how legitimate reform may be achieved in instances where it is necessary.

As with the previous chapter, my ultimate aim is to navigate the antinomy presented by, first, the vision of the people that, as Margaret Canovan describes it, “haunts” democratic theory and, second, the practice of popular government, which relies upon institutional structures to provide processes of legitimation. By placing an investigation into the institutional structures of both WikiLeaks and the National Security Administration side by side, my hope is thus to not only expose the fallacies in the rhetorical appeals made on behalf of the people against the so-called authoritarian state, but also to provide insights into why claims made about the importance of information for democratic engagement must be examined within a context that also respects the legitimacy of institutions.
WikiLeak

WikiLeaks, a self-described not-for-profit media organization, began operating in 2006. In December of that year, it released its first document—a decision to assassinate government officials signed by Somali Sheik Hassan Dahir Aweys. The organization continued to leak documents from both public and private sources over the next four years. The leaks came from around the globe, ranging in substance from private intelligence reports exposing billions in looting by high ranking Kenyan political figures to the contents of Sarah Palin’s yahoo account.\(^{55}\) Though there is evidence (originally released by WikiLeaks) that the Pentagon and other US intelligence agencies began tracking the organization shortly after it published sensitive military operations documents in 2008, it is only after the release of “Collateral Murder” that the site obtained international notoriety.\(^{56}\)

Following its release, “Collateral Murder” quickly went viral, increasing awareness of the site with the public and thought leaders. Among those who took notice were members of the traditional press. This recognition helped WikiLeaks form a working relationship with three of the world’s largest newspapers, further elevating the organization’s voice within public discourse.


\(^{56}\) In March 2010, WikiLeaks released the Pentagon Report from 2008 outlining the threat WikiLeaks posed after the website’s publication of more than 2,000 pages of technical documentation on military equipment used in Iraq and Afghanistan. See Stephanie Strom, “Pentagon Sees a Threat from Online Muckrakers,” New York Times, March 17, 2010.
Alongside the enhanced exposure of WikiLeaks was the rising star of its spokesperson, Julian Assange. Julian Assange, the founder of WikiLeaks, began his activist career as a hacker in the early 1990s. During this period, what would later transform into the internet of today consisted of a set of substantively bound computer networks—computer systems operated by either the military or educational and research institutions.

Assange, along with other hackers during this period, tested the limits of these networks’ information security systems, acquiring documents not meant for public distribution. Accessing this otherwise hidden information was foundational to the formulation of Assange’s political philosophy. In an interview conducted by Hans Ulrich Obrist, Assange describes this period:

It was a very small community, with perhaps only twenty people at the elite level that could move across the globe freely and with regularity. The community was small and involved and active and just before the internet, but then crossed into the embryonic internet, which was still not available to people outside of university research departments, US military contractors and the pentagon. It was a delightful international playground of scientists, hackers and power. For someone who wanted to learn about the world, for someone who was developing their own philosophy of power, it was a very interesting time.\textsuperscript{57}

In Assange’s account the early hacking community consisted of a small elite group that was primarily concerned with issues of justice. It was amongst this group that Assange developed his philosophy of power that would serve as the inspiration for the WikiLeaks organization.

Though Assange and the WikiLeaks website minimize Assange's leadership position, preferring to emphasize the democratic nature of the project, it is clear that Assange's role in the organization is significant. The website describes the people behind WikiLeaks as "an independent global group of people with a long standing dedication to the idea of a free press and the improved transparency in society that comes from this."\textsuperscript{58} However, the site also identifies Assange as a spokesperson available for speaking events. Julian Assange, the site states, is "a journalist and activist best known as the founder and public face of WikiLeaks. He has spoken at international events on WikiLeaks, freedom of speech, freedom of the press and internet activism."\textsuperscript{59} The only other staff person named is official spokesperson Kristinn Hrafnsson. No other active participants are identified. Their identities are hidden because, as the site justifies, the risk of assassination requires that the organization not "disclose exact details about...team members."\textsuperscript{60}

Though preserving the anonymity of staff and participants is, no doubt, a real and important concern. The ambiguous staff list also helps WikiLeaks perpetuate an image of itself as a vast international organization. Early WikiLeaks participant Daniel Domscheit-Berg, or as he is known to the press "Daniel Schmitt," describes the benefit of calling upon anonymous and pseudonymous members:

The official number of volunteers we had was also, to put it mildly, grossly exaggerated. Even in the early days, we claimed that several thousand volunteers and hundreds of assistants supported us. This wasn’t perhaps a direct falsehood, since that number simply included everyone who signed up for our mailing list. These were people who had gotten in

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\textsuperscript{58} "About," wikileaks.org, wikileaks.org/about.html, accessed October 14, 2012.
\textsuperscript{60} \textit{Ibid.}
touch with us at some point with a vague promise of supporting the project. But they didn’t do anything at all.61

According to Domscheit-Berg, the organization embellished the support it received from volunteers. In his account, this bending of the truth helped to both legitimize the validity of documents on the site as well as correct mistakes that were previously made. In correcting an error reported on the site that falsely associated German Banker Ralf Schneider with a scandal related to a Swiss bank with which he had no association, the site included commentary stating, “[a]ccording to three independent sources, this document, the summary and some of the commentary are false and misleading. WikiLeaks is investigating the matter.”62 Domscheit-Berg claims that though they had reason to believe some of the documentation related to the scandal was false, there was neither an investigation nor three corroborating sources. He writes, “[t]hree independent sources? That sounded good. Unfortunately it was made up.”63 The slim staff support for the project meant that the measures to ensure the factual nature of documents were often overstated. In the, according to Domscheit-Berg, rare instances where the veracity of information on the site ultimately came into question, they used those same tactics to introduce an alternative account.

Because information about the organization is so guarded (an irony that has not been lost to at least one news organization)64 one cannot know to what degree

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62 Ibid., 24.
63 Ibid.
Domscheit-Berg’s account of WikiLeaks is colored by his apparently unpleasant falling out with Assange.65

There are some critical facts, however, that can safely be inferred, and I think Domscheit-Berg’s account provides a helpful (if not unbiased) illustration. These facts are:

1. WikiLeaks considers its dissemination of public and private documents to be to the benefit of the people.
2. WikiLeaks justifies its actions based on a theory of democracy that values transparency.
3. People can contribute to WikiLeaks by funding the project and/or by anonymously submitting documents and information.
4. WikiLeaks has no other formal mechanisms of participation.
5. All organizational decisions are made by Julian Assange, Kristinn Hrafnsson and an undisclosed set of staff members.

There is an obvious tension between WikiLeaks’ stated principles and modes of operation. On the one hand, WikiLeaks argues that democracy requires uninterrupted access to information for effective civic engagement. On the other, WikiLeaks is a completely closed organization that actively censors its activities, structure and financial information. One might think that these discontinuities of principle and action are mere blind spots, but I think it is more helpful to recognize them as symptomatic of the fact

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65 Domscheit-Berg, Inside Wikileaks.
that WikiLeaks’ philosophy is motivated by a populist spirit that privileges its own judgment and insights over those of the government.

**Populist Antagonisms with Institutional Power**

Though there is disagreement over the normative value of populist movements and discourse, a topic to be discussed at greater length below, there are two generally accepted qualities of populism that are helpful in our consideration of WikiLeaks and other radical transparency movements. These two central characteristics are: first, populism claims to legitimately speak for the people. And, second, related to the first, populism rejects the legitimacy of current power structures and authorities. Margaret Canovan describes how these two claims complement one another:

> Populism is not just a reaction against power structures but an appeal to a recognized authority. Populists claim legitimacy on the grounds that they speak for the people: that is to say, they claim to represent the democratic sovereign, not a sectional interest such as an economic class.\(^{66}\)

According to Canovan, within democratic regimes populist appeals to the people can be viewed as contestations with the state over who can legitimately speak on the people’s behalf.

There is quite a range in how these claims to being of the people are articulated within populist discourse. Despite these dissimilarities, some have argued that there are mechanistic similarities in how these discourses emerge. Ernesto Laclau gives a structural argument for the emergence of populist discourse, focusing on how the signifier “the

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people” functions within political claims. Laclau identifies *the people* as an empty signifier—“a place, within the system of signification, which is constitutively irrepresentable.”\(^{67}\) Empty signifiers are not the expression of an object that exists *a priori*, but are rather empty spaces that are articulated through discursive antagonisms. In this way *the people*, as an empty signifier, is something which can be structurally revealed, but never adequately defined.

The structural element that is responsible for constructing the people works by creating pressure from the outside. Popular identities are, according to Laclau, fashioned under the pressure of an oppressive regime. Institutions that fail to recognize the demands of individuals create an opportunity for an equivalential relation to emerge between otherwise unrelated demands: "It is because all individual demands, in their very individuality are opposed to the same oppressive regime, that an equivalential community between them can be established." In Laclau's analysis, these individual demands maintain their particularity when united under a popular identity such as *the people*. Their collective identity, in turn, is not expressive of the identical nature of individual's demands, but is rather only an expression of their opposition to status quo institutions.

Because the populist response expresses the unheard demands in an oppressive regime it is, according to Laclau, essential to the functioning of democracy. The continuous rearticulation of *the people* through a changing political landscape is what encourages institutions to revolutionize and better attend to the demands of everyone. Laclau writes, "populism presents itself both as *subversive* of the existing state of things

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and as a starting point for a more or less radical reconstruction of a new order whenever the previous one has been shaken. The institutional system has to be (again, more or less) broken if the populist appeal is to be effective.\(^{68}\) Populism is thus symptomatic of institutions that are in need of destruction. It actively seeks to deprive authority from power holders while it simultaneously asserts the authority of those who are denied access within current power structures.

Others have recognized the opposition to status quo institutions as simply a characteristic of populism. It is because populist actors prefer direct action and distrust representation that there is a sharp opposition between the people and governmental institutions with populist rhetoric. These arguments, unlike Laclau’s, do not make claims about whether the regimes within populist discourse are in fact oppressive.

In this account, populism is in general distrustful of any institution that separates the ruled from the ruler. Nadia Urbanati describes populism's understanding of legitimate rule by the people in the following way: "the populist interpretation conceives of democracy as a principle and an attempt to achieve an immediate identity of governed and governing. Both the claim for a direct relationship between people and leaders and the claim for popular, direct participation reveal a distrust in the forms and institutions of representation."\(^{69}\) Populism’s aversion to institutions springs from those institutions’ inability to absorb the direct actions of their constituents. What this means for the character of the status quo institutions depends upon where one falls within the normative evaluation of populism.

\(^{68}\) Ibid., 177.

As stated above, for Laclau, it is not simply that populist movements have cast authoritative institutions as oppressive within their discourse, but that the existence of oppressive institutions is what provides for the emergence of populism in the first place. This swift theoretical move by Laclau has the consequence of legitimizing popular identities. Popular identities do oppose an oppressive regime, otherwise they could not possibly emerge. When faced with a populist movement that has questionable legitimacy one is left with two options. One must either be indifferent to the rhetorical claims of populist movements—undesirable claims are legitimate so long as they seek to destroy institutions—or place movements with offensive rhetoric outside the definition of populism.

Neither of these options seems wholly satisfactory. I think the reason for this lies in Laclau's equivocation between the symbolic location of the identities of both the popular and oppressive regimes and the empirical relation between the two groups.

Laclau recognizes that the identity of the antagonistic force is articulated through the populist enterprise, writing, "an antagonistic camp is fully represented as the negative reverse of a popular identity which would not exist without that negative reference." An oppressive regime, in this way, is not a natural pre-determined group but rather an empty signifier itself produced by its relation to a popular identity.

In his concluding remarks, however, Laclau refers to the opposing force of a populist movement as an "institutional system," suggesting a concrete entity (or entities) that exists outside of linguistic signification. Laclau himself identifies a list of

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70 Ibid., 139-140.
71 Ibid., 177.
these--1930s Germany, the Fourth Republic, the 1930s Argentinean Oligarchy, the Bush II U.S. government. In each of these cases, the institutional system exists prior to the emergence of the populist movement. The populist movement may shape what becomes of the system or how it is understood, but the system exists in advance and is an important causal component of the emergence of populist movements. By making assumptions about the existence and character of these regimes, Laclau is able to focus solely on the historical antagonisms that demonstrate his case, discounting similarly structured populist discourses that emerge in opposition to less criticized regimes.  

Margaret Canovan sees populism’s focus on political action unencumbered by institutional restraints in a different way. In Canovan’s account, populism “haunts” democracy because its rhetoric fulfills the redemptive and romantic aspirations of democracy. Populism celebrates “spontaneous action,” and close personal ties between “leader and followers” and it favors a version of democracy that is “uninhibited by liberal constraints.” In so doing, it claims to be a more direct expression of the will of the people. In Canovan’s account, however, this leads to a significant shortcoming:

The preference for direct personal representation over elaborate mediating institutions itself gives the leader of a populist movement a degree of personal power that is hard to reconcile with democratic aspirations. In a sense, therefore, this romantic populist appeal is short-sighted, for democracy cannot in fact function without alienating institutions.

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72 Many Nationalist movements would fall into this category. The Freedom Front of the Afrikaner’s Volkstaat (people’s state) that emerged with the legal end to apartheid is one example.
73 Canovan, 7.
74 Ibid.
While populist claims to direct participation fulfill some of the romantic desires of democracy, they do so at the expense of the rational distribution of power that occurs within institutions.

**WikiLeaks the Populist Voice of the Networked Masses**

If one were to analyze radical transparency movements using Laclau's framework one would see the articulation of a populist identity by organizations like WikiLeaks as the product of a system that does not allow certain demands to be heard. Moreover, one would argue that because radical transparency movements are motivated by deficits of the system they contribute to the democratic process of institutional rebirth.

WikiLeaks certainly positions itself in this way. When describing the importance of "principled leaking" the WikiLeaks site states,

> Today, with authoritarian governments in power in much of the world, increasing authoritarian tendencies in democratic governments, and increasing amounts of power vested in unaccountable corporations, the need for openness and transparency is greater than ever. WikiLeaks’ interest is the revelation of truth. Unlike the covert activities of state intelligence agencies...WikiLeaks relies upon the power of overt fact to enable and empower citizens to bring feared and corrupt governments and corporations to justice.\(^{75}\)

The WikiLeaks organization believes that public and private institutions deliberately deceive citizens, which creates a barrier to the effective participation of the people.

In a fashion similar to the one described by Laclau, Assange claims that the WikiLeaks project arose directly from the activities of the oppressive ruling regime. The

\(^{75}\) "About," wikileaks.org, wikileaks.org/about.html, accessed October 14, 2012.
suppression of information by the United States government and other entities in the ruling class calls attention to the information that must be shared with the people to effectively act politically and make social change. In his interview with Obrist, Assange explains how censored information functions politically:

If we want to use information to produce actions that affect the world to make it more just, which information will do that? [W]hat we ask for is a way to color the field of information before us…and mark all the interesting bits—all the information that is most likely to have the effect on the world, which leads it toward the state we desire. But what is the signal that permits us to do that? [W]hen someone wants to take information and literally stick it in a vault and surround it with guards, I say that they are doing economic work to suppress information from the world. And why is so much economic work being done to suppress that information? Probably—not definitely, but probably—because the organization predicts that it’s going to reduce the power of the institution that contains it. It’s going to produce a change in the world, and the organization doesn’t like that vision.76

In Assange’s view, classified documents are hidden from the public because the sharing of their content would redistribute power. Sharing suppressed information is thus redistributing power to the people, where it rightfully belongs. This sharing of information provides them with the knowledge that is a prerequisite to meaningful participation and action.

There are two fairly hefty assumptions contained in Assange’s account. The first is that governments actively try to hide information from citizens in order to maintain their supremacy. The second, related to the first, is that the will of the people is not expressed through the decision-making bodies that govern them.

76 Julian Assange, interview by Hans Ulrich Obrist.
Viewed from the perspective of Canovan, these assumptions, like those in other populist movements, are motivated by the short-sighted romantic belief that institutions are inherently corrupt. This leads advocates like Assange to discount the democratic institutions and processes in which these "covert" government activities are embedded.

Alasdair Roberts, in defending the legitimacy of United States national security programs, states, "The WikiLeaks program is politically naive. It is predicated on the assumption that the social order--the set of structures that channel and legitimate power--is... deceptive... Deceptive in the sense that most people who observe the social order are unaware of the ways in which power is actually used." In Roberts’ account, the history and character of the national security apparatus speaks to a different reality; it "employs millions of people and consumes perhaps trillions annually." Moreover, this complex system was developed over three-quarters of a century, with many of its critical structures and activities being decided by democratically elected officials.

As an alternative WikiLeaks offers uncensored access to documents that have been leaked from private and public sources. This information, in the organization’s assessment, provides the link between the government which acts in nefarious and self-interested ways and the people who have interests that are not currently being attended to. The philosophy of radical transparency, expressed here by Assange and the WikiLeaks, is similar to other populist discourses in that it privileges the people’s direct access to policy making. What makes radical transparency distinct from other populist theories of society is its emphasis on the role of information in action. It is not simply that the people do not

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have a hand in the making of every decision, but that the people do not understand the true motives of those in power and do not know enough about their activities.

The short-coming of this analysis, as revealed by Canovan and Roberts, is that it relies too heavily on a polarized, simplistic account of what constitutes the government and the people. WikiLeaks by emphasizing only what the state fails to reveal, and it too easily dismisses the institutional and social structures that bind the state to the people. And in this way, the organization fails to consider that a people may legitimately choose to keep information from themselves. Much like WikiLeaks does in the interest of its own self-preservation, a people acting through their state may decide that the disclosing of certain information puts democratic institutions at risk.

**Whistleblowing and Popular Participation**

The primary form of participation by the public in the WikiLeaks organization is through what WikiLeaks calls “principled leaking,” a deliberate effort by individuals to leak information for principled rather than self-interested reasons. Though the source of leaks could be a hacker with no connection to the organization whose documents are being exposed, the most significant leaks have come from whistleblowers.

There is a parallel logic between populist rhetoric and the psychological motivations of whistleblowing. In C. Fred Alford’s *Whistleblowers: Broken Lives and Organizational Power*, Alford identifies a psychoanalytical model for understanding whistleblowing behavior:

Whistleblowers identify with the victim by making the victim’s fight their own. It does not matter that in many cases the whistleblower does not know the actual victim. On the contrary, that just makes it easier.
Identification with the victim may be defined not as empathy with the sufferer but as resistance to the aggressor…

In Alford’s account the whistleblower is motivated by his or her identification with the victim. The whistleblower in this instance, does not need direct contact with the actual victim, because the whistleblower’s fight is really with the “aggressor”—the organization or institution. The whistleblower identifies with the victim through his opposition to the aggressor, who has, in Alford’s account, made the whistleblower feel “dirty or corrupted.”

Alford’s objective is to explain how the whistleblower’s narcissism motivates his or her ethical behavior. Alford recognizes in the whistleblower a “narcissistic rage,” which Alford describes as “his least attractive aspect.” The rage of the whistleblower, however, is distinct from the rage of an ordinary narcissist because it has been moralized. According to Alford, “the whistleblower’s narcissism is wounded by the right thing: that he was cast into an environment of lies and deception and was expected to become just like everyone else. In a word, the whistleblower’s narcissism has become moralized.”

Alford begins with the assumption that the information that the whistleblower shares is valuable to society. Alford asks his readers to accept “for the sake of argument…that many whistleblowers have acted ethically in the objective sense.”

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79 Ibid., 73.
80 Ibid., 79.
81 Ibid., 64.
organization is a prerequisite to being included in Alford’s analysis. Workplace deviance studies in Industrial Organizational Psychology (I/O) examine behaviors like whistleblowing without making assumptions about their ultimate ethicality. In workplace deviance literature, a behavior is deviant if it violates organizational norms. This is distinct from unethical behavior, which involves breaking societal rules. Because organizational norms may not align with social rules, being deviant does not necessarily entail being unethical. As I/O researcher Randi Sims notes behaviors that “support society’s expectations may violate the organization’s norms.” Many instances of whistleblowing, or leaking confidential information, fall into this category, they break strong organizational norms against sharing the secrets of the organization while supporting societal norms of fighting corruption and other injustices.

Research examining workplace deviance has looked at two primary sources for the behavior—the individual and the organization. Studies examining individuals who are more prone to workplace deviance have found that they are more likely to exhibit narcissistic personality traits and are typically experiencing a negative emotional state of mind. Lawrence and Robinson explain deviance by looking at both the individual and the organization, arguing that deviance is a consequence of organizational power and an individual’s likelihood to experience frustration in response to that power.

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In Lawrence and Robinson’s analysis instances of power can potentially impact three psychological needs of the individual—the need for autonomy, a positive social identity and fairness. Power that threatens these needs can result in frustration, particularly when the individual being subjected to that power has greater than average sensitivity to those needs. If there are not any productive outlets for this frustration and there are no significant constraints to their deviant expression an individual will likely resist the power through some form of workplace deviance.

The mental state of Private Chelsea Manning in the months preceding and following her decision to leak one of the largest sets of classified documents has received significant media attention and was a primary focus of her defense in her military trial. Private Chelsea Manning, who publically identified herself as a woman one day after her sentencing in April 2014, was born Bradley Manning in Crescent, Oklahoma. She is reported to have had a difficult childhood grappling with her gender and sexual identity in a town that Manning described as having “more pews that people.”

In 2007, Manning joined the United States Army after moving through a number of low paying jobs. She was deployed to Iraq in October 2009 where she served as a field intelligence analyst. While in Iraq, her mental health appears to have come under strain. Manning’s updates to social media sites indicate this distress, including statements such as “Bradley Manning is not a piece of equipment” and Bradley Manning is “beyond frustrated with people and society at large.”

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Manning began to leak information to Wikileaks in February of 2010. On May 26 of the same year, Manning was arrested by military police after being turned in by Adrian Lamo, a former hacker and LGBT activist with whom Manning had shared many details of the leaks. Manning began conversing with Adrian Lamo on May 20 and continued online conversations off and on over the course of the next six days.

During those conversations, Manning shifts easily between her psychological state and the political importance of her leaks. She begins her conversation with Lamo stating, “ive been so isolated so long… i just wanted to be nice, and live a normal life… but events kept forcing me to figure out ways to survive… smart enough to know what’s going on, but helpless to do anything… no-one took any notice of me.”86 The concern about not being noticed becomes a common refrain in their dialogue, sometimes expressing Manning’s frustration with being ignored by her superiors, sometimes expressing Manning’s need to share the classified information she has accessed through her position as an intelligence analyst. In describing her relationship with her superiors, Manning writes, I was “regularly ignored… except when i had something essential… then it was back to “bring me coffee, then sweep the floor.”87

It is clear that Manning was experiencing extreme duress, but her conversations with Lamo do not indicate any anxiety over her leaks being revealed. Lamo repeatedly asks Manning if she is worried about being linked to the WikiLeaks materials, to which Manning states that there is no longer any evidence of her activities and that she is

87 Ibid.
confident her actions went unnoticed. Instead of expressing concern over being caught, Manning dwells on how alone she feels, how depressed she is over recently being discharged, and how poorly she continues to be treated.

Manning’s mental state, as revealed by her conversation with Lamo, is consistent with the individual described in the workplace deviance literature. While Manning is very clearly passionate about her role in revealing some of the unethical actions of the United States military, she hopes that her efforts encourage “worldwide discussion, debates, and reforms” and she expresses sincere compassion over the victims of U.S. military endeavors—she is equally occupied by her own loss of autonomy, the failure of the organization to recognize her as a valuable member, and the inequities she faces as a relatively low ranking soldier. The frustration that is expressed through the leaking of the documents is thus only in part explained by the “impurity,” as Alford would describe it, experienced by Manning through her implicit participation in unethical military action. Of equal importance is the frustration Manning feels over her perceived unimportance to the organization.

Whistleblowing as a central mechanism for transparency places a significant amount of responsibility on individuals who are in a vulnerable state of mind. Though it would be amiss to diminish the often real ethical claims of the whistleblower, the implications of a politics motivated by the behavior, which relies on a negative emotional experience and perceived personal victimization, are concerning. First, it requires one to accept the martyrdom of individuals who are currently experiencing psychological

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88 Ibid.
pressure and may not be fully equipped to act in their own best interests. Second, it requires one to have faith in the fact that someone’s perceived victimization grants them the insights to know what and to whom to disclose.

**Institutional Democracy**

The methods by which radical transparency movements choose to collect and disseminate censored information is important. As noted above, Assange and other advocates of WikiLeaks consider the United States government and other power-wielding institutions to be riddled with corruption. Their collection and circulation of these documents as such occurs outside the traditional channels of participation. The organization operates in secret, it relies exclusively on whistleblowers instead of utilizing mechanisms like the Federal Freedom of Information Act and it makes no effort to engage in open dialogue with policy makers by participating in the legislative process. These activities are consistent with the WikiLeaks philosophy, which as argued above, relies on populist rhetoric that rejects institutionalized power in favor of direct, spontaneous participation.

In this light, their mission of circulating suppressed documents is not simply one of forcing governments and corporations to expose their secrets, but rather one of subverting these institutions of power by operating outside their channels of control. It is through this activity that the people come not only to gain an accurate understanding of their political reality, but truly come to have a voice. These claims, however, are not without difficulties.
Stephen Holmes, in his argument in support of institutionalized democracy, questions whether it is possible for citizens to exercise sovereign power outside of institutions:

The idea that the people as a whole wield the *pouvoir constituant*, prior to all procedural restraints, and outside the discipline of electoral law, may be a useful legal fiction…But to say that “the people” of a modern nation-state, while truly *legibus solutus*, or unbound by law, can spontaneously choose a new political order, is unrealistic. For a society with millions of citizens…there is no such thing as a collective choice outside of all prechosen procedures and institutions.\(^89\)

According to Holmes, popular sovereignty, rule by the people, is made possible through procedural mechanisms that aggregate individual demands. There is no will of the people outside of these procedural mechanisms because the procedures themselves create the will of the people. They not only produce the people as a group, but also empower them by providing legitimate processes of participation.

Holmes borrows from Bodin to explain how these institutional constraints empower, rather than disable the body politic. Though Bodin is often remembered as the thinker who first used theological arguments to explain political sovereignty, asserting that like god, the sovereign cannot be subject to his own laws, Holmes identifies Bodin’s most critical contribution as the paradoxical claim that “less power is more power.”\(^90\)

Holmes identifies Bodin’s discussion on how the “self-destruction taboo” informs the “self-binding taboo” as the key to understanding Bodin’s thoughts on the appropriate

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limits of sovereign self-restraint.\textsuperscript{91} In this reading, self-binding is problematic only when it threatens to destroy sovereign power. It is likewise permitted and recommended when it enhances or maintains sovereign power. In other words, when self-imposed restrictions allow the sovereign to achieve specific concrete goals, or in more dire circumstances ensure civil stability, or the personal security of the sovereign, they enhance sovereign power. In summarizing Bodin’s argument, Holmes writes “constitutional restrictions are less limits on, than expressions of, sovereign freedom and power. Illicit when it involves a diminution of the crown’s authority, monarchical self-binding is possible, permissible, and even obligatory when it maintains and increases royal power.”\textsuperscript{92}

Bodin identifies several examples that he holds typically enhance rather than diminish sovereign power. Several such examples include: using a fixed value of coinage, refusing to tax without consent, and committing to rule in a neutral rather than arbitrary fashion. Holmes calls all of these “stabilizing constraints” and argues that each of these in turn enhance the power of the sovereign.

In democratic societies, these stabilizing constraints serve not only to provide order, but also to construct the avenues by which popular participation occurs. In so doing, these constraints institutionalize practices that maintain and enhance the power of the popular regime. By imposing restrictions on how the people can participate and what they can do with their power, these restrictions create stable institutions that protect democratic processes. The rules for electing the President of the United States, for example, place limits on who will control the executive functions of the national

\textsuperscript{91} Ibid., 114.
\textsuperscript{92} Ibid., 152.
government, they also restrict the times, places and ways in which the people can select this person. But in so doing, they create a durable way for people to participate in the administration of the country. Though the mechanism is imperfect, it ensures that the office is not filled through arbitrary means and that it maintains accountability to the people.

The aim of Holmes’ argument is to signal the importance of liberal guarantees to democratic theory, and resolve what he sees as a false contradiction between liberal and democratic theory. Holmes’ focus is thus on liberal principles that have been historically enshrined in the constitutions of modern democracies. All of these principles, according to Holmes, organize and protect public debate and serve a vital function in the installation of democracy. Two examples of such principles cited by Holmes are the forbidding of punishment of dissenters and the use of tacit rather than express consent. Both of these principles place limits on the actions of the populace, the first by refusing the majority the ability to silence the minority, the second by limiting participation in decisions regarding the foundation and structure of government. Both of these principles are enabling, however, in very important ways. By limiting the public’s ability to punish dissenters a government can encourage participation, protect minority groups and provide more opportunities for self-correction. Likewise, the use of tacit rather than express consent while limiting the public’s ability to determine the rules of democratic engagement frees it to make meaningful policy decisions. Time is spent debating policies rather than constantly renewing the foundations of government.

Though much of Holmes’ focus is on governmental limits that enable deliberative discussion, Holmes recognizes the value in limiting speech as well. Holmes argues for
public self-censorship on moral issues that are highly controversial and unlikely to be reconciled through discussion. Religious practices, Holmes suggests, should not be subject to political deliberation because they will only lead to conflict and never be resolved through debate.

Advocates of radical transparency argue that all matters of government are subject to public scrutiny and it is the responsibility of citizens to acquire and release any information that is actively being suppressed. This includes classified information kept secret for security purposes. Holmes does not specifically justify the act of self-censorship in security matters, he mentions it only in passing as an accepted practice, but his analysis provides a framework to evaluate the power-enhancing and power-diminishing effect of self-censorship policies.

**Self-Censorship and Sovereignty – The National Security Institutions of the United States**

Though the spirit of the radical transparency movement calls for open access to all government information (regardless of whether it is kept from the public for practical or nefarious reasons), critiques from this community have largely focused on efforts by the intelligence community to deliberately suppress the circulation of documents. For that reason, I am focusing my application of Holmes’ insights on three critical moments in the history of the national security system in the United States.

Each of these three moment—the signing of the National Security Act of 1947, the congressional reform activities of the 1970s following Watergate, and the formation and review of the Presidential Special Review Board in the months following the
exposure of the Iran/Contra affair—reveal characteristics about the institutions that compose the national security system. The latter two examples demonstrate the risks associated with the national security program while simultaneously illuminating the institutional capacities for deliberation and accountability. These histories provide insights into the deliberative processes that compose national security decision making and illuminate the participatory elements of the federal intelligence community—the primary group involved in the classification of sensitive documents within the United States. In so doing, they examine how the power of the people is both enhanced and diminished by the practices of the institution.

The national security system that is currently responsible for coordination of the agencies and departments that oversee the gathering of domestic and foreign intelligence operations was formally created with the signing of the National Security Act of 1947. The Act’s declaration of policy defines the purpose of the legislation in the following way:

It is the intent of Congress to provide a comprehensive program for the future security of the United States, to provide for the departments, agencies, and functions of the Government relating to the national security; to provide three military departments for the administration of the Army, the Navy... and the Air Force, with their assigned combat and service components; to provide for authoritative coordination and unified direction under civilian control but not to merge them; to provide for the effective strategic direction of the armed forces and for their operation under unified control and for their integration into an efficient team of land, naval and air forces.  

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The act sought to integrate the national security effort by creating a Secretary of Defense to coordinate a single military strategy. Though not specifically identified in the declaration of policy, the statute also created the two agencies that have formed the core of the intelligence community since—the National Security Council and the Central Intelligence Agency.

The legislation mandates that the National Security Council will be composed of the President, the Secretary of State and the Secretary of Defense. It also grants the president permission to include specified participants identified in the legislation. All members included in the Act are positions requiring confirmation by the Senate, who cannot participate “until the advice and Consent of the Senate has been given.”

The National Security Act defines the NSC as an advisory body to the president that serves at his will. The sole responsibility of the Council is to integrate the national security affairs of the United States. The Act states that the “function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to” national security. This primary function included in the language of the legislation reveals a tension that comes to define the role of the NSC. Though the National Security Council shall advise the President, it does so at the President’s discretion. This has meant that while the institutional structure of the Council has been fairly resistant, subject to minor modifications but more or less staying in tact,

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94The National Security Act of 1947 also created the roles of Secretary of the Army, Secretary of the Navy and Secretary of the Air Force, which were serve on the National Security Council, but these roles were eliminated in the amendment passed in 1949.
the role the Council has played in advising the president has been subject to management style of the president.

Under the NSC, the Act establishes the Central Intelligence Agency (CIA). The CIA is led by the Director of Central Intelligence who is “appointed by the President, by and with the advice and consent of the Senate.” The primary purpose of the CIA is to coordinate intelligence activities. This includes:

1. Advising the NSC on intelligence activities.
2. Making recommendations to the NSC for the coordination of intelligence activities.
3. Evaluating intelligence related to national security.
4. Disseminating national security intelligence to appropriate governing agencies.
5. *Protecting intelligence sources and methods* from unauthorized disclosure.

And, “to the extent recommended by the National Security Council and approved by the president”

6. Inspecting “intelligence as related to the national security…possessed by…departments and other agencies of the Government.”

In short, under the direction of the NSC, the CIA is responsible for evaluating and integrating all intelligence that may be relevant to national security. This includes the intelligence gathered by other agencies and departments.

The provisions of the Act that created the National Security Council were the invention of President Truman and his then Secretary of Navy, James Forrestal. Truman
and Forrestal in the wake of World War II recognized the need for a standing committee to coordinate national security policy. The provisions had broad appeal as Congressional leaders also recognized that a lack of coordination had led to mistakes, including missed opportunities to prevent the bombing at Pearl Harbor. However, once the congressional mandate was established with the execution of the statute, Truman was reluctant to fully adopt the Council as chief advisor, and the NSC did little during his remaining time in office.  

Despite Truman’s reluctance to implement the NSC, his immediate successor President Eisenhower was quick to institutionalize the structure expanding its capacity by creating subordinate boards and committees. Though Presidents following Eisenhower have modified the national security system, expanding it or trimming its size based on their leadership preferences, its institutional structure has largely stayed in place, making it a critical piece of national security policy making.

Though the codification of congressional oversight was initially limited in scope, including only the confirmation of cabinet members and the Director of Intelligence by the Senate, in the 1970s Congress began using investigatory commissions and congressional committees to assert oversight authority over the NSC and other national security structures.

Up until the 1970s modifications to the National Security Council were enacted either by Executive Order or informal reforms. Following Watergate, the role of congress

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in these reform efforts changed. In 1974, amidst the public outcry for greater oversight of the NSC and CIA, congress passed the Hughes-Ryan Amendment of 1974, which amended the Foreign Assistance Act of 1961. The Hughes-Ryan Amendment was the first legislative effort to provide congressional oversight over the intelligence community. Its provisions required that the president report the scope of CIA covert action abroad when using funds for anything other than collecting intelligence “unless and until the President finds that each such operation is important to the national security.” In instances where the President had made such a finding the Amendment required further that the president report to specified congressional committees in a “timely fashion.”

Public scrutiny of national security programs did not diminish following the passage of the Hughes-Ryan Amendment. In December of 1974, a front page article of the New York Times detailed some of the illegal activities the CIA had been engaged in since the 1950s, including keeping files on 10,000 American citizens with intelligence obtained through break-ins, wiretapping and inspection of mail. Many of the Americans who were targeted by the CIA were known anti-war dissidents, but some files predated the war.

Following the publishing of the Times article, investigative commissions were established by President Ford, and both houses of Congress. These commissions, though illuminating in details regarding the activities of the CIA, were mired in antagonisms between the executive and legislature as both jockeyed to maintain control of policy reform. The three commissions included the President’s investigatory effort, the

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Rockefeller Commission, the Church commission in the Senate, and the Pike Commission in the House. Each of the commissions called for a number of reforms, but competition between the governing bodies ultimately delayed some of the more radical efforts. Following the release of the Rockefeller Commission report, Ford issued Executive Order 11905 just one month before the expected publication of the Church Commission report. The Order included oversight by three additional presidential boards and banned the CIA from opening citizen mail and infiltrating activist organizations, it lacked, however, any direction for additional oversight by congress.

The Church and Pike commissions were not as quick to lead to policy changes. Though both the Senate and House created Intelligence Committees in 1976 and 1977 respectively, the committees had limited powers. They could not for example declassify information without the president’s approval and neither was able to successfully pass legislation that expanded the scope of congressional oversight until 1980.

The 1980 Intelligence Oversight Act strengthened some of the key provisions of the Hughes-Ryan Act. When signing in late 1980, President Carter described the function of the bill in the following way:

S. 2597… contains legislation that modifies the so-called Hughes-Ryan amendment and establishes, for the first time in statute, a comprehensive system for congressional oversight of intelligence activities. This legislation, which will help to ensure that U.S. intelligence activities are carried out effectively and in a manner that respects individual rights and liberties, was an important part of the comprehensive intelligence charter on which this administration and the Congress have worked for over 2 years. Unfortunately, the press of other legislative matters prevented passage of the charter thus far in this session…

It is noteworthy that in capturing the current practice and relationship, the legislation preserves an important measure of flexibility for the President
and the executive branch. It does so not only by recognizing the inherent constitutional authorities of both branches, but by recognizing that there are circumstances in which sensitive information may have to be shared only with a very limited number of executive branch officials, even though the congressional oversight committees are authorized recipients of classified information.\(^{97}\)

The statute requires that the Director of Intelligence keep the intelligence committees in both the Senate and House appraised of all intelligence activities, including any “anticipated” activity. In the “extraordinary” instances where the President determines that it is in the “vital interest” of the United States to not disclose to the full committees, he is required to inform the, as it is called, Gang of Eight—the “chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.”\(^{98}\)

In addition to mandating that Congress be kept current on all intelligence activities the Act also specifies that illegal intelligence activities and instances where prior notice was not given to Congress be reported in a “timely fashion.” The latter requirement strengthens the provisions in the Hughes-Ryan amendment by requiring that the report be issued as a *written statement* from the President.

The passing of the 1980 Intelligence Oversight Act strengthened congressional oversight over the CIA by clearly specifying that both intelligence committees were able to review classified documents. Further, it created increased responsibilities for the president in instances where information either had been withheld or where there was a


\(^{98}\) S. 2597 (96\(^{th}\)): Intelligence Authorization Act for Fiscal Year 1981.
desire to limit the release of information. Though the Act specifically declared that congress did not have the authority to restrict the activities taken by the intelligence community, the legislation opened up a critical point for reflection and discussion of policies.

This is an important point for our discussion on popular sovereignty as it reveals that legitimate avenues for contestation were not only available, but also utilized by the public and its representatives. Again, as mentioned earlier in this dissertation, this does not validate or legitimize the actions taken by the CIA and other members of the intelligence community. I would argue, in fact, that it does the opposite. These acts, in fact, suspend the legitimacy of the actions taken by the intelligence community and put in place a more thorough process of oversight designed to allow for censorship to be done in a more cautious and deliberate fashion.

Despite this successful legislative effort, the National Security Council faced scrutiny for engaging in unethical and illegal activities just six years after the passage of the 1980 Intelligence Oversight Act. On November 3, 1986, a Lebanese weekly magazine, Al-Shiraa, reported that the United States had secretly sold arms to Iran in an effort to win the release of American hostages held in Lebanon. Three weeks later on November 25 the Attorney General made a statement declaring that some of the funds earned from the sale of these weapons had been “diverted” to support the Nicaraguan Contras.99

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The Iran-Contra Scandal was quickly picked up by international press, after which several political and criminal investigations began. The investigations included one by the Senate intelligence committee, two by the select committees of Congress, one by special prosecutor Lawrence Walsh, and one by the President’s special review board.\textsuperscript{100}

The Special Review Board, which became popularly referred to as the Tower Commission after its Chairman Senator John Tower, was established by Executive Order 12575 on December 1, 1986. The Order required that the Board submit a report within 60 days that accomplished the following:

The Board shall conduct a comprehensive study of the future role and procedures of the National Security Council (NSC) staff in the development, coordination, oversight, and conduct of foreign and national security policy; review the NSC staff’s proper role in operational activities especially extremely sensitive diplomatic, military, and intelligence missions; and provide recommendations to the President based upon its analysis of the manner in which foreign and national security policies established by the President have been implemented by the NSC staff.\textsuperscript{101}

Despite Reagan’s announcement to the Board that “there must be a full and complete airing of all the facts,” the Board was limited in its powers of investigation. According to the Report, the “Board had no authority to subpoena documents, compel testimony, swear witnesses, or grant immunity.”\textsuperscript{102} Further, when the Board requested that the President compel key figures to appear, the President declined.

The Board was, however, able to obtain testimony from 53 officials and received support from the FBI, which proved to be critical in revealing many key events. Among the evidence provided by the FBI were electronic correspondences between many high ranking National Security officials, including two key individuals who had refused to testify—former National Security Advisor, VADM John Pointdexter, and NSC staff member, LtCol Oliver North. These correspondences retrieved from the backup archive of the PROF system (Professional Office System), an early email-like system that had been adopted by the White House for National Security Council staff in 1982. During 1985 and 1986, the period during which most of the relevant messages were sent, users of the PROF system did not possess the technical savvy to recognize that messages stored on the system remained retrievable after their deletion by end users. Because of this, the PROF messages provided unique insights into the intentions and understanding of NSC staff. As the Board noted in their report, the messages were “presumed by the writers to be protected from disclosure.”

Included in the narrative portion of the Board’s report are complete transcripts taken from the PROF system. In addition to detailed operational plans of both the Iranian arms sales and covert support of Nicaraguan Contras, the messages reveal the political machinations of the two key players in the scandal—Oliver North and John Pointdexter. When these messages are woven together as they are in the report, they tell the story of a number of critical operational failings—the botched transactions to free the hostages in Lebanon are outlined in painful detail demonstrating a total lack of self-awareness of

104 Tower et al., 17.
those involved—and deliberate aversions to the institutional oversights that were legally required by both statute and bureaucratic policy.

North and Pointdexter in multiple instances both reference their efforts to avoid sharing information with other officials who may present obstacles to moving forward with their plans. Instead of relying on formal institutional procedures, they demonstrate a preference for informal processes. As the Joint congressional commission, would later note “secrecy became an obsession.”

The Tower Commission Report is important on two critical fronts. First, it provided the first truly comprehensive evaluation of the National Security Council by the Executive branch. It reviewed the NCS’s processes and impacts—examining not only the part it played in the Iran/Contra Affair, but also its historical role as an advisory body to the president since 1947. Though the Board was conservative in its suggestions for reform, its recommendations were insightful, and aimed to support the institutional measures that were already in place. Second, and of equal importance, the Board report served as a tool to share complete, virtually unaltered documents with the public. Very little from the PROF messages or interviews is redacted. Plans are demonstrated in full detail with only very specific information omitted on the grounds of national security:

We have frequently sold the Israelis weaps/material at FMV vice the replacement cost to the U.S. Since we have over [quantity deleted] of the basic TOW in our inventory and cannot even use it in training due to its age, we ought to look at this as an opportunity to collect on a weapon which we aren’t using [location deleted] (according toKoch) and will

eventually have to dispose of because we cannot sell them off otherwise.\textsuperscript{106}

The passage above, from which only the quantity and location of the TOWs are redacted, demonstrates a capacity for utilizing oversight mechanisms to effectively communicate information about national security efforts while simultaneously exercising sound judgment to redact information that may put the public at risk. To put another way, the Board report showed how the national security institutions had the ability to reveal information to the public when popular control of the national security efforts had been undermined. In the instances, where the vast organizational enterprise had been subverted by a few individuals, the institution proved capable of assessing the damage to public trust.

All three of these moments reveal a picture of the national security system that is much more complex than that described by WikiLeaks and other radicals. The system has been reviewed both by congress and the public throughout its history. When its legitimacy has been called into question, the response has been to reform rather than reject the institution.

Conclusion

WikiLeaks and other radical transparency movements use a populist logic to support their role as activist of the people. They use language that objectifies the state as an inherently corrupt, monolithic entity, incapable of expressing the needs of the people. WikiLeaks, specifically, calls upon itself as the legitimate entity through which the

\textsuperscript{106}Tower, et al., 233.
people can express their voice and sees the act of leaking sensitive information as the critical political act that allows for the people’s will to be expressed.

The examination of the institutional structures of both the national security apparatus and the WikiLeaks organization presented here suggest a more complicated picture of both the state and the radical transparency movement. WikiLeaks’ effort to create absolute transparency is founded on a weak institutional structure primarily created of two central personalities—Julian Assange and the whistleblower. This whistleblower identifies with the public at large through his or her own perceived victimization, and though acting in isolation justifies the act of whistleblowing by appealing to the antagonism he or she shares with the public to the aggressor.

The structure of the national security institutions responsible for classifying information is, likewise, more vast and open then radical transparency advocates describe. Both Watergate and the Iran/Contra affair represented a violation of trust to the public. However, following the revelation of both of these instances investigatory measures were put in place that lead to exposure of the system to law makers and the public and ultimately the introduction of greater levels of oversight and reform.

Recent revelations of the misdeeds of entities like the NSA, however, demonstrate the challenging space these institutions occupy. It is therefore important to recognize the value of oversight and the risks the public takes if it is not vigilant in protecting the legal and political structures that make that oversight possible.

I think Holmes’ reading of Bodin is helpful in grappling with this tension. While it is important to respect institutions formed through public processes, it is also critical to
examine whether those institutions cripple the public’s ability to meaningfully engage. National Security efforts that rely on the deliberate omission of information to the public should constantly be evaluated in light of the value they add to self-preservation. For this evaluation to be effective however also requires an awareness of what is being preserved. And it is here that I believe a free and uninhibited vision of the people, serves as an invigorating force, as it provides a reminder that the purpose of our institutional structures is to empower and enable the public to engage in the decision making processes of government. In any given instance, it is thus of critical importance to evaluate the degree to which the institutional constraints are otherwise empowering to the public.

Where Laclau, Assange and other critics err, I think, is when they presuppose that the misdeeds of organizations like the National Security Administration are the consequence of their institutional structure. Institutions from this view are always acting in an authoritarian manner that concentrates power in the hands of a few. When one examines the examples above where the national security system acted inconsistently with the stated policies of law makers, one sees a pattern of insular decision making and a deliberate avoidance of the institutional decision making process. Radical transparency efforts that rely on rogue elite actors and leaks from whistleblowers compound this problem by allowing for decision making to occur without any oversight and in complete isolation.

Kant’s concept of the antinomy is useful in understanding this conflict. The need on the part of radical transparency advocates for unlimited or absolute transparency results from the overextension of popular sovereignty. When popular sovereignty is
interpreted such that unmediated access to information is required in order for meaningful participation to occur, it is self-defeating. As demonstrated above, absolute transparency undercuts popular sovereignty rather than constituting it. To resolve this antinomy requires a notion of popular sovereignty that respects its own boundaries. It requires, moreover, that the concept be consciously and deliberately applied in a way that evaluates theoretical commitments like transparency in light of the broader support they provide to popular sovereignty’s practice. Through a reflective application of popular sovereignty that acknowledges the limits of its theoretical dimensions, its insights can motivate the practice of government without ignoring the demands posed by its practical application.
Chapter 4

Could’ve, Would’ve, Should’ve: The Theory and Practice of Decision Making and Expertise

The collapse of Lehman Brothers on September 15, 2008 was a watershed moment in the Global Financial Crisis. Lehman Brothers filing of bankruptcy changed how policy makers and the public viewed the crisis, and, some argue, did irreparable damage to the economic climate. The failing of Lehman Brothers was viewed as significant for two primary reasons. First, it increased turmoil in the financial markets by increasing doubt in the valuations of other large investment companies. These strains spilled over into the larger economy and accelerated the effects of what would be the greatest decline in economic health since the Great Depression. Second, and of equal importance, it represented the first and only time during the financial crisis that the federal government did not step in to “rescue” a significantly large firm.

Understanding why policy makers did not support the flailing institution that was arguably “too big to fail” is no simple task. Officials, investors and the general public were all faced with significant uncertainty about how their actions would ultimately shape future economic conditions. This uncertainty is well documented in the 2008 transcripts from the Federal Open Market Committee (FOMC), made available to the public in 2013 after the standard five year moratorium on disclosure. In these transcripts one sees top leaders of the Fed, the primary monetary policy-making group, weigh the costs of letting large financial institutions fail against creating a “moral hazard” problem by introducing policy that creates monetary incentives for institutional failure. In their comments, it is clear that leaders both greatly underestimate the magnitude of the crisis,
while simultaneously recognizing the limitations of their information and insights. In this way, uncertainty figures prominently in the actions of policy makers responding to the crisis. It defines the conditions under which they operate as well as their perception of their own knowledge of the events unfolding. The economic landscape of 2008 was characterized by extreme volatility that undermined the assumptions of long trusted models. Policy makers responded to this with only a reluctant confidence in their decisions.

This chapter examines the legislation and regulatory structure that were in place at the time of the crisis alongside the FOMC transcripts that narrate the crisis as it unfolds to explore the third antinomy. The third antinomy is born out of the competing epistemological demands of popular sovereignty. The demands that ground this antinomy, like the elements that ground the antinomies in the two previous chapters, are drawn from the theoretical requirements of popular sovereignty on the one hand and its practical limitations on the other.

The epistemological commitments of popular sovereignty are tied to the relationship between knowledge and action implied by democratic theory. The ideal of self-government presupposes that the people compose a single, unified body capable of taking actions that lead to consequences consistent with their self-identified interests. To do this requires that the people can not only identify what their interests are (in a concrete, but still universal way), but also how to achieve them. The legitimacy of the actions taken by a popular sovereign is thus intimately linked to the quality and completeness of the knowledge that informs them. To put this in another way, knowledge
is essential to the legitimation of popular governments in as much as good information is necessary for the government to uphold the promises implicit in its laws.

There are two prominent approaches to ensuring the quality of knowledge for democratic decision making. The first, which animates the impulse described in the previous chapter, leverages the deliberative aspects of democracy to articulate an epistemology that views democratic practices as enhancing the validity of beliefs. The second, which guides much of our common sense understanding of bureaucratic practice and has figured prominently in the discipline of public administration, attempts to disentangle particularistic interests from the public interest with the use of institutions and laws that protect the administration of government from corruption.

Modern democratic theorists, John Locke and John Stuart Mill, describe the social mechanisms that improve the quality of our individual and collective judgments about the future. While both acknowledged that certainty is not practically achievable, each argue that deliberation improves the quality of beliefs. In Locke’s account, careful observation along with feedback from others, though never sufficient to provide certainty, allow for individuals (and by extension governments) sufficient knowledge to act:

Probability, then, being to supply the defect of our knowledge and to guide us where that fails, is always conversant about propositions, whereof we have no certainty, but only some inducements to receive them for true. The grounds of it are, in short, these two following: First, The conformity of anything with our own know ledge, observation, and experience. Secondly, The testimony of others, vouching their observation and experience. In the testimony of others, is to be considered, 1. The number. 2. The integrity. 3. The skill of the witnesses...[and] 6. Contrary testimonies.107

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Where certainty is not possible (which for Locke is the case for any claim about the future), probability provides sufficient justification to act. Grounding probability is two sources: personal experience and the testimony of others. When relying on the information of others the greater the number of people who agree, the more expertise the witnesses have, and the greater the degree to which they “have no interest to speak contrary to the truth” the more the testimony should be believed. Locke’s epistemological view supports popular decision making by arguing that the number of people who share a belief should impact whether that belief should inform action.

John Stuart Mill directly articulates how the relationship between knowledge and action impacts governance. Mill writes that, “[c]omplete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.”¹⁰⁸ Open debate with individuals who hold contrary beliefs is what supports, in Mill’s account, the rationality of a belief. Beliefs that have been subjected to this rigorous process of debate can and should form the foundation of government action: “Men, and governments, must act to the best of their ability. There is no such thing as absolute certainty, but there is assurance sufficient for the purposes of human life. We may, and must assume our opinion to be true for the guidance of our own conduct.”¹⁰⁹ Even more so for Mill than for Locke, dissenting opinions, like those that would be exposed in open democratic debate assure that the knowledge used for action is sufficient. The primary argument being that open democratic societies not only allow for

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participation but also make better decisions because they have better knowledge – that though still uncertain, is sufficient.

The second approach to providing quality information within a democracy emerges in relation to the administrative state, which provides neutral space for the evaluation and execution of policy. In this space, bureaucracies act on behalf of political directives using scientific expertise. Implicit here is the belief that if bureaucracies can be kept unsullied of politics they can access uncorrupted information and administer policies with precision. President Woodrow Wilson known as one of the fathers of public administration, captures this approach well, writing that “[b]ureaucracy can exist only where the whole service of the state is removed from the common political life of the people, its chiefs as well as its rank and file. Its motives, its objects, its policy, its standards, must be bureaucratic.”¹¹⁰ From this view, managerial science provides the best foundation for administering government, the public decides what its interests are through the political process, the administration uses technical expertise to carry out policies that protect those interests.

As seen in Chapter 3, both of these approaches to the production of knowledge—the popular and the institutional—support aspects of the theoretical vision of popular sovereignty. The people as producers and evaluators of information can act as participants in the construction of their interests and planning of government action. The state administrative apparatus, likewise, as the body identified by the people to administer policy when free from any particularistic interests may rationally engage in the administration of government.

Both approaches, however, are not free from challenges. Each is undercut by the uncertainty inherent in complex, democratic societies, as well as by the nature in which information circulates in both political and bureaucratic systems. One of the key characteristics of economic policy and regulation in the United States is its inherent complexity. As will be shown at greater length below, the chaotic and complex nature of contemporary markets make it difficult for even the most educated and expert to interpret and understand them. The expectation that policy would be improved by democratizing the decision making process, fails to attend to the fact that competent engagement with the facts in this case may go beyond what is practically achievable by the public.

Actions taken by regulatory bodies such as the Fed are, likewise, intended to have indirect influence on some pre-determined social good. In the case of the Fed, policy decisions related to interest rates and lending are made with the hope that they will lead to stable economic conditions that allow for low (but flexible) levels of unemployment and modest industrial growth. In this way, policy decisions made by the Fed presuppose that the Fed is able to accurately address very complex causal relationships.

Though the mechanisms and challenges to each are distinct (and as was discussed in Chapter 3 also antinomic), both the bureaucratic and popular approach to knowledge reveal that popular sovereignty takes for granted the state’s ability to effectively influence the outcome of social, political and economic events in order to conform with the interests of the people. This need, as will be demonstrated below, leads to an over commitment to the epistemological approaches utilized by both the public and bureaucrats. Thus, though few would feel comfortable arguing that certainty is attainable, the need for predicting the outcomes of policy leads to efforts to reach toward
truth without self-reflective engagement with the underpinning epistemological structures. As with previous chapters, my aim here is to use Kant’s concept of the antinomy to navigate this tension. In so doing, I hope to balance the epistemological strivings of popular sovereignty with the practical constraints to knowledge production inherent in governance.

**The Disruption of True Belief**

In Habermas’ *Truth and Justification*, he describes the distinction between true beliefs and truth claims in a way that is helpful in understanding decision making processes within democracies.\(^{111}\) True beliefs are those that inform action, they are the taken for granted, common sense truths that form the foundation of our everyday interactions with the world. Habermas claims that there is a Platonic quality to the knowledge that guides action—an assumed perfect correspondence between our knowledge of an object and the object itself. It is true beliefs that provide us as actors in the world with the experience of certainty, without which we could not confidently act.

When these certainties are “dislodged” from practical experience, however, they become a part of discourse, and the requirements for determining whether they are true changes. In discourse, truth claims are justified through rational argumentation. A claim is true, if it is rationally acceptable.\(^{112}\)

Truth operates in governance in both the field of discourse and practice. Governing occurs as the result of “true” beliefs that guide the actions of both citizens and governors alike; however, an important part of democratic governance is “rational” discourse, which, for the sake of policy debates and discussion, artificially disconnects

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\(^{112}\) Ibid., 253.
arguments from their practical context. The real challenge for popular governments is the connection between these two modes of knowing and understanding. In the first case, disruptions to the platonic ideal that grounds experiential truth cause can lead to crisis. As such, the taken for granted assumptions that allow for governmental action are suddenly in question. The undermining of these assumptions, as Habermas notes, however, provides the space for discursive argumentation. This can lead to positive reforms that expand the efficacy and renew the legitimacy of government.

As will be demonstrated in the brief historical account below, the financial crisis was characterized by a consistent failure on the part of both regulators, the public and industry experts to accurately anticipate the consequences of their actions. Their beliefs about the world consistently proved to be discordant with what they encountered as events unfolded. This created a crisis in legitimacy for the regulatory agencies – there were formal investigations taken by the government as well as broad dissent from the public that took the form of organized resistance in the Occupy Wall Street movement and a general pervading sense distrust of banks and their regulators. The rational discourse that took place both at the table of regulators and with the public at large, I will argue, did not fully address the causes of this failure in beliefs. The discourse focused on fine-tuning models already in place and adjusting expectations about how the public will respond to policy rather than a full-fledged examination of the belief system that grounded interpretation of financial markets and their regulation.

The history below first outlines the requirements that legislators placed on regulators. This serves a dual purpose. First, it provides the necessary historical context for the financial crisis. Changes to the regulatory environment in the years leading up to
the crisis have been called upon by many as the direct cause of the events in 2007 and 2008. Second, when paired with the details of the crisis that follow, it demonstrates the gap between the intent and outcome of policies, suggesting that the objects identified in policy are distinct from their referents in the practical act of regulation. As I argue below, this is because the discourse of regulators and the public fails to account for all of the complexities of the real act of regulating, hampering the benefits that may come from engaging in rational debate.

One of the key elements that fails to be addressed in the discourse of regulators is the validity of the epistemological structure itself. The thrust of this chapter’s historical account is to demonstrate that though regulators repeatedly recognize their own uncertainty regarding the application of certain policies, they fail to adequately account for how their ways of knowing—the use of academic models generally and the so-called Green Book which contains the forecasts the Fed uses to make policy—in themselves create the conditions of uncertainty.

**Glass-Steagall, Gramm-Leach-Bliley and the Commodity Futures Modernization Act**

The contemporary regulatory system of the banking and financial industry has been built over more than 150 years, beginning with the National Bank Act of 1864. Until the 1980s policy was largely expansionary in nature. The 1980s introduced increased deregulation. This deregulation rapidly increased in pace beginning in the late 1990s. Though there are hundreds of laws that provide guidance to financial regulators, there are three key pieces of legislation—Glass-Steagall, Gramm-Leach-Bliley, and the
Commodity Futures Modernization Act—that loom large in explanations of the financial crisis.

The Glass-Steagall Act, passed in 1933, sought to offer protections against economic collapses like the one that followed the stock market crash in October of 1929. The purpose of the act was to “provide for the safer and more effective use of the assets of banks, to regulate interbank control, [and] to prevent the undue diversion of funds into speculative operations.” When it was passed it was the most expansive regulation of banks in the United States. In addition to establishing the Federal Deposit Insurance Corporation (FDIC), which insures depositors of commercial banks for up to $250,000 and oversees compliance of a number of consumer protection laws, Glass-Steagall sharply separated the activities of commercial and investment banks.

The latter component of the Glass-Steagall Act, the separation of commercial and investment banks, was repealed by the Gramm-Leach-Bliley Act in 1999. Congress passed Gramm-Leach-Bliley in the late 1990s during a period of massive economic expansion when unencumbered economic activities were heralded as the key to prosperity. During this period commercial banks were seen as “missing out” on the large profits that were being made by large investment firms through the trade of derivatives. To rectify this condition the act sought, “to enhance competition in the financial services industry by providing a prudential framework for the affiliation of banks, securities firms, insurance companies, and other financial service providers.” Though Gramm-Leach Bliley allowed for the consolidation of commercial and investment banks, it did not

113 HR 5661 (73rd): The Banking Act of 1933, 1933.
114 The Glass-Steagall Act was also known as the Banking Act of 1933. For more on the FDIC see www.fdic.gov.
provide for consolidated regulatory oversight. Commercial banks continued to be
monitored by the Fed while investment banks were largely supervised by the SEC.

Just one year after Gramm-Leach-Bliley, Congress passed the Commodity
Futures Modernization Act of 2000 (CFMA). The CFMA sought “to reauthorize and
amend the Commodity Exchange Act to promote legal certainty, enhance competition,
and reduce systemic risk in markets for futures and over-the-counter derivatives.” The act
outlined that it would serve public interest “through a system of effective self-regulation
of trading facilities, clearing systems, market participants and market professionals under
the oversight of the Commission.” This system was intended to safeguard the public
interest by deterring “price manipulation or any other disruptions to market integrity;”
ensuring the “financial integrity of all transactions;” avoiding “systemic risk;” protecting
“all market participants from fraudulent or other abusive sales practices and misuses of
customer assets;” and promoting “responsible innovation and fair competition among
boards of trade, other markets and market participants.” Before the CFMA was passed
derivatives did not have a clear place within the law. Since its inception in 1974, the
Commodity Futures Exchange Commission (CFTC) had been in charge of regulating
contracts under the guidelines of the Commodity Exchange Act (CEA) that were “in the
character of futures contracts.” The question of whether derivatives, however, which
were largely developed after the introduction of the CEA, fell under the CFTC’s
jurisdiction was debated. The CFMA addressed this by codifying three primary

categories of derivatives and giving guidance on how and if each of those categories of derivatives should be regulated.\textsuperscript{117} 

Each of these legislative efforts, including both the expansion of regulatory oversight and the deregulation that took place from the 1980s up until the crisis, sought to provide a framework that would lead to stable economic conditions. With Glass-Steagall this was done by providing fiscal support from the government in moments of crisis and by carefully dividing banks in an effort to create stop-gaps to systemic collapse. With Gramm-Leach-Bliley and the CFMA this was done by expanding the scope of permitted activities and providing guidance on oversight over self-regulated market systems.

Many financial analysts and scholars have attributed the crisis to these two critical acts of deregulation. Jacobs and King describe this period in the following way:

Industry lobbying combined with weak administrative capacity for sophisticated risk assessment and a presumption in favor of free markets created a flawed process of oversight and protection against investments that would deliver enormous profits in the short run but expose the financial system in the U.S. and other countries to great risk.\textsuperscript{118}

While the philosophy of deregulation as it applies to the financial markets is deserving of criticism, I think Jacobs and King’s comments raise equally interesting questions about the adequacy of the knowledge and expertise available to regulators. Specifically, I think their comments invite critical questions regarding the abilities of regulators to actively provide oversight to the financial institutions and products they were mandated to monitor. As will be demonstrated at greater length below, the derivatives identified in the CFMA were complicated financial products whose value was determined in part by the

\begin{footnotesize}

\textsuperscript{118} Jacobs, Lawrence and Desmond King, “America’s Political Crisis: The Unsustainable State in a Time of Unraveling,” \textit{PS: Political Science and Politics} (2009), 279.
\end{footnotesize}
models used by ratings agencies and industry experts to measure their risk. These models, though often assumed by governmental and industry practitioners to have a direct correspondence with the financial objects they describe, imperfectly capture complex market systems that result from the actions of consumers, business leaders and regulators. Regulating these transactions, thus, whether it be through a rigorous reporting structure or the more hands-off self-regulating system described in the CFMA, requires regulators to understand the link between the public interest and the actions of market players in complex, dynamic environments.

The Emergence of a Crisis

Questions regarding the stability of this system began emerging in the summer of 2007 when a hedge fund with close ties to investment banking behemoth Bear Stearns collapsed. Suggestions that a recession may be looming became more pronounced throughout 2008, but many remained cautiously optimistic up until the early months of fall. The slow realization of the economic peril the United States and global economies were facing is well documented in the Federal Open Market Committee (FOMC) transcripts. Though the FOMC only formally makes decisions regarding open market operations (OMO) – one of the Fed’s three monetary policy tools—the committee provides a space for leaders of the Federal Reserve to have a comprehensive discussion on monetary policy. The transcripts from these meetings, which are published for

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119 What constitutes economic stability is by no means self-evident. Defining stability, and how it is measured, is itself a political process. Indicators like inflation and unemployment are often used, but can at times contradict each other. While beyond the scope of this paper, it is important to keep this in mind when thinking these events and their political consequences.
circulation after a five year waiting period, thus provide excellent insight into the thoughts and intentions of key federal monetary policy makers.

Open market operations (OMOs), the tool that has historically been used most often by the Fed, consist of the sale of securities in the open market. The Fed uses OMOs to “adjust the supply of reserve balances so as to keep the federal funds rate around the target federal funds rates established by the Federal Open Market Committee.” The Fed manipulates this rate by either selling securities to or buying them from commercial banks on the “open market.” When the Fed buys securities this provides an influx of cash to banks, increasing the amount they have available to loan, and decreasing interest rates. When the Fed sells securities, this decreases the amount of money in circulation, tightening the markets and increasing interest rates.

Though OMOs were the primary tool used by the Fed prior to the crisis, during the crisis the Fed became more aggressive in its use of the “discount window” in its effort to provide macroeconomic stability. Discount window lending refers to loans the Fed makes as a lender of last resort. Historically, the Fed would provide temporary loans to commercial banks that were experiencing liquidity problems, ensuring the bank would be able to make cash payments to any depositors choosing to remove their funds. There were fairly stringent rules regarding the collateral that could be used and interest rates for repayment were typically kept well above market rates. As the crisis began to unfold in the summer of 2007, the Fed recognized that a lack of liquidity in financial markets posed a threat to economic stability and began developing more creative solutions that relied on various formulations and expansions of the discount window lending program.
These more aggressive responses are interesting because they demonstrate the disconnection between the discourse that took place within the Commission and the consequences of the policies when put in place. Any remedy that went beyond the Fed’s standard market intervention—a modest increase or decrease to the federal interest rate—was met with strong concern by members of the FOMC and only implemented with great reluctance. Ultimately, these efforts proved to be unsuccessful: they were underutilized and ineffective.

The first of these efforts to expand use of the discount window was implemented in December of 2007, when the Fed created the Term Auction Facility (TAF). The TAF allowed depository institutions—commercial banks—to gain access to credit using more questionable collateral than had previously been allowed. This proved ineffective in decreasing the volatility in the financial markets and by early 2008, most members of the FOMC were beginning to express concern about a possible economic decline, with some members, most notably Chairman Bernake, expressing concern over the risk of a severe recession. In response to this, the commission began to meet more frequently, holding intermeeting phone conferences to plan and implement policy changes.

The first unscheduled, emergency meeting was called by Chairman Bernake on January 9 to discuss three primary topics: first, whether, in light of recent data they should lower the federal fund rate by 50 points; second, whether this change should happen immediately or following their regularly scheduled meeting at the end of January, and third, whether Bernake should signal changes to monetary policy in a well-publicized speech he was scheduled to make the following day.
Though there was general agreement over the monetary policy change, with most members expressing strong support for reduction in the rate, there was greater disagreement over the impact of signaling policy changes to the public. The commission recognized that expectations about policy changes can be just as impactful as the policies themselves. President of the Federal Reserve Bank of St. Louis, William Poole, captures this well,

If you look at the options market, there is apparently a 0.6 probability of a 50 basis point cut on January 30, when we make that announcement. I would certainly not favor trying to nudge that dramatically one way or the other. It seems to me the most important thing to communicate is the overall strategy that we follow. If you were to quite deliberately nudge that a lot higher trying to push that probability to 1.0, then you could be—we don’t know, but you could be and we could be—in a very uncomfortable position if we got outsized increases much higher than anticipated in the inflation numbers that come next week.\(^\text{120}\)

As Poole states, expectations in changes to the fund rate impact not only the willingness of banks to borrow and lend money, but also the options market, where expectations about fluctuations in interest rates change perceived risks and benefits for investments. If inflationary indicators changed prior to the meeting scheduled for late January 2008 and the committee no longer felt it appropriate to lower the rate, the Fed risked lowering their credibility as a coherent, thoughtful policy-maker and potentially risked introducing additional volatility to credit markets.

Poole’s concern over the volatility that may be created by signaling a change in policy before the Fed was ready to make a change, was, however, not shared by all members of the committee. Then President of the Federal Reserve Bank of San

\(^{120}\text{William Poole, transcript from “Conference Call of the Federal Open Market Committee on January 9, 2008,” 35.}\)
Francisco, Janet Yellen, who was one of the few members calling for an immediate decrease in the rate, thought it prudent for Bernake to make a strong statement that the Fed would be responding with decreases in the near future:

> Based on the data we now have in hand, I support a 50 basis point reduction in the federal funds rate in the near future. I think a very good case can be made for moving down 25 basis points today, and it would be my preference...I could also support a 50 basis point move today, but am concerned that it might be taken as a sign of panic by the committee and somehow wrongly indicate that we have inside information showing that things are even worse than markets already think...But if we don’t move today, I do think we need to take decisive action in January, and I hope you [Bernake] will give a strong signal that we will do so in your speech.¹²¹

Bernake ultimately went with a tempered approach, indicating only that the FOMC would be responsive and act when the data suggested it appropriate. In his speech, he recognized the recent negative changes to the financial markets and the economy in general, but limited his comments on the FOMC’s response to simply that it would “remain exceptionally alert and flexible,” and be prepared “to act in a decisive and timely manner and...counter any adverse dynamics that might threaten economic or financial stability.”¹²²

Despite this moderate approach, many received the speech as signaling that the Fed would be lowering their rate by half a point. In an article published in the evening of January 10, The Associated Press wrote, “Many economists now believe the Fed will slice its key interest rate by a bold one-half of a percentage point when the Fed meets next Jan. 29-30. Some, however, think the Fed will go with a more modest one-quarter

¹²¹ Janet Yellen, transcript from “Conference Call of the Federal Open Market Committee on January 9, 2008,” 22.
point reduction, given concerns that high energy prices could spark inflation.” The article notes further that Wall Street responded positively, with the “The Dow Jones” jumping “117.78 points to close at 12,853.09.”

Despite the reservations expressed in early January, on January 22, Bernake called for a second intermeeting conference call during which the committee voted to go ahead with an intermeeting reduction of 75 points to the federal funds rate. This was followed by a reduction of an additional 50 points at the FOMC’s regularly scheduled meeting on January 30. Despite these reductions, investment firms continue to have liquidity issues, with some small to medium sized firms failing to meet obligations. In response to this the Fed switched back to the strategy of more aggressive short-term lending. On March 11, the Federal Board announced the creation of the Term Securities Lending Facility (TSLF), which allowed primary dealers of mortgage backed securities (Freddie Mac, Fannie Mae and other banks) to borrow treasury securities using mortgage backed securities as collateral. The Fed, in essence, acted as a lender of last resort for these securities in order to prevent “runs-on-the-bank,” as concerns mounted over the valuation of financial products derived from mortgages. A similar approach was taken in March 2008 when an increasing number of investment banks were having difficulties meeting margins. In order to increase liquidity the Fed established the Primary Dealer Credit Facility (PDCF). Managed by the Federal Reserve Bank of New York, the PDCF established an overnight loan facility for participants in the securities market. This

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expanded the Fed’s role as a “lender of last resort” for investment banks, but importantly did little to ensure regulatory oversight over these institutions.\textsuperscript{124}

As would become evident by the fall of 2008, these responses by the Fed did little to stop the domino effect that had begun the year prior. They sent mixed messages to the public and revealed the Fed’s inability to stop the financial collapse. The FOMC debates that occurred during this period largely support the concerns of onlookers at the time. They reveal not only the inadequacy of the Fed to identify and execute policy that would prove successful, but also its inability as a group to accurately identify current economic conditions. When reading the transcripts with an awareness of the immediacy of the crisis, their focus on inflation is difficult to understand. Likewise, the insistence by several Board members that it is unclear whether a recession is emerging is, in hindsight, particularly incomprehensible.

I think the focus on inappropriate concerns stems largely from two epistemological sources. First, the presumption of the platonic relationship between knowledge and action creates a stubbornness on the part of decision makers to both accept that a crisis is emerging and also that the models and analytical devices they use to describe the financial markets and the economy are failing to yield reliable forecasts. Second, the disruptions the crisis \textit{does cause} to decision makers’ day to day beliefs are failing to raise essential epistemological questions to the level of rational discourse. Instead the focus of debate is on how the tools are being applied and how new policies can be integrated into the tools, not whether the use of the tools themselves should be questioned and discussed.

Performative Models

The use of economic forecasting tools is not specific to the Fed. Investment banks, many regulating agencies, and other large players in financial markets all rely on mathematical algorithms and modeled forecasts to inform their decisions. The models in use by this wide array of actors, while they may have their own unique peculiarities, all largely stem from the same body of knowledge and set of presumptions that govern activities in the financial markets. Because of this, when the validity of these models is questioned, one sees quick, radical changes in behavior, as was observed during the crisis.

Economic sociologist Donald Mackenzie constructs a useful typology for understanding the impact of models on the financial market. Mackenzie borrows the term “performative” from philosopher J.L. Austin to distinguish models that “do something” from models that “report on an already-existing state of affairs.” The typology Mackenzie constructs identifies several ways that economic theories and models can be used on markets. The four elements of this typology are generic performativity, effective performativity, barnesian (positive) performativity and counterperformativity.

Mackenzie identifies generic performativity as any use of models, theories and concepts by practitioners. All efforts to produce information or reports by professionals, investors, regulators, etc., so long as they borrow from academic theory fall into this category. Effective performativity, in contrast, involves the practical use of models, theories and concepts that lead to some tangible effect. When the Fed uses Greenbook forecasts to make policy changes, which in turn change the conditions analyzed by their forecasts, their use of the model would an example of effective performativity. Whether
those effects conform or defy the expectations of the model determine whether the activity is barnesian (positive) or counterperformative. If economic conditions begin to correspond better with the Greenbook’s forecast activities would be classified as barnesian. If economic conditions begin to deviate from expectations the activities would be classified as counterperformative.\textsuperscript{125}

Mackenzie’s most successful demonstration of barnesian performativity is the impact he describes of the introduction of the Blacks-Scholes-Merton Model (commonly referred to as Black-Scholes). The Black-Scholes-Merton model was developed during the late 1960s and early 1970s during a period when interest in the expansion of options to the financial market was increasing rapidly. Black and Scholes began their investigation like many other financial and economic theorists of the period, examining the relationship between the price of an option and the price of its underlying commodity.\textsuperscript{126} Prior to the late 1960s, options on stocks were limited due to beliefs amongst regulators and some investors that the options on financial products were speculative, more akin to gambling than investing. Stock options were traded during this period but only between individuals or individual firms, there was no marketplace for their trade. This began to change as the options market on agricultural goods became less lucrative as government subsidies led to a reduction in the risk attached to agriculture prices. Regulators continued to be reluctant to allow widespread trading of stock options,

\textsuperscript{126} In its most basic form an option is an agreement that allows a buyer to purchase a contract stating that he or she has the option to buy a certain asset for a given price at some point in the future. When the option expires the seller is required to sell the asset for the price listed in the warrant, but the buyer is able to opt out of the agreement, losing only what was paid for the initial option to buy. In addition to redeeming the warrant for the asset upon expiration, the buyer is also able to sell the option at any point prior to the expiration of the contract, fetching whatever the going rate is for that option.
but by 1968 both the Chicago Mercantile Exchange and the Chicago Board of Trade were determined to open an options market for stock derivatives.

The efforts of these options market players in Chicago worked in concert with academic work occurring in the field of finance. The development of a market provided a space for new financial theories to be tested and the financial theories that articulated the science of the derivatives market provided legitimacy to the trade. In 1973, these efforts created prime conditions for the quick development and expansion of a stock options market. On April 26, 1973 the Chicago Board Options Exchange opened. That same year, Robert Merton published the “Theory of Rational Option Pricing,” a mathematically rigorous expansion of the work of Black and Scholes, in the spring issue of *The Bell Journal of Economics and Management Science.*

The Black-Scholes-Merton formula, published in 1973, allowed one to find the theoretical, “correct” cost (the true cost without the noise from incomplete or inaccurate information, irrational or ill-informed buyers, etc.) of an option with six pieces of information—the stock price, the exercise price, the risk free interest rate, the time to expiration, and the implied volatility. The first five of these could be empirically observed, the stock price could be looked up, the exercise price was included in the contract, the risk free rate of interest could be estimated using the interest rate on risk free investments like government bonds, and the time to expiration was likewise also defined in the contract. The implied volatility was assumed to be the constant, intrinsic variability of the stock in relation to the market. Though unobservable, it could be estimated by reverse engineering Black-Scholes using historical option prices. Since the implied

volatility was constant it did not matter if its derivation was done with current or historical prices.

When Black-Scholes was introduced, Mackenzie argues, “the fit between” the model and “empirical patterns of option prices was only approximate.” As the model was “published and adopted by market practitioners”, however, the fit rapidly improved. Mackenzie argues that it is the adoption of the model itself that accounts for the improved fit. While there were a number of models being developed for pricing options, the Black-Scholes model prices were circulated and sold on Black’s sheets. Traders used these sheets to deploy arbitrage strategies for underpriced options, buying options that deviated from expectations until the price met the predictions made with Black’s sheets.

Mackenzie’s history of Black-Scholes demonstrates the influence models have on markets – particularly financial products markets, where demand for the product is cultivated only through expectations of profit. Versions of the Black-Scholes model continue to be used in the valuation of options, but the model that has received the greatest attention in relation to the crisis is the Gaussian Copula Formula. The Gaussian Copula Formula, developed by trained actuary and statistician David X. Li in 1998, provided a mechanism for investors to measure the correlation between defaults occurring on two independent loans. Measuring this correlation allowed investors to makes inferences about the level of risk associated with Collaterized Debt Obligations (CDOs), securities composed of pools of loans – typically mortgages. Li’s insight was that the correlation between the actual loans defaulting (an unknown) could be substituted

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128 Mackenzie, An Engine not a Camera, 258.
with the historical correlation between Credit Default Swap (CDS) prices. Credit Default
Swaps work as a sort of insurance protecting lenders against losses. In the event of
default, the buyer of the CDS, the lender, is compensated by the seller of the contract for
the value of the loan. The price of the CDS is determined by market forces based on the
perceived risk of default. Li’s justification for using the correlations between CDS prices
as a proxy for the real correlations of default was that markets absorb information more
or less immediately and thus have “knowledge” about the real risks involved with the
loans. The prices thus allow analysts to infer the relative risks of each of the loans
involved.

Credit Default Swaps (CDS) are a relatively new financial product introduced
only four years prior to the publication of Li’s paper.\textsuperscript{130} The historical data used to
approximate the correlations of default were thus based on a very limited period, during
which housing prices were in sharp ascent and defaults were rare. As a consequence of
this, the correlations between defaults were also very low.

The impact of the Gaussian Copula formula proved to be extensive in the years
preceding the crisis. Mackenzie’s conception of barnesian performativity is helpful in
explaining why this was the case. When Li’s formula was introduced CDOs occupied a
comparatively small segment of the market. According to Financial Times, in 2000 “the
total number of CDOs issued were worth somewhere in the tens of billions of dollars. By
2007, two trillion dollars of CDO bonds had been issued.”\textsuperscript{131} One of the key changes that
took place during this time was the adoption of the Gaussian Copula formula by ratings

\textsuperscript{130} Credit Default Swaps (CDSs) were originally created in 1994 as a creative way to manage the debt
acquired by JP Morgan as a result of the Exxon Valdez oil spill. See MarketWatch, “Exxon Valdez and the
\textsuperscript{131} Jones, Sam, “The Formula that felled Wall St.,” \textit{Financial Times}, (April 24, 2009).
organizations. Moody was the first to adopt it on August 10, 2004, followed by Standard & Poor’s a month later. Before adopting the formula Moody’s required that CDOs meet a diversity score determined by the diversity of the products underlying assets—commercial loans, student loans, etc. Once the ratings company began to rely on Li’s formula, products no longer needed to include debt from a variety of sources to hedge risk. Instead, they only needed to satisfy that the loans were not correlated using the assumptions proposed by Li.

Once a triple-A rating could be secured without a diverse asset portfolio “CDOs built solely out of subprime mortgage debt became,” according to the Financial Times, “all the rage.”¹³² This in turn increased the incentives to approve subprime mortgages, “with so many investors looking to put their money in debt, that debt became incredibly cheap, fueling a massive boom in house prices and turbo charging the world’s economies.”¹³³ Like the Barnes-Scholes-Merton formula, when the Gaussian Copula formula was introduced, conditions were ripe for its adoption. There was a desire amongst investors and ratings agencies to find a simple mathematical way to price the correlation of risk. That Li’s formula in particular was adopted, however, was a matter of historical contingency. As was seen in the late 2000s, Li’s method for determining the default correlations was not as a matter of fact more accurate than others. Its introduction did, however, allow for the creation of conditions which made its application profitable and accurate in the short-run. The likelihood of default remained low because housing prices continued to increase as buyers were able to access greater and greater amounts of credit.

¹³² Ibid.
¹³³ Ibid.
Policy making in this environment requires not only an understanding of how interventions impact current conditions, but also how they impact future conditions—conditions which will partially be shaped by policy and entrepreneurial innovation by market players. Certainty of outcomes is this context is not practically achievable. Though this uncertainty is expressed repeatedly in the transcripts of the FOMC, questions that probe at the Commission’s fundamental assumptions are absent.

When introducing the Primary Dealer Credit Facility to the FOMC, William Dudley, then Manager of the System Open Market Account, described the benefits of the program by stating that the “PDFC should help to restore confidence among repo investors. It essentially creates a tri-party repo customer of last resort—us…The PDCF should break the chain of worry by reassuring the clearing bank that the Fed will be there as a lender to fund the repo transactions.” In summing up his remarks Dudley admits that “the jury is still out on whether the PDCF will be sufficient to stabilize confidence.” He reaffirms this when responding to questions from members of the FOMC stating, “look we haven’t done this before. We have now had one day of experience. We’re going to have to work on the issues that you raised, and we’re going to have to see how it goes, frankly.”¹³⁴ The uncertainty revealed in Dudley’s remarks on the implementation of PDCF are related to expectations about its volume of use and the impact that it will have on consumer confidence. Ultimately, the crux of the Fed’s analysis of policy and economic events still relies on a standard set of tools: the “5 year and 5 year forward” forecasts that measure inflation, the LIBOR-OIS spread that measures interbank lending risk and the Greenbook which contains the Fed’s formalized forecasts for inflation,

employment and other standard economic metrics. Absent is any deep discussion about what these tools might be failing to measure.

The Collapse of Lehman Brothers

The response the Fed took to Lehman Brothers was markedly different from the approach it took with other failing institutions. It was the first and only time during the entire crisis that the Fed stepped back and allowed for the total collapse of an organization that was “too big to fail.” Interestingly, it is also one of the few major developments of the crisis where a response was not developed with the formal consideration of the FOMC in advance of the decision. Instead, the response was led by Timothy Geithner, then President of the Federal Reserve Bank of New York (voting member of the FOMC and the Federal Reserve Board), with the support of Treasury Secretary Henry Paulson. As the administrator of the Primary Dealer Credit Facility (PDCF), the New York Federal Reserve Bank was ultimately responsible for approving the loans made by the facility. Under Geithner’s leadership the New York bank chose not to accept Lehman Brothers’ collateral, determining that the organization was not merely illiquid, but was insolvent.

The market response to the collapse was quick. Anton Valukas, the court-appointed examiner asked to investigate the bankruptcy, summarized the events in his report:

The Dow Jones index plunged 504 points on September 15. On September 16, AIG was on the verge of collapse; the Government intervened with a financial bailout package that ultimately cost about $182 billion. On September 16, 2008, the Primary Fund, a $62 billion money market fund announced that –because of the loss it suffered on its exposure to Lehman—it had “broken the buck,” i.e., its share price had fallen to less
than $1 per share. On October 3, 2008, congress passed a $700 billion Troubled Asset Relief Program (“TARP”) rescue package.\textsuperscript{135}

The shock from the collapse of Lehman Brother’s was so dramatic that the government swiftly stepped in with bolder efforts to support the institutions that began collapsing in its wake. Understanding why the Fed made such a radical departure from the tactics it had used earlier in the year is difficult. The FOMC did not formally meet prior to the decision to let the bank fail, and only obliquely mentioned the decision in the transcripts from late December, with comments alluding to it being “necessary.” When examined in light of earlier transcripts, the best guess for the justification to let Lehman Brother’s fail was that the Commission and Geithner in particular saw the risks associated with the “moral hazard” problem were greater than the risks associated with a bank of that size collapsing.

Despite clear evidence to the contrary, our post-hoc judgments of the crisis in general and the Lehman Brother’s collapse in particular have assumed that policy makers not only \textit{should} have had better expectations about the consequences of policy, but they in fact \textit{did}. The opening testimony of the hearing on “Public Policy issues Raised by the Report of the Lehman Bankruptcy Examiner” before the U.S. House of Representatives Committee on Financial Services includes the following statement:

\begin{quote}
[I]t is clear from the examiner’s report… the SEC, which was supposed to be the primary regulator, was overseeing a number of Lehman’s activities. Whether it was valuation of its assets, whether it was reporting things properly, whether it was liquid or not, whether things were secured, Lehman Brothers at its end was acting like it was pawning its assets. It is as simple as that. It kept pawning its assets to its lenders on a faster and faster basis and got less and less for what it pawned… The regulators saw
\end{quote}

this happening, especially the SEC, but they did not share it with the little guys.\textsuperscript{136}

This sentiment, expressed here by Representative Ana Eschoo, former Supervisor of San Mateo County, is repeated by House Committee members. Committee member Bachus from Alabama follows Representative Eschoo’s statement with the claim that they “were either incompetent or they concealed facts. I would agree with both of you that the facts were they did not share that information. And I think they knew.” During then Secretary of Treasury Geithner’s testimony, New Jersey Representative Scott Garrett, characterizes the New York Fed in a similar fashion: “It is almost like that old movie line, ‘You want the truth? You can’t handle the truth.’ And so the New York Fed decided that perhaps we would not disclose all of the truth going along.”\textsuperscript{137}

The evidence used to support the claims quoted above include several unethical accounting and reporting activities taken by Lehman Brothers in the years leading up to their bankruptcy. The two that are referred to in the greatest detail during the hearing are the so-called Repo 105 transactions, which used an accounting trick to make borrowed money collaterized by Lehman’s company bonds look like bond sales, and $7 billion in encumbered funds that had been included in Lehman’s liquidity pool. The Repo 105 transactions had been reported by a whistleblower internally within Lehman Brothers and to the firm’s auditors at Ernst & Young, but was never disclosed or identified by either the SEC or the Fed. The SEC identified $2 billion in incorrectly reported encumbered


Committee members used both of these pieces of evidence to suggest that officials at the Fed and the SEC had information that if shared with market participants could have prevented the crisis. Evidence that was determined to have not been shared with the Fed or the SEC such as the Repo 105 transactions did not undermine this claim, but emboldened it. According to the comments made by committee members, leadership should have discovered those practices because the questionable character of Lehman Brothers was so obvious.

While both of these creative accounting practices should inform policy developments, the subtext of the Committee members questioning points to a task much more challenging. The suggestion is that policy makers could have prevented the crisis by 1) monitoring high risk firms more closely, 2) identifying risky behavior more readily and 3) disclosing this information to the public.

Leaving aside the empirical question whether taking these steps would have prevented the crisis—history makes clear that this question is nearly unanswerable—I would argue that House Committee members oversimplify the complexity of completing the first two steps implied by their line of questioning. First, Lehman Brothers was one of the largest investment banks prior to its collapse. It was valued at over $700 billion and was counterparty to more than 900,000 derivatives each of which could trade up to 600 times a day.\textsuperscript{138} The sheer magnitude of transactions that comprise the activities of an

\textsuperscript{138} For more information on the size of Lehman brothers see Summe, Kimberly Anne. "Lessons Learned from the Lehman Bankruptcy." Hoover Institution, Stanford University Book Chapters (2010). For more information on derivatives trading see Chen, Kathryn, Michael Fleming, John Jackson, Ada Li and Asani
institution the size of Lehman Brothers exceeds what can be comprehended by the mind. Instead, it requires information systems, often dozens of them, and large departments of finance, accounting and analytics specialists to make sense of the stored data. Any reporting effort to extract information from these sources obscures as much as it reveals. By necessity it makes sense of details by use of abstractions.

The same holds true for identifying risky activities. The probability assigned to risks is influenced by the underlying assumptions about those activities. These assumptions may be well-founded, but may also be influenced experiences or interests that defy current conditions.

Policy should learn from past experience and reporting requirements should be attuned to gaps noticed in previous efforts, but even when regulation is guided by experience it will still sometimes miss the most important elements. This is because, as was evident in the FOMC transcripts, what really matters may only become apparent in hindsight. Sometimes it is even past experience that makes the most impactful insights difficult to see. The Fed has been criticized for being far too focused on inflation in their formulation of policy as late as summer 2008. This focus was no accident; legislation introduced in the late 1970s following the destabilizing hyper-inflation of the previous decade required the Fed to achieve price stability along with its previously set goal of full employment. The importance of inflationary concerns became a notable part of Fed culture after its successful institutionalization by Fed Chairman Paul Volcker (1979-1987).

Interpreting the Crisis

While the crisis made evident the challenges the state faced when attempting to create policy that ensured economic stability, the act of deregulation itself, which preceded the crisis, posed its own set of questions regarding state power. Deregulation fragments state power. It places certain types of law-making authority outside of officials’ legal scope of action, and it enables non-state actors to influence social and political institutions through their relationship with the economic sphere. Following the passage of the CFMA, certain types of oversight of the derivatives market occurred only with the permission of those being regulated. This is seen clearly in the establishment of the SEC’s Consolidated Supervised Entity (CSE) program. The CSE, established in 2005 and discontinued in September 2008, was a voluntary program that provided limited supervision to investment banks. In a hearing before the House Committee of Financial Services in 2010, current SEC Chairman Mary Schapiro, characterized the program by stating that the consolidated entity program

…was designed to fill a gap in the regulatory structure that was left when the Gramm-Leach-Bliley Act failed to require investment bank holding companies to be regulated at the holding company level. This program, while staffed with dedicated and hard-working professionals, was flawed in its design and never adequately resourced to meet the challenges of prudential supervision of some of the world’s largest financial institutions…Participation in the CSE program by firms was voluntary. The program was seriously underresourced, understaffed, and undermanaged, and in some ways lacked a clear vision regarding its scope and mandate.139

Deregulation created an impotent regulatory structure that exerted influence only at the will of those being regulated.

The phenomenon of deregulation and its impact on state power was addressed by Theodore Lowi as early as 1969. According to Lowi, the prevailing ideology in the United States morphed from liberal-capitalism to interest-group liberalism in the late 19th century. In Lowi’s analysis, interest-group liberalism was an easy fit in the US because it, like liberal-capitalism, assumed the stability of society was an automatic process that required little to no governmental intervention. Stability is assured within interest-group liberalism, according to Lowi, by three basic assumption:

(1) Organized interests are homogenous and easy to define…(2) Organized interests pretty much fill up and adequately represent most of the sectors of our lives, so that one organized group can be found effectively answering and checking some other organized group as it seeks to prosecute its claims against society, And (3) the role of government is one of ensuring access particularly to the most effectively organized, and of ratifying the agreements and adjustments worked out among competing leaders and their claims.

Lowi argues that despite the largely mythological nature of interest-group liberalism there were practical reasons for its adoption. Most relevant to our discussion here is the help it offered in resolving problems within federalism. Lowi uses the Extension Service of the Department of Agriculture as an example. The Extension Service, built upon local, privately-operated farm bureaus, allowed groups to self-administer at the local level while still operating under the umbrella of a federal administration. Through the erection of programs like the Extension Service the participation of interest-groups became synonymous with self-government.

140 Lowi, Theodore The End of Liberalism, (New York: W.W. Norton & Company, 1969). The fact that Lowi argued this in 1969 is interesting because it came before the massive deregulation of the 1980s.

141 Ibid., 71.
The federal programs that appeared during and after what Lowi calls the “New Deal revolution” required the same types of justifications, and were thus also subject to the type of “self-governance” expressed by interest group activity. Consequently, agencies born out of the New Deal and New Deal philosophy ultimately came under the influence of the interest groups they are intended to regulate. In this light, one reading of the deregulation that took place in the late 1990s is that rather than being a distinct departure from previous approaches to regulation it is actually the logical expression of the interest-group liberalism that preceded the regulatory expansion of the 1930s and 40s. It was thus no surprise that investment banks were able to direct the activities of their regulators such that they were only subjected to those regulatory powers that were consistent with their own perceived interests. The story of the state that may accompany this type of analysis would be one describing the gradual decline of the liberal state alongside the emergence of an oligarchic state helmed by wealthy industry leaders.

Understanding the crisis simply in terms of the deregulation that was the expression of private interests is attractive. There is a compelling simplicity to it – private group interests undermined the public good in pursuit of profits. The rhetoric of public interest proved ineffective when confronted with the logic of interest-group liberalism. There is no shortage of evidence to demonstrate the extensive lobbying conducted by the financial and banking industries. And many have argued, quite rightly, the industry-championed effort to remove regulatory control over the derivatives market was a critical misstep that led to the crisis. Yet despite the truth to these claims, simply to focus on deregulation and the role of interest-groups obscures a larger issue.
The charge of legislators, the Fed and other financial regulators of protecting the public interest by ensuring a stable economy is, even in the best of cases, always achieved through indirect means. Moreover, the landscape on which policy making occurs is always changing. As stated above, the policies themselves can invite radical changes to the political, social and economic environment. Without pardoning any of the governmental or corporate parties who may or may not have acted ethically or with the public’s best interest in mind, the conditions under which Gramm-Leach Bliley and the CFMA were ushered in were drastically different than the conditions immediately leading up to the crisis. In the late 1990s and through the early years of the 2000s a convincing argument could be made that the public interest was best achieved by ensuring complete flexibility in financial markets.

Steven Schwarz explains that “unrestricted private ordering,” or the use of private, industry derived rules rather than public ones, derives its legitimacy from the claim that industry-prescribed rules provide for greater efficiency by allowing market forces to dictate the need for regulatory constraint.142 Though Schwarz published his work on private ordering in 2002, for many casual and professional observers, it became much easier to question the wisdom of private control of regulation following the crisis.

Lessons Learned – Dodd Frank Reforms

After the initial crisis, the government was left with three primary policy responses: leaving the derivatives market as it was, largely unregulated; passing legislation that required derivatives contracts to be traded in a regulated exchange, similar to the way stocks are traded; or developing a method of exchange that fell somewhere in

the middle. Ultimately, Congress moved to pass legislation that took a moderate approach. The Dodd-Frank Act, passed in 2010, states that its purpose is to “promote the financial stability of the United States by improving accountability and transparency in the financial system, to end ‘‘too big to fail’’, to protect the American taxpayer by ending bailouts, to protect consumers from abusive financial services practices, and for other purposes.” The legislation which fills more than 2,300 pages is a labyrinth of regulatory rules and directives that provides reforms and guidance to the entire financial regulatory apparatus.

Title VII of the act focuses directly on the previously unregulated derivatives market, seeking to minimize the systemic risk of derivatives trading by creating greater transparency to the derivatives market and prohibiting entities holding customer deposits (commercial banks) from engaging in speculative derivative market activity. This section also clarifies the role of the CFTC and the SEC in regulating derivatives and directs those agencies to provide further clarification by issuing rules on more rigorous definitions of the type of swaps that would be subject to Dodd-Frank regulation.

The rules issued by the CFTC and SEC in response to this directive require previously unregulated derivatives, including interest rate swaps, foreign currency exchange swaps, and commodity swaps, exchanged by financial entities to be “cleared” through a regulated clearing house that documents and reports transactions. The rules provide exemptions for commercial end users such as “industrial firms, utilities and airlines, which use swaps to counter risk in goods they purchase or manufacture and against fluctuations in interest rates.” Swaps performed by these entities can continue to be traded as over-the-counter derivatives with limited regulatory oversight.
When crafting Dodd-Frank legislators recognized that the government’s response to the economic crisis was crippled by bureaucratic fragmentation and incomplete data, knowledge and information. The Act puts measures in place to improve these impediments by establishing the Financial Stability Oversight Council to provide coordination amongst regulating agencies. It also outlines the importance of institutional improvements to data and information quality and provides extensive guidance on improving economic and financial market knowledge amongst policy makers and the general public. Some of the provisions addressing the issue of information quality included:

- Establishing the Office of Financial Research with direction that it build a data center to manage all of the data being generated by the six federal agencies.
- Requiring “the CFTC and the SEC to study jointly and report to Congress on: (1) the feasibility of requiring the derivatives industry to adopt standardized computer-readable algorithmic descriptions to describe complex and standardized financial derivatives”\(^{143}\)
- Directing the SEC to study financial literacy amongst retail investors and complete a study on ways to improve investor access to information on investment advisers, brokers, dealers and associated persons on the Central Registration Depository and Investment Adviser Registration Depository systems.
- Directing the SEC to prescribe standards to ensure accuracies of securities ratings.

Each of these directives is aimed at addressing the fundamental problem of bad or incomplete information being used by both policy makers and the public to make decisions.

These are important changes. One of the key challenges in dealing with the complexity of financial markets is the sheer quantity of data produced. Building an infrastructure to support collecting and analyzing standardized data is critical to informed decision making. Despite this significant change, however, the law does little to address the blind spots produced by uninvestigated epistemological conditions. Industry continues to maintain a large presence in regulatory bodies. Though Janet Yellen has spent her entire career as an academic or public servant, current Treasury Secretary Jack Lew has ties to Citigroup. The leadership of the newly formed Office of Financial Research is likewise filled with former leaders of commercial and investment banks, with staff from Morgan Stanley, Merrill Lynch, Charles Schwab and Fannie Mae. Understanding the businesses they are evaluating is necessary for providing a comprehensive review. However, even when members do their best to uphold their fiduciary responsibilities, they continue to examine conditions with the same set of assumptions as those they are regulating. This allows policy makers the ability to identify certain fraudulent behaviors, perhaps, but I would argue that it does not allow them the critical space to effectively engage with the underlying assumptions about growth and risk that dominate the financial profession.

In 2010, the Green Book containing the Fed’s quantitatively modeled forecasts was combined with the Blue Book, a more qualitative analysis of economic conditions, and renamed parts A and B of the Teal Book – officially titled “Report to the FOMC on
Economic Conditions and Monetary Policy.” Currently, the most recent FOMC transcripts and accompanying forecasts available are from 2009. Though there is limited information about the technical nature of the forecasts after 2009, meeting minutes published immediately following FOMC meetings and policy press releases confirm that projections continue to be concerned with two primary variables – inflation and unemployment. Based on the transcripts that are available and the information that has been circulated with the public there does not, likewise, appear to be any radical changes to the underlying assumptions or modeling techniques used to produce the current forecasts.

Conclusions

All of the limitations on knowledge exposed during the crisis –incomplete, inaccurate information; complex, dynamic environments; competing narratives clouded by private interests—challenge the relationship between knowledge and action required by popular sovereignty. Navigating these limitations requires reconsidering popular sovereignty. In the spirit of Kant’s antinomies, I suggest using a conception of popular sovereignty and accompanying epistemological view “that knows its own limits.” Adopting this conceptual framework, however, requires more than simply acknowledging that certainty is not possible. It also requires confronting the consequences of uncertainty in light of the critical role knowledge plays in the legitimation of popular government.

A more limited, flexible epistemological view that does not commit us to one form of knowledge production over another, but recognizes the functional role of knowledge in governmental action, is key to finding this balance. What this means for both theory and practice is the recognition that one form of knowledge production, be it
popular or institutional, may not have universal applicability. Moreover, it is not simply the theoretical consistency of an epistemological structure that determines its value, it is also the degree to which it provides support for the broader goals of popular sovereignty. Legitimate epistemological approaches thus are not found in broad, universal principles, but within the practice of government itself.
Chapter 5

Conclusion

This dissertation has used Kant’s Antinomies as a guide for navigating tensions that emerge in the practice of popular sovereignty. In each of the historical moments explored in the previous chapters’ problematics in the theory of sovereignty are revealed when theory is confronted with the practical act of governance. My approach has been to explore these conflicts in an effort to preserve the significance of the act of theorizing while respecting its boundaries. In each of the chapters, I have explored theoretical tensions through the lens of a particular historical moment. This has provided a space to explore the absolutist tendencies of theories of popular sovereignty while preserving the value they provide in legitimizing government.

In this concluding chapter, I discuss the role that theories of popular sovereignty played in framing the three historical moments explored in this dissertation. In so doing, I argue that each of the events explored represented a crisis in legitimacy that led to a rejection of governing institutions when interpreted through the lens of their popular and theoretical critics. As remedy for this, I return to Kant’s solution to the Antinomies. I make the argument that as the preceding chapters demonstrate the value of theoretical constructs is in the guidance they provide to practice.

Narratives of Mistrust and Malfeasance

The narratives of the three contemporary examples included in previous chapters all describe a crisis in legitimation that is brought about by a set of perceived critical missteps by government agencies and officials. The events leading to these crises are
framed by critical members of the public and theorists alike as the result of coordinated action taken by nefarious industry and government actors. The public interest is set outside of the acts of government in such a way that discredits not only the acts themselves but the entire institution.

As was discussed in Chapter 2, several important critical interpretations of the imprisonments in Guantanamo draw on Giorgio Agamben’s *homo sacer* – a figure who is cast outside the law and exposed to absolute sovereign power. The picture of sovereignty that emerges from this perspective is one that is at odds with a view of popular sovereignty that sees democratic institutions as empowering to individuals. Instead, sovereignty emerges when the state extends beyond the rule of law and the individual subject appears only as adversary and victim. Judith Butler’s description of state power relative to the detentions in Guantanamo captures this well: “The state, in the name of its right to protect itself and, hence, and through the rhetoric of sovereignty, extends its power in excess of the law…In this sense, indefinite detention provides the condition for indefinite exercise of extra-legal state power.”144 The absolutist commitments implicit in this conception of sovereignty require characterizing the institutions of the state as either wholly good or bad. This has practical and theoretical consequences. It both directs dissent to channels outside the state and limits the theoretical space available to explain state actions that are in conflict with one another. This plays out most clearly in times when state actions are being questioned by the public as they were in the early years of the Guantanamo detentions.

In Chapter 3, a similar impulse toward absolutism is demonstrated in the populist response to national security measures that limit the disclosure of documents and information. The radical transparency movement and theorists calling for populist democratic practices see a sharp contrast between the interests of the people and the actions of the institutionalized state. Even in careful work like Ernesto Laclau’s that systematically rejects absolute and universal conceptions of the state in favor of the heterogeneous hegemon, the state and the people are ultimately ontologized in such a way that casts them in opposition to each other. Again, this limits opportunities for recourse and reform to domains outside of the state and discounts the empowering effects of institutionalized democratic practices.

As presented in Chapter 4, the failure to adequately contend with the epistemological constraints of government administrators supports a critical view of government that presupposes malfeasance and deliberate obstruction of the public interest. Crises in these instances lead to a vilification of the government and government actors that limit discussion on how to improve the epistemological conditions of government.

The narratives that surround these crises in trust all suffer, I believe, from the universalizing and homogenizing effects of not only the history of sovereignty as a concept, but the theoretical act in general. When divorced from practice, theory reifies its concepts and reaches beyond what it can rightfully conclude.

**The Regulative Function of Theory**

Kant’s regulative function of reason serves as a helpful guide here. As I mentioned at the outset, though my aim is not to apply Kant’s work directly, I believe the
spirit of the insights in Kant’s first Critique are useful in navigating the conflicts that emerge when political theory confronts the practice of governance. When describing pure reason’s regulative function Kant writes:

Now in order to determine the sense of this rule of pure reason appropriately, it must first be noted that it cannot say what the object is, but only how...[it] is to be instituted so as to attain to the complete concept of the object. For if the former were the case, then it would be a constitutive principle, the likes of which is never possible on the basis of pure reason.145

In this passage, the important distinction regarding the application of pure reason is the difference in informing how an object is instituted versus determining how it is constituted. In the first case, reason serves in an appropriate way by providing the rules the understanding uses when proceeding “from the conditioned to the unconditioned.”146

In the second, reason extends beyond its rightful reach by demanding something that cannot occur in experience—an unconditioned object.

Each of the chapters in this dissertation explored an aspect of popular sovereignty that when examined in a practical context revealed conceptual demands that went beyond what was possible in practice. In each of the cases, these demands led to failures in the ability to accurately capture the empirical and theoretical realities of the historical moments explored.

As argued in Chapter 2, the sovereign embodied by the George W. Bush administration was cast by theorists as being both absolute and indivisible. The decisions made by the administration were however subject to revision by both government officials and the public. Likewise as discussed in Chapter 3, populist theorists and radical

146 Ibid.
transparency activists call upon a popular political body—the people—that exists outside of the institutional practice of democracy. The extra-institutional activities that are legitimated by this rhetoric, however, are themselves supported by institutions with narrow networks and limited opportunities for participation. Finally as demonstrated in Chapter 4, both theories of popular sovereignty and the legislative mandates of governing officials imply that sovereign action requires decision making to occur under conditions of certainty. The discussions that occurred amongst policy makers leading up to and following the financial crisis of 2008, however, demonstrate that decision making often occurs under great uncertainty.

The conceptual constructs in all three of these examples prove to be inadequate to describe the actual practices of the government and the public. The aspirations of theory in these cases overcommitted governing institutions and political action by assuming that unconditioned theoretical objects—the sovereign, the people, certain action—were realizable in practice.

One compelling approach to overcoming this gap between theory and practice is to make conceptual revisions to our theoretical constructs in an attempt to remove absolutist impulses. This is the approach most characteristic of the critical theorists who have commented on the events discussed in this dissertation—Laclau, Brown and Butler, to name a few—as well as their intellectual predecessors, perhaps, most importantly, Foucault.

I find this problematic on two fronts. First, it presupposes that that universalizing qualities of theoretical concepts are particular to only certain approaches to philosophy or certain ways of theorizing. I would argue that this presupposition provides opportunities
for theorists to be blind to their own absolutist categories. Concepts like hegemony or
governmentality, though nuanced in describing the composition of power, do little to
undermine the absolute, impenetrability of that power when cast in a narrative of us
versus them. This leads to theoretical blind spots and limits the vision for change.

Second, this approach requires that theory shed precisely those characteristics that
separate it from a particularistic, empirical account. Theory provides the ability to
conceptualize political forms that are not, in fact, achievable in practice, but these forms
create a foundation from which we are able to evaluate and critique governing
institutions. The concepts ‘the people’ and ‘absolute sovereign’ serve as aspirations for
democratic governments. They provide conceptual points from which we can consider
whether or not our institutions are inclusive and representative, and act with unwavering
authority.

For theory to be useful in this capacity, however, it needs to be placed within an
empirical context. Likewise, it is important to recognize theoretical limits and be mindful
of the universalizing effects of theoretical concepts. As was seen in previous chapters,
when theory does not adequately embrace the empirical practice of governance, it risks
making empirical assumptions that go beyond what can be known through theory alone.

Kant’s structure of the Antinomy is helpful for traversing this divide between
theory and practice. By bringing to light the conflicts between the two, opportunities for
improving practice are exposed, while theoretical overstatements are identified. This
approach has the benefit of not only revealing when theory is corrupting empirical
accounts, but also preserving theoretical concepts that otherwise would have to be
discarded.
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