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Unpopular sovereignty?

Article:

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Unpopular Sovereignty?

Popular sovereignty was presented in modern constitutional discourse as a mode of collective action. It was supposedly manifest in the power to constitute, control and dismantle governments. Important strands of contemporary constitutional theory, notably legal constitutionalism and deliberative democracy, have taken leave of this tradition. They have severed the connection between sovereignty and action. What remains of popular sovereignty is fundamental rights and values, or dispersed networks of deliberation. This is based on the the idea that the place of power is 'empty' and legitimised on the principle of including 'All-Affected-Interests'. The very concept of sovereignty thus becomes *unpopular*. This contribution aims to re-establish the link between popular sovereignty and action by examining sovereignty's emancipatory *telos*, its majoritarian mode of operation and its dependence on political citizenship.

I. Introduction

As political authority is increasingly transnationally shared, dispersed and relativized, sovereignty appears increasingly redundant.[1] In the process, the reality of

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[1] The literature on sovereignty is immense. For specific discussion of the recent transformation of sovereignty see e.g. Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Clarendon, 1999); Kanishka Jayasuriya, 'Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?' (2001) *Constellations* 442 – 460; Neil Walker, 'Late Sovereignty in the European Union' In *Sovereignty in Transition* (ed. N. Walker, Oxford: Hart Publishing, 2003) 3-32; Martin Loughlin, 'The Erosion of Sovereignty' (2017) *Netherlands Journal of Legal Philosophy* 57 – 81.

contemporary governance over-writes long-cherished beliefs concerning the idea of the state and the concept of popular sovereignty. This occurs in three ways.

First, the notion of supreme rule over a territory is contradicted by the *de facto* power of private actors, which has a pronounced effect in the areas of regulation and dispute settlement.[2] Transnational corporations hold sway over national polities by threatening governments and constituencies with exit or divestment. The locus of real power shifts from the state to those calling the shots in the international economy, such as investors, companies and rating agencies.[3]

Second, there is an increasing preponderance of international cooperation and of organisations which create *de jure* power to regulate.[4] International

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[2] For introductions, see Gralf-Peter Calliess & Peer Zumbansen, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Oxford: Hart Publ., 2010); ; Ralf Michaels, 'Globalisation and Law: Law Beyond the State', In *Law and Social Theory* (ed. R. Banakar & M. Travers, 2nd ed., Oxford: Hart Publishing 2013) 287-303; Peer Zumbansen, 'Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power' (2013) 76 Law and Contemporary Problems 117-138; Gralf-Peter Calliess & Moritz Renner, 'Between Law and Social Norms: The Evolution of Global Governance' (2009) 22 Ratio Iuris 260-280 at 272-276; Eyal Benvenisti, The Law of Global Governance (The Hague: Academy of International Law, 2014).

[3] See Quinn Slobodian, *Globalists: The End of Empire and Birth of Neoliberalism* (Cambridge, Mass: Harvard University Press, 2018).

[4] For an overview of softer and harder instruments, see Matthias Goldmann, 'Inside Relative Normativity: From Sources

agreements give birth to new entities which then claim autonomous status, and, as in the case of the EU, substantial law-making and governing power beyond the original remit.[5] In the face of these developments, the belief that sovereign legal status represents the foundation of real political power seem to amount to an outdated abstraction.[6]

Third, even if sovereignty were not affected by private power or sublated in the sphere of international cooperation, it is normatively suspect. States acting by themselves cannot accomplish much, for they lack the capacity to address challenges of a transnational or global kind, from international terrorism to the impact of climate change. Attempts to go it alone merely indicate myopia or nostalgia.

Liberal constitutional theory, unsurprisingly and often unapologetically, tends to endorse the *de facto*, *de jure* and normative demise of sovereignty.[7] Its basic instincts, as it were, incline it to do so. Sovereign

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to Standard Instruments for the Exercise of Public Authority', In *The Exercise of Public Authority by International Institutions* (ed. v. A v. Bogdandy et al., Heidelberg: Springer, 2010) 661-711

[5] See Fritz W. Scharpf, *Governing Europe*: *Effective and Democratic?* (Oxford: Oxford University Press, 1999) 24-25.

[6] See Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Economy* (2d ed., Princeton: Princeton University Press, 2005)

[7] See already John Locke, John Locke, *Two Treatises of Government* (ed. P. Laslett, Cambridge: Cambridge University Press, 1960), Second Treaties § 22, p. 284. Most prominently, in recent times, Mattias Kumm, 'The Best of Times and the Worst of Times' In *Twilight of Constitutionalism?* (ed. M. Loughlin & P. Dobner, Oxford: Oxford University Press, 2009) 201-219.

powers are designed to interfere with natural liberty. Less of it is at least *prima facie* better for human freedom. Although associated with modern libertarianism, advocacy of a minimal state or 'night watchman state' has its roots in the classical liberalism of the 18th and 19th centuries.[8] Contemporary liberal constitutional theory has not entirely shed this original skin.

The gradual democratisation of the political authority of the state over two centuries of struggle for universal suffrage does not deter the liberal from adopting an anti-sovereigntist position. If anything, the popularisation of sovereignty makes the liberal theorist even more sceptical of sovereignty and the exercise of sovereign powers.

There are two inter-related dimensions to this liberal scepticism. First, there is a domestic dimension, owing to the fear of the so-called 'tyranny of the majority'.[9] In the liberal imagination, the democratic

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[8] Although the term was used pejoratively by socialist Ferdinand Lassalle to caricature classical liberalism, Neumann observes that it is misleading to the extent that it neglects the tremendous executive power wielded by the classical liberal state, not least in its military-imperalist ambitions. See Franz Neumann, *The Democratic and the Authoritarian State* (New York: Free Press, 1957) at 22 - 23. On the „nightwatchman idea", see Ferdinand Lassalle, *Arbeiterprogramm: Über den besonderen Zusammenhang der gegenwärtigen Geschichtsperiode mit der Idee des Arbeiterstandes* (Berlin: C. Ihring Nachfolger, 1874) at 30.

[9] See *The Federalist* (ed. C. Sunstein, Cambridge, Mass.: Harvard University Press 2009) No. 51, p. 343. Alexis de

authority of the state must be prevented from becoming a vehicle for public decisions which violate minority rights. The answer to this conundrum is to vest sovereignty in a *constitution* which protects liberal rights and places trust in authoritative interpreters of the constitution. Second, there is an inter-state dimension. Owing to policy externalities, democratic states can abuse sovereignty, or behave "undemocratically", by creating adverse effects for outsiders who are, by definition, excluded from political participation. This is what a sibling of liberal constitutionalism suggests, namely the All-Affected Interests Principle, which stipulates that all those affected by a decision should in principle be given a say in it.[10] States can earn legitimate credentials only by limiting majoritarian decision-making and opening themselves up to some kind of input from beyond their borders, creating frameworks for internalising externalities or disciplining their decision-making processes.[11]

Liberal discourse concludes, therefore, that sovereignty is not only implausible, it is undesirable. The goal of the legal scholar, it has even been said, is to

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Tocqueville, *Democracy in America (*trans. H. C. Mansfield & D. Winthrop, Chicago: University of Chicago Press, 2000) 239-242.

[10] For one of the first formulations of the All-Affected Principle, see Robert A. Dahl, *After the Revolution? Authority in a Good Society* (New Haven: Yale University Press, 1970) at 49.

[11] See Christian Joerges & Jürgen Neyer, '"Deliberative Supranationalism" – Two Defences' (2002) 8 *European Law Journal* 133-151.

'neutralise it'.[12] This conclusion appears to be reconfirmed, in particular, where sovereignty is vested in 'the people'. In fact, *popular* sovereignty strikes liberal theory as doubly faulty, for it combines belief in sovereign state power with belief in the existence of a mystical body of "a people".[13] In practice, the argument goes, sovereignty feeds the politics of national populism.[14] The results are likely to be highly repugnant from a liberal perspective, populism reducing politics to a confrontation between "the

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[12] András Jakab, *European Constitutional Language* (Cambridge: Cambridge University Press, 2016) 116.

[13] See Mattias Kumm, ‚The Best of Times and the Worst of Times' In *Twilight of Constitutionalism?* (ed. M. Loughlin & P. Dobner, Oxford: Oxford University Press, 2009) 201-219.

[14] The idea of popular sovereignty becomes reinvigorated in the context of "populist" political rhetoric. The right-wing version of populism is associated with the idea of the people as a culturally and morally homogenous group preceding the constitutional order. See Paul Blokker, 'Populist constitutionalism' in: *Routledge Handbook of Global Populism*, ed. C. De la Torre (Oxford: Routledge 2018) 113-128, at 125. From this perspective, the relation between the constitutent power and constituted powers is not very subtle. The former is simply taken to be generative of the latter. On the shortcoming of this view, see Luigi Corrias, 'Populism in a Constitutional Key: Constituent Power, Popular Sovereignty and Constitutional Identity' (2016) 12 *European Constitutional Law Review* 6-26 at 16-18. On the recurrence of the old "Anti-Federalist Idea" that the representatives ought to be of the same kind as the represented, see Cesare Pinelli, 'The Populist Challenge to Constitutional Democracy' (2011) 7 *European Constitutional Law Review* 5-16 at 11.

people" and "the elites" and degrading the values of pluralism and constitutionalism.[15]

This paper aims to engage critically with such a debunking of popular sovereignty.[16] It begins with a reminder of the constitutional discourse that originally provided modern popular sovereignty with an intellectual habitat. In that context, popular

[15] Jan-Werner Müller, 'Populism and Constitutionalism' in *Oxford Handbook of Populism* ed. C. Rovira Kaltwasser, P. Taggard, P. Ochia Espejo & P. Ostiguy (Oxford: Oxford University Press, 2017) 590-606. In right-wing populism the distinction between detached elites and ordinary people is often overwritten by another distinction, between "us" and "them" – with the latter standing for migrants, cosmopolitan liberals or multilateralists. The self-assertion of the ordinary people may hence manifest in aggression towards migrants, immigrants or foreigners in general. See Dirk Jörke & Veith Selk, 'Der hilflose Antipopulismus' (2015) 43 *Leviathan* 484-500 at 488: Kolja Möller, 'Populismus und Verfassung: Der autoritäre Populismus als Herausforderung für die liberale Demokratie' (2019) 66 *Zeitschrift für Politik* 430-444 at 440, 443.

[16] On the rich historical connections between populism and popular sovereignty, reaching back into the 19th century, see Duncan Kelly, 'Populism and the History of Popular Sovereignty' in *Oxford Handbook of Populism* above, 511 – 534. We are not offering a historical account here, even though the exploration of the historical roots of popular sovereignty can accomplish much to overcome contemporary misconceptions. See Daniel Lee, *Popular Sovereignty in Early Modern Political Thought* (Oxford: Oxford University Press, 2016) and the anthology *Popular Sovereignty in Historical Perspective* (ed. R. Bourke & Q. Skinner, Cambridge: Cambridge University Press, 2016). See also Edmund S. Morgan, *Inventing the People: The Rise of Popular Sovereignty in England and America* (New York: Norton and Co., 1989) and Geneviève Nootens, *Popular Sovereignty in the West* (Abingdon: Routledge, 2013).

sovereignty was believed to be manifest in action—in acts of political founding and political resistance.

Once constitutional theory departs from this tradition, sovereignty is severed from the world of action, exhausting itself in the morally required recognition of fundamental values or deemed to reside in the ethereal networks of public deliberation. While the first development is epitomised by the predominance of legal constitutionalism (legality, fundamental rights, proportionality),[17] the second is manifest in conceptions of deliberative democracy.

With the disappearance of sovereign action, displaced by legality and discourse ethics, the material struggle for inclusion and equality also disappears. The harnessing of the power of the many that was the hallmark of democracy as a historical phenomenon recedes from view,[18] and with it the possibility of emancipatory bootstrapping: of addressing and overcoming the adversity inherent in the horizontal interdependence of the market through political action. A group *of* people can no longer rise above— and reach out beyond—themselves by acting as *a* people.[19]

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[17] See e.g. David Dyzenhaus, 'The Politics of the Question of Constituent Power' In *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (ed. M. Loughlin & N. Walker, Oxford: Oxford University Press, 2007) 129-146.

[18] See John Keane, *The Life and Death of Democracy* (New York: Norton & Company, 2009).

[19] For a recent account of the tension between democracy and markets, see Wolfgang Streeck, *Buying Time: On the Delayed Crisis of Democratic Capitalism* (London: Verso 2013).

Can the philosophy of popular sovereignty be resurrected? The aim of this paper is to begin that task. It will proceed, first, by outlining the modern constitutional foundations of the idea of popular sovereignty (part II). It continues by reconstructing the move to de-popularise sovereignty through substituting legal constitutionalism and deliberative democracy, underlying which is Claude Lefort's idea of democracy as signifying the 'empty place of power',[20] and the legitimising principle of 'All-Affected-Interests' (part III). This move will be critiqued here as severing the realm of democracy, and ultimately of popular sovereignty, from the sphere of action (part IV). An account will then be offered of how democracy and action might be reunited, outlining three elements of popular sovereignty: an emancipatory *telos*, majoritarianism, and political citizenship (part V).

II. The Foundations of Modern Popular Sovereignty

Modern constitutionalism was based on a number of elementary ideas.[21] Chief among them is the view that a constitution is composed of powers, broadly understood as either law-making (normative) powers

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[20] Claude Lefort, *The Political Forms of Modern Society: Bureaucracy, Democracy, Totalitarianism* (ed. J.B. Thompson, Cambridge, Mass: MIT Press, 1986). Cf. Bert van Roermund, 'Sovereignty: Unpopular and Popular' In *Sovereigny in Transition* note 1, 33-54.

[21] A reliable guide to these ideas still is Thomas Paine, *Rights of Man* (ed. E. Foner, London: Penguin 1984).

or permissions to act. Skilful constitutional design arranges powers in such a manner that their interaction promises to be conducive to the public good. Adapting James Madison's famous words, as long as ambition counteracts ambition, each will run in its proper channel.[22]

This conception is congenial to the mind-set of the mixed constitution. But in the modern constitutional imagination that flows from the 17th and 18th century revolutions, the various powers do not derive originally from particular groups or represent different estates, but are partial instantiations of one sovereign power. The various powers established by the constitution are functional specifications of the one power that is all power, namely sovereignty.[23] This does not mean that normative powers are necessarily centralised.[24] On the contrary; the activity of

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[22] See *The Federalist,* note 10 No. 51, at 341.

[23] See Jean-Jacques Rousseau, *The Social Contract* (Hertfordshire: Wordsworth Editions Limited, 1998) at 15-16: 'the Contract, which is an 'act of association produces a moral and collective body, which receives from this same act its unity... This public person, which is thus formed by the union of all the individual members, formerly took the name of city, and now takes that of republic, which is called by its members *state* when it is passive, *sovereign* when it is active, *power* when it is compared to similar bodies. With regard to its associates, they take collectively the name of *people*, and are called individually *citizens*, in participating in the sovereign power, and *subjects*, as subjected to the law of the state'.

[24] See Martin Loughlin and Stephen Tierney, 'The Shibboleth of Sovereignty' (2018) 81:6 *Modern Law Review* 989 – 1016.

governing[25] is entirely compatible with a federal system or a system of devolved powers. What it means is that authority derives ultimately from the constituent power of the people. Popular sovereignty can then be understood as representing nothing less than the autonomy of the political realm.[26]

Bernard Yack distinguishes the modern constitutionalist idea of popular sovereignty from earlier invocations of sovereignty through the concept of representation.[27] While previously the people were believed to be coextensive with the many or the group whose members did not occupy a noble rank (viz., the "commoners" or the *demos*),[28] modern popular sovereignty introduces something like the idea of the "people's two bodies".[29] The people *qua* authors of the constitution comprise a *corpus mysticum*. Not to be encountered directly in whoever claims to act on its behalf,[30] it is a noumenal entity inaccessible to actual experience, in a manner reminiscent of Kant's thing-in-

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[25] See Michael Oakeshott, 'On Being Conservative' In his *Rationalism in Politics and Other Essay* (2nd. Ed., Indianapolis: Liberty Press, 1991) 407-437 at 429.

[26] See Martin Loughlin, 'Why Sovereignty?' In *Sovereignty and Law: Domestic, Regional and Global Perspective* (ed. Rawlings, Leyland and Young, Oxford: Hart Publishing, 2013) 34.

[27] See Bernard Yack, 'Popular Sovereignty and Nationalism' (2001) 29 *Political Theory* 517-536.

[28] See Berhard Yack, *Nationalism and the Moral Psychology of Community* (Chicago: University of Chicago Press, 2012) at 99.

[29] See Yack, note 27 at 519.

[30] See Yack, note 28 at 101.

itself.[31] Unsurprisingly, therefore, the significance of popular sovereignty is intrinsically tied to representation.[32] But if representing something means making present what is absent, any actual interpretive elaboration of the representation of a sovereign people can highlight either presence or absence. Not only the constituent power, but the people themselves are thus the subject of conceptual struggle (a *Grenzbegriff* of constitutional discourse).[33]

The presence of a represented corporate body in the representative is the distinguishing mark of that strand of the medieval theory of representation which originates in the work of Marsilius of Padua and leaves a strong imprint on conciliarist doctrines.[34] The core idea is captured in Marsilius' concept of *representatio identitatis*, which tacitly combines two different ways

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[31] There is a good reason why Böckenförde called the constituent power a liminal concept, a *Grenzbegriff,* of constitutional law. Kant characterized the thing in itself as a *Grenzbegriff.* See Ernst-Wolfgang Böckenförde, 'The Constituent Power of the People: A Liminal Concept of Constitutional Law' In *Constitutional and Political Theory: Selected Writings* (ed. M. Künkler & T. Stein, Oxford: Oxford University Press, 2017) 169-185.

[32] On the claim that all action on behalf of a collective involves a form of representation, see Hans Lindahl, *Authority and The Globalization of Inclusion and Exclusion* (Cambridge: Cambridge University Press, 2018) 108-113; see also Corrias, note 15 at 17-18

[33] See Böckenförde, ibid.

[34] For example in Johannes Segovia's work. See, generally, Hasso Hofmann, *Repräsentation: Studien zur Wort- und Begriffsgeschichte von der Antike bis ins 19. Jahrhundert* (Berlin: Duncker & Humblot, 1974).

of designating "identity". Representation is effected, first, not by delegation or mandate but by virtue of the identity of the representative. It matters who it is. According to Marsilius' original doctrine, the *pars valentior*, i.e., the better sort, is representative of the group.[35] This points to the second designation that actually provides a clue as to why the representative possesses the "right" identity. Representatives are those parts of a larger whole that best and most adequately express what this whole truly is or what it aspires to be.[36] With identity-representation, the noumenon, which could never reveal itself of itself, is present in the representative.

National identity offers a way to navigate the unruly seas of popular sovereignty.[37] The nation, qua sovereign, is not an organ of the constitution; it is outside of the constitutional system. Yet, the will of the nation is articulated through the channels of

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[35] See Vasileios Syros, *Marsilius of Padua and the Intersection of Ancient and Medieval Traditions of Political Thought* (Toronto: University of Toronto Press, 2011) at 91.

[36] This was the major point of those claiming that the Council of Bishops had a superior claim vis-à-vis the Pope to represent the *corpus mysticum* of the Church.

[37] In the constitutionalist context, the will of the legislative body may be deemed inviolable and supreme because it is, rhetorically speaking, a synecdoche for the unfathomable people. Rousseau tries to avoid the problem of representation by identifying the legislative body with the people and the General Will as the expression of their direct and collective self-legislation, see note 23 above. If this avoids the problem of representation, it appears to do so at the cost of restricting the polity to a small, homogenous unit.

constituted powers. It is thereby rendered present in its absence. When appeals to the traditions or the world-historical mission of a people are internalized into the "ordinary life" of a political community, the absent presence of the people qua nation may become relatively stabilized over time and space. This indicates that the sovereign populus explicitly conceives of itself as a unity.[38]

This imagining of sovereignty is troubling in certain respects. Nations tend to assert prerogatives vis-à-vis others who are not included or included only on inferior terms, as is often the case with non-citizens or those who aspire to become citizens.[39] Nations historically claim territory that they assert as their own and then deny those displaced the right to claim citizenship. In this sense, acts of sovereign power are manifested through original land-grabs, imperialism and continuous processes of accumulation by dispossession.[40] Nations also claim identity and determine conditions for membership in a manner that depends on exclusive ethnic criteria.

The mediation of popular sovereignty can also give rise to authoritarian renderings, such as the idea that

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[38] This is of great relevance to current populist ideas concerning popular sovereignty. See Corrias, note 15 at 23; Blokker, note 15, 113, 116.

[39] Even in a relatively deeply integrated union of states such as the EU, citizens are denied full political citizenship in another Member State, deprived of voting rights in general elections, and restricted to voting in municipal and European elections.

[40] See David Harvey, *The New Imperialism* (Oxford: Oxford University Press, 2003).

a dictator is the depositary of the 'real will' of the people.[41] Who or what is destined to be the agent of identity representation depends essentially on what the represented entity is believed to be. If the entity is believed to be one racially homogenous body speaking with one voice, one "chosen" individual may act as its speaker. If the relevant entity is the future humanity that can only be anticipated in the consciousness of the revolutionary vanguard, then an elite party is a plausible representative. If, by contrast, what is to be represented is a corporate body operating on the basis of reason-giving, then it is most adequately brought forth by a deliberative institution.

III. The great unravelling: Unpopular sovereignty

A different picture emerges when the emphasis comes to rest on the absence of the represented. In this version, no representative can claim to mediate the presence of the people or rightfully to embody the *noumenon* in the world of appearances. In this vein, the German constitutional theorist Martin Kriele concluded that *within* a constitutional democracy sovereignty is impossible.[42] One encounters only

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[41] Evidently, populism is a context for the recrudescence of this idea. See Blokker, note 15 at 123; Hans Vorländer, 'The good, the bad, and the ugly. Über das Verhältnis von Populismus und Demokratie – Eine Skizze' (2011) *Totalitarismus und Demokratie* 8 187-194.

[42] See Martin Kriele, *Einführung in die Staatslehre* (Reinbek: Rowohlt, 1976) at 224.

divided and dispersed powers and none of these, not even the legislature, is a more truthful representative than any other. In principle, the popular sovereign remains just as inaccessible as the idea of transcendental freedom. Both are unamenable to actual political experience.

The transcendence of popular sovereignty is tantamount to a second death of God in political theory. While the first death of God merely led to the people claiming the place of the *nomos basileus*[43], now the whole conceptual fabric of modern political thought begins to unravel. In this context, we are witness to a twofold development: legal constitutionalism and theories of deliberative democracy.

A. Legal constitutionalism

The first development involves an element of regression. In the course of the human rights revolution, as constitutionalism reaches a new stage,[44] it reverts to a legal mentality that predates modern

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[43] Quoting Carl Schmitt quoting Pindar. See Carl Schmitt, *On the Three Types of Juristic Thought* (trans. J. Bendersky, Praeger, 2004).

[44] On the following, see Alexander Somek, *The Cosmopolitan Constitution* (Oxford University Press, 2014). For an account of how the shape and point of the post-war German constitution was to embrace human rights, see Thilo Rensmann, 'The Constitution as a Normative Order of Values: The Influence of International Human Rights Law on the Evolution of Modern Constitutionalism' In *Common Values in International Law: Essays in Honor of Christian Tomuschat* (ed. Pierre-Marie Dupuy et al., Kehl: Engel Verlag, 2006) 259-278.

democracy, namely, a modelling of constitutional authority that is reminiscent of natural law. Absolute monarchs were never supposed to be untrammelled by natural law. On the contrary, their rule had to pay heed to it as God's law because it was to God, and only to God, that the ruler was answerable. While the sovereign ruled supreme vis-à-vis its subjects front-of-stage, he was bound to comply with the precepts of natural reason back-of-stage.

In a similar vein, the constitutionalism that emerges in post-war constitutional thought, paradigmatically in West Germany, allows popular sovereignty to act only for the purpose of recognition, that is, the recognition of human dignity and everything that follows from it. This new type of modern constitutional law puts human rights at the centre. The concrete people are rendered as the trustees of a project that is much greater, and far more universal, than the integrity of a national polity.

It is not by accident that in such a system power typically shifts to the one institution that is charged with elaborating the normative significance of human rights, i.e., the constitutional court. As Christoph Möllers puts it, this bespeaks great distrust of the people.[45] It reflects a fear of the people not only by elites, but by the people themselves, following a

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[45] See Christoph Möllers, "'We are (afraid of) the people": Constituent Power in German Constitutionalism' In M. Loughlin & N. Walker (eds.), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (Oxford: Oxford University Press, 2007) 87-105.

particular diagnosis that the interwar breakdown of liberal constitutionalism was at root a crisis of democratic excess.[46]

This message was foreshadowed in late Weimar by none other than Carl Schmitt.[47] In *Legality and Legitimacy*, Schmitt highlights the deep incongruity between the 'value emphasis' of the second part of the Weimar Constitution (introducing fundamental rights) and the 'value neutrality' of its organiziational first part.[48] While the former commands respect on the grounds of its substance, the latter facilitates legislative or even constitutional change (if by supramajority) by contingent and heterogeneous "chunks of power". There is no intelligible connection between the two, that is, no principle explaining why a haphazard and transient majority, even if composed of two-thirds of the votes, should be able to override or transform that which is a manifestation of essential values. There is no 'middle road' Schmitt asserts, 'between the principled value neutrality of the functionalist system of legality and the principled

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[46] Cf. Michael A. Wilkinson, 'The Reconstitution of Postwar Europe: Liberal Excesses, Democratic Deficiencies' In *Constitutionalism Beyond Liberalism* (ed. M. Dowdle and M. Wilkinson , Cambridge: Cambridge University Press, 2017); Michael A. Wilkinson, 'Authoritarian Liberalism as Authoritarian Constitutionalism' in Alviar and Frankenberg (eds.), *Authoritarian Constitutionalism: Comparative Analysis and Critique* (Edward Elgar 2019) 317 – 338.

[47] See Carl Schmitt, *Legality and Legitimacy* (trans. J. Seitzer, Durham: Duke University Press, 2004).

[48] Ibid, at 46.

value emphasis of the substantive constitutional guarantees.'[49]

Schmitt's insight is radicalised in postwar thought. What emerges is not only the idea that certain fundamental rights and duties of the people ought to be treated as an unamendable part of the constitution, but that their validity be based on recognition by practical reason alone. The people – even as constitutional legislator - cannot exempt themselves from having to fulfil the requirement of recognition of moral reason and need, and indeed must, play no direct part in the practice of recognition. That role is to be played by constitutional experts.[50]

The new world of constitutional law displaces the constituent power, whether as ordinary or constitutional law-maker;[51] constituent power disappears into the normative justification of the

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[49] Ibid, 47. See further Benjamin Schupmann, *Carl Schmitt's State and Constitutional Theory: A Critical Analysis* (Oxford: Oxford University Press, 2017).

[50] See Jan-Werner Müller, *Contesting Democracy: Political Ideas in Twentieth Century Europe* (Princeton University Press, 2012). For an assessment of the impact of this suspicion of democratic constituent power in the context of German reunification, contrasting with the South African case, see Simone Chambers, 'Democracy, Popular Sovereignty, and Constitutional Legitimacy' (2004) *Constellations* 153 – 173. For a critique of this mentality from the perspective of the US American constitutional tradition, see See Jed Rubenfeld, 'Unilateralism and Constitutionalism' (2004) 79 *New York University Law Review* 1971-2028.

[51] See David Dyzenhaus, 'Constitutionalism in an Old Key: Legality and Constituent Power' (2012) 1 *Global Constitutionalism* 229-260.

conditions under which a group can legitimately claim to have exercised it.[52] This is a world in which democracy passes merely as one form of "good governance" among others. The doctrines of reasonableness, proportionality or of balancing give this theorising a self-satisfactory but complacent ring; as if these judgments were somehow technical, value-neutral or outside the structural relations of political and economic power.[53] The supreme court – or the fictional omniscient judge - is the exemplar of public reason.[54] In this worldview, at least within the European Union, we have moved 'beyond the sovereign state'.[55]

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[52] This is reflected in a surprising change of view in Mattias Kumm's cosmopolitan constitutionalism. See his 'Constituent Power, Cosmopolitan Constitutionalism and Post-Positivist Law' (ms. 2016).

[53] It may not have been by accident that this world originated from Roman Catholic doctrine. See Samuel Moyn, *Christian Human Rights* (Philadelphia: University of Pennsylvania Press, 2015). The influence of the German ordoliberals on this worldview, and their idea of the economic constitution, must also be noted, see e.g. Jayasuriya, note 1 above.

[54] See John Rawls, *Political Liberalism* (New York, Columbia University Press, 1991); Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986). Cf. Paul Kahn, *Four Chapters on the Concept of Sovereignty* (Columbia University Press, 2011). As Kahn notes, if we ask what the figure of Hercules—whose decisions always represent the 'true' meaning of the law—represents, do we have a better answer than 'the sovereign'?, ibid 81.

[55] Neil MacCormick, 'Beyond The Sovereign State' (1993) 56:1 *Modern Law Review* 1. Cf. Michael A. Wilkinson, 'Beyond the Post-Sovereign State? On the Past, Present and Future of

B. Deliberative Democracy

The second, related, development is the dominance in political theory of an ethereal account of popular sovereignty. This transformation is encountered in Habermas' reconceptualisation of popular sovereignty as "procedure".[56] From there it travels with great ease to various intellectual laboratories of "deliberative democracy".[57]

The ethereal version of popular sovereignty owes a great deal to Habermas's conception of "communicative power", as the antagonist of administrative power. It is from "communicative power" that law ultimately obtains legitimation. Democracy is expressed in free-floating public debates that do not avail of any political centre, such as a parliamentary assembly. Its demands cannot be imputed to any collective subject but only to the forceless force of the better argument.

The dialectic of the presence and absence of sovereignty is maintained, but at a price: the collective subject can assert its presence only by being dissolved into ideational processes of communication. Sovereignty is a palimpsest on the horizon of future agreement. In a *Rechtsstaat,* as reconceived from the

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Constitutional Pluralism' (2019) *Cambridge Yearbook of European Legal Studies* 1-18.

[56] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Polity Press, 1997).

[57] See e.g. Seyla Benhabib, 'Deliberative Rationality and Models of Democratic Legitimacy' (1994) 1 *Constellations* 26 – 52.

perspective of discourse theory, popular sovereignty "retreats" into the loops of communication among expert fora and public bodies. According to Habermas:

> Because popular sovereignty no longer circulates in a collectivity, or in the physically tangible presence of the united citizens or their assembled representatives, but only takes effect in the circulation of reasonably structured deliberations or decisions, one can attribute a harmless meaning to the proposition that there cannot be a sovereign in the constitutional state. [58]

The seat of sovereignty remains elusive if it doesn't disappear altogether. No matter which institution of government claims to act on behalf of the people— even, and in particular, the legislature—the people will not be there. Legally constituted representative institutions are always under siege from free-floating discourses, out of which the sovereign communicative power of the people somehow originates.[59]

With the dissolution of collective autonomy into the intersubjective communication of free and equals, popular sovereignty no longer reveals itself in agency but only in the rational quality of public debates. In this manner, theorists who purport to defend democracy manage to contain their fear of being disappointed in the actual people. Unenlightened outbursts of "populist" sentiments—xenophobia, racism, homophobia and any other classical sins of the real,

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[58] See Habermas, note 57 at 170.

[59] For a sympathetic, but critical, perspective on Habermas, see William E. Scheuerman, 'Critical Theory Beyond Habermas' In *Oxford Handbook of Political Theory* (ed. Bonnie Honig and John Dryzek, Oxford: Oxford University Press, 2008) 85-105.

existing, ungenteel proletariat—can be easily disposed of as undemocratic, in violation of the Kantian spirit of "a people with mature reason".[60] Enlightened rule by the people would bear the imprint of a serious engagement with arguments, absence of bias or stereotypes, the amenability to new topics and ideas, equal access to all those affected and readiness to revise positions in light of new information. Sovereignty becomes unpopular. The rabble is dismissed![61]

C. The empty place of power

Legal constitutionalism and deliberative democracy offer a conception of sovereignty that is ethereal if not entirely elusive. Through the displacement of disagreement and political conflict, they lay the ground for the transnationalisation and eventual transcendence of sovereignty. The philosophical basis of this move is the severing of reason from action.

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[60] Jörke & Selk, note 16, 485, 491, observe correctly that moral indignation has become the chief liberal response to populism. They point out correctly that this is regrettable, for it misses the mark of mature democratic politics which is to tolerate and to accommodate views of others in spite of moral disagreement.

[61] On the significance of the rabble for Hegel, see, Frank Ruda, *Hegel's Rabble: An Investigation into Hegel's Philosophy of Right* (London: Bloomsbury, 2011). Hegel uses the figure of the 'rabble' to capture the tendency of bourgeoise society and industrial capitalism to lead to extremes of inequality and instability. From this perspective it would appear to be no surprise that the rabble, having been dismissed, turns to non-liberal alternatives.

Undergirding it is a powerful metaphor, that in the modern political form of democracy, the place of power is 'empty'.[62] This is a conception of authority articulated by Claude Lefort.[63]

Lefort takes the emphasis on the absence of the represented to its extreme. Popular sovereignty in this tradition becomes a fiction. It not only loses its mooring in a people; its appearances are demoted to mere figments, and dangerous ones at that. Sovereignty cannot claim to stand for anything essentially public any longer. Claims on its behalf just represent some private interests among others.

Lefort acknowledges that modern democracy is based on the idea of popular sovereignty but observes that the democratic concept of sovereign power is markedly different from the monarchical concept as a mode of symbolic representation. In this view, "[...] the image of popular sovereignty is linked to the image of an empty place."[64]

Ostensibly, this assertion presupposes the contrast to a period, prior to modern democracy, when the

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[62] On the link between Habermas and Lefort see Stefan Rummens, 'Deliberation Interrupted: Confronting Jürgen Habermas with Claude Lefort' (2008) 34 *Philosophy and Social Criticism* 383 – 408, noting structural similarities and in particular how the proceduralisation of popular sovereignty provides a discourse-theoretical interpretation of the empty place of power.

[63] For a short introduction, see Sofia Näsström, 'Representative Democracy as Tautology: Ankersmit and Lefort on Representation' (2008) 5 *European Journal of Political Theory* 321-342, at 327-329.

[64] Lefort, note 21 at 279.

place of sovereignty was occupied by someone or something. This was called a king, a monarch or a prince. With the demise of monarchy, the chair of sovereignty—the throne—is no longer taken.[65]

This observation loses its apparent triviality when one considers that it concerns the symbolic order. It is relevant for what we believe those wielding public power to embody.

In the case of the ancient regime, the monarch is considered to personify plenipotentiary power; he or she is the steward of the nomos of God's order. One is a consequence of the other. The person in charge of sustaining the nomos must have full power, but such power must be used only in order to realise the order that is God's eternal will. The monarch is above positive law only because he is sub lege vis-à-vis natural law or immemorial custom. The power of the monarch "[…] points towards an unconditional, other-worldly pole".[66]

Lefort conjures up, in this context, Kantorowicz's theory of the "king's two bodies". The order maintained by the person of the monarch is the corpus mysticum of the realm. The mortal body of the person incarnates the immortal body.[67] Within the order of the immortal body each is assigned to his or her proper place.[68] Owing to the order's root in the lex aeterna

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[65] Claude Lefort, *Democracy and Political Theory* (trans. D. Macey, Cambridge: Polity Press, 1988) at 17.

[66] Lefort, note 66 at 17.

[67] See Lefort, note 21 at 302-303.

[68] See Lefort, note 21 at 303.

each person's social place is tied to an unconditional foundation. The order is known as *lex naturalis*, which is, according to Augustin's sublime image, the imprint left by the *lex aeterna* in the human soul.

The advent of modern democracy marks the demise of this medieval imaginary. The corpus mysticum, the order, becomes bereft of its substance and its foundation. Everything is up for grabs. Nobody can claim to have any firm knowledge of the right order of social life. Politics is henceforth based not upon knowledge but on ideology, which is, whatever else it might be, less overwhelming and foundational than the natural law.[69]

Lefort points to this transformation by saying that democracy is an "ungraspable society", the identity of which is constantly open to question. All practical knowledge is generated against a background of "fundamental indeterminacy".[70] This means, in other words, that society is no longer symbolically represented in the form of a preordained plan or normative blueprint. Contingency and choice emerge from social conflicts. Some win, others lose. The people

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[69] Ideology admits of crisis and hence critique, particularly when viewed against the real, material conditions of existence. See Michael A. Wilkinson, 'Public Law and the Autonomy of the Political: A Materialist Critique' In *Questioning the Foundations of Public Law* (ed. M. Wilkinson & ;´M. Dowdle, Oxford: Hart, 2018) 181. Lefort's space apparently remains empty also in the sense of unfilled by concentrations of private power, neglecting the totalising tendencies of modern capitalism (see Wilkinson, ibid).

[70] Lefort, note 66 at 19.

cannot be "one", for they lack any substance. They are always divided. Lefort belabours this point so strongly that his social imaginary threatens to become nihilistic. Implicit in social practice is "a process of questioning", but no one can credibly claim to have the right answer to any of the questions being asked.[71]

This perplexing diagnosis bespeaks Lefort's interest in explaining how the normative indeterminacy of a democratic society gives rise to a craving for a totalitarian closure that would all of a sudden reunite society with a final goal, structure or harmony. It would then encounter opposition, if at all, only from external enemies.[72] Totalitarianism promises us "the People-as-One".[73] It also provides us with identifications: The party "is" the proletariat, the proletariat "is" the last class, the last class "is" the people at the end of history. Democracy is the opposite of such unity. It is division all the way down:[74]

> [D]emocratic society is instituted as a society without a body, as a society which undermines the representation of an organic unity.

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[71] See ibid. This means that the question of "this is who we are and what ought to be" cannot be settled.

[72] See Lefort, note 21 at 305.

[73] See Lefort, note 21 at 297; note 66 at 12, 20.

[74] Lefort, note 66 at 18. As Nässtrom, note 57 at 350 puts it: "There is no unity at the bottom of democracy, only a reference to a people that itself remains divided." Populism is often conceptualised in opposition to this idea, refering to the people as "one" and reclaiming the empty place for this very entity. See Corrias, note 14 at 20-21; Blokker, note 14 at 117, 123.

Not by accident, then, the demise of the mystical body affects the role of the physical body, that is, the symbolic significance of the real representative. The democratic sovereign is internally pluralistic and always divided. Democracy is possible only on the basis of representation.[75] But the representative cannot claim to represent unity or to speak with the authority that accrues from speaking on behalf of the people. In this scenario,[76]

> [P]ower belongs to no one, except to the people in the abstract.

D. All-Affected Interests

The "the people in the abstract", however, is nothing other than the unsaturated identity of a people that is prior to the political unit. It is just the nation stripped of its national identity, stripped of its history, of its political and material struggles for democracy and over its meaning. This incidental negative nationalism is the mirror-image of the explicit nationalism of presence, replacing an untenable concrete order with an equally untenable empty abstraction.

This dilemma raises the paradox of democracy.[77] To choose democratically the bounds and composition of a democratic polity presupposes a proto-democracy the credentials of which, failing an indefinite regress,

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[75] See Näsström, note 63 at 322.

[76] Lefort, above note 66 at 15.

[77] For a highly useful discussion of the relevant problems, see Sarah Song, 'The boundary problem in democratic theory: why the demos should be bounded by the state' (2012) 4 *International Theory* 39-68.

must be indeterminate.[78] The only regress-stopper appears to be history. There seems to be no way of getting around the historical contingency of actual peoples, a conclusion which appears to infect all democracies with a foundational paradox: an absence of self-determination.[79] Democracies must necessarily be suspected of perpetuating the imperfect conditions from which they have originated. From the perspective of a theory of justice, historical contingency is always potentially embarrassing. A people might plausibly be taken to be composed of those sharing exposure to the coercive apparatus of the state. But owing to its narrow focus, such a principle of peoplehood is vulnerable to an obvious critique. Why limit the scope of the people to those who are potentially or actually

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[78] As way out of this paradox Hans Agné claims that humanity at large is only legitimate and self-authenticating constituency. See Hans Agné, 'Why Democracy must be Global: Self-Founding and Democratic Intervention' (2010) 2 *International Theory* 381-409. The question is, however, whether a global "democracy" would indeed be sufficiently democratic in its operation. It is likely subject to capture by special interests and dominance by a hegemon. Communication would be next to impossible. Solidarity would likely be only very poorly developed. See Song, note 78 at 61-62.

[79] See Sofia Nasstrom, 'The Legitimacy of the People' (2007) 35 *Political Theory* 624-658 at 653: "[…] [T]he reference to history does not seem to make the demands for legitimacy fade away, and particularly not today. For why should we accept the community in which we live simply because we were born into it? What if I think that the present boundaries of the people privilege some individuals at the expense of others? Am I not then, as free and equal individual, entitled to ask for its legitimacy?"

more permanently subject to coercion while many others are otherwise and less directly affected by governmental action? And why view the state necessarily restricted to a national government? Shouldn't one include also global governance institutions, be they of public or private pedigree? In contemporary conditions of European integration, for example, the endorsement of freedom of movement and the idea that political membership should be derivative of social membership, such as the status of a permanently employed person, suggests peoplehood emerges from flexible and shifting market participation.[80]

Some have attempted to overcome this aporia through the principle of All-Affected Interests. Ostensibly, the All-Affected Interests Principle offers an inclusive solution to the paradox of democracy, a principled way of filling the empty abstraction. According to this principle, collective decisions are legitimate only if all affected persons had an opportunity to participate in the process leading up to their adoption.[81]

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[80] This is the ethos of much contemporary work on the question of de-nationalising "belonging". See, for example, Yasemin Nohoglu Soyal, *Limits of Citizenship. Migrants and Postnational Membership in Europe* (Chicago: University of Chicago Press, 1994); Dora Kostakopoulou, *The Future Governance of Citizenship* (Cambridge: Cambridge University Press, 2008).

[81] See Ian Shapiro, *Democratic Justice* (New Haven: Yale University Press, 1999) at 37.

Applied to a world where political spaces are still bounded it implies that political communities would have to expand and contract depending on the number of stakeholders affected by a decision. Although posing practical obstacles, it seems to be the next logical step of inclusion after the transcendence of the national people of modern popular sovereignty. In light of this principle, what lends unity to the "people" are the decisions that affect them.

The All-Affected Interests Principle complements legal constitutionalism and deliberative democracy. Processes of justification and consultation lend themselves to accommodate the flexible expansion and contraction of the stakeholder constituency. In such a world, individuals are to yield to whomever possesses the capacity to tackle their personal problems most effectively. Indeed, with a special focus on policy externalities,[82] this principle has become central to justificatory discourses of European integration, and beyond.[83]

IV. The severance of constitutional reason from action

Contemporary constitutional theories that lend their support to legal constitutionalism and deliberative democracy profess impeccable enlightenment credentials. They avoid the pitfalls of explicit

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[82] There is no theory of permissible externalities. See Alexander Somek, note 45.

[83] See Alexander Somek, 'The Darling Dogma of Bourgeois Europeanists' (2014) 20 *European Law Journal* 688-712.

nationalism or populism. They are also high-minded, demonstrating regard for how national policies spill over into foreign territory and affect those who have not had an opportunity to voice their concerns or disagreement. They believe that constituencies should be composed of members of civil society and never exclude potential incoming members on arbitrary grounds. The logical outcome is to oust individual and collective action altogether and to replace them with the hypothetical representation of discourses, asking merely what we would agree to under ideal conditions. This exhibits a penchant for disempowerment.

Contemporary constitutional theory tends toward democratic self-flagellation and even exhibits a perverse joy in disempowering "the" people. Counting votes supposedly fails to represent discourses adequately. Debating is good, but national democracies had better abstain from making decisions, not least because their actions create externalities for others. Whenever real democracies do something they are already guilty of something. Doing equals failing. Lefort's incidental negative nationalism presents us with a *demos* that is devoid of an identity and a history and that has no plan for a future society. The place of power is and must remain unoccupied. Nobody can legitimately invoke the authority of the people. Whoever tried would be guilty of a scam, or worse, of being a 'populist'.[84]

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[84] See Jörke & Selk, note 16, at 492, who are critical of the widespread moral aversion to populism. Not only does it reconfirm widespread populist belief about the haughtiness and

Much contemporary democratic theory manifests, in Hegelian terms, a moral view of the world.[85] It occupies a position of judging without acting.[86] Action, however, is unavoidable. We cannot but act.[87] Judging action by abstaining from it fails the test of universalisation. In any case, judging is action, too, and therefore, necessarily, bad. The moral view of the world must thus confess to its own immorality.

In light of this inconsistency, legal constitutionalism and deliberative democracy have to be viewed as symptoms. Symptoms are responses to

irresponsiveness of elites, it ignores that right-wing populism originates from a situation in which the fears of those who have lost out are not represented and dismissed as originating from the cultural backwaters of society. Bugaric also makes the important point that liberal moralist aversion to populism is suspect since populism may be an understandable response to the destructive forces of free market logic. A non-authoritarian (left) populism may thus be justified on the basis of generating an alternative to the political economy of neoliberalism, Bojan Bugaric, 'Could Populism be Good for Constitutional Democracy?' (2019) *Annual Review of Law and Social Science* 41 – 58. More explicitly, see Chantal Mouffe, *For a Left Populism* (London: Verso, 2018).

[85] See G.W.F. Hegel, *The Phenomenology of the Spirit* (trans. A.V. Miller, Oxford: Oxford University Press, 1977).

[86] From the position of the moral view of the world, one criticises others for their actions. Actually, one does not criticise only those actions that are bad while praising others that are good, one rather finds something bad in *any* action, for the point of judging is to make action *as such* morally defective.

[87] With this simple assertion Korsgaard embarks on her grand intellectual enterprise. See Christine M. Korsgaard, *Self-Constitution: Agency, Identity, and Integrity* (Cambridge: Cambridge University Press, 2009).

conditions. They are, however, failures; they do not resolve conflicts and are prone to give rise to further conflicts.[88] Both exemplars of contemporary democratic theory represent unsuccessful responses to the conflict between equality and political agency. Underlying their failure is the transformation of the people into an entity that is incapable of engaging in action. The equal votes of citizens acting within a bounded constituency are taken to undermine the rhizomatic nature of the people dispersed in various unbounded fora and action groups.

Lefort's people in the abstract[89] still tacitly identifies the people with the nation. But it renders any actual people radically absent. Not even the connection that is established by means of an election can guarantee that a representative body speaks with greater authority for the people than the voices that originate from civil society.[90]

Implementation of the All-Affected Interest Principle would make composition of the participating demos policy dependent.[91] The demos would have to be flexibly adjusted with an eye to the proposed impact of a policy. The result is that sovereign powers become issue-specific, fleeting or a product of impact assessments. Sovereign, so it seems, is he who is

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[88] See Sigmund Freud, *Vorlesungen zur Einführung in die Psychoanalyse* (13th ed, FrankfurtaM: Fischer Verlag 2004) at 247.

[89] See above note 77.

[90] See Sofia Näsström, 'Democratic Representation Beyond Election' (2015) 22 *Constellations* 1-12, at 1.

[91] On the following, see Song, note 78 at 57.

adversely affected, or who can provide reason for this claim.

But who assesses the impact assessment relevant for the selection of stakeholders? As an institution, the papacy is heavily involved in seeing the principles of Christian ethics observed. Should the Pope have a say on the Irish decision to repeal the Eighth Amendment to their constitution and legalize abortion? And since the principle is concerned with being affected, it would seem to require giving greater voice to those who are more intensely affected.[92] Who is elected as the President of the United States may have far greater impact on the lives of people in Syria, Libya, Iraq and Iran than on the lives of Americans. To a large extent their survival is intertwined with this question. Should they not only be given a vote in the elections but actually be given two or three ballots considering how much is at stake?

There are no easy answers unless it were conceded that everyone is equally affected by allocations of political authority. Thus understood, the All-Affected Interest principle would presuppose a global demos as the ultimate seat of sovereign power. It is no coincidence that Habermas himself sees the postnational constitutionalism of the EU as a stepping stone to the constitution of the world society.[93]

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[92] As Näsström observes, the democratic ideal of counting equally is replaced with a model of "distribution according to stakes". Näsström, note 64 at 358.

[93] Jürgen Habermas, *The Postnational Constellation* (Cambridge: Polity, 2001).

In practice, the principle of All-Affected Interests reinforces the individualistic liberal illusion according to which people live their lives in isolation from one another, united only by sheer contingency, because they happen to have the same self-interest or like encounters with state power. Accountability would be allocated across a potentially infinitely wide field of different sites of governing. True democratic legitimacy resides only in the weak publics that must not grow into collective subjects; they must refrain from action.

The resulting diffuseness and complexity would likely result in widespread disempowerment and disengagement from political affairs, at least for all except the select few of the frequent-flyer class or those with the capacity to affect policy through influencing the dispersed fora of public opinion.[94] This is a world composed of individuals and bureaucrats. It is the world where incidental negative nationalism is accompanied by accidental cosmopolitanism.[95]

As an ensemble, legal constitutionalism, deliberative democracy, the 'empty place of power' and the All-Affected Interests principle results in a dismantling of the people and of the idea of constituent power. The flexible demos might oppose discrete policies, but is in no position to challenge a government as such. How could it ever see itself as

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[94] See e.g. Peter Mair, *Ruling the Void: The Hollowing Out of Western Democracies* (London: Verso, 2013).

[95] See Alexander Somek, 'Accidental Cosmopolitanism' (2012) 3 *Transnational Legal Theory* 371–393.

constituting a new one? The overall effect on democracy appears nothing short of devastating.

The people in the abstract are, of course, no one in particular and, in indeed, they are no-body. We appear to have arrived by a different route at Arendt's conception of bureaucracy, that most dangerous form of rule where nobody rules, and the other side of the same coin, where nobody is responsible.[96] Is this a condition in which political authority itself is in danger of disappearing?[97]

V. Reuniting reason and action

We have, so far, examined two contrasting models of sovereignty and uncovered their suppositions. The first explicitly embraces popular sovereignty as nationalism. The second ties itself to the ethereal views of legal constitutionalism and deliberative democracy, underpinned by a philosophical discourse that empties power of any discernable content. As a result sovereignty becomes unpopular, and democracy is turned into an abstraction. While the nationalist response perceives the people as always and already constituted by some pre-political factor, such as history, religion, language or race, the second avoids pulling the people together into one entity, at the cost of severing reason from action.

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[96] See Hannah Arendt, *On Violence* (New York: Harcourt, 1970).

[97] See Hannah Arendt, *Between Past and Future: Eight Exercises in Political Thought* (London: Penguin, 2006).

In the remainder of this article it will be argued that the substance of democracy is less determinate than the first, but less indeterminate than the second suggests.[98] There is an ordering of power, at least when viewed teleologically, but this is not determined in a pre-political manner.

A. From disunity to faith in the power of action

This can be explained with an eye to the point at which Lefort heads off into the wrong direction. This happens when he explains the significance of universal suffrage:[99]

> The danger of numbers is greater than the danger of an intervention by the masses on the political scene; the idea of a number as such is opposed to the idea of the substance of society. Numbers break down unity, destroy identity.

There is some soundness in this observation. To count numbers of votes in order to arrive at a binding decision contradicts the identification of an authority that is committed to a plan or an order of things. Equal votes (one person, one vote) is the form in which "disincorporated individuals" articulate their views. In contrast to how members of estates (e.g., the members of the gentry or burghers) speak for their group from within the group's point of view, universal suffrage severs voters from their societal station and casts them as socially deracinated individuals.[100]

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[98] See Lefort, note 66 at 15 (on welcoming and preserving indeterminacy); Lefort, note 21 at 305.

[99] Lefort, note 21 at 303.

[100] See also Corrias, note 15 at 20-21.

But Lefort draws the wrong conclusion. That those count who happen to be part of the greater number is indicative of a deeper commitment.[101] It is the commitment to collective action even if this involves surrendering one's own voting preferences. What lends democracy unity is manifest, at any rate implicitly, in the defeated minority yielding to the majority. A submission of this kind suggests that, after all, to be part of the larger society is more important to them than to prevail in a particular vote. What unites citizens, from that perspective, is their overriding interest in effective collective action, in asserting their power vis-à-vis historically given circumstances of action.[102]

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[101] See Näsström, note 64 at 349. 'The difficulty with Lefort's analysis of democracy' notes Ernesto Laclau, 'is that it is concentrated exclusively on liberal-democratic *regimes*, and does not pay due attention to the construction of popular-democratic *subjects*.' E. Laclau, *On Populist Reason* (London Verso, 2005), 166. As Laclau continues in his critique of Lefort, 'emptiness is not just a datum of constitutional, it is a political construction', ibid, 170.

[102] A reviewer of this article pressed us hard to admit that, at least in our view, successful democratic action presupposes pre-existing bounded units, such as, in particular, the nation. While it cannot be denied that the effectiveness of action is greatly facilitated if the existence of a collective unit is mutally taken for granted by those exercising agency, one should not overlook that any appeal to such unit involves an act of interpretive construction. It is perhaps the greatest mystery of sovereign authority that it has to be self-authenticating. Someone has to speak or act on behalf of a "we" and others have to allow that person to go forward. This is true of appeals to a "nation" and even more so of the former pretensions of elite parties. Put in terms of American pragmatist philosophy, this

On the basis of this elementary idea an understanding of popular sovereignty can be developed that does not treat is as a status, but as an activity. The activity is directed at a specific goal or goals. And it is risky. Attaining the objective necessarily involves the endorsement of a principle that could equally well thwart it.

This understanding of sovereignty can be developed from canonical sources of political modernity: the social contract traditions of Hobbes and Rousseau.[103] It is marked by three elements.

First, sovereignty has a *telos*, which is, in the case of Hobbes, self-preservation; [104] in the case of Rousseau, it is self-legislation. [105] It need by no means exhaust itself in these. On the contrary, popular sovereignty may be geared towards *emancipation* from any form of

means that the identity of publics is dynamically constituted in view of challenges. It is not a given but a by-product of joint agency. See John Dewey, *The Public and its Problems* (3rd ed. Chicago: University of Chicago Press, 1954) at 64. It remains sociologically the case that the levers of effective and accountable political power are exercisable predominantly at the national level. See eg Streeck, note 19, above.

[103] We have relied on an online version that is available at http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/hobbes/Leviathan.pdf. On the importance of democratic sovereignty to Hobbes, and the continuitiues between Hobbes and Rousseau, see Richard Tuck, *The Sleeping Sovereign: The Invention of Modern Democracy* (Cambridge University Press, 2012) 137 – 141.

[104] Hobbes, ibid, ch. XXI (p. 136), XVII (p. 81). Rousseau, note 24 above.

[105] See Rousseau, note 23 above.

oppression, to avoid succumbing to circumstances that individuals or groups cannot control.

Second, with regard to its objective, sovereignty has a mode of operation that depends upon a form of representation. The attainment of goals depends on giving the sovereign agents full authority to achieve the objective by their own lights. Again, in the case of popular sovereignty this is manifest in the commitment to *majoritarianism*.[106]

Third, since the attainment of the telos involves choosing such an inherently risky means, sovereign authority requires a great deal of confidence and trust, which implies a special form of political *citizenship*.[107]

These core features of popular sovereignty will be further elaborated in turn.

B. Emancipation

The *telos* of popular sovereignty is what can be accomplished only by joint political action. Most generally, people act together in order to overcome oppression by some group or by circumstances that may appear to be beyond their control. This task may

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[106] In Hobbes' case this is the conversion of an obligation to protect into an unlimited right to rule. Hobbes' arguments as to why it is inconceivable that the people conclude a contract with the sovereign are rather formal. See Hobbes, note 104 ch. XVIII (p. 81).

[107] Although in Leviathan, Hobbes suggests monarchies as the best sovereigns, ch. XIX (pp. 118-119), Tuck shows that Hobbes's views on the whole (including his earlier works) are more nuanced, particularly when one keeps in mind the distinction between sovereignty and government, Tuck, note 103 above, 86 – 120.

have been envisaged by Marx under the name of "human emancipation".[108] It stands for the organised effort to rise above, from below, the shackles created by mutual dependence.

The constraints inherent in the horizontal competition in market contexts not only tie us together; they also tie us down. Economic interdependence in conditions of capitalism restricts human freedom through the coercion of economic circumstance. When economic interdependence dominates, people have their opportunities determined on the basis of the side-effects of horizontal transactions.

Being governed by the coercive force of economic circumstance is tantamount to being subject to an anonymous and alien force.[109] This is akin to what Cornelius Castoriadis, in an attempt to renew the republican tradition as a radical democratic project,

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[108] Karl Marx, 'On the Jewish Question' in *Early Writings* (London: Penguin 2000).

[109] For this reason Rousseau's insights on sovereignty as representing the 'General Will' in combination with his work on political economy are crucial to move beyond the Hobbesian framework. On the broader requirements of equality in Rousseau's republic, see Frederick Neuhouser, *Rousseau's Critique of Inequality: Reconstructing the Second Discourse* (Cambridge: Cambridge University Press, 2014) at 129-130, 134. On Rousseau's radical constitutionalism and political economy, see Marco Goldoni, 'Rousseau's Radical Constitutionalism and its Legacy' in M. Dowdle and M. Wilkinson (eds.) *Constitutionalism Beyond Liberalism* (Cambridge Universty Press, 2017) 227 -254.

calls a heteronomous society.[110] The outside and uncontrollable force may no longer be conceived as divine in modernity, it is immanent. But if it remains elusive, outwith our grasp, as, for example, conveyed in the metaphor of the 'invisible hand' of the market, unfreedom is entailed. A force that is not yours makes you do what you would not want were you invested with the full freedom that would accrue from rising with others above mere market interdependence.[111] The coercive effect of the market and the powerful force it exerts originate from our common failure to do something about it. In other words, the collectively felt impact of *an alien force* is the upshot of our failure to arrive at a *common will*.

There is no guarantee, to be sure, that society could ever succeed at ensuring each a fully authentic life and autonomous existence. But there is no reason to assume that human beings are incapable of creating

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[110] See e.g. Cornelius Castoriadis, 'Democracy as Procedure and Democracy as Regime' (1997) 4 *Constellations* 1 – 18.

[111] As is well known, Marx observed that the cause of the loss of control over one's own life is the profoundly disempowering effect of competition: Karl Marx & Friedrich Engels, *Die Deutsche Ideologie*, MEW vol 3. (Berlin: Dietz, 1978) at 76. In English translation: "This accidental character is only engendered and developed by competition and the struggle of individuals among themselves. Thus, in imagination, individuals seem freer under the dominance of the bourgeoisie than before, because their conditions of life seem accidental; in reality, of course, they are less free, because they are more subjected to the violence of things." The source of the translation is http://www.marxists.org/archive/marx/works/1845/german -ideology/ch01d.htm.

arrangements where effective autonomy were realised.[112]

The momentum for transcending interdependence ideally originates from those who are most adversely affected by it and able to conceive its injustice. In the Marxist tradition, this is the class whose labour produces surplus value, which is free to sell its labour but also forced to sell it, having no other commodity for sale.[113] The vulnerability of the working class accounts for its status as a special class. But since, as a matter of normative principle, this class merely acts upon the *universally* alienating features of interdependence it also advances a universal interest in emancipation from economic necessity.

C. Majoritarianism

According to Hobbes, for the sovereign to provide for peace and security it has to possess unrestrained public authority. The mode of operation of sovereignty is paradoxical, however, since it does not admit of any checks on how the sovereign might go about attaining these objectives.[114] The only "check" is abject failure itself, for if the sovereign fails to avert the condition of war among its subjects, their inalienable right to self-defence is fully revived.[115]

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[112] 'Effective autonomy' as Castoriadis has it, means freedom 'not only in the letter of the law, but in effective social actuality', note 111, 112.

[113] Karl Marx, *Capital Vol 1*, Ch. 6 (London: Penguin, 1990).

[114] See Hobbes, note 103 ch. XVIII (p. 109).

[115] See Hobbes, note 103 ch. XIV (p. 81-82).

In the case of *popular* sovereignty, the equivalence of unlimited power is the power that accrues from outnumbering others. This formal constraint aside, it is just as unchecked as Hobbes' sovereign.

The significance of this idea is thrown into sharp relief when one considers that it is based on rejecting the pretensions of the "better sort" or some version of aristocracy. Nobody who wishes to pass as a member of a people can rightfully claim to possess superior judgment to any other on political matters. In relation to one another, opinions reduce themselves to mere votes. For the only condition under which a minority could rightfully demand from the majority that it do as it says would be some assurance that the minority possesses superior insight. As a matter of normative principle, this condition can only obtain in a democracy if the majority has determined it to be so, for example by identifying agents with special expertise. By default, however, the people have to come to action without violating the equality principle.[116] We therefore arrive at majority rule.

There is not necessarily a logical basis for majoritarianism.[117] But it is important to understand

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[116] On the connetion between majoritarianism and the equality principle, see Jeremy Waldron, *Law and Disagreement* (Oxford University Press, 1999) 101 – 118.

[117] The Condorcet jury theorem is, of course, an attempt to establish a positive correlation between the views of the majority and insight into truth. It is of no relevance to what is being advanced here. For an elaboration of its significance in a constitutional context, see Adrian Vermeule, *Law and the Limits of Reason* (Cambridge, Mass.: Harvard University Press, 2008).

that it is a principle of practical reason where reason has to be exercised collectively. It marks the point at which the quality of arguments is transmuted into quantity, or numerousness. In contrast to the moral view of the world, getting to action by means of counting is an exercise of political judgment.[118]

A majority are politically right on account of being many, and not on the ground of some absolute quality of their arguments, their elevated position, their celebrity status, their good education, their professional credentials, their money or their networking skills. In their judgment, which may or may not result from "better arguments", "superior insight" or "greater expertise", the rule of the majority is as unlimited as the sovereignty envisaged in the *Leviathan*. It is, therefore, just as dangerous. It bespeaks a mode of operation just as paradoxical as that of absolute power. Majoritarian democracy, which, by design, is the political means of those who can only help themselves by virtue of being many, can of course be put to malign uses. One should not harbour any illusions.[119] But there is no reason to think the dangers are any greater than in any other mode of governing where power ends up being in the hands of a few.

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[118] For a powerful argument for majoritarianism based on agency as well as some responses to the standard concerns, see Tuck, above note 103, 257 – 266.

[119] See Kumm, note 52.

D. Citizenship

Sovereignty is best viewed against the backdrop of emancipation from the "systemic imperatives" of money and power, as clarified by the early Habermas.[120] Since the ultimate focus of popular sovereignty rests on human life in conditions of social and economic interdependence it follows that members of a people—citizens, that is—address the overall situation of society and concern themselves with a whole form of life.[121]

This explains why citizens are distinct from stakeholders. Stakeholders take an interest in an organization inasmuch as it provides them with a service.[122] Viewing the polity from a stakeholder's perspective involves asking, typically, whether, as an individual, one receives a return on one's "taxpayer's money". Viewing the polity from the perspective of a

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[120] Jürgen Habermas, *The Structural Transformation of the Public Sphere: Inquiry into a Category of Bourgeoise Society* (Cambridge: Polity Press, 1992).

[121] In a similar vein, Christiano reconstructs democratic citizenship as a position from which everyone has a "roughly equal stake" in sustaining a common world that is supposed to provide a "home" for those who inhabit it. See Thomas Christiano, 'A Democratic Theory of Territory and Some Puzzles about Global Democracy' (2006) 37 *Journal of Social Philosophy* 81-107, at 84, 88.

[122] It is no coincidence that Raz's 'service conception of authority' explicitly rejects the significance of democracy or even any special political relationship between rulers and ruled. See Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' (2006) 90 *Minnesota Law Review* 1003 – 1044.

citizen, by contrast, engages our social imagination. As a citizen one is invested with the power to create and sustain something greater than the particular set of practices in which one happens to be engaged every day. For example, the question of whether or not the school curriculum should offer ancient Greek matters to a stakeholder only in so far as she "has a stake" in having this language studied by her children. People without children, by contrast, have no stake. Citizenship, however, invests everyone with the power to co-determine whether or not there ought to be a social world in which the study of ancient languages is saved from extinction. Why should this matter? It matters precisely because it allows citizens to rise above their private existence and to participate in creating something that they can create, and sustain, only once they transcend the shackles of economic interdependence.[123]

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[123] In the same context, Christiano, note 121, at 84, speaks of a "common world". This is a world "[...] in which the fulfillment of all or nearly all of the fundamental interests of each person are [sic] connected with the fulfillment of all or nearly all of the fundamental interests of very other person. This world is marked by a deep interdependence of interests among the members." This explains also why territoriality matters to sovereignty. A state is a territory in virtue of its ability to exercise relatively comprehensive control over forms of life. Such a control is undoubtedly indispensible, for otherwise interdependence could scarcely be held in check. But it is not territoriality alone that explains why popular sovereignty and the state are a perfect match. The state can guarantee the effective enjoyment of rights. States are also the sites of solidarity and trust. They are the places where representation can be relatively responsive. See Song, above, at 58-59.

The practice of citizenship as a third feature of sovereignty also reveals its inherently risky nature. Engaging in common action with others can be effective only so long as one can be reasonably assured that others with whom one acts or whom one permits to act on one's behalf share one's view of the world. Credible commitments to political programs that look into the future may invite the relevant trust and reciprocity. But such trust may equally well also be instilled by defending past achievements or traditions. In that case, collective identity serves as the source of trustworthiness. This explains why, unless politics avails of a forward-looking political program, backward-looking nationalist political forces are likely to absorb the energies of defiance that the people can muster.[124]

The predicament of our time appears to be that such future-oriented programmes are difficult to imagine, but this is a symptom of the de-popularising of sovereignty that we have outlined above.

VI. Conclusion

The sceptical reservations with which this paper began have not been fully met. Sovereign states do not *de facto* rule supreme over their territory. Supranational authorities and private or informal

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[124] As both Jörke & Selk, note 16 at 488, 496 and Möller, note 16 434 point out, what explains, at least partly, the appeal of populist movements is that they overcome the "dictatorship of no alternatives" and reinvigorate transformative political action in the midst of ordinary politics.

transnational regulatory regimes have taken charge of important areas of public policy, such as education, banking and economic crisis management. Beyond the state, there appears to be little space for the people to rise above their interdependence. Inside of nation states, however, the scope left for political power has become remarkably narrow. This is reaching breaking point in the case of European integration. In an apposite diagnosis of the European Union, to paraphrase Peter Mair, states now have politics but no policies, and the EU has policies but no politics.[125] The resulting stalemate causes all manner of morbid symptoms to occur.

Yet, there are moments—moments that we have seen in e.g. Greece, in Spain, in the UK, and further afield, in Hong Kong—where the people disavow their allegiance to arrangements that outside authorities, expert bodies and cooperating governments have prepared for them. They stand up and claim they are no longer willing to put up with the system. Elites reply by saying what elites typically say to those who oppose them, namely, that the people do not understand the issues, fail to appreciate their complexity or behave irresponsibly and irreverently. And yet, it is in opposition to the haughty pretensions of transnational governors that the crowd, the commoners, the *demos*, provide instances of popular sovereignty.[126] Their

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[125] See Mair, note 95.

[126] In its original meaning the demos were the lower classes, the poor, those who had 'no part in anything'. See Jacques

resistance preserves the moment in which numerousness translates into authority in a manner which cannot be ignored. No matter what economic rationality appears to dictate, the people renounce their readiness to endure the status quo. The categorical nature with which ordinary people express their indignation is an assertion of popular sovereignty. At the risk of sounding French,[127] one could say that popular sovereignty is not a status. It is an occurrence. It is enacted in and through certain events. And it has not yet disappeared from the face of the earth.

Ranciere, *Disagreement: Politics and Philosophy* (Minneapolis: University of Minnesota Press, 1999) 8 - 11.

[127] The allusion is, of course, to Alain Badiou, *Being and Event* (Oxford: Bloomsbury, 2013).