The Sequential Texture of Democracy: A Reply

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Abstract. The paper comprehensively responds to critical comments by M. Croce, M. Santambrogio, A.E. Galeotti, F.G. Pizzetti e F. Pasquali on Alessandro Ferrara's *Sovereignty Across Generations. Constituent Power and Political Liberalism*. The themes debated include: the convergence and discrepancies between Rawls's and Schmitt's understandings of constitutionalism and constituent power (Croce); the inexistence, or at best fictional quality, of "the people" as bearer of constituent power and the gap, or absence thereof, between the models of normativity undergirding A T*heory of* J*ustice* and P*olitical* L*iberalism* (Santambrogio); the nature of consent to democratic institutions, the temporal extension of the transgenerational people, and the institution best positioned for representing the will of the transgenerational people (Galeotti); a comparison of American and (Continental) European forms of judicial review, and the challenge posed by a multilayered constitutionalism, based on multiple sources of supranational binding higher law, to the model of a domestic constitutional court entrusted with representing the domestic "intergenerational people" (Pizzetti); the unequal burdens placed on the presently living and the founding generation, on account of the principle of vertical reciprocity cogent for sequential sovereignty (Pasquali).

Keywords: constituent power, "the people", democratic sovereignty, vertical reciprocity, populism, Rawls, Schmitt, political liberalism, judicial review, multi-layered constitutionalism

It is a great honor and pleasure for me to respond to the critical points and comments offered by Mariano Croce, Marco Santambrogio, Elisabetta Galeotti, Federico Gustavo Pizzetti and Francesca Pasquali on my latest book

Sovereignty Across Generations. Constituent Power and Political Liberalism. Let me start with a word of sincere and warm thanks to them for the time, energy, and care with which they have engaged my arguments. All their contributions indicate a deep familiarity with the different facets of my volume and an effort to come to terms with my main intent – to revisit the paradigm of political liberalism, its implicit constitutional theory, and its account of constituent power, better to justify Rawls's *sequential* view of democratic sovereignty, and to improve his defense of the implicit unamendability of constitutional essentials. I am also especially grateful to Greta Favara and Roberta Sala for perfectly capturing, in their generous Editors' "Introduction", the dual rationale that motivated me to write the book.

On the one hand, *Sovereignty Across Generations* aims at reconstructing Rawls's theory of democratic constituent power and showing how it somehow cuts across the constitutional doctrines of the two warring titans of 20th-century legal theory, Hans Kelsen and Carl Schmitt, superseding them and opening new vistas for a normative, yet non-foundationalist, approach to democratic legitimacy. On the other hand, the book aims *to intervene* in our present context. Its purpose is also to accrue to and refine the conceptual tools available to political liberalism for countering the lure of populism, which draws its seductive power from questionable conceptions of democracy deeply rooted in our political tradition. As Sala and Favara congruously recall, in this respect the book carries forth my attempt to rethink and update political liberalism in order to enable it to better meet the challenges of the day. At the beginning of the 21st century, an urgent challenge (addressed in Ferrara 2014) was linked with the "hyperpluralism" fed by a growing population of incoming non-liberal constituencies. Over the last decade, the major threat to democracy has come from domestic, all too native populism and its peculiar attempt to elevate the ordinary will of voters to the constituent will of "the people".

1. *Rawls and Schmitt: Narrowing the gap?*

In his very insightful commentary, "Democracy and Its Matter. Juxtaposing Carl Schmitt and John Rawls", Mariano Croce invites me to deeply rethink my rendering of the convergence and discrepancies between Rawls's and Schmitt's understandings of constitutionalism and constitu-

ent power. In my book, I suggest that these politically distant figures – a champion of contemporary liberalism and a vehement critic thereof with Nazi sympathies – both a) distinguish "constituent" and "constituted" power, but also the first-order constituent power to create a *new* political order and the subordinate, second-order constituent power to *amend* the constitution; b) reject both a "purely procedural" and a merely "compromise-based" approach to legitimacy; c) share a "militant" view of liberal-democratic orders (the Weimar Republic, the United States) as entitled to exclude and contain those whose loyalties fall beyond the boundaries of "the political" or "the reasonable" (Ferrara 2023, 108-113). Despite these points of convergence, uncontested by Croce, Rawls's and Schmitt's approaches to constitutionalism remain separated by seven distinct points of dissonance (Ferrara 2023, 116-122), some of which are ingeniously questioned by Croce. According to him, then, the gap between the two approaches is much narrower than suggested in *Sovereignty Across Generations*. In response, let me briefly address some of the contentious claims and then reassess the overall convergence.

I suggested that while Rawls's overlapping consensus is limited to the basic structure, the political conception of justice, fundamental rights basic liberties, as well as other "constitutional essentials" and spans a constellation of comprehensive conceptions endorsed by citizens for quite diverse reasons, for Schmitt the constitution and the institutions of the state rather appear as instrumental for the purpose of affirming a comprehensive form of life, ideally coterminous with Montesquieu's "general spirit of a nation". It is certainly true – and I fully credit Croce for significantly advancing this discussion through his comments – that with the inception of his "institutionalist turn" (after *Constitutional Theory* (1928)) and up until completing a number of significant contributions in 1930-1932 (Schmitt [1930] 2000; Schmitt [1931] 2003b; Schmitt [1932] 2003a), Schmitt's emphasis on deep cultural homogeneity and on tapping the sources of the spirit of the nation, more representative of the early-1920s "decisionist phase", gave way to a more moderate project of identifying, through jurisprudential tools, the "material" coherence underneath the "hodgepodge of programs and positive provisions" juxtaposed in the Weimar Constitution, through compromises, by the diverse political and cultural traditions. As Croce points out, in order to reconstruct that coherent material core Schmitt advocated the use of such tools as "liberty rights", "institutional guarantees", "basic rights"

and "basic duties" – not so removed from the Rawlsian toolkit of the basic structure, fundamental rights and basic liberties with their "central ranges". While the first part of the Weimar Constitution "guaranteed the legislature ample room for maneuver, as it allowed it to draft and amend the content of ordinary laws and, with a qualified majority, even the contents of the constitution itself…" the second part, on the contrary, "was entirely content-dependent, designed to protect a set of substantive contents from legislative procedures" (Croce, *supra*, 29). To put this point in Rawlsian terms, it is as though Schmitt thought it was incumbent on jurisprudential wisdom, given the specifics of the Weimar Republic and constitution, to streamline and finetune a somewhat heterogenous, patchy, almost stillborn "people's project to govern itself in a certain way". Fidelity to the ethical intuitions inscribed in a form of life seems now, in this "institutionalist phase", to give way to what Rawls would call a "political", non-partisan re-articulation of the political project inscribed in the constitution for the purpose of realizing the constitution's potential for attracting a larger overlapping consensus. As Croce contends, never did Schmitt claim that without a "prior overcoming of the epistemic and ethical divide" constitution-making would be impossible, and in his "institutionalist phase" what he now places at the center of the material Weimar Constitution is not a comprehensive conception, "since it is limited to the principles and substantive values of the second part of the constitution". This conception, not unlike Rawls's view of constitutional essentials, "is internally pluralised in a non-trivial sense since the core of consensual matters emerges from the overlap of a constellation of broader, comprehensive, often rival conceptions (such as the Lutheran and Catholic churches, or the Christian Centre and the centre-left social democratic party)" (Croce, *supra*, 34). If at times Schmitt's message sounded different, and he seemed to propound that the constitution should revolve around "some 'cultural artifact' (a philosophical doctrine, a popular ideology, a politicized religious message) purportedly enclosing 'the whole truth'" (Ferrara 2023, 117), there – Croce suggests – it is not Schmitt the constitutional lawyer, but Schmitt the conservative right-wing thinker, who speaks. I take Croce's point (cfr. Croce, *supra*, 34) that these two voices should not be conflated into one.

Nonetheless, once these sensible corrections of my initial claim are taken into account, there remain two major differences between the two paradigms, that once again I wish to draw attention to. The first concerns

legitimacy. I appreciate Croce's ingenuity in narrowing the gap between the two thinkers by suggesting that Schmitt too has a notion of "stability for the right reasons", "rooted in a solid core of constitutional essentials" (Croce, *supra*, 27). With reference to the Weimar Constitution, Croce interprets Schmitt as claiming that "once legal scholars have juristically purged the constitution of its contradictions as a compromise" and, as mentioned above, have retrieved and streamlined its underlying "political project", that constitution "can be described as *the most reasonable political conception of justice in that particular society*" (Croce, *supra*, 38, emphasis added). However, there are still two qualms that trouble a Rawlsian reader.

For Rawls, the "right reasons" that make the difference between a fully legitimate and stable legal order and a merely stable one are not rooted solely in the constitution. In the scheme of "legitimation by constitution" (Ferrara, Michelman 2021), what makes exercises of legislative, executive, or judicial authority legitimate is not simply their consistency with the constitution actually in force, but the fact that over and beyond "the constitution", also the political conception of justice that undergirds it, be "the most reasonable" for the participants in the legal order. Rawls is keen on reminding us that the coalescing of an overlapping consensus about such conception of justice as "most reasonable" should be understood as derivative of, or at least as subsequent to, a "freestanding" construction of such view of justice along philosophical lines – a construction in which the original position still plays a role, albeit one of elucidation only (Rawls 2005, 25-27, 40). This "constructivist" aspect of the constitution's potential for grounding a stable and just, fully legitimate, polity – hardly found in Schmitt – enriches the meaning of the expression "most reasonable for us/someone" of a nuance, once again, not easy to find in Schmitt's institutionalist take on the Weimar Constitution. The most reasonable constitution presumably is not simply congruent with the citizens' deeper understanding of themselves, of their history, and of the traditions embedded in their public life (Rawls 1980, 519). Such an interpretation of Rawls would make "most-reasonableness" hostage to a Savigny-like historicist understanding of the normativity of the constitution. The most reasonable constitution, for Rawls, must also be congruent with the "aspirations" of the citizens (Rawls 1980, 519), and this is the juncture at which the freestandingly validated conception of justice plays a role – difficult again to spot in

Schmitt – in conferring exemplary validity to the political conception of justice undergirding the constitution.

This "freestanding" normative element, with its being balanced (along the lines of the Rousseauian legislator) with the uniqueness of the constituent subject for which it is to be "most reasonable", offers a foothold – whose absence makes Schmitt's constitutional theory ultimately a "political-existential" mirror-image of Kelsen's legal positivism – for saying, as the case might be, that a constitution in force, or a historical manifestation of "the political" with its attendant opposition of friends and foes, is "undeservingly" perceived as legitimate. The absence of this normative foothold, and the consequent reduction of the legitimacy of the constitution to its being, in a pragmatic sense, the best possible deal among the existing plurality of legal and political traditions, marks the persisting key difference in my opinion between Rawls and Schmitt. For Schmitt, normativity only begins *downstream of the constitution*, so to speak, once the constitution is in force. Within political liberalism, there exists a normativity *sui generis*, *upstream* of the constitution and yet not "antecedently given to us" (differently from comprehensive conceptions of all sorts). Responsiveness to this "freestanding-yet-indexed" normativity makes the constitution not simply accepted but worthy of recognition as the most reasonable political project for those living under it.

The gap is narrower now, thanks to Croce's contribution, but it remains and its contours are hopefully more distinctly discernible.

2. *Giving "the people", and Rawls, their dues*

In his contribution, "Whose Constituent Power Is It?", Marco Santambrogio takes aim at the assumption – crucial for my argument in the book – that the subject of constituent power, called "the people" in observance to widespread constitutional usage, cannot be reduced to a fictional, merely presuppositional or constructed entity. As he puts it, "In reality, there is no subjectivity other than individual subjectivity. In other words, there are no subjects other than individuals. Therefore, the people cannot exist as a real collective subject. The many constitutions in the world that refer to 'the people' refer to a fictional entity" (Santambrogio, *supra*, 43). Santambrogio's argument in support of this thesis –

that retrieves classical methodological individualism and atomism – is worth examining closely. But I'll begin by frontally questioning, in equally general and hopefully intuitive terms, the sensibleness of the quoted sentence. Consider a soccer team. Just as a "people", it too should be denied existence "as a real collective subject". Only players should be said to exist and score goals, and only improperly do we attribute victory to the whole team, a fictional entity, in a championship, while in fact only individual players win or lose. When entire teams are said to win or lose, are punished for some wrongdoing in playing, or are attributed prizes and said to be world champions, we are speaking improperly. Instead, as we all know, no one objects to the idea that a whole team – not just the single player who scored a goal – wins the game, including players who hardly have kicked a ball or have been on the sidelines all the time. Furthermore, commenting on the quality of a team's, as opposed to each player's performance, on whether the team deserved to win the game and unluckily did not, or instead appeared to profit from fortuitous circumstances, on which strategy to adopt in a specific game, on whether the team's overall performance has improved or not after the insertion of new players or the adoption of new strategies, all of these habitual topics of conversation among fans, coaches and players should be jettisoned as absurd. The idea that corporate entities, be they peoples or soccer teams, "cannot exist as a real collective subject" but exist only in our minds flies in the face of our intuitions. However, since intuitions may be fallacious, we need to take a closer look at two junctures of Santambrogio's argument. Then I'll address an interpretive point concerning Rawls because Santambrogio's objection is representative of a quite widespread, but in my opinion flawed, way of understanding the relation of *Political Liberalism* to *A Theory of Justice*.

First, with regard to collective agency, the Condorcet-Arrow line of argument about circular preferences applies to the question of aggregating individual *preferences* concerning what pleases me or us regardless of its impact on some "social union" – from family to *cosmopolis* – to which I relate in terms of reciprocity. The objection applies to what Rousseau calls "the will of all", as opposed to the "general will". If this atomistic approach to aggregating preferences were the only possible way of coordinating human action, not only polities and soccer teams but every human organization would be paralyzed. The board of directors of

any firm, just as a political party, a church, or an editorial board would be paralyzed by circular preferences. Joint action is intelligible insofar as human beings can deliberate about "what the general will" requires, namely about what line of action best promotes the general interest, or the common good of some "social union", and not just my individual or factional interest. By all means differences and conflicts of opinion are there all the time, but the vantage point of "what's best for all" – regardless of whether "all" means family, neighborhood, country, region, or humanity – does the aggregating work "prior to casting one's vote" so to speak. Unless you (as indeed often happens) freeride and smuggle in your personal or factional interest for the general interest, in voicing your opinion or voting for one proposal as opposed to another you're already factoring in the preferences of others (Goodin 2023, 5-7). A standard, certainly not susceptible to allowing for subsumption, but nonetheless capable of orienting the participants' assessment of reasons, acts as a coordinating force among the participants' possibly circular atomistic preferences. What "unifies" a collectivity is not a mysterious (and undesirable if ever possible) unanimousness of opinion, but the shared *voluntary* orientation of its members to consider (and debate) what is *good for them as a whole*.

Second, Santambrogio then questions the real versus fictive status of "the people" as a body of citizens who deliberate about the constitutive rules of their political practice and the commitments they jointly want to make and honor. What benefit could we expect "if it had been established that the people is a real subject and not merely imaginary?" (Santambrogio, *supra*, 50). The answer is twofold. The most straightforward one is that we save ourselves a lot of trouble. By understanding the people as a merely imaginary creature a fundamental distinction would be blurred, between the *legitimacy* of a constitution – *qua* benchmark of the legitimacy of downstream laws, norms, and rules – and its *being believed legitimate* by the citizens. Imagine an enlightened despot who enacts a constitution that a) reflects a view of justice, b) gains the citizens' consent and c) functions as a benchmark for the legitimacy of ordinary legislation. Suppose also that AI-assisted techniques and revisionist historians enable the despot to construct a credible narrative, to the effect that the constitution originated from a consulting body of citizens, and that this narrative comes to be accepted by new generations. Down the line, the

citizens may then believe that their laws are legitimate insofar as they are not inconsistent with a constitution whose essentials reflect a view of justice selected as "most reasonable" by a founding generation endowed with constituent power. Yet, we observers – you and I – would hesitate to call that regime a legitimate constitutional democracy. Why? Simply because the narrative of its founding isn't *true*. For Rawls, not only the responsiveness of a constitution to *justice* but also *truth* matters – the truth, not just the mere belief, of its originating from the will of a subject possessed of constituent power. An interpretation of P*olitical* L*iberalism* along the lines suggested by Santambrogio, instead, would blur the distinction between a constitution-making act by "the people" having occurred and its being *believed to have occurred*. Without that distinction, no line could be drawn between a genuine constitutional democratic regime and one that emulates constitutional democracy in all respects but results from undetected manipulation. That is the trouble we would incur by denying the historical reality of "the people", and which we spare ourselves by understanding "the people" as a not merely fictive entity.

However, a more complex and nuanced answer is possible, that draws on psychoanalyst Donald Winnicott's ground-breaking concept of the "transitional object". A cherished soft object, like a teddy bear, that offers comfort at times of anxiety, the transitional object extends its significance well beyond the pathway toward autonomous selfhood. Neither intrapsychic nor external, neither a projection nor a discovery, neither entirely fictional nor fully real, transitional objects prefigure all instances of cultural objectification, up to Hegel's "objective spirit". We can think of constituent power – and its democratic bearer, "the people" – along somewhat similar lines: neither totally real nor totally fictive or presuppositional. Unilateral views of constituent power make our understanding of democratic legitimacy and of the function of a constitution paradoxical. By ignoring the "external", historically embodied aspect of the people we blur the crucial distinction between inhabiting a legitimate democratic order and inhabiting one erroneously believed to derive from some (in fact inexistent) exercise of popular constitution-making. But the "constructed", "presuppositional", and "fictive" side of "the people" – to remain faithful to the metaphor of the "transitional object" – must be given its dues as well. We can do so by distinguishing agency and imputability. We no more need to imagine that the members

of "a people" actually participate in constitution-making than we need to think that each player in a team should score a goal for the team to win a match. All we need is some chain of imputation that can legitimately ascribe to all the members of a people the framing, ratifying, and enacting of a constitution that derives from the work of representatives. If a whole team is attributed victory when one player scores a goal, why can't a whole concrete, historically situated, people be attributed the making of a constitution framed and approved by a few hundred representatives? In sum, when it comes to the bearer of constituent power construction from inside and reflection from outside cannot be uncoupled and posited as absolutes without exacting a heavy cost[1]. Distinguishing observable conduct and impalpable imputability is my way of preserving the two poles of this ineradicable tension.

Third, let me address one interpretive bone of contention which has broad theoretical consequences. Santambrogio asks "If Rawls is right, if each of us is convinced that in the original position he himself would accept those principles of justice, *what else is required* for a constitution that respects them to be embraced by all citizens (more realistically, by almost all) and recognised as just and stable?" (Santambrogio, *supra*, 54, emphasis added). My answer is: the outcome of the original position is a view of justice *most rational for everyone*, for each of the 8 billion human beings on Earth. And all the 195 polities in the world ideally should have the same constitution? I can easily see that belief as stemming from religious bigotry, but tend to find it at odds with a liberalism bent on the full acceptance of pluralism. If so, much else is needed for a constitution to be worthy of the citizens' endorsement than mere respect for those principles – or those incorporated in another member of what Rawls now calls a family of liberal conceptions of justice (Rawls [1993] 2005, xlvi-xlvii). This extra is contextual normative substance, not immediately deducible from the two principles of justice as fairness: i.e., constitutional essentials, a list of basic rights and liberties, an outline for a basic structure, all things that jointly define the "political ideal of a people to

[1] For a similar argument that builds, however, on H.L.A. Hart's distinction between an "internal" and an "external" attitude toward law, see Michelman 2024.

govern itself" which is the work of constituent power to set in place. That is why as of 1980 (Rawls 1980), and especially in *Political Liberalism*, the conception of justice that by undergirding a constitution makes it worth endorsing and allows the constitution's legitimacy to cascade down all the way to ordinary exercises of legislative, executive and judicial power, is no longer understood as one that is rational for every human being to hold, but as one that is "most reasonable for us".

To correct here one view that Santambrogio attributes to me, I do *not* suggest that Rawls should "abandon that thought experiment [the original position] once he embraces the kind of normativity implied in the second work" (Santambrogio, *supra*, 55). The original position *remains* in *Political Liberalism*, as attested by passages in which Rawls suggests that an overlapping consensus should not be equated with a kind of "political mediation" between rival conceptions (Rawls [1993] 2005, 39-40). That is to say, the conception of justice undergirding a proper overlapping consensus should first be articulated in a "freestanding manner", i.e. on the basis of the original position. The original position, to repeat here again a point made in response to Croce, remains in place, but demoted to a "device of representation" (Rawls, 2005, 25-27, 40). What the original position then loses, in the transition to the truly innovative paradigm of *Political Liberalism*, is its status as a generator of a *sufficient* prerequisite for a political conception of justice to function as the keystone of a constitutional order. Something else, *not* provided by the original position, is required now: namely, that conception of justice must be also "most reasonable for us", the participants in constitution-making.

Thus, I don't claim that in footnote 7 of Lecture 2 of *Political Liberalism* Rawls "rejects" the entire conceptual machinery of the original position, but that he reconsiders its implicit claim to self-sufficiency. The notion of the reasonable, in other words, is not adequately present in *A Theory of Justice*. In response, Santambrogio, along with other renowned interpreters, attempts to bridge the gap between the early and the later Rawls's position by claiming that even though the parties, in *A Theory of Justice*, are expected to deliberate along the lines of rational choice, the reasonable is *implicitly* accounted for by the fact that "the principle of reciprocity (i.e., reasonableness) is imposed on subjects in the original position by the veil of ignorance" (Santambrogio, *supra*, 55). Ingenious as this interpretation of Rawls, and of footnote 7 in particular, might

sound, it is vitiated by one fatal flaw. Reciprocity is not all there is to reasonableness. Reciprocity, the willingness to propose and abide by fair terms of cooperation, constitutes the *practical* pillar of reasonableness but is far from being coextensive with reasonableness. Reasonableness is sustained by an *epistemic* pillar as well: acceptance and respect for the burdens of judgment. And will Santambrogio and the other interpreters who wish to narrow the gap between A T*heory of* J*ustice* and P*olitical* L*iberalism* be able to indicate to us where to find the burdens of judgment in A T*heory of* J*ustice*? I doubt it. If they were present, either in the mindset of the parties or in some structural feature of the original position, Rawls (and us) could not expect a unanimous rejection of utilitarianism in favor of justice as fairness. And in fact, in the original "Introduction" to P*olitical* L*iberalism* Rawls uses the adjective "unrealistic" (Rawls 2005, xvii) to qualify, from his new vantage point, his earlier expectation of a unanimous convergence on justice as fairness. Conclusion: reasonableness is *not* adequately reflected in the normative argument based on the original position, and there is no way to derive the status of "most reasonable for us" from deliberation under the veil of ignorance.

The conclusion implies that an unbridgeable gap separates A T*heory of* J*ustice* and P*olitical* L*iberalism*. Whereas the normativity underlying the former is still within the confines of traditional foundationalist models, the normativity of the "most reasonable for us" fully reflects the Wittgensteinian insight into the impossibility of Archimedean points not immersed in a form of life, and yet brilliantly avoids the skeptical, "vulgar Wittgensteinianism" of Rorty and other postmodern thinkers. The normativity of the "most reasonable for us" offers an unprecedented, truly game-changing Kantianism with a Humean face.

3. T*he people and its temporal bounds*

Elisabetta Galeotti's contribution, "Generational Sovereignty v. Perpetual Constitution" ["Sovranità generazionale vs. costituzione permanente"], raises crucial questions concerning the core opposition that undergirds my book: *sequential* sovereignty, vested in the entire transgenerational people, versus *serial* sovereignty, severally exercised by each living cohort of citizens. I'll concentrate on three of them. First, given

that the transgenerational people includes generations endowed with agency and generations that lack it, how is its consent to democratic institutions and constitutional arrangements to be understood? Second, how is the temporal extension and ontological quality of the transgenerational people best understood? Third, which institution is best positioned for representing the will of the transgenerational people?

Galeotti correctly identifies my overall intent to move beyond the traditional pitting of a liberal view of legitimacy against a democratic one and credits me for the view that "legitimacy can only be democratic". The Jefferson-Madison debate has had the unfortunate consequence of corroborating the misleading idea that their approaches reflect a *democratic* and a *liberal* conception of legitimacy. The contest is rather between two theories of democracy and popular sovereignty – a serial and a sequential one – and only the sequential one, in the end, makes full sense (Ferrara 2023, 210-216). Constitutions are the product of the will of representatives of the citizens exercising constituent power under the constraint of what they understand as *the most reasonable conception of justice for them*, in light of their public reason and not in deference to some antecedently valid objective normativity. According to a sequential conception of democratic sovereignty, observes Galeotti, there is no generational sovereignty: the idea is that each generation "*shares* sovereignty with those who preceded and will follow it. Being itself but a segment of the people so understood, each generation then possesses only a segment of sovereignty" (Galeotti, *supra*, 62, emphasis added)[2]. How do then single generational segments of the people and the entire people exercise their respective forms of sovereignty? The former, *qua* cohorts of voters, exercise their share of sovereignty through representatives, but what about the latter, with its mix of agency-possessed and non-agential segments? The answer is that the transgenerational people can be represented by an institution – traditionally, but not necessarily, a supreme, constitutional, or high court – that acts as a trustee of the whole transgenerational people. Galeotti examines three alternative ways of construing the consent

[2] "Condivida la sovranità con chi l'ha preceduta e con chi la seguirà. Ogni generazione dunque possiede un segmento della sovranità essendo solo un segmento del popolo così inteso".

that such an institution must impute to "the people" in order to validate its pronouncements – tacit consent (Otsuka 2003), actual consent, and ideal consensus (Muñiz-Fraticelli 2009). I agree that ideal consensus is the most defensible variant, if we interpret it as the attribution, on the part of the supreme court or other institution acting as trustee, of an irrecusable, reasonably non-rejectable commitment to the represented entity, the people.

Moving on to the second question, an interesting suggestion coming from Galeotti is to avoid the indefinite extension of the temporal span of "the people", and to understand the people instead as "the generations co-existing at a given juncture of the political life of a democracy" (Galeotti, *supra*, 70)[3]. This reconceptualization would still keep "the people" distinct from the actual voters, but would include "bonds of reciprocity upstream and downstream among contiguous, overlapping generations, even if not those attaching to remote generations" (Galeotti, *supra*, 70) [4]. In practice, this democratic subject larger than the electorate would include very few great-grandparents and great-grandchildren, many grandparents and grandchildren, and the great bulk of voters and their children. Debates about intergenerational justice often take adjacent, partially overlapping generations as their starting point and initial frame of reference. Would that do? In responding, let me separate two issues.

Sequential democratic sovereignty is more desirable than serial sovereignty not because the latter necessarily leads to forms of exclusivist ethnic identity, but because of the likelihood that an ethno-nationalist identity remains the only viable and accessible one, given the difficulty – in the absence of a perpetual constitution – of stabilizing a *political* identity, i.e. Rawls's "project of a people to govern itself in a certain way". This transgenerational stability of the "just and stable society that lasts over time", as Galeotti fairly acknowledges, would not be fully guaranteed by conceiving the people "as a collective entity that includes overlapping

[3] "l'insieme delle generazioni coesistenti in un dato momento della vita politica di una democrazia".

[4] "legami di reciprocità ascendenti e discendenti tra le generazioni che si sovrappongono, con relativi doveri e diritti, a quelle successive, anche se non a quelle nel futuro remoto".

and constantly evolving generations" (Galeotti, *supra*, 66)[5]. To secure a political identity, the distinctive, unique project enshrined in a constitution – in the case of Italy, a Constitution premised *inter alia* on the priority of labor over property (Article 1), the duty of the Republic to remove the obstacles to the full development of the person (Article 3), the rejection of war (Article 11) – must last much longer than from great-grandfather to a great-grandchild, as such famous constitutional clauses as "free exercise" of religion, "freedom of speech", "equal protection of the laws", along with the fact that the oldest democracies in the world have entered their third century, readily attest.

Peoples and constitutions certainly evolve, constantly. As Jack Balkin has eloquently put it: "You cannot step into the same constitution twice" (Balkin 2011, 269) not because the words of the text change, but because our minds interpret them in the light of different historical experiences and epistemic assumptions. Long before, in 1906 Jellinek had nicely distinguished two ways in which constitutions undergo transformation: "Verfassungswandlung" or gradual slippage, and "Verfassungsänderung" or intentional amendment (Jellinek [1906] 2005). The former is unavoidable, the latter can be assessed on the basis of a (properly justified) theory of the implicit unamendability of constitutional essentials. A constitution lasts only as long as its defining commitments last. However, the uneasiness that the open-ended, limitless extension of the democratic sovereign may induce, resonates with me as well. While I believe that the formula of the overlapping generations is still insufficient, one could amend Galeotti's suggestion at one end, so to speak. "The people" could be taken to include the past generations all the way back to the founding one but need not extend to the remote future: for purposes of applying the ideal of vertical reciprocity or the equality of all generations, we may just consider the immediate descendants of our descendants.

Finally, Galeotti raises doubts concerning the adequacy of courts as trustees of "the people": their impartiality is often undermined by the process of selection of the justices, and the justices' senior status may incline them to interpret the constitution more in the light of past con-

[5] "come entità collettiva comprensiva delle generazioni che si sovrappongono e in costante evoluzione".

victions than of cutting-edge ideas and lifestyles (cfr. Galeotti, *supra*, 71). I share her worries but submit that a distinction should be kept in focus, between the *function* of adjudicating when the legislative will of the present voters is blatantly inconsistent with the will of the democratic sovereign, as sedimented in the constitution, and *the way that function is executed* by specific actors. As the analogy with sports games shows, the existence of corrupt, incompetent, biased referees speaks to the necessity of finding ways of recruiting more impartial referees, but certainly not to the desirability of abolishing the function of impartially refereeing or entrusting that function to the players themselves.

4. *Models of judicial review and their implications*

I am especially grateful to Federico Gustavo Pizzetti for having – through his paper entitled "Constitutional Interpretation and Popular Representation in the US and Italy: Reflections on Ferrara's Theory of Intergenerational Sovereignty" – brought his expertise as a public lawyer into this discussion on the political liberal view of democratic sovereignty. His reflections, articulated from the point of view of the Italian judicial system and public law, shed light on many facets of my argument about the constitutional or supreme courts' mandate to represent the transgenerational subject of democratic sovereignty, "the people". More generally, Pizzetti contributes an interesting comparative perspective to a discussion on judicial review which in my *Sovereignty Across Generations* is conducted basically with reference to American coordinates.

Pizzetti's comments follow the order of the various sections of Chapter 6: likewise, I will respond to his remarks in the order in which they appear. In the first section, Pizzetti accurately reconstructs my view of the function of constitutional adjudication as entrusted to a supreme or constitutional court. He brings out with great clarity the dual dimension of this function. A high court's main task is to "defend the constitutional text (and thus continue to represent the people who authored the Constitution) from illegitimate decisions taken by the political body representing the electorate" (Pizzetti, *supra*, 83). Restricting the Court's mandate to this task alone, however, would twist its operation in an almost exclusively "conservatory" or "conservationist", if not downright

conservative, direction – as the phrase "Guardian of the Constitution" suggests. However, adds Pizzetti, "at the same time, the Court, with its ability to interpret the general clauses of the constitution according to the spirit (technological, social, economic) of times, plays a significant role in the development of the political-constitutional project through the evolution of the subsequent generations of the people" (Pizzetti, *supra*, 84). This formulation constitutes an improvement over mine, in that it brings out with greater clarity the positive role played by high courts in enabling a "living Constitution" to actually live, namely to adapt to changed circumstances, as the Supreme Court has thus far done in relation, for example, to extending the interpretation of the "equal protection of the laws" from a purely formal reading, which allowed for the infamous "separate but equal" formula of P*lessy v* F*erguson* (1896), to a substantive one, barring segregation (with B*rown v.* B*oard of* E*ducation*, 1954) and barring laws against interracial marriage (L*oving v.* V*irginia*, 1967) and, more recently, striking down laws against same-sex marriage (O*bergefell* v. 2014). A court acting as the interpreter of the constitution is then in a position to *update the constitution without transforming it*, by way of reinterpreting its basic principles and standards – not just equality of treatment, but also "cruel and unusual punishment", "due process" or, with reference to the Constitution of Italy, "inhuman" punishment (Article 27), the "efficiency" of administrative action (Article 97), or discharging public functions "with discipline and honour" (Article 54) – according to a changed sensibility. The thin line separating permissible and actually desirable "reinterpretation" from abusive "transformation" at the hand of the judiciary is the line that separates normative commitments imputable to the people and background cognitive assumptions – of a scientific, political, moral, or merely factual nature – that undergird each application or instantiation of a commitment.

This observation leads me to the second topic of interest in Pizzetti's contribution. Comparing the American and the (Continental) European models of judicial review, Pizzetti points out that because within a legal system of common law all the courts', but especially the Supreme Court's, "case law is considered a source of law 'in parallel' with the statutory law made by politically elected bodies (Congresses or Parliaments)", then the Court's pronouncements and opinions "might have some implications in the dynamics of 'giving voice to customs' (even

if not 'representing') of the society (the people)" (Pizzetti, *supra*, 85 ms). Of course, high, supreme, or constitutional courts do not represent the living citizens: legislative and executive institutions fulfill that function. High courts represent the transgenerational people *through* interpreting the constitution, because the constitution, inclusive of its original and amended parts, is the only reliable and binding testimony of "the will of the people".

Continental European constitutional courts, Pizzetti argues, don't act differently with respect to "representing the people", but they do so against a different background, in which "the Judiciary's role is more focused on interpreting and applying the will of the legislative (political) power, without any binding role for future cases" (Pizzetti, *supra*, 85). More specifically, as far as ordinary law is concerned, the judiciary is understood as subjected to

> statutory law (the judge as *bouche de la loi*). Therefore, the judgments were not considered sources of law "deriving" spontaneously by the "customs" in the society expounded by the judges and maintained stable over time via the "stare decisis" principle. On the contrary, they were just perceived (as they are still today) as settlements of specific, singular disputes, adjudicated by interpreting and applying the will of the legislative (political) power, without any binding role for future cases (Pizzetti, *supra*, 85).

This model spills over, in my opinion, to constitutional adjudication. A justice sitting in a constitutional court is equally supposed, according to a certain interpretation of the European model, to act as *bouche de la loi*, except for the fact that now the law is the constitution and the will to be taken into account in interpreting its meaning is the will of the constitutional lawmaker, the Constitutional Assembly, in representation of the Italian people.

My impression is that this "spillover" of the *bouche de la loi*–mindset from the relation of ordinary judges to statutory law to the relation of constitutional justices to constitutional provisions signals indeed not simply a difference of legal contexts, with respect to the American model of judicial review, but reveals controversial issues of legal theory that go often undetected. Often the *bouche de la loi* – understanding of a judge's role masks an endorsement – signaled by the expression "interpreting

and applying *the will of the legislative* (*political*) *power*" – of the originalist identification of the meaning of the law with the (parliamentary) lawmaker's intention. The view that "what the law says is what its author intended it to say" has been so devastatingly ridiculed by Ronald Dworkin, in a game-changing section of L*aw's* E*mpire* (Dworkin 1986, 318-322), that even the staunchest originalists have abandoned it as untenable and now have redeployed their forces on the bastion of "original *meaning*": namely, what the law says is what can be reconstructed via retrieving the original ordinary meaning of its lexical components.

A corollary to the surreptitious (and unnecessary) "author's intention"–inflection of the *bouche de la loi*, continental approach to adjudication is the idea that in their interpretations ordinary judges and constitutional justice should not deviate "too much" from, or should not "overextend", what the law says. The meaninglessness of this way of approaching adjudication is exposed, once again, by pressing a Dworkinian point: the claim that the judge, whether of ordinary or constitutional rank, should not deviate "too much" in her interpretation from what the law says makes no sense because the law is totally silent, has no message whatsoever to convey, before it is interpreted. As an example, take Article 11 of the Constitution of Italy: "Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes". Imagine that constitutional justices were to adjudicate whether a certain legislative measure approved by Parliament or an exercise of governmental authority violates or respects Article 11. Article 11, our benchmark of constitutionality in matters of deciding on war, says utterly nothing, is silent, and offers no meaningful guidance before some meaning is assigned to the signifier "war". Only *after* establishing whether by "war" we mean "inter-state conflict" between regular armies after a formal declaration of belligerence is delivered, a conflict between a state and internal private militias, a civil war, or simply the use of deadly firepower by certain organized groups, *only then* Article 11 acquires a precise meaning. Thus the adjudicating actor has no "neutral" meaning of the law to stand on and make sure not to deviate too much from, because strictly speaking the law has no meaning of its own before being assigned one… unless one adopts the naïve-originalist view that the meaning of "war" in Article 11 *is* what the members of the Constituent Assembly back then, in 1946-1947, thought

"war" was. All this is meant to supplement Pizzetti's point with the observation that when claiming that in Europe judges and justices are usually considered more of "mouthpieces of the law" than it is the case on the other shore of the Atlantic Ocean, we should make sure to keep neatly separated what belongs to institutional diversity (judges authorized to invalidate or disapply presumptively unconstitutional statutory law; individual justiciability of constitutional claims; access to constitutional litigation; possibility of dissenting opinions, modality of appointment, length of tenure) from what instead masks substantive contentions in legal theory.

The comparative reconstruction, presented by Pizzetti, of the institutional aspects of judicial review as implemented in Italy and the United States brings interesting stimuli for reflection on the impact of these aspects on the impartiality of the court. While in the United States the Supreme Court is at the apex of the judicial system, in Italy the Constitutional Court is not part of it, a solution that in general terms Samuel Freeman has strongly advocated, drawing on Rousseau's defense of the Roman republican institution of the "tribunate" – a non-judicial guardian of the *res publica* (Freeman 1990, 358-359). Life tenure and presidential appointment combined with approval by the Senate can be contrasted with the Italian tripartite scheme of appointment for the 15 justices who hold a 9-year tenure. Furthermore, the Italian model allows for "exhortative" pronouncements, through which the Court signals to Parliament that "certain provisions contain some element of non-constitutional compliance" and that, if Parliament does not change those elements, in a new case – if submitted of course – the Court will directly annul the statute (Pizzetti, *supra*, 85). This modality plays into a much debated, and from many quarters evoked and welcome, "weak" form of judicial review (Tushnet, Michelman, Waldron) premised on a dialogue between the court and the other branches rather than on an imperative judicial closing of the matter under contestation. On the other hand, the impossibility of filing dissenting opinions (which in US jurisprudence have sometimes been even more influential than the official opinion of the Court), let alone the secret voting, impairs the Italian Court's chances to animate the democratic debate, a predicament which sharply contrasts with the public dialogue of the legal profession and politically active citizens spurred by the confrontation of concurring and dissenting justices in the United States. Furthermore, the institution of the

discretional "docket", since the 1920s, designed to render the workload of the Court manageable in light of the number of cases filed, has introduced an element of legal-political discretion in constitutional adjudication: not all cases need to be addressed by the Court. The impact of the attendant element of non-legal choice attached to the selection of which, among the many cases, to adjudicate is yet to be fully ascertained (Vladeck 2023).

Finally, in the fourth part of his contribution, Pizzetti highlights an entirely new facet of judicial review that might well be at center stage in the near future. High courts of the member states of the EU now need to review ordinary legislation not simply in relation to the domestic constitution but also to supranational EU binding law and EU charters like the European Convention on Human Rights, the Charter of Fundamental Rights, and the case law produced by the European Court of Human Rights: a *multilayered constitutionalism*, characterized by multiple sources of binding higher law, is arising.

Therefore, in the European legal framework, differently than in any other part of the world, a domestic constitutional court is not simply representing the "*intergenerational people*"; it is also adopting normative standards that, by virtue of their originating from the multilayered constitutional system of the EU, are not solely the product of the will of the domestic popular sovereign. No "European demos" to whose will to ascribe this supranational constitutional essentials obviously exists, until something like the United States of Europe or even just a real federation will materialize. But until then, the current status of the European Union – "neither a federation nor just a confederation" – will certainly make it difficult to imagine a "multilayered" supranational people (Pizzetti, *supra*, 94) of which the people of a member state could feel to partake. How is then the circle to be squared? How can we imagine the national demos to remain a democratic *sovereign* if some of the constitutional essentials evoked in judicial review are not of its own making? Grateful to Pizzetti for having raised this question, which cannot be answered in this reply, let me gesture towards two possible strategies for addressing the issue.

One is Habermas's idea of "dual sovereignty", according to which differently from classical federal states, supposedly constituted by the national citizenry in its entirety and generating a "supreme constitutional authority",

> the foundation of the European Union can be conceived retrospectively as though the citizens involved (or their representatives) were split into two *personae* from the beginning; [...] every person as a European citizen in the constitution-founding process encounters herself, as it were, as a citizen of an already constituted national people (Habermas 2012, 38).[6]

The EU citizens agree to transfer "the sovereign rights of their already constituted states... to the new polity" with a reservation "that goes far beyond the guarantee of the continued existence of the component states" but includes the proviso that "their respective states survive within the federal polity *in their freedom-guaranteeing function* of constitutional states" (Habermas 2012, 41), i.e. as guarantors of rights, especially social rights. "Dual sovereignty" explains why the citizens of the member states want *to share* their constituent power with the EU citizens and yet not relinquish it to themselves *qua* EU citizens understood as the ultimate source of the power to amend the supranational constitution (Habermas 2012, 42), possibly by virtue of their perception of the "material constitution" of EU-institutions as too impregnated by neo-liberal and ordo-liberal orientations.

The other option is to explore the avenue of assuming still a single source of sovereignty, the national one, which enters a relation of reciprocity with the will of other democratic sovereign subjects – in a way not dissimilar from the fair cooperation of free and equal individual citizens within the same society – and freely submits to the joint constitution-making and constitution-amending will of this "multi-layered" "union of unions of social unions" – to adopt here Rawls's definition of society as a "union of social unions". At this supranational EU level, will formation certainly does not even resemble the domestic democratic circuit – elections, formation of a parliament, legislation, and appointment of a government that implements that legislation. Nor does constitution-making and constitution-amending take the usual form connected with the constituent power of a *demos*. There is no reason why it should. As the transition from city-scale democracy to democracy on a national

[6] Habermas draws here on the work of Franzius (2010) and von Bogdandy and Bast (2003).

scale required the reshuffling of the entire basic structure, from direct to representative democracy, so the transition from democracy on a national scale to supranational democracy on the regional scale of the EU most likely will require a thorough rethinking of sovereignty and constituent power, in ways that make it fully compatible with the persistence of the democratic sovereignty of the member states. Absent that rethinking, the only alternatives will be a) the "ever closer Union", all the way to a true federation and related waning of the sovereignty of the member states, or b) a regression to a mere (and somewhat unstable) alliance of sovereign states. History, not theory will provide an answer.

5. D*o constitutive rules limit our freedom*?

The relation of the transgenerational people to its temporal living segments is also at the center of Francesca Pasquali's paper "Amending power, transgenerational people and political agency" [Potere emendativo, popolo transgenerazionale e *agency* politica], in her case with attention focused on the normative implications of this relation for the limits to amending power. Thanks are due to Pasquali for having very accurately reconstructed the linkage, undergirding the book, between a normative account of this relation and its consequences for amending power on the one hand, and the historical urgency, on the other hand, of sharpening our theoretical tools to counter a ubiquitous populist threat, capable of upending constitutional democracy – a threat all too insidious in that it draws on such well-respected, venerable classical champions of the *serial* view of democracy as Rousseau and Jefferson.

Correctly, Pasquali identifies my aim, in Chapter 7 of S*overeignty* A*cross* G*enerations* ("Amending Power. Vertical reciprocity and political liberalism"), as "to ensure that the electorate has the opportunity to revise the constitution, but without legitimizing the electorate to exercise the power of amendment solely on the basis of its own specific will" (Pasquali, *supra*, 103)[7]. My account, then, "qualifies as legitimate only constitution-

[7] "Assicurare all'elettorato la possibilità di rivedere la Costituzione, senza però legittimarlo a esercitare il potere emendativo esclusivamente in base alla propria volontà specifica".

al amendments that, although proposed by the electorate, could be accepted by all generations that make up the people. This idea is captured by the principle of vertical reciprocity" (Pasquali, *supra*, 103)[8].

Pasquali should also be credited for offering a concise yet very accurate reconstruction of my comparative assessments of different justificatory arguments – the coherence argument, the teleological one, the two versions of the argument that casts the electorate as "representative" of the people – before leading the reader into the details of my own argument based on vertical reciprocity.

In sum, as she puts it,

> instead of a teleologically oriented philosophy of history, Ferrara introduces a normative principle that allows for the exclusion of regressive amendments with reference to considerations of intergenerational reciprocity. Moreover, the principle of vertical reciprocity ensures that the electorate can intervene in the constitution according to its specific will while limiting its room for maneuver. In effect, the electorate is empowered to amend the constitution in line with its will, but only through amendments that preserve or expand individual autonomy. In this way, the electorate is not a mere representative or proxy of the people as a whole[9] (Pasquali, *supra*, 108).

At this juncture, however, Pasquali inserts her two critical reservations. First, "it appears that the burdens placed on the electorate are greater than those placed on the founding generation, since the latter

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[8] "Qualifica come legittimi soltanto emendamenti costituzionali che, sebbene proposti dall'elettorato, potrebbero essere accettati da tutte le generazioni che compongono il popolo. Questa idea è racchiusa nel principio di reciprocità verticale".

[9] "al posto di una filosofia della storia teleologicamente orientata, Ferrara introduce un principio normativo che permette di escludere emendamenti regressivi con riferimento a considerazioni di reciprocità tra generazioni. Inoltre, il principio di reciprocità verticale assicura all'elettorato la possibilità di intervenire sulla costituzione in base alla propria volontà specifica, pur limitando i suoi margini di manovra. In effetti, l'elettorato è legittimato a modificare la costituzione in linea con la propria volontà, ma solo attraverso emendamenti che preservino o amplino l'autonomia individuale. In questo modo, l'elettorato non è un semplice rappresentante o un mero delegato del popolo nel suo insieme".

enjoys a broad political autonomy that is, by contrast, precluded for all subsequent generations" (Pasquali, *supra*, 108)[10]. Second, the principle of vertical reciprocity might in the end place too heavy a burden on the living generations and severely limit their political autonomy. Let me take them up in sequence.

The first objection, in turn, has two facets. On the one hand, the founding generation appears to have the privilege, unique among all the supposedly equal generations of a people, of not having to worry about the legacy of past generations. On the other hand, the reciprocity model makes it hard to fathom what the living generations can offer to past generations who are no longer there.

Concerning the first facet of the objection, its cogency depends on an assumption itself problematic, in any event in need of independent grounding. The first generation has greater degrees of freedom, relative to the subsequent ones, only if we assume that it starts from scratch, from the infamous *tabula rasa*, when it gives birth to a new regime and formulates the political ideal of a people to govern itself in a certain way. This assumption holds water in accounts – from Hobbes to Schmitt – that place constituent power *above* the law, qualify it as the unoriginated origin of higher law, but is far from being the only, let alone the best, understanding of what is at play at the founding of a constitutional-democratic regime. In *Sovereignty Across Generations* I adopt a competing account, that draws on Frank Michelman's felicitous formula, according to which constituent power acts "always under law" (Michelman 1995). The idea is that the practice of constitution-making can itself be understood as an act of judgment and interpretation – namely, as an interpretation of the political community's "*ultimate law* or *proto-law*", call it *nomos*, to which the historically enacted constitution relates as an application (Ferrara and Michelman 2021, 29). This view is more consistent with Rawls's idea that the constitution's capacity to exert normative force and to legitimize ordinary exercises of constituted powers rests with its essentials' reflecting a political conception of justice freestandingly justifiable and also "most

[10] "sembra che gli oneri attribuiti all'elettorato siano superiori rispetto a quelli che spettano alla generazione fondatrice, dato che quest'ultima gode di un'ampia autonomia politica che è, invece, preclusa a tutte le generazioni successive".

reasonable" for the citizens of that polity. If so, the "first generation" is far from being totally unfettered by the legacy of past "unconstituted" or "differently constituted" (in the case of regime change) generations: it is burdened with an interpretive task – i.e., tracking and reflecting a political conception of justice and the *nomos* of the people in the constitution – whose execution can itself be assessed in terms of adequacy.

Concerning the second facet of the first objection – what can the living generations offer to past generations who are no longer there? – its cogency depends again on a narrowly conceived idea of the "give and take" among generations, which makes it difficult to understand what it might mean to "uphold a tradition". For me, present generations can offer to previous ones the fulfillment of the promise, on which predecessors may have counted during their lifetime, to keep afloat and sea-worthy the constitutional boat in which Habermas famously described we contemporaries and our predecessors being on board, if we uphold constitutional patriotism. Fulfilling, and carrying out past commitments, is something that on a private basis we do in relation to the informally received will of our ancestors, as part of being in the same family, and we blame those who disregard or betray that legacy. We certainly cannot hand over any concrete good to our ancestors, yet the normative bond is still felt as binding on us.

Let me now move on to Pasquali's second objection. Conceding that the principle of vertical reciprocity may adequately justify the limits to be imposed on amending power in order for its exercise not to disfigure the political project embedded in the constitution, "one may therefore question whether tying the exercise of amending power to compliance with the principle of vertical reciprocity is also fully effective in redeeming, as Ferrara seems to want to do, the electorate's capacity for political agency. The doubt is, more precisely, that the principle of vertical reciprocity is too demanding" (Pasquali, *supra*, 111)[11]. Why too demanding? Because, Pasquali argues, for the sake of preserving

[11] "Ci si può quindi domandare se vincolare l'esercizio del potere emendativo al rispetto del principio di reciprocità verticale sia anche pienamente efficace nel riscattare, come Ferrara sembra voler fare, la capacità di agency politica dell'elettorato. Il dubbio è, più precisamente, che il principio di reciprocità verticale sia troppo esigente".

> a valuable political project and ensure that it can endure over time, the political autonomy of individuals must be limited through substantive – not merely procedural – regulatory principles such as that of vertical reciprocity [...] only if flesh-and-blood individuals, the only ones who can concretely exercise amending power, are required to honor the political project inherited from the past, considering the perspective of the generations that preceded them, can it be ensured that this political project will endure over time (Pasquali, *supra*, 123)[12].

The citizens of generations other than the founding ones, in sum, are offered a reduced degree of political autonomy, no matter how noble the rationale for this curtailment, namely to preserve the political project that has defining significance for "the people" to which they belong. They "are not entitled to fully exercise their political agency [...] they have the right to intervene in the constitution on the basis of their own specific will only if that will accords with, or is compatible with, that of the individuals belonging to the other generations that make up the transgenerational people" (Pasquali, *supra*, 123)[13].

It seems to me that this objection rests on a less-than-adequate grasp of the crucial distinction between "regulative" and "constitutive" rules[14]. While

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[12] "un progetto politico di valore e garantirgli la possibilità di perdurare nel tempo, l'autonomia politica degli individui deve essere limitata attraverso principi normativi di carattere sostantivo – non meramente procedurale – come quello di reciprocità verticale... solo se gli individui in carne e ossa, gli unici a poter esercitare concretamente il potere emendativo, sono tenuti a onorare il progetto politico ereditato dal passato, considerando la prospettiva delle generazioni che li hanno preceduti, si può assicurare che tale progetto politico perduri nel tempo".

[13] "non sono legittimati a esercitare appieno la propria *agency* politica [...] hanno il diritto di intervenire sulla costituzione in base alla loro volontà specifica, soltanto se quest'ultima si accorda, o è compatibile, con quella degli individui che appartengono alle altre generazioni che compongono il popolo transgenerazionale".

[14] On "constitutive rules", see Searle 1969, 33-42. The notion of a "definitional", as opposed to "summarizing" or descriptive, relation of rules to practices, and its long lineage (from Hume to Mill and Austin), is best elucidated by John Rawls when he distinguishes a "practice view" of rules, similar to Searle's constitutive rules, and a "summary view", similar to Searle's notion of "regulative rules", in Rawls 1955, 3.

regulative rules regulate forms of conduct that pre-exist the rule (as happens with traffic norms), constitutive rules *create* the conduct that they then regulate (as it happens with chess, football, and poker). Of interest for our discussion is their different relation to freedom. While regulative rules may be meaningfully said to limit freedom, constitutive rules create their own form of freedom. A driver can claim that traffic regulations diminish her freedom to drive a vehicle in whichever way she pleases. Instead, it makes no sense whatsoever for a chess player to complain that rules limit his ability to move the castle diagonally. Playing chess is *defined* by those rules and while in all senses physically capable of moving the castle diagonally, our player would simply cease being playing chess if he did so. In a structured game, freedom is freedom to act *within the rules*. Thus, the presently living citizens don't have a reduced autonomy if they abide by the constitutive norms embedded in the constitution: they can break out of the communal political project. They can make a revolution, which is a historical fact.

Another way of replying to Pasquali's objection is to qualify the normativity that makes it illegitimate for currently living citizens to alter the constitutional essentials in a way that infringes vertical reciprocity as the normativity – to put it with Kant – of a *hypothetical imperative*. I*f* we want to sail in the same constitutional boat, namely share a constitutional project with our predecessors and successors, *then* we living citizens must understand our power to amend the constitution as stopping short of subverting the constitutional essentials, i.e. the constitutive rules of the political game. To claim that we are less autonomous because of that is as absurd, once again, as complaining that as chess players we are not free to move the castle diagonally. No one obliges us to play chess, but *if* we wish to play chess those are the constitutive rules that make chess chess and constitutional democracy constitutional democracy. If for some reason we don't or no longer care about sharing an ongoing political project with the other generations, then we are free to use our autonomy in a totally unrestrained way. What is incoherent is to have it both ways: to pretend to be "under a constitution", as opposed to in a revolution or regime change, and to treat the constitution as a mere projection of our will alone, entirely at our disposal. If we want to have a political identity anchored in constitutional essentials, then we must preserve some of the planks of the constitutional boat while we replace others: which means, translated into normative language, that we can't alter the defining core of the project and still claim to be affirming it.

At the end of this reply, let me express once again my gratitude and appreciation for the thoughtful, challenging, and engaging questions posed by Croce, Santambrogio, Galeotti, Pizzetti and Pasquali and for the attention that they have dedicated to my work. I hope to have gone at least some way toward providing tentative answers.

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