Who is the People? Alessandro Ferrara's "Sovereignty Across Generations"

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Indice

Ferrara's Intergenerational Vision of the Liberal Constitution against Populism: Introductory Notes[1]

Greta Favara, Roberta Sala

Abstract. In these introductory notes we explore the arguments developed by Alessandro Ferrara in *Sovereignty Across Generations* and illustrate the commentaries collected in this special issue by Mariano Croce, Marco Santambrogio, Anna Elisabetta Galeotti, Federico Gustavo Pizzetti and Francesca Pasquali. We also shed light on the aims that inspire Ferrara's project. As we explain, *Sovereignty Across Generation* has a twofold aim, a philosophical one and a political one: on the one hand, the book aims to develop Rawls's political liberalism by exploring the grounds and scope of constitutional legitimacy; on the other hand, it aims to address an urgent political threat to democratic legitimacy, namely populism. In addition, we emphasise that one of the key theses underpinning Ferrara's argument is the conceptualisation of the sovereign people as an intergenerational entity composed of all generations living under the same constituency over time. For this reason, we conclude by showing how Ferrara's arguments could be developed in other directions and domains, in particular by exploring the politics of climate change.

Keywords: Alessandro Ferrara, sovereignty, populism, liberal legitimacy, liberal constitution

The commentaries hosted in this special issue are the result of an engaging and thought-provoking discussion that took place on 19 October 2023 at the Faculty of Philosophy at Vita-Salute San Raffaele Universi-

[1] Progetto 2022W8CT4J *Liberal politics and nature. Democratic decisions about animals, plants and climate change*. Finanziato dall'Unione Europea - NextGenerationEU, Missione 4 Componente 2 Investimento 1.1, CUP 2022W8CT4J.

ty around Alessandro Ferrara's *Sovereignty Across Generations: Constituent Power and Political Liberalism*, first published by Oxford University Press in 2023.[2] Although only recently published, *Sovereignty Across Generations* has already gained considerable attention, with widespread recognition of its philosophical merits. In 2024, it won the prestigious ICON-S (International Society of Public Law) prize and it is worth stating here the reasons for the committee's decision: "*Sovereignty Across Generations* redefines the concept of constituent power, analyses the difference between representing the transgenerational people and representing the electorate, and advances a theory of democratic sovereignty based on political liberalism. The structure is well-organized and the arguments are highly persuasive. This book is a must-read for those who are interested in legal philosophy and constitutionalism". The justifications offered by the ICON-S committee accurately describe the vast scope of Ferrara's research. *Sovereignty Across Generations* is a book that encompasses political philosophy, legal philosophy and constitutional theory but also touches upon political science. Yet the broad horizon of Ferrara's research by no means undermines the specificity of the question he investigates, nor the rigour of the argument developed. On the contrary, in *Sovereignty Across Generations*, Ferrara shows a mastery of every discipline he addresses, and the depth of analysis offered is remarkable. Like every work of such philosophical depth, *Sovereignty Across Generations* revises the scholarship, raises new questions and sparks a lively debate. We are, therefore, very pleased to make available in this special issue an edited version of the comments presented on the occasion of the workshop held at Vita-Salute San Raffaele University. The broad scope of Ferrara's work makes it impossible to fully summarise its arguments in this short introduction. In the following, therefore, we recapitulate the major theoretical elements that build *Sovereignty Across Generations* to illuminate its principal philosophical achievements and illustrate how the contributions collected in this issue dialogue with them.

Sovereignty Across Generation is a philosophical investigation of constituent power: it is about who owns it, how it is legitimated, how it should be

[2] "Sovereignty Across Generations (OUP): Tavola rotonda con Alessandro Ferrara", 19 ottobre 2023, Facoltà di Filosofia, Università Vita-Salute San Raffaele.

managed and how it should inform and/or transform political practice. A range of philosophical and political concerns bring Ferrara's project to life. To begin with, Ferrara is interested in developing John Rawls's theory of political liberalism beyond charted territories. As Ferrara explains, liberal theorists in general, and Rawls specifically, have devoted no – or insufficient – attention to the foundations of constitutional legitimacy. Ferrara's effort is first and foremost devoted to illustrating how Rawlsian political liberalism – presented in Chapter 1 as the most compelling theory of political legitimacy – can be convincingly developed to provide a sound theory of constitutional legitimacy. However, his research is also shaped by deeper concerns that make his analysis politically, as well as philosophically, poignant. Indeed, Ferrara's research interests, far from being merely exegetical, are moved by a political phenomenon pervasive in contemporary societies: populism. As Ferrara explains:

> During the first two decades of the twenty-first century the upsurge of populist parties, leaders, and movements, sometimes accompanied by phenomena of democratic backsliding, has confronted liberal-democratic regimes with unprecedented pressure. Presidents and prime ministers, legislatures, administrations, and cabinets often claim to represent the will of the people and in its name try to legitimate not just ordinary legislation but also constitutional amendments, projects for extensive constitutional revision, or landmark statutes of constitutional significance. This predicament makes it all too urgent to revisit the tension, at the heart of constitutional democracy, between popular sovereignty as the touchstone of legitimacy and the notion that even the constituent power exercised by the popular sovereign, far from absolute, must operate within normative tracks that call for specification (Ferrara 2023, 19).

In indicating an upsurge in populist pressures, Ferrara has in mind a specific political phenomenon that encompasses both right-wing and left-wing movements and that he describes, in Chapter 2, as identified by three features. In Ferrara's account, populism consists of "(i) the conflation of the people, *qua* democratic sovereign, with the electorate, and of the will of the people with the will of the voters; (ii) the attribution of fully fledged constituent power to the electorate as embodiment of the people; and (iii) presumptively justified intolerance against all opinions

that differ from what populist leaders posit as the general interest of the people" (14-15). Thus characterised, in Ferrara's account, populism would encourage – if not cause – some of the most undesirable and dangerous political trends that liberal democracies have experienced in recent decades, such as polarisation, extremism, sovereignism and the erosion of political trust. In a Rawlsian spirit, then, Ferrara's philosophical inquiry starts from a recognition of the urgent political questions arising out of current political practice. While these constitutional dilemmas did not top the agenda when Rawls first wrote P*olitical* L*iberalism* in 1993 – and, for this reason, Rawls does not fully explore the grounds and normativity of constituent power – Ferrara persuasively shows why constitutional normativity should be at the centre of contemporary philosophical political research.

We are all familiar with recent examples of political slogans that conflate the people as democratic sovereign with the electorate. As Ferrara recalls (73), "You're stealing sovereignty!" was the cry of the Italian party N*orthern* L*eague*, headed by Matteo Salvini. It was used against the President of the Republic, Sergio Mattarella, when he gave the Prime Minister, Giuseppe Conte, a mandate to form a new coalition government in 2019 after the previous government had lost the support of the majority of parliamentarians. The President of the Republic chose not to call an election, but rather to give the Prime Minister a mandate to form a new coalition-sustaining majority. To be clear, the sovereignty of the people was not "stolen" by not calling an election. Italy is a parliamentary democracy: the Italian electorate chooses its own parliament, not its government, whose Prime Minister is appointed by the President of the Republic. As Ferrara explains, by interpreting populism through the lens of a theory of political liberalism, those who invoke voters' alleged sovereignty claim to defend the authentic democratic spirit of liberal democracies, which they see as threatened by fixed rules and boundaries, political élites and the complex procedures of deliberation that create a significant distance between the government and its citizens. However, while discussions around the *democratic deficit* are to some degree meaningful and urgent,[3] populism – far from being the cure – is one of

[3] See, for example, Neuhold (2020).

the causes. Indeed, by emphasising the democratic source of political legitimacy, populists get rid of its liberal counterpart: that framework of limits, balances and rights that define the space in which democracies can function effectively. Yet – Ferrara explains – it is on such fundamentally liberal grounds, namely the reciprocal recognition that we are all free and equal individuals deserving equal respect, that democracies find their rationale and flourish. That is to say, democracies require solid constitutional boundaries, as the will of a majority cannot override the fundamental rights held by each citizen by virtue of their equal dignity. However, when the conflation of the people and the electorate is consistently taken to an extreme, the electorate comes to be interpreted as the holder of constituent power: the voters should be able to determine constitutional reforms or proposals.

The origin of political polarisation as a contemporary phenomenon – often bringing with it intolerance and extremism – becomes clearer within the conceptual framework developed by Ferrara: once the people, as the electorate, are seen as the sole source of political legitimacy, those who speak against the alleged *will of the people* as expressed by the populist party or its leaders are seen as enemies, rather than fellow citizens expressing their disagreement. The "authentic" members of the people know what must be done – "Honesty!" used to shout the Five Star Movement party while calling for the dismissal of an alleged Italian political élite, the enemy of the people's interests. Intolerance spreads as soon as "the people" is seen as the arbiter of right and wrong in political matters, where pluralism is seen as the product of conflicts of power rather than the inevitable result of *burdens of judgment* and a healthy democratic public sphere. In its most worrying form, populist leaders are not simply truth-bearers; rather, they become truth-makers – since they claim to be the only trustworthy politicians. As we write this introduction, hatred and fear are spreading through the Haitian community in Springfield (Ohio), since the former US President, Donald Trump, made the controversial and unsubstantiated claim during a presidential debate on 10 September 2024 that immigrants in Springfield were eating the pet dogs and cats of their neighbours. This claim was immediately fact-checked by the debate moderators and has been widely refuted by local officials. We should also not forget the attack on Capitol Hill on 6 January 2021, fuelled by Trump's false accusation, following his defeat, that the 2020 US presidential election had been rigged.

In former works – most notably *The Democratic Horizon: Hyperpluralism and the Renewal of Political Liberalism* (CUP, 2014) – Ferrara has attempted to ascertain whether and how political liberalism could provide a suitable normative framework for *hyperpluralism*, a form of pluralism deeper and wider than the one Rawls had in mind when *Political Liberalism* was published. In contemporary politics, however, populism thrives where pluralism is reduced to mere conflict, and opinions are deployed rather than shared. Political theory, therefore, has now to address the emergence of forces that – within liberal democracies – tend to suppress pluralism rather than manage it. Can political liberalism provide us with a sound normative theory of constitutional legitimacy, capable of reconciling liberal rights and popular sovereignty? This is the challenge that *Political Liberalism* leaves open and that *Sovereignty Across Generations* persuasively takes up.

Sovereignty Across Generations seeks to resolve the tension between liberal rights and popular sovereignty by defending two key theses. First, Ferrara argues for a careful distinction between the people and the electorate, and the interpretation he proposes is original and thought-provoking. While the *people* form the *intergenerational* entity comprising all the generations that follow the original constituent one, the *electorate* is its living segment. Among the consequences that follow from this theoretical shift in perspective, Ferrara explains that the electorate can legitimately exercise only limited sovereign power, as one part of the people cannot be entitled to change the constitutional norms valid for all generations. This brings us to Ferrara's second key thesis, namely, that the relationship between the constitution, the people and the electorate cannot be described simply in terms of the traditional picture of the interplay between constituent and constituted power. Rather, Ferrara elaborates two principles of constitutional legitimacy, building on Rawls's principle of liberal legitimacy: a "liberal principle of constitutional legitimacy" and a "liberal principle of amending legitimacy" which respond to different kinds of normativity and must be assessed separately.

How, and why, Ferrara reaches these conclusions will emerge through the contributions collected in this issue. In order to offer the reader some orientation in this dense dialogue, let us anticipate the points of Ferrara's argument that the contributors wish to discuss. We will proceed in order.

In Chapter 3, Ferrara introduces the originality of a Rawlsian theory of constitutional legitimacy by presenting a comparison of the constitu-

tional theories outlined by Hans Kelsen and Carl Schmitt. This dialogue allows Ferrara to show that a Rawlsian theory of constitutional legitimacy, while bearing some affinity to the accounts of Kelsen and Schmitt, originally cuts across them: Rawls outlines a constitutional theory that is normative and yet non-foundational through the standard of reasonableness. Rawls's account of constitutional legitimacy is, therefore, both "situated" – recalling the Schmittian conception of the authority of the constitution – but also partially "normative" – being above the electorate's will, as Kelsen would affirm. The Rawlsian approach to constitutional legitimacy is most clearly summarised in Ferrara's "Liberal principle of constitutional legitimacy":

1. L*iberal principle of constitutional legitimacy*

> Constituent power is justifiably exercised when it is exercised in accordance with a political conception of justice most reasonable for its free and equal holders (134).

In "Democracy and Its Matter: Juxtaposing Carl Schmitt and John Rawls", Mariano Croce examines the comparison that Ferrara makes between Schmitt and Rawls and argues that Rawls's liberalism has more in common with Schmitt's thinking than Ferrara admits. Croce examines the writings Schmitt completed between 1928 and 1934 and shows that major similarities can be found between Schmitt and Rawls, above all in the key interest in defining a freestanding "political" space insulated from disruptive forces and the importance assigned to a shared political conception of justice based on the constitutional essentials that can guarantee stability.

In "Whose Constituent Power Is It?", Marco Santambrogio challenges Ferrara's political conception of the people. A constitution, indeed, needs a bearer – namely a holder of sovereign power, and in Chapter 4 Ferrara provides such an account for democratic contexts. This is, as Ferrara observes, a much-neglected topic in liberal philosophy. A major challenge must be unpacked here: how is it possible for a people to legitimise the authority of a constitution if, for that people to exist, a constitution is needed? Ferrara's solution hinges upon two key notions, *ethnos*

and *demos*, according to which he is able to explain how a group of people with shared ethnocultural affinities (ethnos) can become a group of people agreeing upon a specific set of normative commitments that define the constitutive rules of their coexistence (demos). Ferrara's conception of the people, then, sees the basis of constitutional sovereignty as residing in the formation of a group of individuals who choose to endorse mutual commitments. This is the thesis that Santambrogio challenges. In contrast to Ferrara, Santambrogio claims that an actor endowed with intentionality who establishes a constitution can only be fictional. In fact, Santambrogio argues, to be qualified as endowed with intentionality, an actor must possess – among other attributes – will, memory, preferences and rationality. Yet, by relying on Condorcet's and Arrow's theorems, Santambrogio explains why a plurality of subjects, albeit rational, can sometimes be irrational by holding cyclical preferences.

As we have anticipated, besides the people being – in Ferrara's account – a real entity, it is conceived as comprising all the generations – in the past and in the future – living in the same constituency. This is, as we emphasised, one of Ferrara's key theses. Several reasons lie beneath this thought-provoking conceptualisation, among them the fear of the tyranny of the majority, the idea that generations should be treated as equals, the value of intergenerational reciprocity, and the key role attributed to political stability that would be undermined if constitutional essentials were as changeable as the electorate. By exploring Chapter 5 of *Sovereignty Across Generations*, in which Ferrara reveals the interpretation and implications of intergenerational sovereignty and reframes political representation accordingly, Anna Elisabetta Galeotti, in "Sovranità generazionale vs. costituzione permanente", scrutinises the concept of intergenerational sovereignty and suggests that an equivalent, and more convincing, function could be played by a suitably specified account of *generational sovereignty*. If – Galeotti argues – we conceive of the people not merely as a set of individuals but, rather, as an aggregate non-reducible to its members (e.g. a football team remains the same even when its players change) and comprising the set of generations currently overlapping, we mitigate many of Ferrara's concerns: the people is not reducible to its ethnic features but is a political entity; moreover, its representatives should take into consideration the interests of future proximate generations, thereby curbing concerns about the tyranny of the majority.

However, if the people as sovereign is an intergenerational entity, as Ferrara claims, how can it be represented? Only the living segment of the people can express a preference, yet Ferrara claims that the electorate cannot have unlimited political agency: constitutional principles are intended to represent and safeguard the people as a whole. Who, then, can represent the people? Constitutional courts are intended to play this role in Ferrara's framework. More precisely, constitutional courts must safeguard the constitutional essentials but are also entitled to *interpret* the constitutions to adapt them to new social and historical circumstances. How this complex process of interpretation works, how it is related to the standard of reasonableness and how it interacts with the electorate are questions extensively discussed in the sixth chapter of the book. Federico Gustavo Pizzetti, in "Constitutional Interpretation and People's Representation in the United States and in Italy", offers an enlightening reconstruction of the diverse roles that constitutional courts have historically played in the United States, Europe and Italy. Pizzetti's analysis sheds light on two fascinating issues, whether European constitutional courts should, and could, fulfil the function that Ferrara imagines, and how we should conceive the representative role of a multilayered system of constitutional courts such as the European one.

The concluding chapter further investigates the potential power of the people and the electorate to amend the constitution. Ferrara traces the limits of such power in light of the fundamental requirement of *vertical reciprocity* that underpins his entire philosophical project: any amendments to the constitution should consider what the living generation owes to past and future ones, that is, they should respect the legacy of former generations and protect the interests of future ones. The extension of the Rawlsian liberal principle of legitimacy that Ferrara envisages for amending the constitution runs as follows:

2. L*iberal principle of amending legitimacy*

> Amending power is justifiably exercised when it modifies the constitution in full respect of the (explicitly and implicitly) unamendable essentials and of ideals and principles acceptable to present citizens as rational and reasonable, as well as compatible with vertical reciprocity among all the generations of the people. (281)

It is easy to see, then, how Ferrara's conclusions undermine the populist attribution of full sovereign power to the electorate. Yet Francesca Pasquali, in "Potere emendativo, popolo transgenerazionale e agency politica", while acknowledging the internal consistency and philosophical sophistication of Ferrara's analysis, raises some doubts regarding its efficacy against the populist menace. After all, by emphasising the sacred and central political role played by the people, are we not implicitly backing the populist rhetoric? And are we not significantly undermining the political agency of living people by invoking respect for vertical reciprocity?

To all these comments, doubts and questions, Alessandro Ferrara offers detailed answers in the concluding section of this special issue. By way of conclusion, and taking into account the comments collected here, we would like to emphasise the many strands of research opened by Ferrara's discussion. We believe, as Galeotti suggests, that Ferrara's philosophical investigations could be extended beyond the bounds of constitutional normativity. Intergenerational reciprocity and respect are of the utmost importance, particularly in times of environmental crisis. Among current political challenges, climate change and populism stand out, and the two often go dangerously hand in hand. In this regard, certain recent episodes come to mind. Take, for instance, the Trump administration's withdrawal from the Paris Agreement in 2017. Commenting on the withdrawal, Trump declared, "In order to fulfil my solemn duty to protect America and its citizens, the United States will withdraw from the Paris Climate Accord. […] As P*resident*, I *can put no other consideration before the wellbeing of* A*merican citizens*. The Paris Climate Accord is simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers – who I love – and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production" (emphasis added).[4] Trump here refers to the American people as synonymous with living American citizens and his task as that of safeguarding their interests, despite potentially undermining those of future American citizens by neglecting climate

[4] Statement by President Trump on the Paris Climate Accord, 1 June 2027.

agreements. Trump is not talking of constitutional amendments here; yet, is the duty of the highest democratic offices simply to enact the will of the living electoral body? Should other normative considerations be factored in? If so, how and to what extent? Such concerns raise, in turn, philosophical debate about the limits and scope of political agency and multilayered sovereignty. We believe that philosophical studies on reasonableness and political legitimacy cannot but be extended in this direction, especially in light of current political circumstances. Therefore, alongside its many philosophical merits, Alessandro Ferrara's *Sovereignty Across Generations* makes a valuable contribution to the ongoing political debate.

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Democracy and Its Matter. Juxtaposing Carl Schmitt and John Rawls

Mariano Croce

A*bstract*. According to critics, the adjective 'political' of John Rawls's political liberalism indicates an unexpected convergence with the thought of Carl Schmitt. Rawls is said to offer a justification for liberalism that presupposes many of the substantive commitments he sought to avoid. Nor did he ever address the pressing question of how to contain doctrines that do not support the content of the overlapping consensus. Based on this critique, Schmitt's political theory emerges as a complement to the gaps in political liberalism. Alessandro Ferrara has recently taken up this argument to refute it once and for all. It is true, he maintains, that Schmitt discussed issues that resonate with some Rawlsian themes, but the reasons that make these two leading authors incomparable seem to him stronger than any similarity. This article makes two claims that seek to strengthen the above critique. First, if one believes, as I do, that the comparison is plausible, it should be with Schmitt's most robust constitutional theory, which he completed between 1928 and 1934. Second, if one looks at Schmitt's scholarly production in those years, the points of convergence appear more significant than those Ferrara is prepared to accept.

Keywords: constitution, constitutional essentials, decisionism, pluralism, Rawls, Schmitt.

1. I*ntroduction*

Most probably any attempt to carve out a democratic core in Carl Schmitt's political thinking is doomed to failure. While I believe that no trace of Nazi ideology can be found in his pre-1933 works, it is undeniable that he was a staunch supporter of the most traditional and conser-

vative right. He advocated a firm and energetic presidential government, directly elected by the people and almost completely free from parliamentary control. It was his inner conviction that a presidency reinforced by special powers could be the foundation and the point of greatest stability for the dying Weimar Republic. I am convinced that such a political view did not stem from Schmitt's belief in the salvific virtues of a sovereign decision-maker endowed with demiurgic powers. Rather, he believed that a stable political community should be founded on a tight core of fundamental values and principles, already present in the normative repertoires of the dominant social groups, and enshrined in an extremely rigid constitution, whose supreme interpreter was the holder of the executive power.

I do not know how democratic this is, and certainly, none of it can be called liberal. Yet there is a curious convergence between the constitutional theory underlying this political perspective and one of the most remarkable and influential theories of the 20th century: John Rawls's political liberalism. In a liberal democracy, according to Rawls, a constitution establishes certain fundamental rights and freedoms, fixes the basic structure of society, and regulates the interaction between the various state agencies it creates. These are the «constitutional essentials» which determine the content of rights and freedoms and impose normative constraints on the general structure of government. The specifically 'political' element of Rawls's liberalism lies in the fact that these constitutional essentials, of a substantive nature, represent the ultimate infrastructure of a society characterised by the "fact of pluralism" – which is to say, the inescapable fact that in liberal political communities the heterogeneity of beliefs flourishes and so-called "comprehensive doctrines" proliferate.

As far as I am concerned, Alessandro Ferrara (2014; 2022; 2023) has proposed the most robust interpretation of Rawls's constitutionalism. According to him, constitutional essentials represent the yardstick for assessing the legitimate exercise of political authority. This is because in a liberal-constitutional society, citizens cannot be expected "to endorse all the details of the legislative, executive and judicial activity of democratic institutions. […] there will always be groups of citizens for whom some verdict, statute, or executive order is unjust and coercive" (Ferrara 2022, 82). Citizens are only expected to agree on the content and

normative priority of constitutional essentials. In this regard, Rawlsian liberalism stands out as a liberal theory of the constitution that emphasises some of its material aspects, including primary goods, polity-specific political values, and certain general political virtues. These are substantive contents, enshrined in the constitution, which can be used as a procedural constraint, in particular through constitutional review.

Underlying this interpretation of political liberalism is the notion of «legitimation by constitution» developed by Ferrara and Frank Michelman (see Michelman 2019; Ferrara, Michelman 2022). It bends Rawls's theorising in a decidedly constitutional sense. If one takes the fact of pluralism seriously as well as the institutional complexity of contemporary societies, reasonableness comes down to the best possible interpretation of fundamental values and principles in the light of both the present circumstances and the constitutional history of a country. This interpretation also implies that it is essential to identify an ultimate *pro-tempore* final interpreter of the constitution in the highest courts. In this framework, justice as fairness is no longer the outcome of a thought experiment, as in the early Rawls, but the most reasonable political conception of justice, that is, the one that best realises constitutional values in the light of the most significant political and cultural characteristics of a historical community.

It is certainly not my intention to establish how Rawlsian this reading of political liberalism is. Certainly, it is a reading that seems to me to be utterly convincing because it offers a concrete and operational translation of the theory of justice advanced in P*olitical* L*iberalism*. Rather, I will try to show that it precisely highlights the numerous convergences between Schmitt's and Rawls's political views – even broader and more remarkable than those Ferrara is prepared to accept. To this end, I will proceed as follows. I will commence by briefly illustrating the view of critics who claim that their theories do dovetail. I will then examine the few aspects which, according to Ferrara, indicate some kind of proximity concerning a few circumscribed issues.

I will then argue that, if the question of proximity is to be taken seriously, the account of Schmitt's theory needs to be clarified and refined. In this framework, I will stress that Schmitt advanced a theory of "material democracy" which bears even more striking resemblances to political liberalism. In the wake of my revised account, I will scrutinise Ferrara's discussion of the

various elements of differentiation between Schmitt's and Rawls's political theories which, in his view, prevent any hypothesis of complete convergence. I will conclude by further explaining why it is exactly Ferrara's interpretation of Rawls that brings the two authors closer together.

2. *The unexpected proximity*

According to some critics, the adjective 'political' in 'political liberalism' betrays something more than a Schmittian nuance. For example, Miguel Vatter (2008, 259) argues that, just like Schmitt, "Rawls asserts that the extraordinary is always superior to the ordinary. But what is extraordinary in Rawls is not the authority of the sovereign's judgment, as much as the power of every ordinary citizen's judgment in so far as he or she is recognized by all others as an equal and free member of a revolutionary, constituent people". Arguably, Vatter's case could turn out stronger if, rather than looking, as he does, at *Political Theology* (Schmitt [1922] 2005), one took into consideration *Constitutional Theory* (Schmitt [1928] 2008). In this latter book, the fundamental decision is no longer for a personal decision-maker, but for the people, who are revolutionary and constituent when they decide on the form of their political existence.

More convincingly, David Dyzenhaus (1996) has pointed to a possible Schmittian drift in the Rawlsian conception of the «fact of pluralism». As is well known, Rawls rejects the idea that a just society can be based on a *modus vivendi* and claims that it must be justified on moral grounds. But this morality is to be thoroughly political since it is not to be grafted onto any particular comprehensive doctrine. The liberal political conception of justice, which is the most reasonable conception from the point of view of free and equal citizens, regardless of the doctrines they espouse, articulates the «basic structure» of a modern constitutional democracy. For Dyzenhaus, the Schmittian feature lies in the «containment» of unreasonable doctrines. Although not directly addressed in *Political Liberalism*, this is an inescapable corollary of the theory. He writes:

> [A]lthough Rawls argues that political liberalism is neutral in the sense that it does not prefer any comprehensive doctrine to any other, it is not neutral in other senses. Most important, it is not neutral in its consequences. For instance, unreasonable doctrines will be un-

> dermined by a public culture which exposes them to the constitutional conditions of liberal democracy. Indeed, Rawls says that even doctrines which are not unreasonable but which are merely illiberal will be so undermined (Dyzenhaus 1996, 19).

Benjamin Schupmann (2017) takes up and expands on Dyzenhaus's critique. Not only has Schmitt anticipated Rawls's political liberalism, since he strenuously asserted that democracy is to be founded on a set of basic values and fundamental rights, shared by all citizens regardless of their different worldviews. More than that, he offered a truly *political* version of it, which required taking «action against existential threats to the foundation of that order, so that it will endure stably over time» (Schupmann 2017, 216). Put another way, Schmitt not only made explicit the *political* nature of democracy, just as Rawls was to do a few decades after him. He also clearly illustrated the urgent need to contain those comprehensive doctrines that threaten the existence of the constitutional order.

In summary, according to Dyzenhaus and Schupmann, the convergence between Schmitt and Rawls takes place at 'the political' level. Their case is strong, especially if one does away with a caricatured picture of Schmitt's political theory, which is still widespread even in the academic literature. I will try to rearticulate this case as follows. Not even in his most thunderous statements did Schmitt ever argue that the constitutional order should be founded on enmity as a dynamic principle that mobilises and unites the people against a polemical target (presented as) an existential threat. The basic notion underlying *The Concept of the Political*, first published in 1927 and extensively revised between 1928 and 1963, reads that for a political community to exist and subsist, the pluralism of social groups and their worldviews should be contained. This is because worldviews are just like Rawls's comprehensive doctrines. They claim to determine the ultimate truths about nature and human life and, in so doing, risk creating stronger forms of allegiance and loyalty between individuals *qua* group members and their group than between individuals *qua* citizens and the state (see Böckenförde 1997; Croce 2017). Schmitt ([1927] 2007, 41) wrote:

> [A given citizen] is a member of a religious institution, nation, labor union, family, sports club, and many other associations. These con-

> trol him in differing degrees from case to case, and impose on him a cluster of obligations in such a way that no one of these associations can be said to be decisive and sovereign. On the contrary, each one in a different field may prove to be the strongest, and then the conflict of loyalties can only be resolved from case to case. It is conceivable, for example, that a labor union should decide to order its members no longer to attend church, but in spite of it they continue to do so, and that simultaneously a demand by the church that members leave the labor union remains likewise unheeded.

In this sense, the peremptory incipit that «[t]he concept of the state presupposes the concept of the political» (Schmitt [1927] 2007, 19) is intended to convey a very simple message: it is up to the state, and by no means to any other normative entity, to decide the conditions under which citizens can legitimately use violence and risk their lives in the fight against the enemy. The considerable danger, in his view, was that this kind of eminently political decision could end up in the hands of the various associations and organisations that emerged in the first decades of the 20th century.

The Weimar Republic was on the verge of collapse, weakened by internal divisions and lacking strong political leadership. Seditious groups promoted worldviews that sought to replace the ethics of the state and abolish the constitutional order. In Schmitt's view, the German political community could regain its strength by relying on a narrow set of fundamental values and basic rights as a point of intersection between all constitutionally loyal social groups. By the same token, the state should restrict the rights and freedoms of groups that could potentially undermine the Republic. In what follows, I would like to resume this claim and justify it more robustly. As a preliminary step, however, I will need to build on Ferrara's important considerations on the parallelism between Schmitt and Rawls.

3. *Slightly Schmittian, but not too much*

In chapter 3 of *Sovereignty across Generations*, Ferrara (2023, 93-136) adroitly reconstructs some basic tenets of Schmitt's legal and political thought. The cardinal virtue of his account is that it centres on the latter's in-

fluential theorisation of the *materiality* of the constitution, that is, those substantive elements that exceed the form of the constitution and give it ordering force.[1] This, according to Ferrara, is the genuine point of contact between Schmitt and Rawls. In doing so, he partly rejects a stereotypical view of Schmitt as an extoller of the exception and the advocate of political agonism[2] and rather focuses on the most meaningful elements of his constitutional theory. As I will clarify below, however, he does not do so all the way and therefore does not get to the point where one can appreciate Schmitt's most robust and coherent theory – one that, importantly, gets closer to political liberalism.

To commence, a major problem with Ferrara's examination of the differences between Schmitt and Rawls is that it begins with a discussion of the personality of the political decision-maker. He is supposed to be a flesh-and-blood person who has a kind of demiurgic power over the political community. This is undoubtedly a theme that runs through Schmitt's work, especially, but not only, between 1918 and 1924. Moreover, according to Ferrara (and admittedly many others), the sovereign's demiurgic activity takes place in the realm of the political, because the decision-maker is said to be the one who, by his constitution-making decision in certain exceptional circumstances, determines the enemy who threatens the community's way of life. Now, while it is undoubtedly true that, as Ferrara (2023, 103) points out, one of Schmitt's fundamental assumptions is that the legal order can neither establish itself nor suspend itself and that it always requires a concrete political actor, at the beginning of his reconstruction he brings together Schmitt's assertions that belong to different phases of his scholarly production.

It is not for the sake of philology that I raise this point, but because it is key to the parallelism between Schmitt and Rawls. Without wading into Schmitt's prolific output, I think Ferrara is right to claim that, for Schmitt in 1927-1928, the production of the constitutional order is the foundational moment in which the group of friends is brought into be-

[1] See Goldoni, Wilkinson 2020; Goldoni 2024. On Schmitt's constitutional theory and the materialist approach, see Meierhenrich, 2023.

[2] As to why this is a stereotypical view that should be left behind, see Croce, Salvatore 2013; Croce, Salvatore 2022.

ing. This is the natural result of bringing together such works that are so close in time as *The Concept of the Political* of 1927 and *Constitutional Theory* of 1928. Far more problematic, however, is the reference to the exceptional moment and the sovereign decision. For these are themes that Schmitt dealt with especially in *Political Theology*, published in 1922, in which he put forward an extreme and ultimately untenable thesis that he would never take up again, at least not in such a radical form. Unfortunately, Schmitt is still known to the public for that incongruous short-circuit that reads *Political Theology* and *The Concept of the Political* as if they were two faces of the same work. This misguided interpretation leads to a position that Schmitt never advocated, viz., that the sovereign performatively creates the enemy when he decides on the suspension of the legal order[3]. To avoid such an interpretative pitfall, in the subsequent pages, I will separate the issue of the sovereign and her/his exceptional powers from the issue of the materiality of the constitution, which is much more relevant to the juxtaposition with political liberalism.

Let me return to the notion of materiality. Ferrara captures it succinctly when he writes that, for Schmitt, a state *does not have* a constitution by which the state is formed and operates, but *is* the constitution, that is, a concrete condition of unity and order. Put otherwise, the constitution is by no means a mere set of norms and principles. It is an activity that gathers and implements a concrete order rooted in a historical tradition. Therefore, there is no constitutional structure that is not the context-specific and content-dependent project of a community that, at a given moment, gives itself a concrete configuration to shape its own political future. For example, a state is not a liberal democracy because it adopts a particular set of fundamental norms and a particular set of freedoms and rights. Rather, it is a liberal democracy because it is the result of an overall historical experience that has led state institutions to take on a particular concrete configuration, resulting in particular freedoms and rights, as well as particular mechanisms for the protection thereof.

According to Ferrara, this material approach to the constitution looks relevant for three basic reasons. The first is that it emblematically articulates the distinction between *the constitution* and *constitutional norms*. In the

[3] For a sounder vindication of this critique, see Croce 2017.

interwar period, the German debate revolved around the vexed question of Article 76 of the Weimar Constitution, stating that the constitutional text could be amended by legislation with a two-thirds majority of the Reichstag. According to positivist jurists, this article *de facto* made the Parliament a genuine and legitimate constituent power that had neither formal nor material limits other than the qualified majority constraint (see Loewenstein 1931). Schmitt objected to this. In his reading, even though no formal limits were to be seen, a material limit could be detected in the difference between *making* and *amending* the constitution – one that was logically connected to the further distinction between the overall constitution and constitutional norms (see Colón-Ríos 2020, 203-225).

Hence the second reason which, according to Ferrara, explains the relevance of Schmitt's materialist approach. The conceptual separation between the constitution and constitutional norms was conditional on the even more fundamental distinction between those who have the power to produce the basic law, namely the people, and those who have the power to amend it, namely the parliament. As Ferrara nicely points out, the constitution, according to Schmitt, is the foundational moment in which the people are structured as a concrete unity. Only then, and not at any later moment, does the constituent power manifest itself. The third reason, which in my view has no structural connection with Schmitt's constitutional theory, relates to his firm conviction of the need for a strong presidency. This should be a neutral power for the protection of the democratic constitution (where 'neutrality' stands for 'superior to parliamentary politics'). Faced with the blatant ineffectiveness of representative politics, which proved incapable of providing strong and coherent political leadership, Schmitt believed that the only solution was the political leadership of a strong President of the Republic, with a popular mandate and endowed with the permanent power to appoint a presidential government almost completely unaccountable to parliament (see Schmitt [1931] 2015).

Rawls gets into the picture as far as the 'substance' is concerned as opposed to an exclusive focus on democratic procedures. As I mentioned above, goodness as rationality, primary goods, the polity-specific 'political values' and certain general 'political virtues' are among the material normative elements explicitly mentioned in *Political Liberalism*. Yet, Ferrara notes, it is above all the notion of an overlapping consensus that

elicits material considerations which come very close to Schmitt's political friendship in *The Concept of the Political*. For the overlapping consensus is such that some comprehensive doctrines «support a political conception of justice underwriting a constitutional democratic society whose principles, ideals, and standards satisfy the criterion of reciprocity. Thus, all reasonable doctrines affirm such a society with its corresponding political institutions: equal basic rights and liberties for all citizens, including liberty of conscience and the freedom of religion» (Rawls [1997] 2005, 482-483). Doctrines that do not converge on such a political conception are not reasonable and cannot support a democratic society.

Ferrara claims that the consensus so conceived can hardly be said to be content-independent. It has an unquestionable material side ingrained in the specific historical tradition and concrete experience of a political community. Despite this, he warns against a criticism that he deems unfounded, one that envisages «a deep rift» in political liberalism: an opaque Schmittian residue lying beneath its luminously democratic character. A lengthy quotation will be of help:

> On one hand, there are constituencies that endorse comprehensive conceptions very diverse but not so diverse as to prevent them from converging on a modular political conception of justice (hopefully, but not necessarily, 'justice as fairness') thick enough for sustaining constitutional essentials shared from diverse angles by all these citizens. The overlapping consensus on that political conception of justice, on certain political values, ideas of the good, and ultimately on a robust core of constitutional essentials, allows for the 'stability for the right reasons' of the just and stable liberal-democratic polity. On the other hand, and this is the Schmittian flipside of political liberalism emphasized by these commentators, there is an 'inner periphery' of the well-ordered society, populated by citizens who embrace unreasonable or partially unreasonable conceptions, are not party to that overlapping consensus, are protected by rights they have not concurred in shaping, are the object of policies resting on principles they do not endorse, and are not even owed 'political justification'. (Ferrara 2023, 115).

In the following pages, I will not try to establish whether the idea of a rift is tenable. Rather, I will discuss the arguments advanced by Ferrara to refute it and will elucidate why they do not increase the distance be-

tween Schmitt and Rawls but reduce it. To put it better, in Schmitt's view, the containment of unreasonable doctrines would be illegitimate without stability for the right reasons, rooted in a solid core of constitutional essentials. To make this point, in the subsequent section I would like to tease out his most relevant contribution as a political theorist. In my reading, this was to show that friendship over constitutional essentials is an indispensable condition for the survival of a constitutional regime, especially, but not only, when it is challenged by internal enemies. Let me now briefly outline the textual basis for my reading.

4. *Schmitt's material democracy*

It is not for this contribution to offer a detailed reconstruction of Schmitt's theory and its various developments between the 1920s and the 1930s. What I do want to argue, however, is that if there is a convergence, however asymptotic, between Schmitt and Rawls, the juxtaposition between them should be based on those works in which Schmitt took up the question of political stability vis-à-vis constitutional essentials. He did so in a controversial period of the agonising Republic, not long before the Nazi seizure of power in 1933. In this problematic phase of German history, Schmitt, along with a whole generation of political and legal scholars, was struggling to understand how the Weimar Constitution could be saved from ruinous capitulation.

To repeat: in those years Schmitt had lost his faith in the idea of a sovereign decision-maker with salvific powers. Suffice it to recall that the second edition of P*olitical Theology*, dated November 1933, contained a kind of initial disavowal. Decisionism was treated as a limited type of legal thought that needed to be supplemented by a more concrete and realistic theory of the material features of law. No sovereign decision could miraculously create the legal order and make it effective, as he seemed to believe at an earlier stage. But the process of dismantling the more bombastic theses of P*olitical Theology* had begun early on. In 1924 Schmitt downgraded the role of a sovereign decision-maker who could exercise unbound power through emergency decrees. In an important constitutional essay, "The Dictatorship of the President of the Reich according to Article 48 of the Weimar Constitution" (written in 1924, with

a few additions before publication in 1927) (Schmitt ([1924]2014), he unequivocally denied the article in question conferring legislative powers on the President, even when the state of exception was declared. He then identified material limits, though far from clear, that restrained the emergency powers of the executive.

As I noted above, Schmitt's concern at the time of writing *The Concept of the Political*, in 1927-1928, was with social pluralism and the multiplication of comprehensive views. Pluralism encouraged antagonism between social organisations and the central state. This is one of the main reasons why he made the Anglo-Saxon pluralist theory of the state his main polemical target. For him, authors such as G.D.H. Cole and Harold Laski were right in their diagnosis of an intensifying pluralism of political allegiances. However, they were drastically wrong to argue that such a process should be encouraged because it paved the way for the reform of the state. Quite the contrary, pluralism had to be tamed. To this end, an executive with unbound prerogatives could have little effect, since the basis for political stability in normal times cannot be the exceptional measures which are issued in times of crisis. This explains Schmitt's abandonment of his earlier decisionism in the second half of the 1920s, when he embraced the institutionalist thinking of Maurice Hauriou and Santi Romano.

At this stage, however, he had not yet completed his proposal for a substantive democracy based on the constitution, because his theory was still contaminated by a thick decisionist residue. This was the idea that a constitution is a fundamental decision. Importantly, though, it is a constitution-making decision since it is taken by the people who give themselves a political form, and not because it revolves around specific contents. For this reason, not even *Constitutional Theory* can be regarded as the site of a Rawlsianism *avant la lettre*. Schmitt himself emphasised that the real turning point came in 1931-1932. As noted by Schupmann (2017, 173-200), an interpreter who has paid due attention to the writings that Schmitt himself considered as key, one can find the most robust articulation of what I would like to call 'material democracy' in two essays published close to each other. These are "Freiheitsrechte und institutionelle Garantien der Reichsverfassung" ("The Liberty Rights and the Institutional Guarantees of the Reich Constitution") (Schmitt [1931] 2003) and "Grundrechte und Grundpflichten" ("Basic Rights and Basic Duties") (Schmitt [1932] 2003).

What deserves attention here is a crucial gap between the constitutional theory that emerges in these two essays and that presented in *Constitutional Theory*. In 1928, Schmitt, like most fellow jurists, saw the Weimar Constitution as the result of a compromise between very different political conceptions and value orientations. It was a «hodgepodge of programs and positive provisions, which provides the foundation for the most diverse political, social, and religious matters and convictions. Bourgeois guarantees of personal freedom and private property, all of an individualistic variety, socialist programmatic principles, and Catholic natural law are frequently jumbled together in an often somewhat confused synthesis» (Schmitt [1928] 2008, 83). At this stage, Schmitt certainly saw this as an intolerable defect, but one that could not be remedied. On the contrary, in 1931-1932, Schmitt argued with determined jurisprudential pragmatism that the task of jurisprudence was to rid the Weimar Constitution of its compromise character. The life of the Republic depended on this crucial task. The constitution had to be made consistent with its original intentions so that it could provide clear political guidance where parliamentary politics had failed.

As he illustrated in less technical terms in *Legality and Legitimacy* (Schmitt [1932] 2004), in those years it had become clear that the Weimar Constitution was riven with an overt conflict that it was up to legal science to settle[4]. In its first part, the constitution embodied the model of the legislative state, in which constitutional norms are meant to regulate how laws are enacted, promulgated, and applied. The content-independent nature of this type of constitutional norms merely ensured that the organs of the Republic followed formal procedures whose outcomes depended entirely on the legislative activity of Parliament. This first part of the constitution guaranteed the legislature ample room for manoeuvre, 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. But the second part of the constitution, Schmitt argued, had an opposite purpose. It was entirely content-dependent, designed to protect a set of substantive contents from legislative procedures.

[4] As attested by another, later key text, *The Plight of European Jurisprudence*, Schmitt ([1950] 1990) did not change his mind on the leading role of jurisprudence.

Schmitt stated that the second part enjoyed a stronger normative force because it was the most precious sediment of the German historical and spiritual tradition. In Schmitt's words ([1932] 2004, 79): «It would be in itself conceivable and in no way an intrinsic logical contradiction to declare all substantive guarantees of the Second Principal Part sacred and inviolable. Only that would be a different state form than a parliamentary legislative state, which, indeed, the Weimar Constitution is still considered». He thought that bringing out the core of the constitution could change the situation of the Weimar Republic for the better. By conjuring Hauriou, he called this «superlégalité constitutionnelle» (Schmitt [1932] 2004, 57) – the idea that the constitution enjoys the status of higher law in that it expresses the basic principles of the political society (see Loughlin 2017, 163).

This sums up Schmitt's view of material democracy, which seems particularly close to political liberalism. The Weimar Republic was based on a consensus among the various segments of the majority population around a set of basic values. These were already present in the normative repertoire of the sub-state communities recognised by the state. The substance at the heart of the consensus was encapsulated in a few constitutional essentials in the form of fundamental rights and duties over which the legislature had no power. In this framework, the kind of constitutional allegiance that Schmitt theorised could indeed be described in terms of an overlapping consensus: the various comprehensive doctrines that populated the social world cultivated a notion of the good of their own, but they converged on a subset of principles and values that were embodied in the constitution and provided the material content for the latter. Needless to say, Schmitt did not adopt the notion of 'reasonableness', let alone 'justice as fairness'. Nor could one expect the German social fabric of the late 1920s to support the same principles and values as those found in late 20th-century American society. Nevertheless, Schmitt's material democracy and Rawls's political liberalism seem to agree both on what underpins the basic structure of society and on what secures institutional legitimacy.

5. *Closer than it seems*?

I would now like to address the numerous aspects that, according to Ferrara, separate Rawls from Schmitt so clearly that their conceptions of politics

can be unequivocally distinguished. First, however, a preliminary remark is in order. Ferrara's juxtaposition, as I have pointed out elsewhere in this text, conflates Schmitt's writings in a way that somewhat compromises the analysis and undermines its results – as if one were to conflate A T*heory of* J*ustice* with P*olitical* L*iberalism*. For reasons of exposition, which I can certainly understand, Ferrara isolates and brings together theoretical pieces from different phases, such as the sovereign decision in exceptional times of P*olitical* T*heology*, the friend-enemy distinction of T*he* C*oncept of the* P*olitical*, and the fundamental decision of C*onstitutional* T*heory*. As in the previous sections, however, I will refer to Schmitt's theory from 1928 to 1934. Again, this is not due to any exegetical preference. Rather, it was during this period that Schmitt developed a vision of politics which bears significant family resemblances to Rawls's political liberalism.

Another preliminary consideration is that I do not consider as structural all the various differentiating elements identified by Ferrara. Rather, some of the most relevant, as I will detail, look to me as the result of the different political orientations of Schmitt and Rawls. In other words, unless one wants to claim that Rawls is the only theorist of political liberalism as well as its designated interpreter, there can be more progressive and more conservative understandings of it, depending on how one wants to translate it into a complex of procedures and institutional agencies. If this is the case, Schmitt can be said to lean towards the more conservative end of the spectrum.

Having said that, I can now turn to Ferrara's analysis. He singles out and discusses seven aspects which, in his view, undermine any attempt to charge Rawls with a hidden Schmittianism. I will not address them in the order in which they appear in *Sovereignty Across Generations*, because some are interrelated, while others require separate discussion. In this respect, I will omit the seventh aspect for the reasons given above. Ferrara argues that, when the appropriate exceptional circumstances arise, the sovereign is the person who draws the line between friend and enemy, while her/his decision is as free from any form of institutional control as any activity of the constituent power. Such a constitutive act, like the exception in which it occurs, is claimed to be above the law, even above the higher law of which I spoke in the previous section. This reading, however, merges various Schmitt's claims over time. As far as this exceptional source of law is concerned, in the period of his overall re-

thinking of decisionism, he espoused two basic theses: (1) any power to make laws or to amend the constitution is in any case bound by the latter; (2) the constitution, as the supreme source of legitimacy, must be made impermeable, at least in its minimum organisational content, to the action of any political body, including the President of the Republic during emergencies. As an illustration of this, it is worth recalling Schmitt's words ([1932] 2004, 75) when, in *Legality and Legitimacy*, he discussed the risks of an unfettered conception of the powers conferred on the President by Article 48:

> The organizational provisions of the Weimar Constitution are not merely impinged on through this interpretation, which is supported by the prevailing reading in legal theory and practice. They are, rather, essentially changed. [...] All these organizational provisions are now no longer (according to G. Anschütz's coinage) 'dictator-proof', because one finds in Article 48, 2, an extraordinary lawmaker equivalent to the simple legislature. In this case, one should at least acknowledge that an organizational minimum must remain inviolable both for the federation and for the preservation of the Land governments, if the entire constitution is not to be overturned by Article 48.

In short, for Schmitt, first came the constitution, then the executive power of the President, and finally the legislative power. But neither the presidency nor the parliament could be considered free from any form of institutional control, while both bodies were forbidden to tamper with the founding core of the constitution on pain of the collapse of the state as the institution of institutions. If in the early 1920s, Schmitt had entertained the idea that there could be a truly sovereign power, superior to any constitutional constraint, from the mid-1920s he distanced himself from such a naive position. Based on this, I would like to discuss the remaining elements of differentiation identified by Ferrara, starting with the first.

With unquestionable philosophical dexterity, Ferrara (2023, 116) grasps Schmitt's notion that «constitution-making is the product of a constitution-making power that needs no authorization and by establishing a form of government or regime unifies the polity – which has already come together by virtue of a contract, pact, or covenant – around a political order responsive to some substantive values». So far, Ferrara's reconstruction nicely reflects Schmitt's take on the matter. However, I

strongly disagree with him when he maintains that the constituent process "occurs against the background of a shared conception of politics, the state, and government, which is comprehensive and enjoins the consociates to partake of some 'cultural artefact' (a philosophical doctrine, a popular ideology, a politicized religious message) purportedly enclosing 'the whole truth'" (Ferrara 2023, 117). I think this juncture combines what Schmitt argued as a constitutionalist lawyer with what he believed as a conservative right-winger.

While it is true that, in line with his deep-seated political convictions, Schmitt hoped for the highest degree of social homogeneity as the most reliable guarantee of political stability, as a constitutional lawyer he adopted an approach inspired by jurisprudential pragmatism. In this regard, he was fully aware that pluralism is an inescapable fact of social life, such that it profoundly affects the dynamics of constitution-making and its material results[5]. P*ace* Ferrara, in Schmitt's legal analysis, political unity begins with an unavoidable division between the worldviews of the various social forces – a division that must be gradually reduced for the sake of long-term political stability. To this end, the progressive consolidation of constitutional values and principles must be achieved through the political leadership of the executive and the corrective intervention of a judiciary loyal to the constitution.

Even more importantly, the very definition of the Weimar Constitution as the outcome of a compromise between different political programmes and conflicting value orientations indicates that Schmitt was looking for a firm homogeneity around certain constitutional essentials, not around ultimate truths – on which he did not believe that any political institution, however sovereign, could have a say. His theoretical aim was to show how, in the Weimar constitution-making process, the major social groups converged on a set of fundamental values and general principles that were embodied in the second part of the constitution. Nor, on the other hand, did he ever claim that the prior overcoming of the epistemic and ethical divide was a necessary condition

[5] That pluralism is an inextinguishable feature of the social, and certainly a source of danger to the state, is a Schmittian thesis clearly inferable from what he wrote in a short but decisive 1930 essay, *State Ethics and the Pluralistic State* (Schmitt [1930] 2000).

for constitution-making to take place. For this reason, concerning his political theory in the years 1928-1934, I think it can be argued that: (1) it is far from comprehensive since it is limited to the principles and substantive values of the second part of the constitution; (2) it 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).

The second element of differentiation has to do with the political: while Rawls considered it to be a special domain with specific features, Schmitt saw it as ubiquitous since it can potentially manifest itself in any other domain, such as religion, morality, or economics. However, despite all appearances, I do not see this as an element of conflict with Rawls. I cannot prove this in detail, but the fact of the matter can be easily summarised as follows. The power to decide as to who the enemy is, or rather, when it is legitimate for civilians to kill and be killed, lies with the state, and must never be left to the disposal of the various sub-state groups. Should any non-state collective actor decide to resolve a conflict, e.g., a religious or an economic one, by resorting to violence, the entire scaffolding of the state would collapse. According to Schmitt, in societies characterised by a high degree of differentiation, the danger of the political manifesting itself in the guise of a violent struggle between groups is so high that the state is called upon to exert an even more inflexible and capillary action of internal depoliticisation. In a way, one could say that, for Schmitt, precisely insofar as the political is potentially ubiquitous, it must remain a special realm with specific features. This is to say that the state must be the only actor legitimised to declare both external and internal enemies. His heartfelt warning in *The Concept of the Political* is that the political must be kept firmly anchored in the hands of state authorities if it is to remain within a specific and legally circumscribed realm.

This leads us to the sixth element of differentiation identified by Ferrara. He claims the political in Schmitt is eminently subjective. It is the sovereign decision that 'elects' a given collective entity as the public enemy, whose mere existence poses a threat to the existence of the friend. He then continues to say:

> [T]he only key to assessing a given sovereign act of line-drawing which separates these 'friends' from those 'enemies' is its actual success (i) in rallying a people around a given representation of the line separating it from its public enemy and (ii) in mobilizing political energy in defending that line. There is no normative foothold, in the Schmittian paradigm, for raising the question whether a certain enmity should be declared in existence or another denied any real import (Ferrara 2023, 121).

Without a shadow of a doubt, Ferrara is right on the money here. The only criterion for judging the success of this act of line-drawing lies in its performative effect, whereby the friend begins to see a given collective entity as the enemy. Nevertheless, one must bear in mind what I have just argued. For Schmitt, the greatest danger is that the political could be revived within the boundaries of the state and that a group hostile to legitimate institutions could take it upon itself to instruct its members as to who their enemy is and when they can go to war to protect the existence of the group. Nor should it be forgotten that, in the inter-war period, pieces of revolutionary syndicalism, subversive organisations, irregular armies, and extremist parties from the right and the left could out of the blue proclaim themselves the fundamental political entity and declare war on the state. Schmitt's warning was about the ever-present danger that antagonism within the state could bring about its demise – antagonism which, for him, was and should remain a peculiar and ineradicable feature of the international political scenario.

I can now turn to the two elements of differentiation, the third and fourth, which I find more convincing. However, as I anticipated, I do not think they amount to structural differences, since they depend on the divergent political orientations of Schmitt and Rawls, although they continue to agree on the core of a common theoretical-political view. According to Ferrara (2023, 118), the political is permanently divisive, thus tending towards a 'static divisiveness'. The dividing line between friends and enemies "may shift at any time, but it shifts as an effect of the happenstance modification of the sovereign will that commands constituent power, not as the likely, though by no means necessary, outcome of a dynamic intrinsic to the political". This characteristic of the political is undeniable. Certainly, as I emphasised above, the political can hardly shift by dint of a sovereign act, since a much more complex dynamic is

required for the relationship between sub-state groups and the state to be altered. Despite this, Ferrara is right to say that for Schmitt politics is certainly not a process of progressively closer adherence to liberal values and a broadening of the base of the overlapping consensus.

Likewise, on the comprehensive doctrines that do not fit into the constitutional framework, Schmitt is rather blunt: they must be excluded. As he made clear in the first corollary to *The Concept of the Political*, originally written in October 1931, the state cannot afford to be neutral. While discussing "Neutrality in the sense of parity, i.e. equal admission of all eligible groups and orientations" (Schmitt 2018, 263), he unhesitatingly stated that "neutrality in the sense of parity is only feasible vis-à-vis a relatively small number of entitled groups and only with a relatively undisputed distribution of power and influence among the partners entitled to parity. Too large a number of groups claiming equal treatment, or even too great an uncertainty in the assessment of their power and importance, i.e. uncertainty in the calculation of the quota to which they are entitled, prevents both the implementation of the principle of parity and the evidence of the principle on which it is based" (Schmitt 2018, 263).

Undeniably, the decisionist element of Schmitt's view reappeared in the early 1930s under the guise of straightforward exclusion. It is no longer the miraculous decision of the demiurgic sovereign, but it still bears traces of decisionism in a properly Schmittian sense: the decision needs no justification whatsoever, nor would it become justifiable if one tried to find a normative basis for it. It behoves the state to decide which groups are admissible and to exclude the inadmissible ones – naturally, not by sheer violence, but, for example, by denying them the public-law advantages and benefits that are guaranteed to state-sponsored groups. A main criterion for inclusion remains the groups' support for the material content of the consensus reached during the constitution-making process on fundamental principles and values.

Nevertheless, as I have suggested, these two elements of differentiation between Schmitt and Rawls do not depend on core aspects of their political theories, but on the divergence of their political convictions. Neither of them offered a clear treatment of the so-called "containment" of unadmitted or unreasonable doctrines. Schmitt believed that the state should pivot on the convergence of few societal groups

on constitutional essentials because the disproportionate pluralisation of worldviews is fated to generate conflict. And yet he never bothered to justify such an unwarranted position. Rawls believed in the possibility of increasing the scope of the overlapping consensus, as the conditions for fair cooperation are gradually accepted even by the most reluctant and sceptical citizens. But, as the critics mentioned above pointed out, it is unclear what should happen to those who stubbornly refuse to converge on the ultimate normative value of constitutional essentials.

6. *Concluding remarks*

Schmitt was a deeply conservative thinker who distrusted parliamentary representation and saw pluralism as a permanent threat to political stability. In this respect, no one could reasonably say that he shared Rawls's interest in understanding how to accommodate the plurality of worldviews in a free society. I am convinced, however, that they shared a primary concern: they feared the potential clash of religious and moral views claiming to express the ultimate epistemic and pragmatic truths. To this end, they both theorised that the political should be defined negatively, as a space that is 'depoliticised' in a Schmittian sense, in contrast to other domains of values and judgements which are the concern of religion, economics or practical reason.

In addition, both believed that the stability of a constitutional democracy basically depends on citizens and their political officials sharing a conception of political justice in terms of which constitutional essentials could be understood, evaluated, and reformed by constitutional means. Like Rawls, Schmitt too thought that the government and the political process must honour and express a commitment to basic freedoms and fundamental principles – though he probably had a different idea than Rawls about what their content should be. But again, this has to do with Schmitt's political leanings towards the conservative right, not with any structural theoretical discrepancy with political liberalism.

In the end, there is nothing to stop anyone who wants to take up Schmitt's burdensome legacy from saying that, once legal scholars have juristically purged the constitution of its contradictions as a compro-

mise, it can be described as the most reasonable political conception of justice in that particular society. The most reasonable of all the available conceptions, which the state allows only on the basis of the existing constitution and its material content. Thus, once one rejects the flawed popularisation of Schmitt that makes his theory a mishmash of unbounded decisionism and political antagonism, Ferrara's convincing interpretation of Rawls's constitutional thought is an arrow in the quiver of those who see these towering figures of 20th century political theory in the same mould.

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Whose Constituent Power Is It?

Marco Santambrogio

Abstract. Ferrara maintains that constituent power – i.e., the power to issue a constitution – needs a sovereign actor endowed with singular intentionality, because neither a law nor a constitution can establish itself. At least fifty-three actual constitutions around the world claim authorship on behalf of "the people" for their articles. The question arises: is that actor – the people – an actual subject or, as argued by Juergen Habermas and Hans Kelsen, a merely fictional one? An argument is presented to the effect that it cannot but be fictional. The argument draws on a celebrated result due to Condorcet and generalised by Kenneth Arrow, showing that a plurality of rational subjects, such as a people, is bound to be sometimes irrational, in so far as it harbours cyclical preferences. This is a serious obstacle to holding that an actual people could be endowed with intentionality, which presupposes the possession of, among other things, will, memory, preferences and also rationality.

Keywords: constituent power, rationality, reasonableness, Arrow's theorem, fictional entities

Sovereignty Across Generations is a book of many merits, but the wealth of doctrine and ideas that Alessandro Ferrara offers to clarify, if not solve, some of the fundamental problems of political liberalism is impressive. I would not be able to comment on it in its entirety, so many issues are addressed and so vast is the relevant literature. Fortunately, I have been asked to comment on only one chapter, the fourth, and even of this I will select only one theme: how should we conceive of those

peoples whose deliberations so many constitutions around the world represent themselves as the product?

The chapter P*olitical* L*iberalism and* '*the* P*eople*' opens with a challenging statement due to Carl Schmitt, which Ferrara fully subscribes to: constituent power needs a subject to exercise it, because neither a law nor a constitution can establish itself. The assertion seems to be borne out by numerous existing constitutions that, in their preambles or first articles, refer to the subjects who would be their authors respectively as "the people". The U.S. Constitution, which at the very beginning identifies itself as the deliberation of "We the People", is but one example among many.

It is not immediately obvious that this statement is true, and potential counterexamples immediately come to mind. Are there not customs that are not attributable to any particular subject and yet have legal value – at least as precedents? Are there not financial markets that do not constitute a subject and yet determine the political and even legislative choices of a country – indeed, of many countries?

Ferrara rejects these alleged counterexamples. Undoubtedly, he writes, one cannot impute subjectivity to financial markets. Markets are "mere aggregates of individual preferences". It is indeed true that we speak of the actions and reactions of a market, and an action properly so called (as distinct from, for example, a simple involuntary motion) always presupposes an agent endowed with intentionality. But this is only a figurative way of expressing it: in reality the "actions and reactions" of markets are the simple results of the actions (these in the proper sense) of countless individuals converging while acting independently of one another. When, on the other hand, we attribute constituent power and actions such as that of enacting a constitution to a people, we always assume that there are shared deliberations, exchanges of reasoning among individuals, consultations that ultimately bring about decisions for which the whole collectivity bears responsibility. Thus, it is not a matter of collective will in a merely "statistical" sense – to use a term that Ronald Dworkin contrasts with "communitarian". Financial markets do not act politically, they do not choose one policy in preference to another at the end of a conscious decision procedure binding each of its members: that is why they have no constituent power. Constituent power requires "a sover-

eign agent endowed with individual intentionality", and the "political conception of the people" (Ferrara and Michelman's conception) assumes that peoples instead have it.[1]

I provisionally concede this point to Ferrara. But now a new question arises: is the singular intentionality presupposed in the author of a constitution (because exercising constituent power is undoubtedly an action and not a mere "statistical" regularity) that of a real subject or is it instead that of a fictional, purely imaginary entity that has the same ontological reality as literary characters and other entities that are perfectly respectable but lack intentionality and existence independent of human imagination, such as the metric system?

All of us human beings can assume that we have individual intentionality and subjectivity, which is a rather complex thing and definitely poorly understood by philosophers and psychologists. But the intentionality and subjectivity that we would like to impute to a collectivity such as the people are even more complex and it is not at all clear that they can be attributed to anything other than a flesh-and-blood individual except by pretence. This is the thesis I want to argue. Ferrara reminds us that Juergen Habermas and Hans Kelsen have argued in favour of the fiction hypothesis.[2] I aim to present an independent argument to argue that it could not be otherwise.

I will focus on the kind of subjectivity that should be attributed to the people as the subject of a constitution. I will try to argue that, 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.

Ferrara laments that contemporary political philosophers – including Rawls – simply assume that a people already exists: "We are never

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[1] "Constituent power, instead, needs a sovereign actor endowed with singular intentionality" (137).

[2] About Kelsen, for example, Ferrara writes: "For Kelsen, the people and its constituent power are postulates – in other words, fictions. The people, putatively exercising constituent power, 'is not, as is often naively imagined, a body or conglomeration, as it were, of actual persons. Rather, it is merely a system of individual human acts regulated by the state legal order'" (94).

told how a people comes into existence as a people". He adds, "It is an unfortunate lacuna of contemporary liberal-democratic theory that this *idolum fori* persists, according to which the formation of the people is understood either as a historical contingency immune from all judgment about its legitimacy or as a retrospective projection, transcendentally 'necessitated' by an accepted constitution" (139). For what I intend to argue – that is, that necessarily the people is a fictional entity – there can be no answer to the problem of how a people constitutes itself as a people. Nor is its existence a historical contingency. "Retrospective projection" is therefore the only viable alternative. For that matter, is there really any need for anything else? Rawls, in A T*heory of* J*ustice*, presents a thought experiment that asks us to imagine our own judgment and that of other individuals – individuals, not collective entities endowed with intentionality – about his two principles of justice: it is this judgment that should convince us that a constitution comprising those two principles is not only just, but will appear just to its citizens – a necessary condition for its stability. If Rawls is right, nothing else is needed to make such a constitution our own.

I now come to the argument. As far as I can tell, philosophers, psychologists and neuroscientists are still far – how far, I do not know – from having clear ideas about what an individual subject is. Each of us is convinced that we are subjects in our own right, but when it comes to attributing the property of being a subject to other individuals (human or otherwise) we are uncertain about the criteria. Some conditions clearly appear necessary. We certainly would not say that a being without a mind can be a subject. And to have a mind it seems necessary to be capable of intentionality: at least beginning with Brentano, intentionality has been taken as the hallmark of the mental. In addition to this, it also seems necessary to be able – at least at a minimal level – to act, to formulate more or less long-term plans of action and projects. So the will is indispensable, and in addition, in order to act, one must also have preferences among the different courses of action available. Perhaps some ability is required to set for oneself conditions to be met in the future and thus to have some notion of the passing of time and to keep track of it. Some conception of oneself seems equally necessary. Is that all? Perhaps not. Perhaps one should add an ability to conceive of the presence (or at least the possibility) of other subjects distinct from, but similar to,

oneself, and an idea, however vague, of the difference between viewing from a particular vantage point and viewing objectively or (if one can say so) from nowhere (Nagel 1986).

I do not intend to go into the details of these conditions – although it seems to me that an entity that is no longer individual, but plural like a people, is very unlikely to be able to satisfy all of them.[3] I am interested in only one condition which I have not yet mentioned and which is perhaps no less arduous than all the others: in order to be able to attribute to someone some form of subjectivity, it is a necessary condition to be able to attribute to her or him at least a minimum of rationality. The difficulty in stating this condition lies in the fact that it is quite hard to draw a clear line of separation between actual irrationality and the simple difference of views and opinions: one must take great care not to mistake extreme and unusual, but consistent, views for irrationality. I know of no effective and safe criteria for doing so. It seems certain, however, that at least in extreme cases, when we realise that we are dealing with beings whose behaviours we are unable to understand and with whom we just cannot communicate – for example, because we have no idea how we could convince them of what seems obvious to us and which we are convinced should be obvious to them as well – we are unwilling

[3] Ferrara cites an eloquent passage in which Schmitt identifies the modern subject of constituent power with the people or the nation: the nation "denotes, specifically, the people as a *unity* capable of political action with the *consciousness* of its political distinctiveness and with the *will* to political existence, while the people not existing as a nation is somehow only something that belongs together ethnically or culturally, but it is not necessarily a bonding of men existing politically" (italics mine). The passage is very clear: Schmitt postulates that the people (or nation) is a subject (a) unitary, (b) endowed with consciousness and (c) will. This is a postulate for which no justification is given. Point (b) I will deal with in a moment. Now I only observe that point (a) takes on a very precise meaning in a context such as Nazi Germany: it turns dissenters into traitors to the state. Ferrara observes in this regard, "Any controversy, in any realm of institutional or social life, could become the vehicle and focus of a 'political' opposition of friends and enemies" (117). It is known that the enemies, according to Schmitt, are not the opposition parties and those who vote for them: they are those who reject those values and "commitments" without which the state would cease to exist. On this point I do not think there is any possible mediation between Schmitt and Rawls' pluralism, especially in *Political Liberalism*.

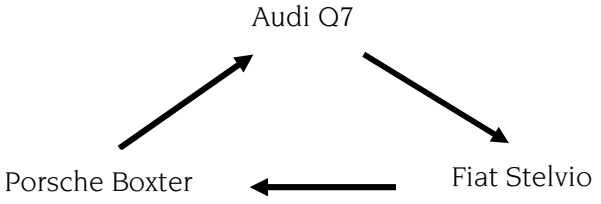
to attribute to them true subjectivity. It naturally happens to all of us to think that someone, even among our closest acquaintances and friends, is occasionally irrational and behaves in a way that is incomprehensible to us, but in all such cases we are convinced that, with time and sufficient goodwill, either we could sooner or later come to convince our interlocutor of her irrationality and get her to admit her error or we would come to understand her behaviour ourselves and realise that her point of view is simply different from ours. But in extreme cases, when we think we are dealing with truly irrational beings who are incomprehensible to us, we cannot attribute subjectivity to them: we can only try to control or cure them.

Is it possible for a real collective entity, such as a people, to satisfy this condition of rationality? Ferrara had assumed, with Schmitt, that the people exercising constituent power possesses "sufficient intentionality to be the author of a constitution" and "the capacity not only to act politically but also to shape its own political conduct". It should therefore be a subject in the full sense of the term and thus also be rational or not obviously irrational. Ferrara does not see substantial differences between an individual and a collective subject. Indeed, in order to explain how a people (in the sense of *ethnos*) can self-constitute itself into a political subject with constituent power (and thus transform itself into a *demos*), he appeals to some theorists of the self-constitution of the subject – from Michel de Montaigne to Christine Koorsgard, to Harry Frankfurt, to Charles Larmore – and adds, "Although their goal is generally *individual* self-constitution, their teachings also apply to *collective* self-constitution" (152). The point I intend to make is all here: in the transition from an individual to a collective entity we necessarily lose not only the guarantee, but the very possibility of rationality. It is at least difficult, therefore, to argue that there is a real subject to be entrusted with constituent power: only by pretence can we refer to the author of a constitution as a subject. In other words, the subject who has constituent power must be a fictional or imaginary subject. (Of course, it cannot be argued without circularity that the constitution itself manifests the intentions and will of the people and, if it is consistent, also demonstrates the consistency and rationality of the people who are its author.)

The argument I want to make is far from new, but I do not know if it has ever been used for the conclusion I am interested in. The starting

point is a simple observation: all rational people, if they prefer A to B and B to C, also prefer A to C and not vice versa, for whatever A, B and C. It is easy to see that this is a necessary condition of rationality.

Indeed, suppose someone you know expresses his preferences in matters automotive and tells you that he prefers the Audi Q7 to the Porsche Boxter and then that he prefers the Porsche Boxter to the Fiat Stelvio. But then between the Audi Q7 and the Fiat Stelvio he prefers the latter. In other words, he has circular preferences that we can graphically represent like this:



Suppose also that the fellow owns a Fiat Stelvio and you happen to have both a Porsche Boxter and an Audi Q7. Hearing his preferences, you offer him your Porsche Boxter in exchange for his Fiat Stelvio and only a thousand euros. Well pleased, he accepts the exchange and gives you the Fiat. Now he owns the Porsche and you own the Fiat, the Audi and an extra thousand euros. He is still not satisfied, however: as we know, he prefers the Audi to the Porsche. And you propose another exchange: your Audi for his Porsche plus another thousand euros. Following his preference, he accepts and you end up with the Porsche, the Fiat and two thousand euros more. He has the Audi and two thousand euros less. Is he satisfied? Not yet: he has revealed to you that he prefers the Fiat Stelvio to the Audi Q7. In a fit of generosity you offer him another exchange, immediately accepted: your Fiat Stelvio for his Audi Q7 plus one thousand euros. Now you find yourselves exactly in the initial situation – he has the Fiat, you have the Porsche and the Audi – except that you now have three thousand euros more and he has three thousand euros less. If you wanted to, and if he had not yet learned his lesson, you could start all over again exchanging cars, each time with his modest outlay of a thousand euros in your favour. You could go on forever – he always dissatisfied, you always richer at his expense. But of course

human subjects endowed with reason may have moments of temporary irrationality but sooner or later they recognise their error (especially if it is explained to them) and correct themselves. That is, they recognise that it is irrational to have circular preferences. We have thus ascertained the starting point of our argument.

Do supposed plural subjects – peoples – behave in the same way? More than two hundred years ago, Marquis Nicolas de Condorcet proved that no, peoples can have circular preferences and there is no way to change their minds. They are therefore irrational in the sense we are interested in. Suppose there are three voters (or three thousand or three million – it makes no difference) and three candidates to choose from: A, B and C. The voters are all rational individuals and have no circular preferences. They also have very marked preferences (perhaps the candidates are enormously different from each other) and are unwilling to change their minds. We represent their preferences graphically in this table:

Voters	*First choice*	*Second choice*	*Third choice*
Voter 1	A	B	C
Voter 2	B	C	A
Voter 3	C	A	B

The first voter prefers A to B and B to C. Since she is rational, by hypothesis, and has no circular preference, she also prefers A to C. Similarly for the other two. Suppose now that each voter expresses her preferences by voting. We can define the preferences of the totality of voters – the people – as those that result from a vote (or a series of votes, depending on the way one votes): we say that the people prefer one candidate to another if a majority of voters express themselves (or would express themselves) in favour of the former. It is easily seen that in the case represented by the table the people have circular preferences: a majority of voters prefer A to B (Voter 1, Voter 3), a majority of voters prefer B to C (Voter 1, Voter 2), a majority of voters prefer C to A (Voter 2, Voter 3).

Condorcet worried about the (decidedly counterintuitive) result whereby, in case of an election of a representative from among A, B, and C, any outcome of the vote would displease a majority of the voters. We are interested in the simple fact of circular preferences that

cannot be remedied, unlike the individual case, simply by bringing it to the attention of the collective subject (the people): we have said that the voters are not willing to change their minds about the candidates, who are strongly characterised, and therefore the people will not be willing to change their minds either. And if we wanted to consider it as a collective entity to which we could attribute authorship of a constitution, we would have to admit that the people would be irredeemably irrational, to the point where it could not be considered a subject similar to individual subjects.

Condorcet's result was generalized by Kenneth Arrow and earned him the Nobel Prize in Economics for the year 1972 (Arrow 1951). His impossibility theorem is a major result concerning the fundamental concepts of political theory, although it would be wrong to draw negative conclusions about the very possibility of democracy. Arrow himself summarised its political significance as follows, "Most systems are not going to work badly all of the time. All I proved is that all can work badly at times." To the contrary, it seems to me that the theory that the author of a constitution should be a real collective subject – the people – is seriously damaged by the argument.

It could perhaps be argued that the people only occasionally are irrational, in much the same way that real individuals are irrational. If the occasional irrationality of individuals is not a sufficient reason to deny them the quality of subjects, why should we deny it to the people? The answer is twofold. First, it can be shown that cases of circular collective preferences are relatively rare in ordinary political elections, when there are many voters and few candidates. (A mathematical theory has been developed that deals with these phenomena and quantifies them exactly.) But if the people, or any other collective entity, were a subject, there would be an indefinite number of occasions when they are called upon to express preferences, and on a far greater percentage of these occasions their preferences would be circular. For example, if we asked the set of guests at a wedding to vote to choose the people with whom to share a dinner table, we would have as many voters as candidates. As we know, leaving the majority of guests unsatisfied is unfortunately a very real possibility.

Second, it is true that we are all occasionally irrational, but, unfortunate as it is, no one has ever made a big deal out of it: why should we get

over-worried in the case of collective subjects? There is a difference, which I have already alluded to, between our individual irrational behaviours and those of the supposed subject, the people. We know how to correct our mistakes – at least, when someone points them out to us. That is why we cannot hope to get rich at the expense of our car-loving and occasionally confused friends. But in a case of circular preferences the people cannot correct themselves if their members do not change their minds. The percentage of cases of irrationality is not in question here: it only takes a single case to declare that someone is hopelessly irrational. Suppose someone is able to add any two numbers without making mistakes but for some mysterious reason cannot calculate 2 + 3 at any cost and despite all our explanations goes on endlessly to say that 2 + 3 = 1729. Or even worse, suppose we know that in only one case does he make such an error, but we don't know what that case is. Would you take him as an accountant? ("Come on, it's a very small error in only one case!").

The conclusion seems forced to me that the people as a collective subject must be a fiction, like the present king of France and the phlogiston.[4] After some individuals formulated the text of a constitution, after it was put to a vote and approved (presumably by a majority, because unanimity seems unattainable), we can retrospectively pretend that the people as a whole were its concordant author and by that themselves, exercising intelligence and will, made commitments for themselves in the future and constituted themselves as a people (*demos*). But this is precisely only a pretence.

Even in our case when, instead of electoral systems, we are dealing with the rationality of the subject who is the author of a constitution, the conclusion is not troubling (except for the theory that it is the actual people who are the author of modern constitutions). Indeed, what benefit could we have expected if it had been established that the people is a real subject and not merely imaginary? Ferrara cares to distinguish the people exercis-

[4] Of course, nothing prevents us from imagining the present king of France, but Russell's theory of descriptions, which has much authority among contemporary philosophers, allows us to dispense with even this fictitious individual (the real one is obviously nonexistent) while still recognising that utterances such as 'The present king of France is bald' and 'The present king of France does not exist' are not truth-valueless (Russell 1905).

ing constituent power from the set of individuals interacting in a market. In a market the interests of individuals are conflicting or at any rate not all jointly satisfiable. Each person thinks only of himself. This would not be the case in a constitutionally regulated society that is – to use a characterisation by John Rawls – a cooperative venture for mutual advantage, even though it is typically marked by a conflict as much as by an identity of interests.[5] To account for this (partial) convergence of purpose and action among the citizens of a state it seems to Ferrara necessary to assume that some form of unity exists among them. He claims that this unity can be realised only if the citizens form a single subject, a people that acts politically, in the sense that it chooses certain policies in preference to others, in a decision-making process that binds each citizen and is capable of sufficient shared intentionality to be the author of a constitution.[6]

I, however, fail to see how this plural subject – the people – can serve to satisfy that need. In fact, I think it is an impediment. If it were a subject endowed with intentionality, in what relationship would it stand with the other subjects, the individual citizens who are part of it? Necessarily they should be different subjects and external to each other. Of course, citizens are part of the people but we cannot say – it would make no sense – that individual intentionalities are part of the collective intentionality. One intentionality (one mind) cannot be part of another. And two distinct intentionalities can get along just as well as they can conflict. If we wanted to insist that the collective one somehow realises the concord of citizens and does not conflict with them, we would have to postulate another intentionality that 'includes' both the collective and individual ones. Once again the Third Man proves to be a powerful, and lethal, argument.

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[5] "Then, although a society is a cooperative venture for mutual advantage, it is typically marked by a conflict as well as by an identity of interests" (Rawls 1971, 4).

[6] "[A] people can *act politically*, in the sense of publicly choosing, in law-regulated ways, one policy over another, thus prioritising one collective end aver another in a decision-making process that binds, or at least significantly affects, every member" (143) and "our 'political conception of a people' must assume that each of the peoples whose constitution was cited above is capable of enough shared intentionality to author it" (143).

Moreover, the opposition between the people and the market can also be questioned, and here again we have much to learn from a debate at the beginning of political philosophy. "It is best that the whole state should be as much of a unity as possible" – Socrates says at one point, in Plato's R*epublic* (R*epublic* 422e ff, 462a ff.) Aristotle's main objection to this view of the state is that it overvalues unity and uniformity.

> The state consists not merely of a plurality of men, but of different kinds of men; you cannot make a state out of men who are all alike. Consider in this connection the difference between a state and an alliance: the purpose of an alliance is military assistance, and its usefulness depends on the amount of that assistance, not on any differentiation in kind; the greater the weight, the greater the pull. [...] On the other hand, constituents which must form a single unity differ in kind. Hence, as I have already stated in my E*thics*, 3 it is *reciprocal equivalence* that keeps a state in being. (T*he* P*olitics*, 1261a22) ['Reciprocal equivalence' – *to ison to antipeponthos* (N*icomachean* E*thics*, V) – is the principle of mutually supporting diversity of function, whereby (to take a simple example) a shoemaker provides shoes for a bakery who provides bread in return] (Aristotle 1962, 103).

And little beyond that:

> Undoubtedly there must be some unity in the state, as in a family, but not total unity. On the road to gradual unification, at some point the state, if it does not fail altogether as a state, is endangered and becomes worse. It is as if one wants to reduce harmony to unison and rhythm to a single beat. As I have already said, a state is a plurality that must let unity be produced by education (Aristotle 1962, 116).

In a Greek city-state, individuals, families, tribes, freemen and slaves, citizens and foreigners, who had different and competing skills, functions, and economic interests, met and clashed and supported each other. But doesn't the same hold true in a marketplace? Ferrara contrasts the "independent but convergent" actions of individuals acting in a marketplace with the exchange of reasons and consultations that precedes

deliberations among the members of a people.[7] But it does not seem to me that the actions of individuals in a market are independent: supply and demand evidently take into account each other and coordinate.

Observe then that the assumption that the people would be a real subject endowed with intentionality, and not a mere fiction, directly conflicts with Rawls' own critique of all forms of utilitarianism in one of the opening paragraphs (§5) of A T*heory of* J*ustice*:

> It is a conspicuous feature of the utilitarian position on justice that the way in which this sum of satisfactions [e.g., of rational desires] is distributed among individuals matters no more (except indirectly) than the way in which an individual person distributes his satisfactions over time. [...] The most natural way to arrive at utilitarianism (though of course it is not the only way to do so) is to adopt for society as a whole the principle of rational choice for a single person. Once this point is recognized, one immediately understands the place of the impartial spectator and the insistence on sympathy in the history of utilitarian thought (Rawls 1971, 26-27).

We know what Rawls' critique of this position is:

> This position on social cooperation is the consequence of the extension to society of the principle of choice for a single person and then, to make this extension work, of the merging of all persons into one through the acts of imagination of the sympathetic impartial spectator. Utilitarianism does not take the distinction of persons seriously (Rawls 1971, 27).

What else does the hypothesis of the people as real individuals endowed with intentionality amount to, if not precisely the fusion of all people into one and the refusal to take seriously the distinction of per-

[7] "When we attribute to a market, or to a social system, positive or negative reactions to circumstances, we are really using those terms as a shorthand for what millions of individuals, independently but convergingly, do. When instead we attribute to a *people* positive or negative reactions to possible options, we imagine that some sort of inter-individual exchange of reasons – however minimal, anonymous, or impersonal – does take place, a minimal consultation according to some mechanism that in the end, if only via simple majority rule or acclamation, selects one or the other option as *imputable to the whole collectivity*" (143).

sons? Note that Rawls' critique primarily strikes at the assumption that the unbiased onlooker can even imagine the people as one person, but *a fortiori* it also strikes at the stronger assumption that the people is not just a fictitious entity like the current king of France and the phlogiston, but has real existence of its own, either as *ethnos* or *demos*.

Ferrara says that "Rawls unreservedly sides with Schmitt in affirming the non-fictional, not merely retroactively or 'constructed', existence of constituent power as the power of a subject — the people, in democratic theory — 'to establish a new regime', to bring into being 'a framework to regulate ordinary power, and to articulate in a constitution its political ideal 'to govern itself in a certain way.'" (123) I do not read the passages from Rawls quoted by Ferrara (on pages 231 and following of *Political Liberalism*) in the same way. Indeed, I find this other passage little further: "The idea of right and just constitutions and basic laws is always ascertained by the most reasonable political conception of justice and *not by the result of an actual political process*." (italics mine, Rawls 1993, 233)

But above all, I do not see why Rawls should resort to a real subject, or even an imaginary subject, to make it the author of a constitution. Consistent with the last quoted passage that states, in essence, that the judgment on the justice of a constitution is of the same kind as the judgment on the reasonableness of a philosophical conception or theory, and not the verdict of a vote, Rawls resorts to a mental experiment. In *A Theory of Justice*, the thought experiment is crystal clear: we are asked to imagine ourselves in the hypothetical situation of the original position and to verify that, in that situation, the principles of justice formulated by the theory would appear acceptable to us. The original position in a certain way forces us to be impartial and not to privilege the social position in which in fact each of us finds ourselves. This impartiality is the same thing as reciprocity and reasonableness.[8] If Rawls is right, if each of us is convinced that in the original position she herself 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?

[8] See the characterisation of reasonable inclusive doctrines on pp. 58ff. and especially p. 62 of Rawls 1993.

But perhaps Ferrara, who distinctly prefers P*olitical* L*iberalism* to A T*heory of* J*ustice*, thinks Rawls must abandon that thought experiment once he embraces the kind of normativity implied in the second work: "this normativity [of P*olitical* L*iberalism*] cannot be that of 'justice as fairness' which is the result of the original position discussed in A T*heory of* J*ustice*. That interpretation is precluded by footnote 7 of the second lecture in P*olitical* L*iberalism*." (126) Footnote 7 immediately follows this period in the main text, "To see justice as fairness as trying to derive the reasonable from the rational misinterprets the original position". Here is the footnote: "Here I correct a remark in T*heory* [*of* J*ustice*], p. 16, where it is said that the theory of justice is a part of the theory of rational decision. From what we have just said, this is simply incorrect. What should have been said is that the account of the parties, and of their reasoning, uses the theory of rational decision, though only in an intuitive way. This theory is itself part of a political conception of justice, one that tries to give an account of reasonable principles of justice. There is no thought of deriving those principles from the concept of rationality as the sole normative concept. I believe that the text of T*heory* as a whole supports this interpretation" (Rawls 1993, 53).

It seems to me that Ferrara takes footnote 7 as a rejection by Rawls of his earlier (T*heory's*) position, as if the thought experiment of the original position asked us to imagine purely rational subjects who lack a sense of justice and do not recognise the independent validity of other subjects' claims. Instead, I think Rawls in that note meant only that already in A T*heory of* J*ustice* (despite the unfortunate remark on page 16) the reasonable and the rational are complementary ideas and neither can stand without the other. As I have said, the principle of reciprocity (i.e., reasonableness) is imposed on subjects in the original position by the veil of ignorance, which makes it inevitable to acknowledge the validity of other subjects' demands as being on the same footing as ours – simply because their demands might be ours. It is thus not a discovery of P*olitical* L*iberalism* that merely rational, and not also reasonable, agents can be psychopaths if their only interest is in advancing their own welfare.[9] My

[9] "Rational agents approach being psychopathic when their interests are solely in benefits to themselves" (Rawls 1993, 51).

conclusion, then, is that the thought experiment of A *Theory of Justice*, or at any rate a reasoning of the same kind that philosophers use to judge whether a philosophical theory is acceptable – and not the result of an actual vote or other manifestation of the will of a supposed plural subject such as the people – continues to be for Rawls the way in which each of us, and therefore all citizens belonging to a people, could accept a just constitution and feel it as their own.

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Sovranità generazionale vs. Costituzione permanente[1]

Anna Elisabetta Galeotti

A*bstract*. How can the containment of democratic government in the rule of law and the constitution be justified in terms of democratic legitimacy? This question, which the recent rise of populism has made urgent, is faced in this paper by a critical reconstruction of the chapter 5 of Sandro Ferrara's S*overeignty across Generations*. Ferrara's position refers to the distinction between the people representing the democratic sovereign expressed by the constitution, and comprising all generations, from the enactment of the constitution on, and the electoral body, representing only the living segment of the people. This paper puts Ferrara's view in the contest of the longlasting discussion over the perennial constitution vs. generational sovereignty, and concludes that his idea of the people as an abstract transgenerational entity is not necessary to save democracy from the tyranny of the majority. Finally the author considers the notion of generational sovereignty within the literature of intergenerational justice and show its useful function.

Keywords: generational sovereignty, perennial constitution, people, electoral body, sequential vs. serial sovereignty, *demos*, *ethnos*.

La distinzione e allo stesso tempo la conciliazione di liberalismo e democrazia è una questione ricorrente nel pensiero politico liberaldemocratico. Nelle sue lezioni, Norberto Bobbio ripeteva che il liberalismo è un ideale

[1] Questa pubblicazione è stata realizzata con il cofinanziamento dell'Unione Europea – Next Generation EU, nell'ambito del Piano Nazionale di Ripresa e Resilienza (PNRR), Investimento Partenariato Esteso PE8 "Conseguenze e sfide dell'invecchiamento", Progetto Age-It (Ageing Well in an Ageing Society), CUP.

politico che pone vincoli al potere statale per garantire le libertà e i diritti civili, mentre la democrazia è una forma di governo che esprime la volontà popolare tramite suffragio. Nonostante nel mondo delle democrazie occidentali liberalismo e democrazia formino insieme il sistema politico liberaldemocratico, dove la volontà della maggioranza è limitata dai diritti costituzionalmente garantiti e dallo stato di diritto, in realtà liberalismo e democrazia non procedono necessariamente uniti. Nella storia abbiamo esempi di stati liberali, ma non propriamente democratici, data la limitazione dell'elettorato a una piccola porzione della popolazione, e di stati democratici ma non liberali, quando l'elezione popolare non ha luogo in una cornice di stato di diritto. In effetti, liberalismo e democrazia fanno riferimento a due diversi tipi di legittimità: la legittimità liberale è data dal rispetto dello stato di diritto e della cornice costituzionale, con la divisione dei poteri e la protezione dei diritti dei cittadini e delle cittadine, cornice che pone dei vincoli a ciò che la maggioranza può decidere e fare. La legittimità democratica è data invece dalla espressione della volontà popolare che sceglie i suoi rappresentanti e li investe del potere di agire in nome di tutti. In un sistema liberale e democratico, la legittimazione dal voto popolare dà ai rappresentanti il potere di agire politicamente nella cornice della *rule of law* e della Costituzione.

Negli ultimi decenni, tuttavia, abbiamo assistito, e proprio nelle democrazie liberali più consolidate, a una tendenza al divorzio fra le due forme della legittimità a scapito della legittimità liberale, ossia della cornice che vincola le decisioni della maggioranza a un quadro normativo costituzionale, a cui tutti i cittadini e le cittadine, rappresentanti e rappresentati, sono sottoposti. Mi riferisco al fenomeno del populismo che è stato ampiamente analizzato nell'ultimo ventennio[2], ma di cui qui sottolineo specificamente l'accentuazione della legittimazione via investitura popolare a scapito del rispetto delle regole e dei diritti fondamentali, ossia della legittimazione liberale. Curiosamente, nel discorso pubblico, la critica ricorrente alle varie manifestazioni del populismo nelle democrazie occidentali spesso riguarda il presunto deficit di de-

[2] Tra i molteplici studi sul populismo apparsi negli ultimi vent'anni: Blokker, Anselmi 2020; Canovan 2005; Cohen 2019; Eatwell, Goodin 2018; Müller 2016; Urbinati 2019.

mocrazia, anziché il deficit di liberalismo, quando in effetti i leader populisti hanno sempre fatto riferimento al consenso popolare come fonte di legittimità di scelte politiche anche in contrasto con i principi dello stato di diritto. Il leader ungherese Orbàn è in questo senso eloquente: nonostante le richieste dell'Unione Europea e le censure per le contravvenzioni allo stato di diritto, Orbán ha proseguito per la sua strada forte della legittimazione del voto popolare.

Tra i tanti tentativi di rispondere alla sfida del populismo alle democrazie liberali, si segnala come particolarmente originale lo studio di Alessandro Ferrara, *Sovereignty across Generations* (2023) che vede nel riferimento al voto popolare come legittimante l'azione di governi populisti, poco inclini al rispetto delle regole istituzionali, un problema non solo per la pratica politica democratica, ma anche per la teoria normativa democratica. La questione centrale che Ferrara affronta è appunto il contenimento dell'esercizio del potere dei governi democraticamente eletti entro i vincoli delle norme e dei principi costituzionali. Se la questione rientra nella riflessione tradizionale dei rapporti fra liberalismo e democrazia, come accennavo, tuttavia l'approccio, nel contesto della teoria normativa della democrazia, e poi la soluzione proposta si staccano da quella riflessione tradizionale. Per Ferrara la legittimità può essere solo democratica, dal momento che le costituzioni degli stati democratici sono proposte dai costituenti che rappresentano il popolo sovrano cui spetta poi il compito di sottoscriverle. In particolare, la legittimità delle costituzioni non sta nell'adesione a certi principi e ideali preesistenti, per esempio iscritti nel diritto naturale, ma all'opposto, la legittimità costituzionale sta nella scelta ragionata da parte del potere costituente del popolo sovrano di norme e principi che rappresentano «la più ragionevole concezione della giustizia» appropriati a dar vita alla comunità politica in cui vivere in un tempo lungo che attraversa le generazioni.

Se pure la legittimità può essere solo democratica, ce ne sono tuttavia tre diversi tipi che si possono articolare a seconda che abbiamo a che fare a) con il potere costituente che istituisce la Costituzione; b) con il potere costituente subordinato che può emendare la Costituzione nel suo sviluppo storico; c) con il potere costituito che sceglie e agisce entro la cornice del dettato costituzionale. Questi tre poteri sono legittimi in quanto rappresentanti in modi diversi del popolo sovrano, la cui natura è al centro dei miei commenti sulla riflessione di Ferrara.

Intanto due parole sulla collocazione di questo studio che è propriamente parte della tradizione americana di "*Constitutional Theory*", che tuttavia nel nostro paese non corrisponde propriamente alla dottrina costituzionale, ma che si situa a un livello superiore rispetto a essa, una sorta di metateoria costituzionale che concerne la giustificazione delle costituzioni, nel loro nascere e nel loro permanere, e la giustificazione delle scelte politiche ordinarie entro la cornice disegnata dalle costituzioni. Il percorso teorico di Ferrara intende costituire uno sviluppo del paradigma tratteggiato in *Liberalismo politico* da John Rawls (1999) per proporre appunto una più compiuta meta-teoria costituzionale. Il primo punto che Ferrara affronta, ampliando Rawls, riguarda il potere costituente che è sì sovrano, ma che non è hobbesianamente indipendente da alcuna normatività, bensì è vincolato, non già a una legge di natura o a una preesistente concezione di giustizia, ma «alla più ragionevole concezione di giustizia» raggiunta tramite l'esercizio della ragione pubblica. In altri termini la sovranità democratica del potere costituente si esplica tramite un esercizio collettivo di ragione pubblica che approda a quella che al potere costituente appare come la più ragionevole concezione della giustizia, che, a sua volta, fornisce il quadro normativo di principi per delineare le norme costituzionali. Una volta definita la cornice di principi, ideali e norme che compongono la Costituzione, occorre chiarire come il potere costituente originario si relaziona rispetto al potere costituente subordinato, ossia quello che nel corso del tempo di una democrazia ha il potere di interpretare e emendare la Costituzione nella sua evoluzione storica. Infine di fronte al potere costituente, originario o subordinato, sta il potere costituito che ha il compito di implementare la Costituzione e di darne esecuzione, legiferando e agendo entro la cornice costituzionale. Le tre forme della legittimità sopra individuate, pur rispondendo ciascuna a una diversa normatività, e rispettivamente, alla normatività della più ragionevole concezione della giustizia, a quella dei principi costituzionali, e a quella delle norme e degli emendamenti della Costituzione, in ultima analisi, fanno tutte riferimento alla sovranità democratica. La volontà del popolo si situa in ogni caso entro un quadro normativo, ma è nel suo affermarsi che la vita politica dello stato prende forma democratica.

Ed è proprio nella concettualizzazione della sovranità democratica che Ferrara avanza la tesi più originale che sostanzia tutto il suo lavoro e che fornisce una risposta a livello della teoria normativa alla questione del

contenimento della volontà dell'elettorato entro la cornice del dettato costituzionale e dello stato di diritto. Facendo riferimento a due diverse tradizioni del pensiero politico sul popolo[3], Ferrara distingue fra il popolo (*the people*) che è propriamente *il sovrano democratico* e il segmento vivente del popolo che costituisce il *corpo elettorale* in un certo momento della storia di una democrazia e che elegge i rappresentanti politici e, indirettamente, il governo. In questo modo, il corpo elettorale non è il popolo nel suo insieme e la sua volontà espressa nel suffragio non è che un segmento della volontà popolare; analogamente i rappresentanti eletti non hanno potere costituente, ma solo potere costituito. In altri termini, lo spazio appropriato dei rappresentanti del corpo elettorale è quello della legislazione ordinaria, sotto l'ombrello della legge costituzionale che ne fissa i limiti. La legittimazione dal suffragio è dunque solo una componente della legittimità democratica da parte del popolo sovrano. Al contrario del corpo elettorale, che rappresenta solo il segmento attualmente vivente del popolo, il popolo è un'entità intergenerazionale che comprende tutte le generazioni a partire da quella costituente verso un futuro in linea di principio illimitato. Il popolo sovrano viene in essere ed è costituito proprio dalla cornice di principi, diritti e regole costituzionali, al di fuori dei quali non c'è popolo, ma moltitudine (come sostenuto dal pensiero contrattualista di Hobbes e Locke). È proprio la Costituzione che definisce l'identità politica del sovrano e che rimane costante attraverso le generazioni. Osservo che la dimensione transgenerazionale del popolo risulta in sintonia con un aspetto importante della *Teoria della Giustizia* di Rawls. Da un lato, la dimensione transgenerazionale interpreta e dà forma a uno dei requisiti formali dei principi di giustizia, ossia la definitività (Rawls 2008, 140-141). Dall'altro, prende sul serio l'idea rawlsiana che le parti in posizione originaria siano rappresentanti di una catena generazionale (Rawls 2008, 135) e quindi anche delle generazioni future perché la società giusta non è *one-shot* ma dura nel tempo[4]. Uno dei vantaggi della concezione intergenerazionale del popolo consiste nel fatto di poter interpretare il po-

[3] Jefferson [1789] 1979; Burke [1790] 2020, vedi anche Jefferson-Madison 2021.

[4] Norman Daniels (1988) afferma espressamente di sviluppare l'intuizione e intenzione di Rawls di aprire la giustizia distributiva a considerazioni generazionali.

polo come *demos*, propriamente nella sua dimensione politica sostituendo efficacemente l'interpretazione in termini di *ethnos* a cui, secondo Ferrara, la concezione seriale della sovranità darebbe necessariamente adito per poterne rappresentare la continuità nel tempo. Se il sovrano è costituito dal corpo elettorale attualmente esistente, quindi varia generazione dopo generazione, ciò che costituisce la continuità grazie alla quale, per es., ci riconosciamo come italiani, mentre i nostri vicini come francesi, ricade nell'etnicità, nella continuità storica territorialmente delimitata di gruppi che parlano una certa lingua e condividono un passato e una certa cultura. Viceversa se è la Costituzione a costituire un gruppo di individui in *popolo*, l'identità di quest'ultimo è un'identità politica e non etnica. Il che consente, tra l'altro, di pensare come parte del popolo sovrano tutti i cittadini e le cittadine indipendentemente dall'origine o dalle loro ascendenze nazionali e dalla loro cultura e risolvere a monte la questione dell'inclusione di chi pur vivendo e partecipando alla società non è parte del gruppo che storicamente abitava un certo territorio.

La tesi di Ferrara dunque si specifica nel fatto che la sovranità sia *sequenziale* e non *seriale*, ossia che non ci sia *generational sovereignty*, ma che ogni generazione 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. A questo punto Ferrara deve mostrare come il segmento vivente del popolo, ossia il corpo elettorale, esercita la sua porzione di sovranità, attraverso la rappresentanza politica e, d'altro canto, come si possa concepire che il popolo, quest'entità astratta intergenerazionale, possa esercitare la sua.

La proposta di Ferrara, che si specifica nel capitolo V del volume, prende forma attraverso un'analisi delle diverse modalità della rappresentanza. Facendo un'accurata disamina critica delle concezioni possibili della rappresentanza stessa che sono state discusse in teoria politica, a partire dal seminale lavoro di Hannah Pitkin (1967), fino ai contributi più recenti di Saward (2010) e Rehfeld (2018) egli cerca di distinguere il tipo di rappresentanza appropriata al corpo elettorale, da una parte, e al popolo dall'altro. Naturalmente la difficoltà è che solo l'elettorato è dotato di agency politica, con possibilità di protesta e di ritiro della fiducia alla prossima votazione. Ma, ci dice Ferrara, se i membri delle generazioni passate e future non hanno la capacità di esprimere le loro preferenze, i loro interessi possono tuttavia essere rappresentati. E quali

sono questi interessi? Per le generazioni passate l'interesse è la "*normative legacy*", depositata nei documenti costituzionali originali e successivi emendamenti, e per le generazioni future è l'interesse a esercitare una *agency*, ossia ad avere preservato lo spazio di azione garantito dalla cornice costituzionale. Una volta identificati gli interessi da rappresentare, vedremo come e chi potrà rappresentarli legittimamente. Ma ritorniamo ora alla rappresentanza del corpo elettorale. Tra i due corni del dilemma, se gli eletti siano delegati dei rappresentati, vincolati alla volontà dell'elettorato, o siano dei fiduciari, che fanno riferimento solo alla ragione e al bene pubblico, senza preoccuparsi della prossima elezione, Ferrara prende una posizione intermedia. Senza essere dei delegati, i rappresentanti del corpo elettorale sono al servizio degli elettori e occorre trovare una conciliazione tra gli interessi dell'elettorato e quelli del bene comune secondo i suoi rappresentanti. Viceversa la rappresentanza degli interessi del popolo, inteso come entità transgenerazionale, non può essere ostaggio di un suo segmento che potrebbe mettere a repentaglio le garanzie e i diritti che la Costituzione (e pertanto la maggioranza del popolo) ha definito per garantire che tutti i cittadini vivano da liberi e da eguali indipendentemente dalla generazione in cui a ciascuno capita di nascere. In gioco c'è appunto la preservazione della cornice liberale di garanzie, e diritti che una maggioranza eletta potrebbe anche sovvertire, mettendo a rischio le generazioni future del popolo. La rappresentanza appropriata del popolo così intesa è affidata alla Corte Suprema, che vigila sulla Costituzione e sui suoi possibili emendamenti e sue modifiche. In questo senso la Corte Suprema è propriamente un fiduciario della sovranità popolare, costituita dalla sequenza delle generazioni passate presenti e future che condividono la stessa identità politica[5]. Questo argomento è a sua volta sostenuto da sofisticate analisi di diverse interpretazioni di come intendere la *judicial review*, così come prima la rappresentanza dei votanti era sostenuta da una minuziosa ricostruzione delle numerose e diverse concezioni con i loro vantaggi e svantaggi.

[5] Vorrei qui far notare che la nozione di rappresentanza di interessi di persone che non esistono ancora come fiduciari, seppur sostenuta anche da Dennis Thompson (2016), è invece molto criticata da Axel Gosseries (2023, 161) il quale ne inferisce che con riferimento alle generazioni future non ha senso parlare di legittimità, quanto piuttosto di giustizia.

Per valutare appieno la proposta di Ferrara sulla natura transgenerazionale del popolo, credo sia opportuno collocarla nel contesto appropriato. Infatti la discussione sulla natura del popolo ha alle spalle una lunga tradizione che Victor Muñiz-Fraticelli ben ricostruisce nel suo articolo "The Problem of Perpetual Constitution" (2009) andando oltre la discussione fra Jefferson e Madison per risalire addirittura alla concezione medievale della sovranità, dove il sovrano non è una persona fisica ma una finzione giuridica limitata dalla tradizione e dalla legge naturale. Il sovrano ha sopra di sé soltanto Dio, ma la fonte della sua legittimità sta nella legge, nell'antica Costituzione del regno, non nella sua volontà. In questo modo viene preservata l'identità del sovrano nel tempo, perché appunto non coincide con la persona fisica del sovrano in carica, ma con la sequenza dei sovrani depositari dell'antica Costituzione e rappresentanti della sovranità. Durante il XVII e XVIII secolo, tuttavia, si afferma un'altra concezione della sovranità, volontaristica, che vede nella volontà del sovrano la fonte della legittimità, di cui Hobbes è forse l'esponente più noto e diretto. Con questa svolta, entrano in crisi sia la concezione della priorità dell'antica Costituzione sulla volontà sovrana, sia la continuità della sovranità nel tempo. Nel passaggio dal L*eviatano* allo stato liberale di John Locke, la concezione volontaristica della sovranità permane anche se il popolo sostituisce il sovrano assoluto. Jefferson conferma il volontarismo lockeano nella sua visione della Repubblica americana. Se tuttavia la fonte della legittimità della repubblica democratica è la volontà popolare, e se il consenso che legittima l'azione della repubblica è quello espresso effettivamente dal popolo, ecco che sorge il problema che il consenso espresso da una generazione non può rappresentare un vincolo per la generazione successiva. Non a caso è il conservatore Burke che riecheggia la teoria medievale della sovranità come proprietà di un'entità temporalmente estesa a garanzia dell'identità della nazione, mentre Jefferson vuole preservare l'autogoverno della generazione che deve poi obbedire alle leggi. Quindi la discussione di Ferrara sulla natura sequenziale o seriale della sovranità ha lontane ascendenze, anche se originale è la curvatura di questa discussione sul problema del populismo.

In tempi recenti la questione che Muñiz-Fraticelli chiama, riecheggiando Jefferson, «il problema della Costituzione permanente» è stato

affrontato e discusso da diversi autori: per esempio, Janna Thompson sostiene che la nazione è una comunità politica transgenerazionale legata insieme da obblighi reciproci e prerogative (2009, 25) e che questa concezione rende conto di ciò che abbiamo ricevuto dai predecessori e degli obblighi che abbiamo nei confronti del futuro. Aggiunge però che una simile concezione difficilmente è compatibile con le teorie contrattualiste liberali che, secondo lei, non sono adatte ad affrontare il problema della riconoscenza ascendente e dei doveri nei confronti delle generazioni future, mentre, dal suo punto di vista, le teorie comunitariste, proponendo una visione di società come rete di solidarietà e obblighi reciproci rappresentano la cornice teorica più adatta a concepire il popolo come entità transgenerazionale. In realtà, la concezione del popolo come entità transgenerazionale specificamente contrasta non tanto con le teorie liberali e contrattualiste, ma con le concezioni spiccatamente volontariste, secondo le quali, lockeanamente, la legittimità viene dal consenso e le disposizioni legislative a cui i sottoposti non hanno dato il loro consenso non sono legittime. Naturalmente a questo proposito centrale è l'interpretazione del consenso, come già Hanna Pitkin aveva messo in evidenza in un noto saggio (1972). In realtà neanche la posizione di Jefferson a favore della sovranità generazionale è immune dal problema di quale consenso: perché se ogni generazione deve ratificare di nuovo la Costituzione con eventuali emendamenti, che succede ai giovani che diventano elettori poco dopo che la ratificazione ha avuto luogo? Devono aspettare vent'anni per poter dare il loro consenso esplicito, e questo comporta che per vent'anni circa, sono di fatto esclusi dal popolo democratico e subiscono la legge come sudditi. Per ovviare a questo problema normativo, Michael Otsuka (2003) che sostiene la sovranità generazionale, fa ricorso alla tesi del consenso tacito, già presentata da Locke per ovviare al fatto che il consenso esplicito non viene mai richiesto a chi nasce entro uno stato democratico. Sono noti tuttavia i difetti del consenso tacito, tra cui l'asimmetria tra il restare nell'ordinamento di nascita e l'exit che è molto più costoso e non sempre fattibile: di fronte a una simile e ovvia asimmetria, è accettabile interpretare la permanenza nello stato in cui si è nati come "consenso" al suo ordinamento costituzionale? Muñiz-Fraticelli propone come soluzione del problema della Costituzione permanente il consenso ideale, ossia il consenso che individui ragionevoli, in condizioni di scelta ideali, darebbero a un certo

ordine politico. È al consenso ideale che, per esempio, si richiama John Rawls secondo cui il consenso è quello che cittadini ragionevoli darebbero alla concezione della giustizia e ai *constitutional essentials* dell'ordine liberaldemocratico[6]. In sintesi, se si utilizza la nozione di consenso ideale si risolve non tanto e soltanto il problema della generazione di giovani che entrano nella maggiore età dopo la ratifica periodica al dettato costituzionale, ma in generale il problema del consenso transgenerazionale alla Costituzione. Tuttavia, si noti che quando si passa dal consenso esplicito al consenso ideale, il ruolo giustificativo non è tanto dato dalla scelta in sé quanto dal fatto che l'oggetto della scelta presenta tali caratteristiche che individui ragionevoli non possono non preferirla ad altri. Il volontarismo cede il passo perché la scelta poggia sulla ragione, e come giustamente sottolinea Ferrara, sulla ragione pubblica, ossia condivisa dai cittadini e dalle cittadine di un certo ordinamento[7]. Il vantaggio di questa posizione non è solo pragmatico (o strumentale come lo chiama Muñiz-Fraticelli), nel senso di garantire stabilità a progetti a lungo termine, ma anche normativo in quanto garantisce la possibilità delle generazioni future di avere *agency* politica, di avere un ordinamento che preserva i loro diritti politici e capacità di agire politicamente (Holmes 2005). Un'ulteriore caratteristica della concezione della Costituzione permanente evidenziata da Jed Rubenfeld (2001) e dallo stesso Muñiz-Fraticelli è ontologica, relativa alla natura del popolo sovrano che viene in essere nel momento costituente come entità collettiva e non come aggregato di individui fisici. La natura collettiva del popolo rende conto del suo non coincidere con gli individui che in un dato momento del tempo lo rappresentano. Come una squadra di calcio sopravvive al ricambio dei giocatori, così il popolo persiste nei ricambi generazionali che, si sottolinea, sono continui. Una concezione aggregativa e riduzio-

[6] Questo detto sommariamente è la posizione di *Liberalismo politico*; tuttavia il consenso ideale gioca un ruolo giustificativo anche in *Teoria della Giustizia*, in quanto la scelta collettiva dei principi di giustizia è data da individui razionali nelle condizioni di scelta definite dalla posizione originaria.

[7] Va sottolineato che nel caso di Ferrara la normatività della ragione pubblica non è preesistente al potere costituente che vi si adegua, ma è costituita dalla discussione fra costituenti ragionevoli come la concezione più ragionevole della giustizia.

nistica del popolo renderebbe ontologicamente vuoto il concetto stesso di popolo. In realtà Ferrara non affronta direttamente questo argomento ontologico, in quanto non considera la possibilità del popolo come aggregato di individui, mentre sottolinea piuttosto che la caratterizzazione dell'entità collettiva del popolo, se al di fuori da quella costituita dalla Costituzione, come *demos*, ricade necessariamente nell'*ethnos*, nella natura storico-linguistica-tradizionale. D'altra parte Ferrara, nel perorare la tesi della natura sequenziale e non seriale della sovranità, non ha come bersaglio il volontarismo, per esempio di Otsuka, ma gli argomenti populisti che si riferiscono alla nazione con espliciti richiami etnici.

L'alternativa sovranità sequenziale/*demos* vs. sovranità seriale/*ethnos* non è in realtà così pacifica. L'identità politica del popolo come *demos* non richiede necessariamente il riferimento a un'entità astratta transgenerazionale che comprenda tutte le generazioni dalla costituente all'infinito: è sufficiente concepire il popolo come entità collettiva comprensiva delle generazioni che si sovrappongono e che continuamente si sostituiscono, quindi non coincidente con il corpo elettorale di oggi perché già domani esso avrà perso e acquisito nuovi membri[8]. In questo modo, si preserva il *demos*, la cui *agency* è affidata a chi può esprimere preferenze, autorizzare e ritirare la fiducia, ma si evita il rischio di ipostatizzare un popolo permanente fuori dalla temporalità con la difficoltà aggiuntiva che immaginare gli interessi oltre le generazioni immediatamente seguenti o attribuirne a quelle passate è ritenuto filosoficamente problematico[9]. Certo la soluzione del popolo come entità collettiva comprensiva delle generazioni che si sovrappongono e in costante evoluzione non garantisce che la Costituzione, pur emendata, permanga indefinitamente. Se a un certo punto il popolo, composto dalle generazioni che si sovrappongono, e che ha a cuore gli interessi dei suoi discendenti, per esempio, decidesse collettivamente di fondersi in una federazione con altri, aprendo un nuovo momento costituente, in che senso questa scelta violerebbe gli interessi di chi non esiste

[8] In questo senso, ontologicamente il popolo come entità collettiva delle generazioni che si sovrappongono e si succedono è del tutto analogo a una squadra di calcio: l'esistenza non dipende dall'esistenza dei suoi membri in un dato momento, ma neanche dipende da membri passati e da membri futuribili.

[9] Mi riferisco qua al noto problema sollevato da Parfit (1984) sulla questione della "*non-identity*".

più e non esiste ancora, e che quindi per definizione non ha interessi? E in che senso sarebbe illegittima da un punto di vista democratico? Capisco e condivido le preoccupazioni politiche di Ferrara sulla possibile tirannia della maggioranza, ma non credo che possano essere definitivamente risolte nella direzione da lui indicata.

Occorre tuttavia considerare un altro aspetto della sovranità generazionale, che va oltre il contesto qui presentato della questione della perpetuità costituzionale, e che fa riferimento alla letteratura sulla giustizia fra generazioni. In questo caso, il campo si allarga, poiché con questo concetto non si intende solo la sovranità politica e giurisdizionale, quanto la capacità di una generazione di autogovernarsi, di prendere decisioni per sé, per il proprio benessere, senza trovarsi vincolata a decisioni passate che la svantaggiano. Questa prospettiva è esplorata in dettaglio da Gosseries (2016) nell'ambito di una raccolta di studi sulle istituzioni per le generazioni future. Il fuoco della questione è così spostato dall'ambito politico e giuridico in senso stretto, a quello dell'autonomia decisionale di una generazione rispetto a tutte le scelte che riguardano il proprio benessere e quello delle generazioni successive. È chiaro che in questa prospettiva, il bersaglio polemico non è la deriva populista, ma le conseguenze negative che certe scelte fatte da generazioni passate hanno su quella presente e su quelle future delimitandone il campo di possibilità e mettendo in questione quello che Gosseries assume come un valore non controverso, la sovranità generazionale, ossia la capacità di ogni generazione di decidere il proprio destino. Se la sovranità generazionale è un valore, questo comporta che le scelte delle generazioni presenti devono essere tali da non mettere in questione la possibilità di scelte delle generazioni future. Insomma la sovranità generazionale della coorte A non deve ridurre la sovranità generazionale di B, C, D ecc. Questo vale nell'ambito prettamente politico, ma va oltre. In tale prospettiva, decisamente orientata al futuro, Gosseries non contesta l'esistenza di vincoli costituzionali, che come ha sostenuto Steven Holmes, sono quelli che garantiscono la possibilità dell'*agency* di generazioni future. L'esistenza di una cornice costituzionale di norme e principi sottratti al gioco delle maggioranze del momento non viene visto da Gosseries come una limitazione della sovranità generazionale, alla Jefferson, ma come giustificata per consentire a ogni generazione un'adeguata autonomia sul piano della dimensione politica, sociale ed economica. Un'autonomia tanto più accentuata dal fatto dell'emendabilità della Costituzione stessa, secondo le regole previste. La preoccupazione di

Gosseries riguarda piuttosto le scelte a breve termine politiche del potere costituito che hanno effetti devastanti sull'ambiente, l'energia, il benessere delle generazioni future. Il tema di conciliare la sovranità generazionale con la conservazione per le generazioni future di uno spazio di scelta che ne garantisca l'autonomia è affrontato in chiave più politica da Dennis Thompson (2016) che legge la possibilità della sovranità generazionale per le coorti a venire come legata alla presenza di precisi vincoli all'ampiezza dell'autonomia della generazione presente. Per Thompson la garanzia che le generazioni future godano della stessa *agency* di quelle passate non è data solo dai vincoli costituzionali che certo sono indispensabili, ma non sufficienti. Non sufficienti perché potenziali effetti negativi sulle generazioni future delle scelte operate da una certa generazione, che ne riducono la sovranità sul proprio destino, non riguardano solo la cornice costituzionale. La cornice istituzionale preserva la possibilità di autogoverno democratico di quello che Ferrara chiama il segmento vivente del popolo, ma le scelte effettuate da governi democratici hanno conseguenze concrete sulla possibilità futura di scegliere o meno un certo stile di vita. Pertanto Thompson suggerisce che, accanto alla Costituzione, vigilata dalle corti supreme, venga istituita un'assemblea di cittadini che agisca come fiduciario democratico per le generazioni future, attraverso raccomandazioni e supervisione delle scelte politiche che potrebbero avere impatto negativo sul futuro.

Il senso del mio richiamo a questa discussione consiste nel fatto che la nozione di sovranità generazionale non è esclusivamente legata al dibattito Jefferson-Madison relativo alla perpetuità o meno della Costituzione e alla natura del popolo sovrano, ma può essere intesa come il principio che afferma l'eguaglianza politica fra le generazioni. In quest'ottica, vincoli costituzionali transgenerazionali non implicano una diminuzione dell'eguaglianza politica fra le generazioni, visto che sono comuni a tutte a partire da quella costituente. Né il fatto di non appartenere alla generazione costituente rappresenta una diseguaglianza nel potere politico delle generazioni a seguire e sulla base di due diverse considerazioni: la prima, molto sottolineata da Ferrara, così come da Muñiz-Fraticelli, perché la scelta del potere costituente del popolo è una forma di *precommitment*[10], che si ispira a principi e norme

[10] La nozione di *precommitment*, avanzata da Jon Elster (1979), è stata da lui stesso utilizzata per dar conto dei vincoli costituzionali come strategia razionale

che meglio proteggono la possibilità futura dell'autogoverno democratico; la seconda, perché le costituzioni si evolvono nel tempo, grazie alla possibilità di essere emendate secondo procedure che di nuovo garantiscano la possibilità futura di esercitare autogoverno. In conclusione, ritengo che l'argomento di Ferrara è convincente relativamente alla indispensabilità dei vincoli costituzionali per la legittimità democratica, ma non così persuasivo relativamente alla concezione ideale del popolo come astratta entità transgenerazionale. Come ho accennato sopra, la concezione del popolo come entità astratta transgenerazionale virtualmente infinita presenta dei problemi sul piano ontologico, morale e politico.

Credo che se invece si concepisse il popolo come l'insieme delle generazioni coesistenti in un dato momento della vita politica di una democrazia, sarebbe possibile considerare per analogia i 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. Si eviterebbe in questo modo di ipostatizzare un'entità astratta come il popolo transgenerazionale la cui relazione con il «segmento vivente del popolo» a mio giudizio rimane oscura. Negli studi sulla giustizia intergenerazionale, il problema dei doveri verso le generazioni future è affrontato esattamente in questo modo, partendo dai doveri di reciprocità, e non solo, fra le generazioni che si sovrappongono: per estensione ci si muove alle generazioni future più prossime e poi anche a quelle più lontane[11]. Questo non risolve esattamente il *non-identity problem* di Parfit, ma consente l'estensione della cura per i nostri immediati discendenti a quelli più lontani. Questo rilievo non vuole essere una critica all'argomento principale dello studio di Ferrara che condivido, ma un invito a conciliare la sua posizione con una posizione in fondo non dissimile e che tuttavia afferma il valore della sovranità generazionale.

Mi rimane invece una perplessità sul ruolo delle corti supreme come fiduciarie del popolo transgenerazionale. Nell'argomento di Ferrara, le

contro i rischi di decisioni casuali e impulsive. Questo comporta anche nella versione di Elster il riferimento a una normatività del potere costituente che nel suo caso è dato dalla razionalità strategica, mentre nel caso di Ferrara è dato dalla ragione pubblica che porta i costituenti a deliberare sulla concezione più ragionevole di giustizia tra quelle alternative.

[11] Cfr. Meijers 2018.

corti supreme rappresentano gli interessi del popolo nella sua accezione, nel senso che sono fiduciarie della sua volontà espressa nella Costituzione. Questa rappresentazione è teoricamente necessaria a Ferrara per argomentare che sebbene il popolo non abbia *agency*, tuttavia ha degli interessi rappresentabili, affidati al potere costituente subordinato, ossia al potere che non solo custodisce la Costituzione, ma la interpreta e la emenda. Tuttavia nella teoria non ideale, le corti supreme sono composte da uomini e donne con orientamenti politici e a volte selezionati proprio per quelli, la cui capacità di imparzialità è, come in tutti gli umani, limitata. Non voglio neanche entrare nel merito dei comportamenti e scelte della Corte Suprema degli Stati Uniti, dove i giudici sono di nomina presidenziale e quindi orientati politicamente, e dove le scelte di un presidente possono influenzare le decisioni della corte negli anni a venire, reinterpretando e a volte limitando i diritti di generazioni successive. Focalizzando l'attenzione alla nostra Corte Costituzionale, mi pare che anche in questo caso, la funzione di garanzia della norma costituzionale non sempre rappresenta gli interessi delle generazioni presenti e future. Mi riferisco, per esempio, alla sentenza n. 138 del 14 aprile 2010[12] che ha affermato l'inammissibilità del matrimonio fra persone dello stesso sesso. Sulla base dell'art. 2 della Costituzione, secondo cui il matrimonio è l'unione di un uomo con una donna, la corte così si è espressa: «a fronte di una consolidata e ultramillenaria nozione di matrimonio come unione di un uomo e di una donna» e data l'inscindibile «finalità procreativa del matrimonio che vale a differenziarlo dall'unione omosessuale» le unioni omosessuali non possono essere riconosciute come matrimonio, pur riconoscendo nell'art. 3 della sentenza il diritto alla tutela delle unioni omosessuali in quanto formazione sociale. Questo ha fatto sì che nel nostro ordinamento abbiamo riconosciute solo le unioni civili, con le relative conseguenze negative per le adozioni e il riconoscimento dei figli di una coppia omogenitoriale. Ovviamente si possono portare esempi anche nell'altro senso, come la sentenza n. 242/2019[13] sull'ammissibilità

[12] http://www.portalenazionalelgbt.it/bancadeidati/schede/sentenza-1382010-della-corte-costituzionale.html#:~:text=138%20del%202010%2C%20afferma%20che,tutela%.

[13] https://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2019&numero=242.

in certe circostanze della scelta del malato di porre termine alla sua vita, sentenza cui però è seguita nel 2022 la sentenza n. 50/2022[14] sull'inammissibilità del referendum sull'eutanasia. In sintesi, mi sembra si possa dire che le corti svolgono certo una funzione indispensabile per vigilare sui confini delle leggi ordinarie entro il quadro costituzionale, ma che siano i fiduciari del popolo transgenerazionale dal passato a un futuro illimitato mi sembra problematico, almeno nelle condizioni non ideali. In realtà, le corti supreme sono composte da uomini, e in proporzione minore da donne, in genere anziani la cui interpretazione della carta può essere più orientata all'indietro, alla lettera, che in avanti sugli effetti sulle generazioni future. Certamente il lavoro delle corti supreme garantisce la legittimità costituzionale; sono meno convinta che siano i fiduciari del popolo inteso come entità ideale transgenerazionale che tutela la *legacy* e l'*agency* politica futura. È indubbio che mantenere l'ordinamento democratico come stabilito nelle costituzioni, sottraendolo ai giochi delle maggioranze del momento, rappresenta una forma di *precommitment* per garantire che le generazioni future godano di *agency* politica. Occorre tuttavia che quest'ultima comprenda anche possibilità di scelta su stili di vita, modelli di sviluppo, opportunità che dipendono da qualcosa che va oltre il rispetto dei vincoli costituzionali e che realizzano la dimensione politica della giustizia tra le generazioni, ossia l'eguaglianza politica delle generazioni, preservando anche alle generazioni a venire un'autodeterminazione sostantiva. Alla luce di queste considerazioni, il bel lavoro di Ferrara potrebbe risultare arricchito da una riflessione sulla garanzia della eguaglianza politica tra le generazioni che richiede forse uno sforzo oltre la teoria costituzionale.

[14] https://www.cortecostituzionale.it/actionSchedaPronuncia.do?param_ecli=ECLI:IT:COST:2022:50.

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Constitutional Interpretation and Popular Representation in the US and Italy: Reflections on Ferrara's Theory of Intergenerational Sovereignty

Federico Gustavo Pizzetti

Abstract. The essay makes some reflections, from the point of view of the Italian constitutional justice system, on the theoretical position held concerning the "people's" representation through the interpretative work of the Constitutional Courts by Alessandro Ferrara in Chapter 6 of his monograph *Sovereignty Across Generations. Constituent Power and Political Liberalism*.

Keywords: constitutional review of legislation, Italian Constitutional Court, European multilevel constitutional system, constitutionalism, common law and civil law system

1. *Political Liberalism and Constitutional adjudication according to Ferrara's perspective of the 'intergenerational' people*

In Chapter 6 – titled "Representing 'the People' by Interpreting the Constitution" – of his Book, *Sovereignty Across Generations. Constituent Power and Political Liberalism*, Alessandro Ferrara presents a profound and intellectually stimulating analysis of the *judicial review of legislation* (also known as the *constitutional review of legislation*, or *judgment about constitutional legitimacy of laws*) from the perspective of political liberalism. He situates this analysis within the context of the "power (or mandate) to represent people" – a "people" which the Author views as an *intergenerational political subject*, distinct from the current "electorate" represented in parliamentary elected bodies. The Chapter offers a thought-provoking exploration of the ways in which the Constitution can be interpreted to represent the people.

The Chapter is structured into three main paragraphs, each of which provides a comprehensive exploration of the topic. These paragraphs are further divided into sub-sections, offering a detailed and systematic analysis of the subject matter.

The first paragraph of the Chapter, titled "The Democratic Legitimacy of Judicial Review Revisited", engages with various political theories on the democratic legitimacy of reviewing legislation through the Constitution. Professor Ferrara critically examines classical critiques that question the democratic legitimacy of the Court's role in constitutional justice. These critiques argue that the Supreme Courts or Constitutional Courts, being unelected, cannot be considered truly democratic and representative of the electorate.

Under this point of view, far from acting on *democratic* ground, those juridical bodies (*i.e.*, the Supreme Courts or the Constitutional Courts) are operating on an *epistocratic* base and are exercising a sort of perilous degeneration of the democratic State into a predominance of the "epistocracy".

The power wielded by Supreme Courts in resolving constitutional disputes often has a profound social-political impact, albeit one that is strictly *juridical* (or even better *judicial*) in nature. This power, therefore, has the potential to erode the public's trust in representative-elected bodies such as Parliaments and Congresses, a concern that should not be taken lightly.

In fact, when the Supreme Court scrutinizes a statute, and eventually declares it void, it may be perceived as a supervisor of the Parliament, who adopted that flawed legislation.

Furthermore, the Supreme Court's activism in safeguarding new constitutional rights, established through evolving interpretations of the Constitution, could cast a shadow over the Parliament's capacity to shape constitutional design and acknowledge these new rights through political means. This could lead to a decrease in public expectations of the legislator's ability to address and resolve political issues, potentially fostering disaffection towards political-democratic participation.

Simultaneously, an overemphasis on the judicial resolution of deeply political questions through the Court's cases and forms could erode public confidence in the autonomy and impartiality of the judiciary. This outcome could pose a significant threat from the perspective of political liberalism and for a Country founded on the rule of law.

The same first paragraph also addresses the crucial topic of *interpretative conflicts* that could arise regarding the Constitution. These conflicts might arise between different Supreme Court decisions over time (when the Court changes its interpretative position) and also between the Court and the Parliament. When the Court changes its former interpretations of the Constitution, while the constitutional text remains the same, this "conflict" between the court precedents can lead to criticism (by public opinion and by legal scholars) as the Court might be seen as an "errant interpreter" of the Constitution (because it has changed its ideas), eventually moved by new political interests. Therefore, this kind of conflict may put public confidence in the autonomy and stability of constitutional justice at risk. On the other hand, when a Supreme Court (or a Constitutional Court) affirms a "new" constitutional right as part of the "penumbra" of the Constitution's text (overthrowing previous decisions), the policies adopted by the Parliament may change accordingly to the new right. So, the new reading of the Constitution by the Court may provoke a conflict of policies between the Parliament (anchored to the previous reading of the text) and the Court itself. Then, a "conflict" between the Court and the Parliament may also be prompted, without any changing of interpretation, when the Parliament believes that the Court's constitutional interpretation, used by the same Court to annul a parliamentary statute, shall not be easily reputed as fully adherent to the Constitution.

Lastly, paragraph 1 reconnects those different interpretative evolutions upon Constitutional text made by the Court (evolutions that may raise "interpretative conflicts") to the debate – among legal scholars as well as political philosophers – between *originalism* and *living* approaches to constitutional interpretations. As is widely known, originalism pretends to read the Constitution by excavating and expounding the "original" intent of the Founding Fathers or Constituent Assembly, looking to the socio-political context and the words' ordinary meaning when the Constitution was passed. For the "originalist" legal scholars, therefore, interpretative conflicts between different readings of the Constitution are sporadic. While the text remains the same, and the text has to be interpreted in its "original" (once and for all) meaning, no "new" reading of the text may be developed by the Court (and no conflicts between older interpretations of the text, and evolutive interpretations may arise). On

the contrary, those who support the theory of a "living constitution" are in favor of a broader interpretation of the constitutional wording, trying to adapt the text – which cannot be amended by the Judiciary – to the current social-political waves, needs, and expectations of the present times. For the "evolutists" legal scholars, there might be "conflicts" between old and new readings, and that is not a pathology but a way to smoothly adapt the Constitution to emerging times.

It is worth mentioning that in this 1st paragraph of Chapter 6, Alessandro Ferrara re-evaluates the *querelle* between the "originalism" theory and the "living constitution" theory under the peculiar point of view of his political-philosophical perspective. For Ferrara, in fact, the question at stake here is how to "represent" the intergenerational people (*i.e.*, the *body politic across generations*). For Ferrara's point, the Supreme Court, by interpreting the Constitution, is exercising a sort of "representing function" of the political agreements and outcomes made by the "people" who were the author of the Constitution (by the elective Constituent body). In fact, by invalidating a statute passed by the Parliament because it is inconsistent with the Constitution, the Court is, under Ferrara's view, protecting the political will expressed by people who authored the Constitution, in respect of the political will, which is shown by the present electorate, represented in the Parliament. So, following Ferrara's theoretical path, an "originalist" Supreme Court appears to speak loudly in the name of the people who were born at the time the Constitution was drafted and approved (persons who might not be part of the present demos because they were dead in the meanwhile).

On the contrary, an "evolutive" Constitutional Court, even if it interprets a Constitution that was adopted by the "past people" (because the text interpreted is the same), seems to pay much more attention to the "present people". This evolutive approach to constitutional interpretation suggests that the Court, in interpreting the Constitution, tries to let the words of the Constitution evolve in a different meaning compared with the meaning the exact words had in the past. The Court tries to scrutinize the parliamentary statutes, also considering the constitutional text's possible evolutions- a text that the Court cannot modify - and not only the original intent of the author of the Constitution. This approach, according to Ferrara, marks a difference concerning parliamentary bodies, which "represent" from time to time, only the "current peo-

ple" who elected them (and not the people who were the author of the Constitution).

In the second paragraph of Chapter 6, titled "Interpreting the Constitution: The Mandate of the Interpreter", Ferrara immerses us in his political-philosophical analysis of the Supreme Courts (or Constitutional Courts) in constitutional democracies. His work is not just a theoretical exercise, but a significant exploration of the constitutional interpretation's mandate, vested upon the Supreme (or Constitutional) Courts, within a liberal democracy. He raises a crucial question that resonates with the ongoing debates in our society. It is clear that Constitutional Justices shall not have any power to amend or interpolate the text of the Constitution; it is a matter of debate if they have, or have not, allegiance to the cognitive assumptions of the Founding Fathers (or Constituent Assemblies).

Alessandro Ferrara traces the distinction between the specific "cognitive horizon" (a term referring to the collective understanding and knowledge) in front of the constituent power when the Constitution was crafted on one side and the potential spectrum of meanings the constitutional text may show, on the other side. This "cognitive horizon" represents the intellectual and cultural context within which the Constitution was written, and understanding it is crucial for interpreting the Constitution's original intent.

Of course, the "textual" meaning represents an anchor for any constitutional interpretivism by the Constitutional Justices. However, according to Ferrara, the Supreme Court (or a Constitutional Court) might not also be bound to the past cognitive horizon if the textual elements (such as specific clauses) are open enough to incorporate the new cognitive horizon of present times.

Under this point of view, in the same paragraph 2, the Author identifies different "types" of constitutional clauses: some of them are *rules*, which are specific and cannot be extended beyond their literal meaning (*i.e.*, the number of the members of Parliament or the age to be elected President). Others are *general clauses* or *standards*, which are more flexible and can incorporate new declinations of meanings (*i.e.*, the "due process of law", or the "equality before the law"). There are also some *implicit principles*, which are even more comprehensive than the general clauses (*i.e.*, the "democratic principle", the "separation of powers" principle) and not plainly

mentioned in the Constitution's text. They might be found and evoked by the Constitutional Justice interpreting the overall architecture of the same Constitution. According to Alessandro Ferrara, constitutional justice, in interpreting general clauses and principles under the light of the evolving society's cognitive horizon, may represent trans-generational people over time. In fact, not normatively bound to the cognitive horizon of the Founding Fathers (or Constituent Assemblies) in approving that wording, the Court may adapt the meaning of the same words to the new instances.

Finally, the same second paragraph of Chapter 6 evokes the contribution given by Constitutional Justice to the equilibrium between maintaining the authenticity of the Constitution (as the result of the people's will at the time the document was drafted and under the circumstances of its adoption) and the Constitution as an intergenerational political and legal fabric, which shall represent the present (and also the future) people. Here, the Author draws attention to the fact that the people's elected representatives (Parliaments or Congresses), through the mechanism foreseen by the same Constitution, may adopt Amendments in order to change the Constitution if and when the same people's political representative body believes the Supreme Court (or the Constitutional Court) veered off the constitutional tracks in its interpretive activity. In other terms, the Parliament (or the Congress) may consider that the interpretations of the existing Constitution, as adopted by the Supreme Court (or by the Constitutional Court), are "wrong." If that happens, the Parliament (or the Congress) may use the Constitution's Amending power to pass new constitutional provisions that cut off the "wrong" interpretations of the previous constitutional text made by the Court.

Of course, when and if the Constitution's amending power is evoked in order to fine-tune the constitutional meaning "against" the constitutional interpretations given, over time, by the Supreme Court, a matter of "institutional conflict" might arise. While the Supreme Court – in its activity – is pretending to expound the "authentic" meaning of the Constitution, and therefore the "authentic" will of the past people who adopted the same Constitution, the Parliaments, in changing the Constitution in order to counter-fight the Constitutional Justice's case-law, are representing the will of the living people (the present people who have elected those Parliaments).

Delving deeper, the subsequent paragraph 3 (titled: "The Normativity of the Most Reasonable and the Line between Interpreting and

Transforming") of the Chapter 6 intricately maps the political-theoretical terrain between interpreting the Constitution and transforming the constitutional law by influencing the meanings of the Constitution's text. Professor Ferrara illuminates that the Supreme Court (or a Constitutional Court) may unveil diverse interpretations of the precise constitutional text, particularly when the Court encounters general clauses or implicit principles. The Author posits that under liberal political theory, the Court, by interpreting the Constitution, embodies the people who adopted the Constitution. However, the Court operates ahead of the actual people. Therefore, the Court must proceed with caution. First, the Court must demonstrate that its opinion is based on exercising *public reason* by providing logical arguments. Second, in the face of multiple opinions and potentially different constitutional readings of the same "clause" or "principle," the virtue of the Court is to assume the *more reasonable*.

So, Chapter 6 offers an intriguing point of view about how, in Alessandro Ferrara's theory, political liberalism may read the role played by Constitutional Justice in *representing* the people across generations by interpreting the Constitution.

For the Author, in safeguarding the Constitution against the flaws of the parliamentary statutes, the Supreme Court has the crucial task of protecting the people, as the *transgenerational author* of the Constitution, against its pro-tempore living segment (the electorate).

For Professor Ferrara, the mandate of the Supreme Court as the highest judicial interpreter of the Constitution is bounded by the normative commitments of the transgenerational people and the overall political project expressed in the Constitution. However, the cognitive presuppositions of the Founding Fathers do not also astringe the Court. Therefore, the Court may eventually evoke different interpretations of principles and clauses written in the Constitution, of course, insofar as those interpretations are consistent with the semantics of the constitutional text. In doing that, according to political liberalism and in a functioning democracy, the Court, as Ferrara remarks, must provide the *public reasons* for each of its interpretative outcomes. These *public reasons* could include detailed explanations of the legal principles applied, the factual findings made, and the policy considerations taken into account. Those reasons must be proven to be the *most reasonable*.

According to Alessandro Ferrara's perspective, the relationship between the people and constitutional justice can be seen as a continuous "dialogue" between an "author" (the people, as the Constitution's author) and an "interpreter" (the Supreme Court) regarding the potential meaning or implications of a "text" (the Constitution). This applies particularly to the formulas of that text, which are crafted as principles or clauses with many interpretations.

Indeed, the Court serves as the ultimate interpreter, authorized by the Constitution, for decoding and updating the meaning of the Constitution's open clauses (such as "equal protection of the laws" or "due process") and implicit principles (such as "the separation of powers").

The people, author of the Constitution – in Ferrara's theoretical landscape – shall be considered as the *intergenerational people*: something different from the actual electorate, represented by the Parliament, and also something different from the original framers of the Constitution. This term, A*uthor*, refers to the collective entity that is responsible for the creation and maintenance of the Constitution. It represents the enduring values and principles that underpin the Constitution and are passed down across generations.

In fact, on one side, the Court, in *representing* the people across generations by interpreting the Constitution, may strike down the unconstitutional statutes passed by the Parliament representing the actual electorate. These could be laws that infringe upon the rights and freedoms guaranteed by the Constitution or that are inconsistent with its fundamental principles. On the other hand, the Court was not rigorously tied to the "cognitive horizon" of the Founding Fathers when they adopted the Constitution. So, the Court, in its activity, may acceptably actualize the interpretation of the constitutional open clauses to adapt them to the "present people" if the social, political, and cognitive landscape has been changed.

Of course, the Court cannot trespass the semantic boundaries of the text, nor can it adopt unreasonable interpretations of the same text. On its side, the Parliament may legally promote, exercising its Constitution Amending power, a new, different constitutional text if the constitutional interpretations provided by the Court sound unacceptable at all.

Therefore, according to Alessandro Ferrara's brilliant claim, the *intergenerational people* shall be considered *represented* by the activity of in-

terpreting the Constitution insofar as the constitutional interpretations offered by the Supreme Court are accepted by the *people*.

Ferrara argues that when the Supreme Court provides constitutional interpretations, they may be considered accepted by the public if no political actors attempt to challenge them through proper constitutional amendment procedures or by mobilizing the public against the Court's interpretation. In other words, if there are no efforts to legally promote a new constitutional interpretation or to counter-face the Court's interpretation, it is assumed that the people have accepted it. This acceptance is often based on the "public reasons" provided by the Court, which could include detailed explanations of the legal principles applied, the factual findings made, and the policy considerations taken into account.

It appears that Ferrara's thoughtful and authoritative analysis highlights the role of the Court in assessing the constitutionality of laws based on the *representation* of the *people* (perceived as *intergenerational body politic*), rather than the current *electorate*.

The Constitution places a significant responsibility on the Court, requiring it to invalidate laws passed by Parliament and approved by the living electorate if they violate the constitutional text, which was adopted by the people of the past. This text, while open-ended, contains implicit principles that the Court must interpret rationally. The Court, while not strictly bound to the epistemic horizon of the Constituent Fathers, cannot arbitrarily interpret the constitutional text, even in its vaguest clauses, according to an entirely "de-constructivist" approach. The Court is constrained by the possible meaning of the words and the necessary reasonableness of its interpretations. If the Court deviates from this, the political power may introduce new constitutional provisions or promote an overruling of the Court's previous opinion using the legal instruments provided by the Constitution for constitutional revision. It's crucial for the Court to adhere to these limitations, as the same dissenting opinions within the Court's panel may provide new interpretations.

By operating in this way, the Court – Ferrara seems to argue – can, according to the canons of political liberalism, help 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. 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.

2. *The* European model *of constitutional review of legislation*

The summary provided above of Chapter 6, from Alessandro Ferrara's Book, is only a basic and incomplete outline of a more nuanced and fascinating analysis that the author presents regarding the Constitutional Courts and their role in interpreting the Constitution in the context of liberal democracy. The Chapter should be deemed essential for both legal scholars and political philosophers to understand Constitutional Justice. However, it does not seem entirely futile to offer some further considerations.

It is worth noting that Chapter 6 discusses the constitutional review of statutes by widely following the A*merican model* (even if the same Chapter also makes some reference to the Italian Constitutional Justice).

From the perspective of an Italian constitutionalist, the A*merican model* stands out with the unique characteristics that set it apart from the E*uropean model* of *constitutional review of statutory law*, sparking curiosity and interest (Stone Sweet 2012; Bagni, Nicolini 2021; Caielli, Palici di Suni 2017; Pegoraro 2018).

Very briefly, it is very well known that the United States is a system of Common Law where, typically, the Judicial branch of government plays an influent and active role in the law-making process (even if it has been defined topically as the "least dangerous branch" because it has not the purse or the sword). In fact, following in the path of the British Common Law tradition, American judges may contribute not only to the interpretation and the application of statutory law, but also to the flourishing of the "common law" under their "precedents" (the *thema* decidendi of the pronouncement). This is done through the principle of *stare decisis*, which means that courts are bound by the decisions of courts higher in the hierarchy and must follow those decisions when the same legal issue arises in a later case. This principle is a crucial feature of the American legal system (as well as of the original British legal system) (Sacco, Gambaro 2018).

This peculiar activism of the Judiciary, whose case law is considered a source of law "in parallel" with the statutory law made by politically

elected bodies (Congresses or Parliaments), might have some implications in the dynamics of "giving voice to customs" (even if not "representing") the society (the people).

Not even in England (where judges are not elected but are installed by appointment drawn from the professional category of lawyers) or in the United States (where, at the federal level, judges are not elective but by appointment, and even at the state level, not all states have magistrates elected), one can speak of the Judiciary's function of "representing" the people.

Like their British counterparts, American judges are not primarily tasked with "representing" the people. Instead, their primary duty is to interpret and apply the "statutes" enacted by the legislature, which is an elective and political body. Even when precedent contributes to the development of new legal norms (common law), their role is not directly tied to the (elective and political) "representation" of the people but to the reasoned elaboration of the "customs" prevalent in society. This is in contrast to the European model, where 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. This difference in approach has implications for the role of the Judiciary in respect of the *demos*.

Even in the United States, where the Supreme Court (along with other judges) reviews the constitutionality of laws, the judges do not "directly" represent the people, including those who "authored" the Constitution. Instead, they act by interpreting the Constitution, giving it a voice.

It is important to mention that the role of the Judiciary and constitutional justice in continental Europe, as well as in non-European countries that follow the same model, has a different historical background (Olivetti, Groppi 2003).

As it is very well known, European Continental States were, in the past, and still are today, grounded on the opposite principle of the Judiciary's subjection to the 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 still are 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. Even

if, also in the past and more today, the judgments of the highest courts (like the Court of Cassation or the Council of State) play a very significant role in orienting the interpretation of codes and statutes performed by the lower courts, those precedents still do not have any binding force. Thus, there would not be the possibility to establish, inside the Judiciary system, a unique, authentic interpretation of the statutory law (as well as the Constitution) insofar as each judge is not legally bound in its reading of the statutes (and of the Constitution) by an "ultimate" interpreter with authoritative power, except from the same Parliament (via a "interpretative statute" passed with legislative procedure and form). This historical background is crucial to understanding the unique characteristics of the European model of constitutional review (Grimm 2016; Amato, Clementi 2012).

At the beginning of liberal States in Europe, statutes (*i.e.*, Acts of Parliament) were considered the normative exercise of "parliamentary supremacy"; therefore, they were not intended to be subjected to the hierarchical authority of a "rigid" constitution.

Consequently, there was no room for an established system – like a Constitutional Justice in the U.S. – that may invalidate a statute for inconsistency with the Constitution.

Finally, it may also be noticed that in some European Continental States, the people were not the authors of the Constitution insofar as some of the Constitutions were granted *to* the people by the Monarch.

Following the historical experience of erosion and overthrow of liberal form of States in some European Countries (such as Spain, Germany and Italy), during the first decades of the XX Century, new constitutional and democratic regimes were established in Continental Europe in the aftermath of the Second World War. This was a response to the "capture" of the representative assembly by the action of totalitarian parties within the framework of plebiscitary forms.

Undoubtedly, the transition from parliamentary supremacy to the constitutional rule of law marked a monumental shift in both the legal and political spheres. This transformative change saw the emergence of new, rigid, and hierarchically superordinate Constitutions, designed to curtail the power of elected parliamentary majorities. Under this system, statutory law is bound by the procedures and boundaries of the Constitution, the supreme law of the Land. This Constitution, while unamendable, does provide a specific guaranteed procedure involving limits.

Moreover, these Constitutions played a pivotal role in safeguarding subjective rights, freedom, and social justice. They transcended the mere establishment of the State's structure, acknowledging and securing a broad spectrum of rights. These encompassed the right to freedom of speech, a fair trial, personal and domicile liberty, assembly and association, voting, and education and health. These rights were not subject to the whims of the elected majority but were the products of fundamental constitutional agreements. The protection of these civil, economic, and political rights led to the creation of autonomous and impartial mechanisms, detached from the political realm, which functioned as guardians of the constitutional assets (fundamental principles and rights) (Pegoraro, Rinella 2018; Ferreres Comella 2009).

Those new mechanisms could not be inserted into the traditional Judiciary (the Third Branch of Government) for the reasons briefly recalled above. Despite in the U.S., the European Continental judges were traditionally intended as "subject" to the statutory law so that they could not be vested with some power to "nullify" the statutes passed by the Parliament. Nor do the precedents play, in Continental Europe, the same role they have in the Anglo-Saxon tradition (such as in the U.S.). Therefore, there was not a "highest" judge whose ultimate constitutional interpretations could have become binding for all the other courts on a national basis. A patchwork of different constitutional readings for the same statute could have become the risky outcome of giving any judge the power to review the Act constitutionally. So even though the model of rigid Constitutions was spread overall Continental Europe, there was lacking some of the fundamental conditions to vest the Judiciary (and the Supreme Court of Cassation) with the power to scrutinize the Acts of the Parliament for constitutional compliance as happen in the U.S. starting from the landmark case, decided by the Supreme Court, M*arbury v.* M*adison* (1803).

While the Judiciary, like any other branch of Government, is anchored to the sovereignty of the people. The Judiciary, whose sentences are typically pronounced "in the name of the people," it is not "a representative" of the people. It was, and remains, a body deputed to the "administration" of justice and not to the "representation" of the people in solving cases. Therefore, the Judiciary is reconnected to people's sovereignty "through" the interpretation of statutory law adopted by the Parliament, which is the elected representative body.

In this context, the American model of constitutional justice, which Alessandro Ferrara extensively discusses in Chapter 6, would not have been readily transferable to the European continental landscape, highlighting the intriguing contrasts between the two.

Indeed, the contrast is stark. While the Supreme Court in the United States holds the ultimate authority in interpreting and applying the federal Constitution, each federal judge (and, in the individual states, each state judge) is tasked with evaluating the conformity of laws to the Constitution (Tushnet 2009). In contrast, in Europe (and in Italy), judges are not empowered to nullify the legislative will of the Parliament.

It might be of relevance to delve into the European model of Constitutional Justice to grasp its distinctiveness from the American one (Cappelletti 1971). This understanding will significantly enhance the interpretation of Chapter 6, particularly when viewed through the lens of the European (and Italian) model of Constitutional Justice.

The system of constitutional review legislative acts, widely adopted by continental western European States in the latter half of the XX century (and later transplanted to eastern European States after the collapse of the Warsaw Pact in the final decade of the same century), is fundamentally rooted (albeit with some variations) in the template proposed by Hans Kelsen. This template, originally crafted and adopted for the constitution of the Austrian Second Republic in 1920, holds significant historical importance in the development of the European model (Kelsen 1981).

This kind of "European model" is grounded on some key elements.

First and foremost, the European model places the power to scrutinize statutes for constitutional illegitimacy in a unique and centralized body, the Constitutional Court. This institution is distinct from the judiciary, serving as a separate entity.

One of the unique aspects of the European model is the Constitutional Court's monopoly on invalidating legal norms of an infra-constitutional nature, especially primary norms. This means that ordinary or specialized jurisdictions are prohibited from annulling a statute that fits into the case at the bench.

Importantly, the Constitutional Court is not an appellate jurisdiction from inferior courts. It does not resolve disputes between parties in a pending *real* case, but rather, it is the initial and final floor for constitu-

tional controversies. Its judgments become effective without the intervention of any other body.

However, notwithstanding the different nature of this Constitutional Court compared with the Supreme Courts of Judicature (like in Italian, the *Corte di Cassazione* for civil and criminal justice or the *Consiglio di Stato* for administrative justice), the body acts with likely judiciary nature and forms.

It is not a "political" control performed by a political body that represents the political unity of the people like it was in the thoughts of Carl Schmitt (Lombardi 2011).

The Constitutional Court is designed to be detached from politics, autonomous and independent. It is mandated to adjudicate constitutional cases under legal-constitutional arguments, exposed in opinions (typically only one, the Court's opinion) and pronounced as "in the name of the people". This detachment from politics ensures the Court's decisions are based solely on legal-constitutional arguments, fostering a sense of reassurance about the impartiality of its decisions.

However, it's crucial to recognize that the *Kelsenian* Court, due to the nature of the Constitution it interprets and the diverse conflicts it may be called upon to resolve (such as those between different state powers or at the national and sub-national levels of government), cannot be fully understood without acknowledging its *political sensibility* or role in a broader context.

Because the caseload of the European model of Constitutional Court shall not come from appeals or recourses by inferior jurisdictions, shaping the way to access the Court is of relevance.

The model typically offers two or three distinct ways of access. The first is exclusively available during a *concrete* pending trial. Here, when faced with significant doubt about the constitutionality of the primary norm the same judge must apply to resolve the case, the presiding judge can submit a motivated "question" to the Constitutional Court to verify the validity of their doubt.

The second way is through a recourse directly submitted to the Court from another branch of government (*i.e.*, a parliamentary minority, the President of the Republic, the National Government, or the Regional Government for disputes concerning regional/national competencies and powers under the Constitution).

The third way is by a direct complaint submitted by individuals (namely, collective groups, firms …) when those private subjects believe that their fundamental rights, affirmed in the Constitution, have been violated (and the other remedies have been exhausted).

It is intriguing to note that the "incidental access" – activated by a judge during a trial – does not present the *concrete* dispute but a *question* of the validity of the primary norm the judge applies to adjudicate the case, compared with the constitutional provision the judge doubts has been violated.

The second way of access – that related to a direct "recourse" by a state body – is naturally "abstract" insofar as the recourse shall be submitted even if a case has not been raised (and, eventually, even a preventive way: a proactive measure taken before the same bill has been finally signed into an Act). Under this point of view, even if – of course – the judgments of the Constitutional Court are able to mark the legal and social system deeply, the "Kelsenian" Court, referring to the constitutional theory developed by Hans Kelsen, is much more far from a sort of connection to the "people" (in its concrete life) than the American model of constitutional review. That may contribute to putting the "Kelsenian" Court virtually quite "distant" from the "people".

Insofar as the European model foresees a specialized Constitutional Court, different from the judges (while in the U.S. model of constitutional review of statutes is performed by the Judiciary), the recruitment of the components may be diverted from the one applied to ordinary judges. It may be tailored to the Constitutional Judiciary's specific nature, tasks, and position. It might be possible, like in Italy, that while the civil and criminal judges are mainly selected through a public concourse, a competitive examination open to all, (except for honorary judges), Constitutional Judges are elected or appointed. Typically, they must possess professional requisites as experts in law, which means they may have been law professors, former judges, or lawyers.

Furthermore, while the E*uropean model* presents peculiarities compared with the American one, it is worth mentioning that – as well as the U.S. Supreme Court, when adjudicates a question of constitutionality – the "Kelsenian" Court, when solving a dispute, must give defensible public reasons for its judgments, vested in legal arguments (Frosini 2022).

It might also be noted that in the E*uropean* model of constitutional review of legislation, as well as in the American one, when the Constitutional Court interprets the Constitution, the same Court contributes, by

its case law, to the development of constitutional law (under this point of view the Court is "just" an *interpreter* of the text, and *cannot amend the exact wording* of the constitutional text). Finally, like the U.S. Supreme Court, also the "Kelsenian" Constitutional Court when adopting a judgment of acceptance, a decision to nullify a statute, and therefore it nullifies a statute and contributes to the development of statutory law (by deleting pieces of legislation) (Florezak-Wator 2020).

3. *The Italian Constitutional Court and model of constitutional review*

After discussing the common features and differences between Continental Europe's and the American models of constitutional review of legislation, it is appropriate to briefly explain the Italian model of constitutional review (Barsotti, Carozza, Cartabia, Simoncini 2020).

As it is well known, Italy did not show proper constitutional jurisdiction until the advent of the Republic. The Constitution approved by the Constituent Assembly (popularly elected) foresaw a Constitutional Court, crafted on the "Kelsenian" model, with some peculiarities (Cartabia, Lupo 2022; Groppi, Simoncini 2023).

The Court is notably composed of fifteen judges: one-third appointed by the President of the Republic (without any political proposal by the Government); one-third elected by the Joint Session of Parliament (with very high majorities that favor the agreement between the parliamentary groups); and one third elected by the supreme courts. The members shall be full professors in law or lawyers trained at minimum for twenty years or the highest judges (even retired). They stay in office for a non-renewable term of nine years (the Court elects the President among one of the members).

The Italian Constitutional Court's responsibilities are multifaceted. It is tasked with identifying constitutional flaws in statutes and other primary sources of law (*review of legislation for constitutional illegitimacy*), to ensuring the adherence to constitutional rules in resolving disputes between different branches of the central State and between the central State and the Italian Regions (*constitutional disputes*). Additionally, the Court also handles cases of High Treason and attempts to overthrow the Constitution committed by the President of the Republic, and reviews the constitutionality of requests for abrogative referenda.

As is well known, there are two ways of accessing the Italian Constitutional Court to check a statute's constitutional illegitimacy (national or regional). One is *incidental*: by the judge in a pending trial, by submitting a question of constitutionality grounded on relevance and, at least, one minimum constitutional doubt). The second is *direct*: the Government can submit a constitutional claim against a regional law, and a Region may do the same against a national law or a law enacted by another Region.

The constitutional and statutory provisions governing the Court outline two possible outcomes of the constitutional review of legislation: a *judgment of acceptance* or a *judgment of denial*, apart from "inadmissibility judgments" (for procedural or political reasons). It is worth noting that the Court issues these judgments without the option to publish dissenting or concurring opinions. The vote is secret, and there is only the 'opinion of the Court'.

However, within this binary model (judgments of "acceptance" or of "denial"), the evolution of constitutional case law has crafted many subtypes of formulas. Very briefly, the Court might declare the unconstitutionality of a statute only in a "part" of the text because that part contains a specific rule, insulated from the rest, or because that part does not contain a specific (and unique) portion of text that must be added, or because it contains a part instead of another one to which it must be uniquely substituted (the so-called "manipulative judgments", because they "erase" or "add" or "substitute" a specific portion of legislative text in order to remove the constitutional flaw).

Also, the Court might ascertain the unconstitutionality of a statute only if it is interpreted in such a way, leaving the text intact but annulling a possible (unconstitutional) meaning (the so-called interpretative judgments because they declare the statute unconstitutional just if "interpreted" in such a way, leaving the text of the same statute intact).

A declaration of unconstitutionality has a broad impact. It nullifies the statutes for both future and past events, with a few exceptions. On the other hand, a dismissal decision does not prevent the raising of a new question in another case using different arguments.

When the Court dismisses the case by adopting a judgment of rebuttal, the same Court may also "warn" the legislative power (the so-called "exhortative" judgments). In those situations, the Court temporarily rejects the constitutional challenge (they are judgments of "dismissal")

but at the same time signals to the Parliament that those provisions contain some element of non-constitutional compliance that, if the Parliament does not change those elements, in a new case – if submitted of course – the Court will directly annul the statute.

In the Italian system of constitutional review of legislation, it's important to note that individuals do not have direct access to the Court. This is a key aspect of the legal process that the audience should be aware of, as it underscores the structured and regulated nature of the Italian legal system.

The incident way, on its side, requires that the question be relevant to the case, not in general for the "people". Suppose the judge might solve the pending case without applying the disputed provision. In that case, the question will be irrelevant and, therefore, shall not be submitted to the Court and will not withstand their social and political relevance. It cannot be said that the Constitutional Court is "far" from the "people" or that it is not acting by "representing" the people or giving voice to the people (the one who authored the Constitution). The institutional role of a "Kelsenian" model of Constitutional Justice is not to be a "political" or "representative" body (not a representative of the people who elected the Constituent Assembly or who voted for the Constitution, not a representative of the actual people or the future generations). What may be said is that by requiring the judge as a "gatekeeper" to knock on the Constitutional Court's door, the Italian model of constitutional justice may maintain effective statutes that are not in pursuance of the Constitution if a constitutional case does not arise during the pending trial.

The other powers of the Court are to resolve institutional disputes between the State and the Regions if those disputes do not involve a parliament law or a regional law (but, i.e., a regulation) and to adjudicate conflicts among different state powers. In performing this kind of activity, the Constitutional Court not only protects the constitutional rights that the adoption of an unconstitutional law might have violated, but it also safeguards the delicate balance and separation of powers among state institutions and, as Italy is a Regional form of State, between the national power and the regional power.

When these institutions assert that the authorities conferred upon them by the Constitution have been infringed upon by another branch of government, prior to this, such conflicts were not subject to judicial

resolution but were instead left to political remedies. Given that the Constitution is crafted to ensure that an impartial arbitral body applies the regulations governing the allocation of powers, these disputes have consequently been entrusted to the Constitutional Court.

4. *Interpreting the Italian Constitution in the European "multilayered constitutionalism"*

It would be indeed a wishful effort to apply Professor Ferrara's complex theoretical prism to the Italian machinery of constitutional review of legislation (above summarized) as the Constitution and the laws have established it and as it has been developed by the historical Court's case law and systematized by the abundant legal doctrine (Onida 2018; Zagrebelsky, Marcenò 2018; Ruggeri, Spadaro 2022; Cerri 2019; Malfatti, Panizza, Romboli 2021).

However, it seems not entirely useless to provide the following considerations about the role that the Italian Constitutional Court may perform in "representing 'the people' by interpreting the constitution" (quoting the exact title of Chapter 6 of Ferrara's book).

At the risk of appearing superficial and cursory, it must be noted that the Italian Constitutional Court, in its very initial period (at the beginning of the middle Fifties), faced the pre-Republican legislation (adopted under the Kingdom of Italy also during the fascist period).

Of course, it was legislation adopted under a profoundly different fundamental law and by a Parliament politically and institutionally divergent from the Republican Parliament. Under the Kingdom of Italy, the Senate and the House were less representative (as in the liberal period) of the "people" or non-democratic at all (under the dictatorship's period).

During this period, the Italian Constitutional Court, far from protecting the Constitution against the current electorate, represented by the Republican Parliament elected, had to affirm the new fundamental design of the Republic, crafted by the Constituent Assembly, against the past statutory law, passed by a legislative power that was limited, if not non-representative, of the electorate.

The Court's role evolved after this initial period, which was dedicated to purging unconstitutional provisions of the past codes and statutes. It

was now tasked with assessing the constitutional conformity of legislative provisions passed by the Republic Parliaments, elected on the basis of the Constitution.

Those were, of course, fully democratic and representative legislative bodies according to the same republican constitutional rules.

In the second period, during the Seventies and the Eighties, the Court's role evolved into a balancing act, weighing the various constitutional principles according to reasonableness. Profound political and social transformations marked this phase, and the Court demonstrated its adaptability by seeking a balance among the various interests and values involved in constitutional matters through the technique of balancing, grounded on the principles of reasonableness.

The subsequent "crisis" of the political system (during the Nineties), which had characterized the constituent phase and the republican life for fifty years, opened a new period for the Constitutional Court. It has been a period of institutional instability. The constitutional interpretation gradually became more characterized by a greater dynamism in terms of recognizing, within the general clauses of the Constitution, an expansive and evolutionary capacity that, by identifying the underlying principle or value of such clauses, allows the Court to resolve constitutional legitimacy issues even in respect of statutes facing "new" issues which were not present or foreseeable at the time the Constitution was written (*i.e.*, in the biomedicine sector). The Court tries to promote solutions that are authentically expressive of a democracy that respects the human person and is oriented towards individual and social progress within a territorial and cultural pluralism framework.

In a subsequent period, the Court was confronted with proposals for constitutional reform, some of which came to fruition. Particularly, in the context of the reform of the system of regional autonomies, the Court witnessed its role expand from that of a prevalent constitutional guardian of rights for possible violations by the legislature to that of a guardian of the spheres of legislative power between the State and the Regions (with respect to a complex division of competences envisaged by the reform).

More recently (in the last decade), the Court has further expanded its complex "dialogue" with the Judiciary (one may remember that the Constitutional Court is facing the judges both as they submit consti-

tutional questions and as they are the "terminals" of its interpretation of the Constitution). The nuances of the "interpretative judgments" by which the Court orients the evolution of statutory law according to the Constitution exemplify this "dialogue" between the Constitutional Court and the Judiciary.

At the same time, the Italian Court has increased its "dialogue" with the Parliament. The Court has sometimes signaled to the Parliament by its judgments (in a way "issuing a warning") that a piece of statutory law presents some elements of unconstitutionality, giving the Parliament time and opportunity to change it according to the Constitution.

The Court has been able to weave a fruitful dialogue with institutional actors: judges and Parliament. Moreover, it has been capable, in interpreting the constitutional text, not only of engaging in a sort of "dialogue" with the Italian people as the "author" (through the election of the Constituent Assembly) of the Constitution (recalling here Ferrara's thoughts about the relationship between the people and the Supreme Court in the U.S.).

Despite the difference that distinguishes the Italian system of constitutional justice from the American one, even the Italian Constitutional Court, in carrying out its function of interpreting the Constitution, has been faced with the delicate need to interpret wide-ranging clauses and principles that lend themselves to open and evolutionary readings by applying them to annul laws that are the result of the will of the Parliament representing the electorate. In carrying out this activity, the Italian Court – given that it is not an organ belonging to the circuit of popular representation and political-legislative decision-making, but rather an organ of constitutional guarantee – is called upon to be faithful to the constitutional text (the "original" one, fruit of the choices made by the past generation through the work of the Constituent Parties, and the amended the one, fruit of the choices made by Parliament using the power of constitutional revision). At the same time, the Court cannot shy away from offering an interpretation of the principles and general clauses of the constitutional text that are susceptible to multiple readings. In this work, the Court must try to find the balance between understanding the Constitution as a "living document" that, thanks to its open clauses and general principles, can "tell us" everything, even what it does not speak about, and sclerotizing the reading of the Constitution in such an originalist perspective as to result in anachronism.

It should also be stressed that in the Italian constitutional system, Parliament has the power to amend the constitutional text. This power is exercised through the constitutional revision procedures provided for by the Constitution itself. These procedures allow Parliament (and, under particular circumstances, the people via a confirmative referendum) to revise the Constitution, even going against the interpretative strands of the Constitutional Court. However, this power is not absolute. There are implicit limits (the fundamental principles and inviolable rights) that would not be constitutionally revisable in a pejorative sense (*e.g.*, repealing the personal liberty or decreasing the protection of the freedom of speech). It should also be noted that even if only under certain conditions, the people, through a confirmatory referendum, can pronounce directly on a constitutional reform.

Furthermore, there is even something to be added as food for thought.

In fact, in recent decades, the European Union, on the one hand, and the legal framework established by the Council of Europe and its European Convention on Human Rights, on the other hand, have also increased their relevance in constitutional matters.

On the one hand, the European Union has adopted a Charter of Fundamental Rights – mimicking the Bill of Rights present in the national Constitutions – and a Treaty that refers to the "common constitutional traditions" of the Member States as a foundational element of the European Union that the same European Union shall respect.

On the other hand, the European Court of Human Rights case law, developed upon the European Convention on Human Rights, addresses legal questions about the right's protections of "constitutional nature".

Put simply, while the Constitutional Courts (such as the Italian one) are also the guardians of the rights recognized and protected by the Constitution, one must consider that the European level of government (the EU and Council of Europe) also plays an active and extended role in affirming rights. This is where the concept of *supranational law* comes into play. The two levels of *supranational rights* protection have their own *supranational court* – the EU Court of Justice and the European Court of Human Rights – which actively interpret and enforce supranational rights, even in domestic law.

The "multilayered" system that rises from the interaction of national constitutional law and supranational law on European charters of rights

involves the national Constitutional Court – like the Italian Constitutional Court – and the judges of the Member States. In fact, the national Judiciary has to adjudicate also following directly and without exceptions the European Union law (if there is no doubt about its meaning and if it is not violating the fundamental principles and rights of the Italian Constitutional system. Applying the E.U. law by the national Judiciary means to follow the case law of the E.U. Court of Justice.

Furthermore, the national Judiciary has to interpret domestic law according to the European Convention on Human Rights' legal framework (if there is doubt of noncompliance with the European Convention on Human Rights, a question of constitutionality has to be submitted to the Italian Constitutional Court). Applying the European Convention on Human Rights also means following the established case law of the European Court of Human Rights.

It is beyond the scope of this brief commentary to make any thoughtful application to the European multilevel framework of Professor Ferrara's complex and brilliant reflections on the activity of constitutional courts in representing the "people" through constitutional interpretation.

However, one may suggest, merely for food for thought, that the Constitutional Courts today, in Italy and the other European States (for those states that adhere to the European Union and the European Convention on Human Rights) are no longer only called upon to dialogue with the author of the national Constitution (the people that that national Constitution has wanted and continues, over time, to want, as the expression of a fundamental political and legal project in which they recognize themselves). They are now also engaged in a dynamic dialogue with supranational bodies, reflecting the evolving nature of constitutional interpretation in the European context (Caravita 2022; Celotto, Tajadura, De Miguel Bárcena 2011; Ninatti, Piccirilli, Repetto, Tega 2023, Faraguna, Fasone, Piccirilli 2018, Martinico, Pollicino, 2010).

The Constitutional Court, in fact, is today "immersed" in a complex network of relationships with supranational judicial bodies, which are called upon to protect supranational charters of fundamental rights. However, unlike national constitutions, these charters are not, as yet, the outcome of the political will of a united (federal or national) people (or one that intends to perfect its union). They remain part of a multilevel system that is not organized in statutory form and is not based on a constitution in the

classical sense, resulting from a constituent assembly (or constitutional revision power) democratically representative of a body politic.

Therefore, in the European legal framework, the still open question – echoing Ferrara's thoughts – is not only how to represent an "intergenerational people", by interpreting the Constitution; it is also how to harmoniously interpret a "multilayered constitutional system". This system is composed of national Constitutions and national constitutional common traditions, as well as supranational charters on fundamental rights.

This raises the question of how to contribute to the creation of a "multilayered people" (and not only an "intergenerational one") encompassing both the European and national levels.

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Potere emendativo, popolo transgenerazionale e *agency* politica

Francesca Pasquali

Abstract. The article focuses on the principle of vertical reciprocity proposed by Alessandro Ferrara to regulate the exercise of amending power. The principle is integral to the theory of democratic sovereignty and constitutional power developed by Ferrara in *Sovereignty Across Generations: Constituent Power and Political Liberalism*. In the book, Ferrara elaborates on Rawls's insights and updates political liberalism to make it more suitable for addressing contemporary tendencies and phenomena, particularly populism. From Ferrara's perspective, populism improperly reduces the will of the people to the will of its living segment – namely, the electorate – so he emphasizes the need to distinguish the electorate from the people, and he defends a sequential account of sovereignty according to which past, present, and future generations are all co-owners of the constitution. Therefore, the electorate is not entitled to unilaterally modify the constitution, and the principle of vertical reciprocity grants legitimacy only to constitutional amendments that, although proposed by the electorate and expressing the electorate's own will, could prove acceptable also to past and present generations. As the article suggests, the principle tends to constrain the political *agency* of the electorate, which is bound to preserve the political project inscribed in the constitution by the founding generation. Though possibly problematic, this implication seems perfectly consistent with – and fully vindicated within – Ferrara's general approach. Therefore, to assess more reliably the principle of vertical reciprocity and its import, the article examines its presuppositions. More precisely, the article discusses Ferrara's defence of the sequential model of sovereignty, his understanding of the constitution as the expression of the will of the people, and his conception of the latter as irreducible to the will of any single generation composing the people itself. Based on such investigation, the article highlights the merits and the

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shortcomings of Ferrara's approach and questions whether, while certainly coherent with political liberalism, his proposal is fully effective in countering populism.

Keywords: amending power, political liberalism, populism, sovereignty, will of the people

1. *Introduzione*

In *Sovereignty Across Generations. Constituent Power and Political Liberalism*, Alessandro Ferrara mette a punto una teoria della sovranità democratica e del potere costituente che, coerente con gli assunti di fondo del liberalismo politico, si propone di esplicitare e articolare al meglio gli spunti offerti da Rawls a questo proposito. Sebbene il focus e l'intento del libro siano molto specifici, la riflessione proposta da Ferrara è davvero di ampio respiro. Attraverso il continuo confronto con una varietà di tradizioni e approcci teorici, anche antitetici rispetto al liberalismo politico, Ferrara intende ampliare e aggiornare il paradigma sviluppato da Rawls alla luce di fenomeni politici che non erano ancora salienti al momento della pubblicazione di *Liberalismo politico*. In effetti, per quanto sembri muoversi su un piano spiccatamente teorico, l'indagine di Ferrara risponde anche all'esigenza di fare i conti in modo diretto con quanto accade sulla scena politica contemporanea e, in particolare, con il populismo.

Ferrara dedica un'analisi puntuale al populismo e ne individua il tratto distintivo, che coincide con il suo vizio di fondo, nella pretesa di far coincidere il popolo con l'elettorato, riducendo così la volontà del popolo alla volontà della generazione presente. Al contrario, l'autore-segnala la necessità di mantenere ben distinti popolo ed elettorato in modo da evitare che i componenti di quest'ultimo, per il semplice fatto di poter esercitare la propria *agency* politica in quanto appartenenti al segmento vivente del popolo, siano legittimati a prendere decisioni in nome del popolo nel suo complesso. La distinzione tra popolo ed elettorato, centrale nell'intera riflessione di Ferrara, fa da sfondo anche al capitolo finale del libro, intitolato "Amending Power: Vertical Sovereignty and Political Liberalism". In questo capitolo, Ferrara elabora criteri per regolare l'esercizio del potere emendativo in modo coerente con i punti

fermi del liberalismo politico. In particolare, Ferrara intende assicurare all'elettorato la possibilità di rivedere la Costituzione, senza però legittimarlo a esercitare il potere emendativo esclusivamente in base alla propria volontà specifica. Infatti, la soluzione proposta da Ferrara 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 catturata dal principio di reciprocità verticale, sul quale si concentra l'analisi sviluppata nelle prossime pagine.

Dopo aver chiarito, nel §2, il contenuto del principio di reciprocità, l'articolo ne discute le implicazioni. In particolare, il §3 suggerisce che, oltre a comportare un'asimmetria tra gli oneri che spettano alla generazione presente e quelli che competono, invece, alla generazione fondatrice, il principio di reciprocità verticale sembra limitare notevolmente l'autonomia politica dell'elettorato. Si tratta, però, di una limitazione pienamente coerente con il modello sequenziale di sovranità, che attribuisce alle generazioni passate, a quella presente e a quelle future il ruolo di comproprietarie della Costituzione. Ferrara difende questo modo di intendere la sovranità e lo contrappone al modello seriale, secondo cui ogni generazione, come proprietaria separata e *pro tempore* della Costituzione, ha la facoltà di modificarla in base alla propria volontà specifica. Per Ferrara, il modello seriale di sovranità è certamente incompatibile con l'assunto, centrale nel liberalismo politico, che la società politica sia uno schema cooperativo intergenerazionale e, per di più, tende a minare la forza regolativa della Costituzione. Tuttavia, come il §4 suggerisce, per salvaguardare il potere regolativo della Costituzione, non sembra necessario adottare il modello sequenziale di sovranità e il principio di reciprocità verticale a esso associato. Si potrebbero, infatti, prevedere principi di carattere procedurale che, rendendo oneroso l'esercizio del potere emendativo, promuovano la stabilità delle norme costituzionali, assicurando loro un ruolo sovraordinato rispetto alla legislazione ordinaria. Principi procedurali, però, non offrono garanzie contro l'eventualità che l'elettorato sovverta il progetto politico ereditato dal passato e codificato nella Costituzione. Una simile eventualità appare poco problematica se la Costituzione è semplicemente un insieme di regole costitutive che rendono possibile un assetto istituzionale ben funzionante. È, invece, un'eventualità da scongiurare se, come per Fer-

rara, la Costituzione è espressione della volontà del popolo, concepito come un soggetto che abbraccia le generazioni passate, quella presente e quelle future e la cui volontà non è riducibile a nessuna di esse presa singolarmente. Come il §5 evidenzia, riconoscere centralità al popolo così inteso potrebbe essere, oltre che controverso da una prospettiva liberale, poco efficace nel contrastare il populismo. Chiarendo meglio costi e benefici derivanti dal porre al centro della scena politica il popolo transgenerazionale, piuttosto che i singoli individui in carne e ossa, l'articolo si chiude con un bilancio dei meriti e dei limiti della proposta di Ferrara rispetto al potere emendativo.

2. P*otere emendativo e reciprocità verticale*

Nell'ultimo capitolo del suo libro, Ferrara evidenzia che Rawls «offers no explicit reflections concerning the proper exercise of amending power» (Ferrara 2023, 248), sebbene Rawls stesso sia consapevole che non si può escludere – e, anzi, che è plausibile aspettarsi – che l'elettorato intenda modificare la Costituzione per renderla conforme alla propria volontà. Ferrara si propone di colmare una simile lacuna attraverso l'elaborazione di principi che, regolando l'esercizio del potere emendativo, permettano di discriminare tra modifiche costituzionali legittime e illegittime. In vista di questo obiettivo, Ferrara prende le mosse dall'analisi di principi o approcci che, nella letteratura di riferimento, sono proposti come candidati rilevanti per svolgere una simile funzione e ne evidenzia i limiti. Questa indagine preliminare è anche congeniale a delineare con precisione i requisiti necessari affinché principi volti a regolare il potere emendativo siano soddisfacenti dalla prospettiva del liberalismo politico.

In primo luogo, Ferrara si confronta con approcci che propongono di circoscrivere il potere emendativo in base a considerazioni di coerenza e che, quindi, squalificano come illegittimi gli emendamenti che risultano «inconsistent with the core, the basic structure, or the defining decisions embedded in the constitution» (265). Per Ferrara, il principio di coerenza è poco soddisfacente perché è puramente formale. Infatti, quando sono di matrice liberale e democratica, gli approcci che si rifanno a considerazioni di coerenza sembrano fondati soltanto «on the implicit assumption that we are witnessing the degrading or dismembering of a

liberal-democratic constitution at the hands of regressive forces» (266-267). Tuttavia, come Ferrara sottolinea, appellandosi a considerazioni di coerenza, senza adeguate qualificazioni normative, si rischia di sbarrare la strada, non solo a modifiche costituzionali di natura regressiva, ma anche a emendamenti che abbiano «opposite direction» (267), ovvero che si propongano di rendere più democratica o più liberale una Costituzione di carattere illiberale o non democratico.

Il focus sul carattere progressivo o regressivo degli emendamenti costituzionali è, invece, centrale in approcci che Ferrara qualifica come "teleologici", una variante dei quali è attribuita proprio a Rawls. In un passaggio di L*iberalismo politico*, Rawls afferma che gli emendamenti inclusi nella Costituzione degli Stati Uniti «hanno avvicinato la Costituzione alla sua promessa originaria» (Rawls 1993, 217). Alla luce di questa constatazione di carattere storico e fattuale, Rawls ritiene di poter affermare, come Ferrara evidenzia, che sarebbe respinto come illegittimo un emendamento che mettesse in dubbio o che tradisse «fin dalle fondamenta la tradizione costituzionale del più antico regime democratico del mondo», tradizione costituzionale i cui principi fondamentali sono «convalidati da una lunga pratica storica» (*ibidem*, 217). L'obiezione di Ferrara è, innanzitutto, che la stessa idea di «promessa originaria» è controversa, passibile di essere interpretata secondo modalità differenti e contrastanti, e dunque poco plausibile nell'ottica del liberalismo politico. Inoltre, Ferrara mostra che, affinché l'argomento di Rawls possa funzionare, è necessario adottare una filosofia della storia di carattere teleologico, in base alla quale, dato che la storia è orientata verso il meglio, il consolidamento dei principi costituzionali sarebbe sufficiente a bloccare emendamenti di carattere regressivo e ammettere soltanto emendamenti che, invece, portino a compimento una Costituzione liberale e democratica. Anche la necessità di appoggiarsi a una filosofia della storia è incompatibile con gli assunti di fondo del liberalismo politico ed è per questo che Ferrara ritiene inadeguati argomenti teleologici.

La terza opzione indagata da Ferrara è rappresentata da approcci che prevedono di limitare il potere emendativo con riferimento alla relazione "*principal-delegate*", approcci che generano due problemi distinti, sebbene speculari, a seconda di come è interpretata tale relazione. Per un verso, l'interpretazione che Ferrara etichetta come "radicale" si fonda sull'idea che, accanto al popolo la cui esistenza è sancita e codifica-

ta dalla Costituzione e che, dunque, è tenuto a rispettarne i dettami, vi sia il popolo concepito come entità che esiste a prescindere e al di là della Costituzione e che ha sempre la prerogativa di riattivare il proprio potere costituzionale ed emendare l'impianto di quella vigente. Adottando un'impostazione di questo tipo, dato che una simile potenzialità può essere attivata soltanto dall'elettorato, quest'ultimo godrebbe della prerogativa di «reshaping the whole polity in the name of the whole transgenerational people» (271-272) e il popolo risulterebbe ridotto all'elettorato, proprio come previsto dall'impianto del populismo che Ferrara intende scardinare. D'altra parte, l'interpretazione "moderata" della relazione "*principal-delegate*" riconosce la distinzione tra popolo ed elettorato e attribuisce a quest'ultimo solo la possibilità di intervenire sulla Costituzione in qualità di rappresentante o delegato del popolo nel suo complesso. In questo modo, come Ferrara sottolinea, non si corre il rischio di attribuire un potere eccessivo all'elettorato, ma si corre il rischio opposto: l'elettorato tende a essere relegato al ruolo di esecutore fiduciario della volontà del popolo ed è così qualificato come «mere projection of the will of another actor» (273). Per Ferrara, anche questa opzione è insoddisfacente perché il potere emendativo assolve proprio la funzione di garantire che l'elettorato non sia semplice esecutore di un progetto politico definito e codificato da altri, dalle generazioni passate e dalla generazione fondatrice in particolare. Ferrara afferma, infatti, che, «without the power to modify the constitutive rules of the game, the subsequent generations of the people would live in the shadow of the founding one, executing a program that they have not scripted» (248).

Il potere emendativo risponde dunque all'esigenza di allentare «the normative grip of the dead over the living generations» (248), garantendo che anche la generazione presente possa contribuire al progetto costituzionale alla luce della propria volontà specifica. Tuttavia, Ferrara tiene ferma la distinzione tra elettorato e popolo e chiarisce che, sebbene non debba essere ridotto a mero rappresentate del popolo nel suo complesso e abbia diritto a far valere la propria prospettiva, l'elettorato non è legittimato a modificare la Costituzione in modo unilaterale, ovvero senza tenere conto della volontà delle altre generazioni che compongono il popolo. Scrive Ferrara:

> The power to amend the constitution can only derive from the constituent power of "the people", but the transgenerational people possesses no agency and can appoint no representative. Its living segment is the only one endowed with agency but neither can it be equated with the whole people, nor can it "represent" the whole people. [...] The electorate derives its entitlement to transform the constitution from its being a co-owner – along with past and future segments of the people – of the constitution in a *sequential*, as opposed to a *serial*, pattern in which owing something "sequentially" means owing something to the previous and the future co-owners (249).

Come questo passaggio chiarisce, pur avendo pieno diritto, a pari titolo con le generazioni passate e quelle future, di contribuire al progetto costituzionale, la generazione presente deve onorare alcuni doveri nei confronti delle altre generazioni, doveri che circoscrivono l'esercizio legittimo del potere emendativo. Più nello specifico, dato che è solo comproprietario della Costituzione, l'elettorato non può decidere in modo unilaterale di emendare la Costituzione: come in ogni situazione in cui vi sia una proprietà condivisa, l'elettorato è tenuto a verificare se gli altri comproprietari – in questo caso, le generazioni passate e quelle future – sarebbero disponibili ad accettare gli emendamenti che intende introdurre. Tuttavia, a differenza di casi ordinari di proprietà condivisa, la questione è complessa perché non è possibile interpellare tutti gli attori rilevanti: non tutti i comproprietari della Costituzione possono esercitare concretamente la propria *agency* esprimendo in modo diretto la propria volontà. Per Ferrara, è quindi necessario introdurre un principio normativo che limiti il potere emendativo e qualifichi come legittimi sono gli emendamenti che, inevitabilmente proposti dalla generazione presente, potrebbero essere accettati anche dalle generazioni passate e da quelle future. Si tratta del principio di reciprocità verticale, in base al quale:

> Amending power should be barred from altering the constitutional essentials (basic structure, basic rights and liberty) in any way that would make it *less reasonable* for the other generations, past or future, of the people to be imagined as willing to live within that newly generate constitutional order (273).

Ferrara individua con precisione la dimensione da considerare per valutare se le generazioni future potrebbero essere disponibili ad ac-

cettare di condurre la propria vita politica all'interno dell'assetto istituzionale che deriverebbe dall'introduzione di eventuali emendamenti proposti dall'elettorato. Non si tratta di considerare «the full range of interests and ideas of the good of future generations (future generations will define them for themselves), but simply to preserve the future generations' capacity to self-determine these interests and ideas of the good on the basis of a public autonomy not inferior to that of the present citizens» (274). Non fornendo indicazioni specifiche e diverse per verificare, sempre in chiave ipotetica, la disponibilità delle generazioni passate ad accettare gli emendamenti proposti dall'elettorato, sembra plausibile assumere che, anche per le generazioni passate, valgano i criteri e le considerazioni adottate per le generazioni future. Quindi, alla luce del principio di reciprocità verticale, un emendamento è illegittimo se comporta riforme istituzionali che diminuiscono l'autonomia degli individui e delineino una forma di vita pubblica che offrirebbe, alle generazioni passate o a quelle future, minori margini per determinare da sé i propri interessi e le proprie idee del bene.

È opportuno sottolineare che il principio di reciprocità verticale scongiura il rischio, implicito in un approccio meramente formale come quello basato su considerazioni di coerenza, di scartare emendamenti che, nell'ottica del liberalismo politico, sarebbero migliorativi. Allo stesso tempo, con la proposta di Ferrara, si evita di dover ricorre alla filosofia della storia per avvallare la fiducia nel carattere progressivo delle riforme costituzionali. Infatti, 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. Tuttavia, come anticipato, 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. Dunque,

come evidenziato nel prossimo paragrafo, è plausibile sollevare alcune perplessità circa il principio di reciprocità verticale e la sua effettiva capacità di garantire all'elettorato la possibilità di esercitare appieno la propria *agency* politica.

3. *Generazioni future, presenti e passate*

Ci sono pochi dubbi che l'esercizio del potere emendativo si proietti nel futuro. Modificare oggi la Costituzione significa riorganizzare l'assetto istituzionale di una società politica e il nuovo impianto, salvo ulteriori modifiche, farò da sfondo e regolerà la vita pubblica delle generazioni future. Sembra quindi più che plausibile ritenere che, nell'esercitare il potere emendativo, l'elettorato debba garantire appropriata considerazione alla prospettiva delle generazioni future. Sembra, invece, più controverso ritenere che l'elettorato abbia doveri analoghi anche nei confronti delle generazioni passate.

È possibile sollevare una prima obiezione piuttosto intuitiva. Gli individui che appartengono alle generazioni passate – ed è proprio questo che li qualifica come tali – hanno già vissuto la propria vita politica e un emendamento costituzionale adottato oggi non può avere alcuna conseguenza sul loro grado di autonomia o sulla loro possibilità, ormai esaurita, di definire da sé le proprie idee del bene e di perseguire i propri interessi. Infatti, a meno che non si adotti una peculiare e potenzialmente controversa concezione dello scorrere del tempo e dei rapporti di causa ed effetto, si può escludere che una modifica costituzionale adottata nel presente possa avere ricadute concrete sulla vita pubblica delle generazioni passate. Di conseguenza, assumendo che sia possibile indagare la prospettiva delle generazioni passate e verificare se sarebbe o meno ragionevole per loro accettare gli emendamenti proposti dall'elettorato, sembra plausibile mettere in dubbio che l'esito di una simile indagine possa essere rilevante per definire i confini del potere emendativo. Tuttavia, questa obiezione, per quanto possa apparire sensata, comporta un'impropria semplificazione del principio di reciprocità verticale proposto da Ferrara.

Come già evidenziato, nell'introdurre il principio di reciprocità verticale, Ferrara sottolinea che l'elettorato, in quanto comproprietario della Costituzione, deve «something to the previous and the future co-owners»

(249). Il principio di reciprocità verticale, però, non richiede di assicurare alle generazioni passate un qualche bene tangibile, che effettivamente non potrebbe essere trasferito dal presente al passato ed escluderebbe la possibilità, per l'elettorato, di onorare i doveri che gli spettano. Piuttosto, nell'esercitare il potere emendativo, l'elettorato ha il dovere di garantire appropriata considerazione alla prospettiva delle generazioni che lo hanno preceduto e a quelle che verranno. Tuttavia, se è così, gli oneri attribuiti agli individui che formano l'elettorato sono maggiori rispetto a quelli che competono, invece, agli individui che appartengono alla generazione fondatrice, ovvero agli individui che, redigendo la Costituzione, hanno definito concretamente i termini della cooperazione e l'assetto istituzionale che regola la vita pubblica. In effetti, l'elettorato ha il dovere di garantire adeguata considerazione sia alla prospettiva delle generazioni future, sia a quella delle generazioni passate, compresa la generazione fondatrice. A quest'ultima, invece, spettano certamente doveri nei confronti delle generazioni future, compresa quella presente, ma non le possono essere attribuiti doveri verso le generazioni passate. La generazione fondatrice, infatti, è la prima generazione a vivere sotto le regole condivise raccolte nella Costituzione vigente e, nel formulare simili regole, non interviene su un progetto politico di cui non condivide la proprietà con alcuna generazione passata. Dunque, per la generazione fondatrice – e solo per questa generazione – il principio di reciprocità verticale è orientato esclusivamente verso il futuro. Per tutte le generazioni successive, invece, tale principio prevede oneri tanto verso le generazioni passate quanto verso quelle future. Questo assicura alla generazione fondatrice un netto vantaggio in termini di autonomia politica – che sono i termini rilevanti anche dal punto di vista di Ferrara – rispetto alle generazioni successive: solo la generazione fondatrice è pienamente svincolata dal dovere di onorare un progetto politico ereditato dal passato. Una simile asimmetria tra gli oneri della generazione fondatrice e gli oneri delle generazioni successive – e, di conseguenza, una disparità tra la sfera di autonomia politica della generazione fondatrice e quella delle generazioni successive – potrebbe apparire poco convincente proprio sul piano della reciprocità.

La questione più rilevante, però, è un'altra. L'applicazione del principio di reciprocità verticale, proprio per superare i limiti associati al principio di coerenza, ha carattere sostantivo: richiede di valutare la

legittimità di un emendamento costituzionale entrando nel merito dei suoi contenuti. Più nello specifico, tale principio richiede di immaginare quali riforme sarebbero associate all'implementazione di un emendamento costituzionale proposto dall'elettorato, per poi verificare, in via ipotetica, se sarebbe ragionevole, per le generazioni future e per quelle passate, essere disposte a condurre la propria vita pubblica all'interno di un assetto istituzionale segnato da simili riforme. In questo modo, lo spazio di manovra concesso all'elettorato per esercitare la propria *agency* politica è circoscritto dal dovere di evitare modifiche costituzionali che alterino il progetto politico adottato dalle generazioni passate. Infatti, se si assume che queste ultime considerino desiderabile l'assetto istituzionale che hanno lasciato in eredità all'elettorato e che, quindi, non sarebbe per loro ragionevole accettare di vivere la propria vita pubblica nell'ambito di un ordine politico differente, si può concludere che il principio di reciprocità verticale esclude come illegittimi emendamenti che alterino l'impianto di fondo della Costituzione. Questo meccanismo e questo ragionamento ipotetico, però, devono essere immaginati al lavoro all'interno di contesti politici caratterizzati da Costituzioni auspicabili dal punto di vista del liberalismo politico. In simili contesti, il principio di reciprocità verticale svolge in modo molto efficace la funzione di preservare un assetto istituzionale di valore legittimando soltanto emendamenti migliorativi o progressivi e squalificando come illegittimi, invece, emendamenti di segno opposto. Tuttavia, come anticipato, questo obiettivo è conseguito attraverso una strategia che non è priva di costi, in quanto riduce notevolmente i margini d'azione e di intervento dell'elettorato. 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 per garantire che, grazie al potere emendativo, i componenti della generazione presente non conducano la propria vita pubblica «in the shadow of the founding one, executing a program that they have not scripted» (248). Però, anche ammesso che sia fondato, un simile dubbio non è sufficiente qualificare come ingiustificata la proposta di Ferrara. Le limitazioni previste dal principio di reciprocità verticale, infatti, risultano giustificate se si tiene conto del modello di sovranità che Ferrara difen-

de – un modello sequenziale di sovranità opposto al modello seriale – e del modo in cui, di conseguenza, Ferrara intende la Costituzione.

4. *Costituzione, regole del gioco e stabilità*

Il modello seriale di sovranità si basa, come Ferrara chiarisce, sull'idea che «each segment of the people is a separate "owner" of democratic sovereignty and therefore fully exercise "pro tempore" constitutional authorship» (211). Thomas Jefferson, al quale anche Ferrara dedica ampio spazio nel libro, è senza dubbio tra i sostenitori di questa concezione della sovranità. In una lettera a James Madison, redatta nel 1789, sullo sfondo della Rivoluzione Francese e, nello specifico, interrogandosi sulla necessità di onorare i debiti contratti in nome del popolo francese dagli esponenti del regime deposto dalla Rivoluzione, Jefferson scrive:

> Suppose Louis XV and his contemporary generation had said to the money lenders of Genoa, give us money that we may eat, drink, and be merry in our day; and on condition you will demand no interest till the end of 19 years, you shall then forever after receive an annual interest of 12 per cent. The money is lent on these conditions, is divided among the living, eaten, drank, and squandered. Would the present generation be obliged to apply the produce of the earth and of their labour to replace their dissipations? (Jefferson 1789)

La risposta di Jefferson a questa domanda è decisamente netta: «Not at all», ovvero la generazione presente non è affatto tenuta a onorare i debiti contratti dalla generazione passata. Se è così, più in generale, per Jefferson, la generazione presente non è tenuta a onorare il progetto politico elaborato dalle generazioni precedenti e iscritto nella Costituzione. Un onere di questo tipo, infatti, vincolerebbe, secondo Jefferson in modo improprio, la generazione presente al rispetto di decisioni politiche alle quali non ha contribuito ma a cui è soggetta e di cui subisce le conseguenze. Per Jefferson, dunque:

> No society can make a perpetual constitution, or even a perpetual law. The earth belongs always to the living generation. They may manage it then, and what proceeds from it, as they please, during their usufruct. They are masters too of their own persons, and consequent-

> ly may govern them as they please. [...] Every constitution, then, and every law, naturally expires at the end of 19 years. If it be enforced longer, it is an act of force and not of right (Jefferson 1789)[1].

È una posizione senza dubbio radicale perché prevede che la Costituzione, affinché non sia coercitivamente imposta, abbia una data di scadenza predefinita e che ogni generazione abbia il diritto di determinare per sé le regole che governano la propria vita politica. Naturalmente, è un approccio incompatibile con il modello sequenziale di sovranità adottato da Ferrara, in base al quale le generazioni passate, quella presente e quelle future sono qualificate, non come proprietarie separate e protempore della Costituzione, ma come comproprietarie della Costituzione in quanto componenti del popolo transgenerazionale.

Il modello sequenziale di sovranità, intrepretando in questo modo la relazione tra generazioni e il loro rapporto con la Costituzione, risponde all'idea, centrale nel liberalismo politico, che la società politica sia uno schema cooperativo intergenerazionale. Oltre a essere incompatibile con questa idea, il modello seriale è da scartare anche perché, secondo Ferrara, «ends up undermining the very idea of a constitution» (212), non essendo all'altezza di rendere conto della speciale «regulatory force» (213) della Costituzione stessa. Infatti, Ferrara ritiene che, «with a thorough institutional reconfiguration of the basic structure taking place as each segment of the people amends the constitution in accordance with its preferences, the constitution would forfeit its regulatory function and be reduced to a projection of the pro tempore popular sovereign's inclinations» (213). La principale obiezione di Ferrara è, dunque, che adottare il modello seriale di sovranità comporta che «higher laws become indistinguishable from ordinary laws and indeed from prevailing sentiment» e che, «in order to avoid a so-called tyranny of the past, [...] the polity fall prey of the "tyranny of the momentary political sentiment"» (2012). Tuttavia, così come una eventuale critica dalla prospettiva di Jefferson alla proposta di Ferrara sarebbe una critica esterna, Ferrara è consapevole che «holding its lack of regulatory function against the

[1] La validità di una Costituzione, per Jefferson, si esaurisce nel giro di 19 anni, un limite temporale che è l'esito di un calcolo complicato – i cui dettagli non sono qui rilevanti – basato sui dati dell'epoca in merito all'aspettativa di vita.

non-perpetual constitution is at best a purely external criticism», dato che la «transgenerational cogency of the constitution is what Jefferson rejects» (213)[2]. Si tratta di un'opposizione radicale e difficilmente componibile tra modelli di sovranità alternativi. Eppure, sembra possibile mettere in dubbio che, rifiutando il modello sequenziale di sovranità e adottando il modello seriale, si corra inevitabilmente il rischio di non garantire un ruolo sovraordinato alla Costituzione rispetto alle leggi ordinarie, privando così la Costituzione di ogni forza regolativa.

A questo proposito, è utile richiamare la distinzione tra «regulative rules» e «constitutive rules» alla quale Stephen Holmes rimanda per difendere il costituzionalismo dall'accusa di essere antidemocratico e per mostrare, al contrario, che «constitutionalism and democracy are mutually supportive» (Holmes 1988, 197). Holmes sottolinea che, se si distinguono «regulative rules (e.g., "no smoking")» che «govern preexistent activities», da un lato, e «constitutive rules (e.g., "bishops move diagonally"» che «make a practice possible for the first time» dall'altro, allora «constitutions may be usefully compared to the rules of a game or even to the rules of grammar» (Holmes 1988, 227). Infatti, per Holmes:

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[2] È opportuno segnalare che la critica di carattere esterno citata in queste righe non è certamente l'unica che Ferrara avanza nei confronti del modello seriale di sovranità. In particolare, Ferrara ritiene che «the wanton republic that a serial understanding of popular sovereignty may fail to block would merely have a nominal constitution with null regulatory force and would consequently lack not only stability – as Madison points out – but also a recognizable political identity properly recognizable *over time*» (213). Il primo punto, quello riguardante la stabilità, è affrontato nelle prossime righe. Rispetto al secondo punto, che non sarà approfondito in queste pagine, vale la pena di evidenziare che, per Ferrara, «if there is no closer relation of a generation to its own, as opposed to other peoples' ancestors, the serial republic – the product of "generational federalism" rather than of transgenerational constitutional authorship – is irreparably indistinct. It fails to be individuated along *political lines*» (214-215). Ferrara ritiene che questo esito sia da scongiurare perché, «if the citizens are not able to develop any sense of being somehow – as Habermas once felicitously put it – "in the same boat as their forebears" in relation to a transgenerational democratic project, then their identification can develop only along *ethnic* lines, with all the dangers thereto associated» (215). Sulla necessità, rivendicata da Ferrara, di intendere, nell'ambito del liberalismo politico, il popolo in termini propriamente politici e non etnici, cfr. §5.

> A democratic constitution does not merely hobble majorities and officials. It also assigns powers (gives structure to the government, guarantees popular participation and so forth), and regulates the way in which these powers are employed (in accord, for example, with principles such as due process and equal treatment). In general, constitutional rules are enabling, not disabling; and it is therefore unsatisfactory to identify constitutionalism exclusively with limitations on power (Holmes 1988, 227).

Come evidenziato in questo passaggio, la presenza di una Costituzione è indispensabile affinché il gioco democratico possa funzionare: la Costituzione definisce le regole che rendono possibile il funzionamento dei processi decisionali delle democrazie. Inoltre, come Holmes sottolinea, per apprezzare il ruolo abilitante della Costituzione rispetto alle pratiche democratiche, si deve tenere presente anche «each generation's need to unclutter and systematize the agenda for solving present problems by taking for granted certain power-granting, procedure-defining and jurisdiction-specifying decisions of the past» (Holmes 1988, 222). In questo senso, gli impegni e i vincoli sanciti dalla Costituzione e, dunque, definiti dalle generazioni passate, consentono alla generazione presente di non sprecare tempo ed energie a definire le regole del gioco e di focalizzarsi, invece, sulle questioni che la riguardano in modo più diretto. Questo non sarebbe possibile se, in linea con la proposta di Jefferson, ogni generazione dovesse riscrivere da capo la Costituzione o anche solo riconfermare la Costituzione predisposta dalla generazione precedente. Come sottolinea Holmes, infatti, «by accepting a pre-established constitution, a people ties its own hands; but it also frees itself from considerable burdens» (Holmes 1988, 222-223).

L'argomento di Holmes chiarisce bene i vantaggi che derivano alla generazione presente dal fatto di disporre di una Costituzione preesistente, necessariamente definita dalle generazioni passate: le regole del gioco sono già codificate e permettono di giocare, invece di perdere tempo a elaborare tali regole. Questo argomento sembra efficace nel rivendicare per la Costituzione un ruolo regolativo e sovraordinato rispetto alle leggi ordinarie e alla pratica politica, senza richiedere necessariamente di adottare un modello sequenziale di sovranità. Infatti, anche se alle singole generazioni fosse garantita la possibilità di modificare unilateralmente la Costituzione, come previsto da Jefferson e dal model-

lo seriale di sovranità, ci sarebbero ottime ragioni, in base all'argomento proposto da Holmes, per evitare di mettere mano alla Costituzione e per esercitare, invece, le propria *agency* politica all'interno dell'impianto definito dalle norme costituzionali preesistenti. Si tratta di ragioni che evidenziano perché la proposta radicale di Jefferson rischi di essere controproducente, senza deporre necessariamente a favore del modello sequenziale di sovranità. Ci sono anche altre ragioni a favore della stabilità delle norme costituzionali che rimandano alle aspettative degli individui rispetto ai propri piani di vita.

Immaginate di essere coinvolti in una partita a scacchi, di aver posizionato – di mossa in mossa e rispettando le regole vigenti – i vostri pezzi in modo da proteggere il vostro re da tutti i possibili attacchi dell'avversario. La vostra strategia sarebbe vanificata se le regole del gioco cambiassero nel bel mezzo della partita e l'alfiere dell'avversario, all'improvviso, potesse muoversi in ogni direzione, non solo in diagonale, mettendo sotto scacco il vostro re. Allo stesso modo, le aspettative degli individui rischierebbero di essere disattese e i loro piani di vita di essere vanificati, se le regole di fondo che governano i termini della loro cooperazione e le istituzioni all'interno delle quali vivono fossero repentinamente o continuamente modificate. In questo senso, se la Costituzione definisce le regole del gioco, stabilendo i termini della cooperazione e delineando l'assetto istituzionale, è indispensabile che le norme costituzionali godano di stabilità. Anche considerazioni di questo tipo, però, sembrano indipendenti dal modello di sovranità che si adotta, se quello seriale o quello sequenziale. Infatti, simili considerazioni rimangono valide anche attribuendo all'elettorato la possibilità di rivedere la Costituzione in base alla propria volontà specifica. Dunque, anche adottando il modello seriale di sovranità, ci sono ragioni per regolare in modo stringente il potere emendativo, con l'obiettivo di evitare che le norme costituzionali siano soggette allo stesso grado di variabilità che contraddistingue le leggi ordinarie. Più nello specifico, in quest'ottica, ciò che conta è bilanciare in modo appropriato esigenze di stabilità con istanze di cambiamento che possono emergere dall'esercizio dell'*agency* politica da parte degli individui che formano l'elettorato[3].

[3] Può essere utile sottolineare che la proposta discussa in queste righe non implica alcuna mancanza di considerazione per le generazioni future. Anzi, proprio

Ferrara non nega affatto che possa effettivamente sorgere l'esigenza di modificare la Costituzione o di aggiornarne le norme attraverso l'introduzione di emendamenti. Ritiene, però, che eventuali modifiche costituzionali debbano essere vincolate al rispetto del principio di reciprocità verticale che, fondato sul modello sequenziale di sovranità, entra nel merito dei contenuti degli emendamenti proposti e circoscrive i margini di intervento concessi all'elettorato, attribuendogli il dovere di rimanere fedele al progetto politico definito dalle generazioni passate. Invece, alla luce di un modello seriale di sovranità, non sarebbero necessari criteri sostantivi per evitare di mettere in pericolo la stabilità delle norme costituzionali. Sarebbero sufficienti criteri procedurali volti a rendere il processo di modifica della Costituzione il più possibile dispendioso e lungo, in modo da scoraggiare – o destinare spesso all'insuccesso – iniziative volte a emendare la Costituzione in base al semplice sentimento politico del momento. Se si tratta soltanto di salvaguardare le aspettative degli individui o di rendere possibile l'ordinario processo decisionale di una società politica, evitando che le regole di fondo cambino secondo il capriccio dell'elettorato o della maggioranza del momento, non servono principi sostantivi.

Principi sostantivi sono, invece e senza dubbio, indispensabili se ciò che conta non è la mera stabilità delle norme costituzionali, a prescindere dal loro contenuto, ma è la continuità di un progetto politico auspicabile iscritto nella Costituzione e la sua possibilità di perdurare nel tempo. Per Ferrara, infatti, la Costituzione non è semplicemente un insieme di regole costitutive. Nel suo libro, non mancano passaggi in cui la Costituzione è intesa proprio in questo modo: per esempio, Ferrara definisce il potere emendativo come «the power to revise the constitutive rules of the political game» (248). Tuttavia, Ferrara utilizza anche espressioni come «the will of the people inscribed in the constitution»

perché l'esercizio del potere emendativo è reso oneroso da principi procedurali che mirano a salvaguardare la stabilità delle norme costituzionali, l'elettorato deve considerare la prospettiva delle generazioni future: abrogare un emendamento introdotto oggi, richiederà alle generazioni future tempo ed energie che dovranno essere sottratte a questioni di più immediato interesse per le generazioni future. Quindi – e Ferrara ha perfettamente ragione su questo – la prospettiva delle generazioni future è fondamentale e non può essere ignorata dalla generazione presente quando si appresta a intervenire sulla Costituzione.

(251) e afferma che «a constitution articulates a project for jointly living a political life over an open-ended time span» (260). Quindi, la Costituzione è un insieme di regole costitutive che definiscono uno specifico progetto politico, che non può avere una durata predefinita ma abbraccia potenzialmente diverse generazioni, regole costitutive che riflettono la volontà del popolo nel suo complesso. È proprio per questo che la Costituzione non può essere modificata unilateralmente dal segmento vivente del popolo: la Costituzione esprime la volontà del popolo e l'elettorato da solo non può arrogarsi il diritto di esprimere tale volontà. Se la Costituzione è intesa in questo modo, ovvero in base al modello sequenziale di sovranità, la questione fondamentale non è il bilanciamento tra eventuali istanze di cambiamento avanzate dagli individui che compongono l'elettorato ed esigenze di stabilità volte a tutelare le aspettative degli individui che sono e saranno soggetti alle norme costituzionali. L'obiettivo sembra essere, piuttosto, trovare un punto di accordo tra la volontà specifica dell'elettorato, da un lato, e quella delle altre generazioni che compongono il popolo – o, più semplicemente, la volontà del popolo nel suo complesso – dall'altro. Infatti, se gli emendamenti proposti dall'elettorato non si accordano con la volontà del popolo, ovvero con la volontà di tutte le generazioni che lo compongono, non possono essere considerati legittimi. È quindi opportuno introdurre qualche osservazione più puntuale rispetto a come Ferrara intende la nozione di popolo, dato che è una nozione centrale sia nella sua concezione della sovranità, sia nella sua concezione della Costituzione.

5. *Popolo e populismo*

Ferrara sviluppa una riflessione molto articolata e interessante in merito al concetto di popolo, chiarendo come dovrebbe essere inteso dal punto di vista del liberalismo politico. In particolare, Ferrara distingue *ethnos* e *demos* e sottolinea che, sebbene «both terms denote aggregate of individuals or human groupings», hanno due connotazioni differenti. Il termine *ethnos* indica un insieme di individui «related on the basis of *non-political* characteristics», tra le quali rientrano, per esempio, «the use of a language, patterns of conduct, lifestyles, shared codes of politeness and civility, dietary habits, historical memories, and clusters of shared

preferences in broad areas of life» (147). Invece, il termine *demos* si riferisce a un «*ethnos* about which it can defensibly be stated, by external observers, that at a certain juncture, it has taken the form of a body politic or a political order, and that thereafter its members have been living according to commonly adopted constitutive rules for political action and within commonly accepted structures of authority, democratic or non-democratic» (147). Infatti, il demos – ovvero il popolo in senso proprio – si forma, sullo sfondo di pratiche e abitudini non politiche, soltanto quando un gruppo di individui accettano o sono soggetti a regole politiche comuni. Dunque, per Ferrara, il popolo non preesiste alla Costituzione o all'accettazione, più o meno volontaria, di regole politiche: è istituito solo quando, grazie alla introduzione di regole costitutive, un insieme di individui da *ethnos* si trasforma in popolo. Scrive Ferrara: «an *ethnos* becomes a *demos* – it takes on a *political* identity – through the act of ratifying or accepting a constitution» (148). L'adozione o l'introduzione di una Costituzione è l'atto costitutivo del popolo, atto in seguito al quale tutte le generazioni di individui soggetti alle stesse regole costitutive sono parte integrante del popolo e comproprietarie della Costituzione.

È opportuno sottolineare che, nell'ottica di Ferrara e in linea con il rifiuto del modello seriale di sovranità, "popolo" non è soltanto un'etichetta che si utilizza, in mancanza di alternative soddisfacenti, per indicare un insieme di individui in carne e ossa che, in un dato momento, sono soggetti alle stesse regole costitutive che governano la loro vita pubblica condivisa. La nozione con la quale lavora Ferrara è più esigente: il popolo è un soggetto che abbraccia le generazioni passate, presenti e future e la cui volontà non è riducibile alla volontà di nessuna delle generazioni presa singolarmente e, quindi, neanche alla volontà data dall'aggregazione delle volontà dei singoli individui che compongono una singola generazione. In questo modo, Ferrara può mettere un freno alla mossa populista, evitando che il popolo sia ridotto al suo segmento vivente: nessun insieme di individui appartenenti a una singola generazione è l'intero popolo e, quindi, l'elettorato non può arrogarsi il diritto di esprimere la volontà del popolo nel suo complesso. Tuttavia, per togliere terreno al populismo, Ferrara apre un problema di carattere diverso.

Ferrara sembra attribuire prominenza a un soggetto collettivo che, eccedendo l'insieme dei singoli individui in carne e ossa che compongono l'elettorato, è sovraordinato rispetto a questi ultimi. Questa implicazio-

ne appare potenzialmente problematica da una prospettiva liberale, ma fare a meno della nozione di popolo o darne una definizione deflazionistica, come Ferrara chiarisce, non è un'opzione percorribile all'interno del liberalismo politico. Infatti, l'idea di "popolo" è radicata nella cultura pubblica delle società democratiche e, dato che intende rispettare gli assunti di fondo del liberalismo politico, Ferrara non vi può rinunciare. A questo proposito, infatti, scrive:

> We political liberals are stuck with "the people", not with the people. Political philosophy can clarify the terms that are used but cannot wish them away. "People" is a terribly ambiguous term [...]. However, the reason that makes it appear ludicrous to dismiss the people as an inexistent referent like "the present king of France – namely, the fact that so many constitutions include reference to it – make it unlikely that a philosophical argument can rid our political discourse of this term. "The people" is here to stay, as long as democracy lives on, and the best we can hope for is to dispel its inherent ambiguity by casting light on it (145).

Se si ritiene che, in linea con l'impianto di fondo del liberalismo politico, la filosofia politica abbia un ruolo tanto ridotto, che debba limitarsi a chiarire le nozioni centrali nella cultura pubblica di riferimento, senza poter intervenire in modo più incisivo sul linguaggio politico, è difficile sbarazzarsi della nozione di popolo. In effetti, il popolo, inteso proprio come soggetto che trascende i singoli individui in carne e ossa, è centrale nella cultura pubblica delle democrazie. Con il superamento del modello hobbesiano, si afferma l'idea – riconducibile, tra gli altri, a Rousseau – che la sovranità spetti al popolo, a un soggetto collettivo di cui tutti gli individui che costituiscono il corpo politico sono membri. In questo modo, gli individui non sono più relegati al mero ruolo passivo di sudditi soggetti alle decisioni del sovrano: esercitano collettivamente la sovranità e, come membri attivi del corpo politico, ovvero del popolo, sono coautori delle decisioni pubbliche cui sono, al tempo stesso, soggetti. Attribuire la sovranità al popolo, i cui componenti sono tanto autori quanto destinatari delle decisioni pubbliche, permette di qualificare la democrazia, seguendo la brillante sintesi di Lincoln, come «governo del popolo, dal popolo, per il popolo». È evidente dunque perché il popolo, come detentore della sovranità, ricopra un ruolo centrale nella

cultura delle società democratiche. Ferrara sembra sottoscrivere questo tipo di impostazione, sebbene con significative cautele e ponendo l'enfasi sulla natura propriamente politica del popolo, in modo da svincolarlo da connotazioni riconducibile all'ethnos. Tuttavia, è proprio un impianto articolato intorno alla centralità del popolo a creare un terreno particolarmente fertile per il populismo.

Il populismo non è un fenomeno alieno. È solo nell'ambito della cultura pubblica delle società democratiche – o, per lo meno, nell'ambito di una tradizione democratica che attribuisce la sovranità al popolo inteso come soggetto che eccede l'elettorato e a cui spetta la sovranità – che l'appello alla volontà del popolo è sensato e dotato di particolare salienza. Per contrastare il populismo, si può adottare la strategia di Ferrara e insistere che l'elettorato non può esprimere la volontà del popolo nel suo complesso perché ne costituisce solo un segmento. In questo modo, però, si circoscrive l'autonomia politica dei singoli individui o delle singole generazioni, non legittimate a decidere per sé e si avvalla l'idea che il depositario della sovranità, che ha la facoltà di decidere in ultima istanza, sia il popolo, ovvero un soggetto che eccede i singoli individui o la singola generazione. Si tratta esattamente del soggetto cui fanno appello le forze populiste per legittimare il proprio operato. Come strategia alternativa, si potrebbe ricorrere a una revisione del linguaggio politico, definendo "popolo" in modo deflazionistico. Se il termine "popolo" indicasse semplicemente l'insieme di individui che, in un dato momento, vivono sotto regole politiche comuni, la rivendicazione di essere espressione della volontà del popolo equivarrebbe ad affermare di agire in nome dell'elettorato, ovvero in nome di individui in carne e ossa che esercitano la propria *agency* politica decidendo insieme della propria vita pubblica. Adottando questa seconda strategia, un eventuale appello al popolo sarebbe privo della speciale aura di sacralità di cui abitualmente gode. Sembra quindi opportuno verificare se, per fare i conti con il populismo e contestarne le pretese, non sarebbe più efficace ridefinire in modo netto la nozione di popolo, piuttosto che sancirne l'interpretazione ordinaria e più accredita all'interno della cultura pubblica delle democrazie. È chiaro che una strategia di questo tipo è insoddisfacente dalla prospettiva di Ferrara, non solo – e forse non principalmente – perché viola i limiti che il liberalismo politico impone alla riflessione filosofica, come evidenziato nel prossimo paragrafo.

6. T*ra popolo transgenerazionale e individui in carne e ossa*

Se la sovranità non spetta al popolo – inteso come soggetto che abbraccia le generazioni passate, quella presente e quelle future – ma non spetta nemmeno a un'entità indipendente dagli individui che vi sono soggetti – come può essere il Leviatano di Hobbes – sembra inevitabile attribuire il potere ultimo agli individui in carne e ossa, ovvero ai componenti dell'elettorato. Se gli individui hanno il diritto, in quanto depositari della sovranità, di intervenire sulla Costituzione, non c'è alcuna garanzia contro l'eventualità che la generazione presente o una delle generazioni future snaturino completamente il progetto politico definito dalla generazione fondatrice. Anche imponendo il rispetto di principi procedurali volti a promuovere la stabilità delle norme costituzionali e ad assicurare loro forza regolativa maggiore rispetto alle leggi ordinarie, non c'è garanzia contro questa eventualità. In altri termini, in quest'ottica, non c'è alcuna garanzia che un progetto politico auspicabile iscritto nella Costituzione perduri nel tempo. Dalla prospettiva di Ferrara, un'impostazione di questo tipo comporta, senza dubbio, una perdita netta.

La soluzione che Ferrara propone per regolare il potere emendativo ha proprio la finalità di squalificare come illegittime modifiche costituzionali che alterino in modo peggiorativo un progetto politico di valore. In linea con gli assunti di fondo del liberalismo politico, questo obiettivo non è realizzato qualificando come illegittimo ogni esercizio del potere emendativo che metta a repentaglio un progetto politico qualificato teoricamente come desiderabile. Piuttosto, un simile obiettivo è conseguito ponendo l'enfasi sulla reciprocità tra le generazioni che compongono il popolo e qualificandole tutte come comproprietarie a pari titolo della Costituzione. Se la generazione fondatrice ha delineato nella Costituzione un assetto politico desiderabile, che garantisce un certo grado di autonomia agli individui nella definizione dei loro interessi e delle loro idee del bene, l'elettorato non è legittimato a introdurre emendamenti che comportino una diminuzione dell'autonomia individuale. Emendamenti di questo tipo sarebbero illegittimi, non perché sono di fatto regressivi, perché non sarebbero accettabili dalla prospettiva della generazione fondatrice, oltre che da quella della generazione futura. Infatti, è irragionevole aspettarsi che la generazione fondatrice sia disponibile ad accetterebbe riforme costituzionali che riducano l'autonomia indivi-

duale, dando così vita a un ordine politico meno desiderabile rispetto a quello che la stessa generazione fondatrice ha istituito. In questo modo, un assetto politico auspicabile, sebbene possa essere migliorato e rivisto per affrontare questioni non anticipate dalla generazione fondatrice, si preserva nel tempo e passa in eredità alle generazioni future che saranno soggette agli stessi vincoli di reciprocità verso le generazioni che le hanno precedute.

L'analisi di Ferrara chiarisce dunque in modo molto convincente che, per assicurare stabilità a un ordine politico auspicabile, non è necessario fare affidamento a una filosofia della storia teleologicamente orientata. Chiarisce, però, molto bene anche che, per preservare 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. Infatti, 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. In questo modo, sebbene non soggetti al rispetto di un modello normativo predeterminato, gli individui in carne e ossa non sono legittimati a esercitare appieno la propria *agency* politica e a definire autonomamente l'assetto istituzionale che governa la loro vita pubblica o i termini dello schema cooperativo nel quale sono coinvolti. In effetti, 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.

Attribuire centralità al popolo transgenerazionale permette di assicurare continuità a un progetto politico auspicabile al prezzo, però, di ridurre l'autonomia politica degli individui in carne e ossa. Se facendo a meno del riferimento al popolo e lasciando il centro della scena politica agli individui, si corre il rischio che un assetto istituzionale di valore sia sovvertito, con la soluzione proposta da Ferrara si evita un simile rischio ma si sacrifica, almeno in parte, l'*agency* politica degli individui in carne e ossa. È molto probabile che un simile sacrificio non sarebbe accettabile per chi attribuisce centralità agli individui in carne e ossa e intende

assicurare loro la possibilità di decidere liberamente della propria vita pubblica, senza oneri verso il popolo, inteso come soggetto che trascende i singoli individui e le singole generazioni.

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The Sequential Texture of Democracy: A Reply

Alessandro Ferrara

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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Critical Exchange

The Privatized State: Neo-republicanism and Ideal Theory

Elena Icardi

In her book *The Privatized State. Why Government Outsourcing of Public Powers is Making Us Less Free* (Princeton University Press, 2020) Chiara Cordelli addresses the largely unexplored issue of state privatization, namely "whether and when it is permissible for a government to delegate certain responsibilities to private actors" (5). According to Cordelli, these questions pose a problem of legitimacy. Private actors not only provide goods and services to citizens on behalf of the government, but also make decisions that affect individual liberty while performing such public functions. These decisions are deemed illegitimate.

Although these few pages cannot fully convey the scope and value of the book, I will briefly summarize Cordelli's rich and elaborate argument in order to better understand her thesis, before raising some critical points that I think are worth discussing.

To begin with, it is important to note that freedom here is understood as independence from the will or authority of others, and "independence requires rights", i.e., "a sphere of action that one is entitled to control and others are obliged not to interfere with" (49). Furthermore, in a Kantian vein, Cordelli argues that such rights are only provisional in the state of nature, where everyone has "an equal right to stand by his or her own judgment and not to defer to others with regard to reasonable disagreements about the shape and boundaries of their reciprocal rights and obligations" (63).[1] By contrast, reciprocal rights and obligations be-

[1] Cordelli draws on both Locke and Kant with respect to the definition of freedom and its connection with rights; then, though, she distances herself from the

come effective when they are the result of a process in which everyone has participated and in which everyone has been granted equal normative authority. Namely, when they are defined and enforced within a democracy that does not privilege anyone and that represents the shared or "omnilateral" will of all (62). Only when rights are shaped by a democratic process will no one be dependent on the unilateral will of others, and thus everyone will be free.

The question now is what happens when a democratic government delegates certain responsibilities to private actors. Cordelli's answer is that a new form of dependency emerges, for two reasons (Part One). On the one hand, by performing such public functions, private actors shape the rights and duties of citizens, namely, they have a legislative or quasi-legislative power, rather than a merely executive power (92). On the other hand, this power is illegitimate because private actors *qua* private actors cannot fulfil the above-mentioned requirements for defining such rights and duties without endangering citizens' freedom as independence.

Let me use one of Cordelli's telling examples, that of US health-care system, to illustrate this point.

> Under the US health-care system, recipients of publicly funded health-care services typically enroll in "managed care organizations" (MCOs). The government pays MCOs a set amount for their services. Since, given resource scarcity, it is impossible to cover all requests for treatment, an MCO must make decisions about what treatments to cover. Suppose two patients, A and B, both enrolled in the same MCO, claim access to different kinds of treatments, T_1 and T_2. Both patients advance reasonable claims and are prima facie owed the treatment, but because of resource scarcity only one treatment can be covered. The MCO must then decide how to balance these patients' claims (90).

In other words, the private actor delegated by the democratic government to carry out a specific public function, i.e., health care, seems to enjoy a certain discretion in deciding who is entitled and who is not to the good it must provide to citizens, i.e., medical treatment. Accordingly,

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former by following the Kantian idea that "rights are merely provisional in the state of nature, [and] so is justice" (50).

MCOs enjoy not only executive power but also legislative power since they ultimately determine what A's and B's entitlements to health care are.

At first glance, this could be legitimate if the government not only outsources a specific task to private actors, but also delegates its legislative power – after all, this is precisely what individual citizens do with respect to public administration, i.e., they delegate their normative authority, why should this not be the same for private actors? Cordelli, however, strongly rejects this possibility (Part Two). Unlike public administration, she argues, private actors cannot meet the three conditions for delegation, namely authorization, representation, and domain (119-120). First, they cannot be validly authorized. When many public functions are outsourced, "the government loses both 'epistemic' and 'practical' control over what is done to citizens", "'civil vigilance' is often weakened (142-150)", and this undermines legitimate democratic self-rule (Herzog 2023). Second, even if private actors could be validly authorized, they cannot act in the name of citizens, anyway, because *qua* private actors they follow reasons of profit and efficiency that differ from the public and shared reasons of citizens. Third, even if they could act on behalf of citizens, private actors still cannot do what they would be delegated to do: the provision of public goods is not only a matter of outcomes, but also of collective processes direct toward collective ends and "private actors [...] fail to be part of these 'jointly intentional' activities (209)" (Herzog 2023). As a result, a democratic government cannot legitimately delegate much of its normative authority to private actors, and when many private actors exercise normative authority (i.e., make decisions that shape citizens' rights and duties), as is often the case in contemporary Western democracies, citizens' freedom is ultimately compromised because citizens are inevitably dependent on the unilateral will of such private actors.

What should be done? Cordelli asks after this rather negative diagnosis (Part Three). Her answer is twofold. On the one hand, we should *ideally* get out of the privatized state. Governments should stop systematically delegating public functions to private actions, and this could be done by setting constitutional limits on privatization and by redesigning the system of public administration. On the other hand, however, such an exit process might take time, as well as being currently unavailable in the real world, hence, *non-ideally*, we should promote some improvements within the privatized state itself, e.g., imposing moral duties on

private actors while exercising their legislative or quasi-legislative power. To be sure, privatization would still be illegitimate, and the main goal would still be to get rid of it. Nevertheless, Cordelli seems to be aware of the practical difficulties associated with this goal, and thus she envisages further proposals, although her core aim in the book remains to show the illegitimacy of the privatized state.

This leading purpose is, I think, one of the main interests of the book itself. This is so in two ways. First, Cordelli undeniably addresses a real problem that is often overlooked in political philosophy. Addressing such a problem from the perspective of political philosophy allows her to provide a precise theoretical analysis of it, as well as to show why it is morally problematic in general and what the available solutions are, normatively speaking.

Second, the author frames it in terms of legitimacy, rather than in terms of desirability or efficiency, the two criteria generally used to address the issue of privatization. This has the advantage of emphasizing the urgency of the issue. For legitimacy enjoys a certain priority (12) over other values, such as justice. As I see it, citizens may, for instance, be treated justly by their queen, but if they have no control over her decisions, they will always be subject to her discretion, i.e., they will always be dependent on her unilateral will. Of course, they would be better off if their queen treated them justly, but this would not mean that they would be less dependent on her good will.

Such an image clearly recalls Philip Pettit's well-known example of "the slave of a kindly master" (Pettit 1997, 35). Even if the enslaver is "benign and permissive" (Pettit 1997, 32) and does not interfere with the enslaved person's life, the enslaved person remains dependent on the will of the enslaver. According to Pettit, this is a classic case of domination without interference. On the other hand, there is interference without domination. The main example pertains to laws that citizens can control: such laws interfere with citizens' lives but do not dominate them (Pettit 1997, 35-41 and 63-64). What matters, then, seems to be that people have control over the process that leads to the decisions they have to abide by, rather than the content of those decisions themselves. If the goodness of the latter depends on the "unilateral" – as Cordelli calls it – or "uncontrolled" – as Pettit (2012) does – will of some, it would be a mere concession of the kind that a kindly master or a benevolent queen

might make, which could change at any time according to their capricious will. In fact, as Cordelli also mentions in a footnote (308), Pettit himself argues for the priority of legitimacy over justice (Pettit 2012).[2]

This similarity underscores another element of interest in this work, which is the ongoing dialogue with the recent contemporary revival of the republican tradition. Cordelli herself makes explicit her aim to contribute to the neo-republican literature (14). In my view, however, the deep relationship between T*he* P*rivatized* S*tate* and neo-republicanism lies not so much in the specific contributions identified by the author as in the very idea of freedom that they both defend. As the author herself acknowledges, they are both concerned with the same problem, whether one labels it dependence or domination. Despite the differences between Cordelli's thought and neo-republicanism, thus, T*he* P*rivatized* S*tate* makes an important addition to the neo-republican literature.

As a corollary to this initial praise, let me mention that this book represents a remarkably strong and well-written piece of political and analytical philosophy. The author brilliantly guides the reader through her argument, step by step to its conclusion. Not only does she make her point clear, but she also offers accurate analysis and charitable criticism of alternative positions. Despite being a very rich and dense work, it proves to be an enjoyable reading even for readers who are new to the topic – as I suspect many will be, given the novelty of the subject.

Now, although I am sympathetic to Cordelli's argument against privatization in general, there remain some issues that I think are worth discussing. I find two of them particularly relevant. The first is the relationship between Cordelli's work and neo-republicanism; while the second concerns the balance between ideal and non-ideal theory. In what follows I will explore them one by one.

Despite the above-mentioned similarities with the neo-republican framework, as well as Cordelli's explicit aim to contribute to the neo-republican literature, the author of T*he* P*rivatized* S*tate* surprisingly does not endorse a neo-republican perspective. I wonder why. On the one hand,

[2] In her reading of Pettit's thought, Pamela Pansardi speaks of "*normative* priority of legitimacy over justice" since "in the absence of legitimacy […] justice may be a contingent feature of a society dependent upon the discretionary will of the ruler" (Pansardi 2015, 52).

her work might fit more neatly into such a contemporary outlook, given their shared rationales and concerns. On the other hand, her argument itself might benefit from the debate about freedom as non-domination.

Cordelli, instead, endorses a Kantian understanding of freedom, and she does so, it seems to me, in the name of a stronger connection between freedom and democracy. As she writes:

> while for Pettit democratic political institutions are *instrumentally* related to nondomination (they are meant to minimize instances of domination), a Kantian view of democracy stresses the freedom-*constituting* role of democratic institutions (323, footnote 50, emphasis added).

Although this observation appears in a footnote, such a distinction seems crucial to Cordelli's analysis of privatization as a matter of legitimacy. The illegitimacy of private organizations acting on behalf of the state is so compelling precisely because democratic legitimacy constitutes freedom.

However, even if one agrees that Pettit considers democracy primarily as instrumental rather than constitutive, this interpretation overlooks the centrality that political legitimacy also holds for Pettit's idea of freedom as non-domination. Furthermore, the departure from neo-republicanism appears to be happening too quickly: even though Pettit's definition certainly stands as an undiscussed milestone, it is only one of several available definitions of non-domination within the neo-republican panorama.

Other neo-republican notions of non-domination seem to put more emphasis on the link with democracy. Consider, for instance, the work of Dorothea Gädeke, who even uses language similar to Cordelli's, since she also refers to the idea of 'normative authority'. According to Gädeke, in order to be free from domination, people should indeed be granted an equal status as "normative authorities" (Gädeke 2020, 29). Moreover, they are granted such an equal status when the norms they have to comply with meet the criteria of generality and reciprocity, that is, they are justified by procedures in which all "enjoy equal chances to take part" and no one can impose his or her preferences, as well as "they [norms] apply to all and not particular persons" and "they accord the same claims and obligations to everyone" (Gädeke 2020, 40).

This is not to highlight a lacuna in Cordelli's book – especially since the two works are nearly contemporaneous. It is merely to suggest that her position appears to align more closely with the neo-republican discourse than what she is willing to concede. Furthermore, the debate on non-domination could enhance Cordelli's argument by offering a solution to the impasse of demandingness pointed out by Liza Herzog.

In her review of *The Privatized State*, Herzog wonders "how incredibly difficult" it would be to solve the problem of privatization following Cordelli's approach. To achieve this, not only should private actors cease to be delegated, but public actors should also meet exceptionally high standards of legitimacy:

> civil servants need to steadfastly hold onto their mandate, unerringly following the course of the omnilateral democratic will, even while also exercising their unavoidable discretion wisely and in ways that are responsive to citizens' needs and concerns. There might be civil servants capable of such virtuous behaviour, but they seem rare exceptions (Herzog 2023, 662).

As Herzog argues, Cordelli focuses on 'who' exercises legislative power and, drawing on Hegel, on their motives and reasons. This is in line with her decision to avoid concentrating on the 'what', i.e., what are the results of such a power, when she criticizes the delegation of power to private actors. Remember that when private actors perform public functions, they act illegitimately not because of their actions themselves, but rather because the way they act leads to a form of dependency – and *qua* private actors, they cannot act otherwise. However, I agree with Herzog that the standards set forth by Cordelli for how public actors should behave in order to prevent this kind of dependency appear to be quite demanding.

This is where I think non-domination *à la* Gädeke could be useful, as legitimacy does not rely on those who wield legislative power or their behavior (who), but instead, on the process by which the power is exercised (how). In fact, the non-dominating character of norms does not hinge upon the "individual set of internal commitments, intentions or dispositions" (104) of lawmakers, or their high "level of moral motivation" (289). The legislative process itself, meeting the criteria of generality and reciprocity, prevents domination. The prevention is not due to

the legislator's orientation or "bureaucratic ethos", as Cordelli puts it. Normative authority would thus be granted to everyone through normative-procedure dependent laws.

Such a move would not contradict Cordelli's view of privatization as illegitimate because private actors, *qua* private actors, inevitably adhere to other criteria, such as those of profit and efficiency. Similarly to what Cordelli argues, besides, I believe that they would lose their essence as private actors if they abandoned these criteria in favour of those necessary for legitimacy, i.e., generality and reciprocity. On the other hand, a shift from focusing on the 'who' to the 'how' could obviate the objection of demandingness, since public officials would not be expected to be exceptional, nor would their motives or reasons.

Of course, Cordelli might reply – as she does in response to the "realist skeptic" of the epilogue – that the public actors she is referring to are *ideal* public actors, part of the *ideal* normative solution she puts forward at the end of the book, which is, after all, "primarily a work of philosophy and, as such, a work of hope" discussing "what sort of political reforms [it is] reasonable to hope for" (302).

This brings us to my second point, which concerns the balance between ideal and non-ideal theory. Roughly speaking, the debate between ideal and non-ideal theory is a methodological debate within political philosophy: while some argue that the proper task of political philosophy is to put forward a picture of the *ideal* just society, others claim that political philosophy should be concerned with actually improving the *non-ideal* unjust world to make it more just.[3] As I see it, Cordelli's work lies between these two positions. I*deally*, she argues that the privatized state should come to an end because it cannot be legitimate. Therefore, we should envision a more legitimate political regime based on constitutional limits on privatization and governed by civil servants. N*on-ideally*,

[3] For an overview of the ideal vs. non-ideal theory debate see Valentini 2012. Note that, in what follows I do not intend to enter such a complex debate, nor to defend ideal theory from the well-known objection by Amartya Sen (2006) that "transcendental" theories, as he calls them, are neither necessary nor sufficient for justice – other scholars (e.g., Ingrid Robeyns 2012) have undoubtedly dealt with these issues better than what the scope of this review would allow me to do.

instead, she promotes duties for private donors and providers to enhance the current state of affairs, even though she emphasizes that this would not render privatization more legitimate.

Two types of problems arise from this non-ideal solution. One is practical. Improving the status quo could slow down, if not undermine, the process of exiting the privatized state. The author herself recognizes this matter:

> Assuming conditions of resource scarcity, we may well have reasons to invest these resources in efforts to limit state privatization and to bring about a more legitimate political order. Further, effectively implementing the above duties might end up being *counterproductive* [...]. This is because realizing those duties may end up legitimizing the role of private agents as appropriate political organs (282, emphasis added).

Nevertheless, she argues, these practical problems do not undermine her argument. I do not see, however, how the promotion of reforms that improve the privatized state would not weaken the claim that this state is wrong (i.e., illegitimate) and cannot be otherwise. It is one thing to acknowledge that the privatized state is unlikely to cease to exist in the near future, and that we need to adapt accordingly. But it is quite another to propose enhancing the legitimacy of privatization, even if only provisionally, in the non-ideal scenario. How can private associations act "as if they were legitimate" (281) if they cannot be legitimate by definition? Saying that seems to contradict the main argument. In this regard, I think that Cordelli's non-ideal solution leads to a theoretical problem as well. Therefore, I wonder why Cordelli does not bite the bullet and go for the ideal solution *tout court*. This looks more consistent with her own argument, namely that privatization is illegitimate and cannot be legitimized.

Moreover, this would not prevent her from considering empirical constraints, as she says she does in defending her view against the "radical skeptic", to whom she replies that her "political imagination may be limited, but intentionally so" (302). With this, she clearly seeks to balance the desire to develop a "work of hope" with the need to take practical limitations into account. However, this appears to be an issue of the feasibility of ideal theory rather than a matter of non-ideal theory. Furthermore,

this intention would not be denied by endorsing only the ideal solution. Such a solution may indeed take into account empirical constraints. For example, if one admits that "the presence of a complex administrative apparatus" is inevitable, one could, like Cordelli, imagine an ideal political world that reflects this feature. In a Rousseauian vein, political philosophy would "inquire if, in the civil order, there can be any sure and legitimate rule of administration, men being taken as they *are* and laws as they *might be*" (Rousseau 2014, 3, emphasis added) – where what has to be taken as it is would not only be human nature, but also some features of human society. This is also in line with Cordelli's answer to the "realist skeptic", which emphasizes that what she is looking for are "political reforms" for which it is "*reasonable* to hope" (302, emphasis added).

Note that my final remark is driven by the conviction that the privatized state is a problem, and political philosophy ought to find ways to eliminate it. However, because I agree with Cordelli's main argument, I believe that her ideal normative proposal of a more legitimate system of public administration (283) would have deserved more space in the book's length. This does not diminish the validity of her prior take on the illegitimacy of privatization, which I think is still sound, consistent, and compelling.

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Critical Exchange

The Privatized State, Output Legitimacy, and Market Structure[1]

Pietro Maffettone

It is hard to overstate the significance of Cordelli's wonderful *The Privatized State. Why Government Outsourcing of Public Powers is Making Us Less Free* (Princeton University Press, 2020). The book is closely argued, original, complex in design and execution. The narrative that Cordelli wants to bring to philosophical life is a relatively familiar one. Over the past fifty years or so, increasing parts of traditional state functions have been wholly or partly privatized. Political philosophers, as Cordelli correctly argues, have not, however, fully grasped the significance of these changes. They have oscillated between a concern for the efficiency of privatized services on the one hand, and the search for what might putatively make a given aspect of state activity inherently public (think of prisons, courts, the army etc.) on the other. In this picture, there might be parts of state activity that simply cannot be delegated to private actors in light of their essentially public nature, while for all others, the only thing that seems to matter is whether they make people better or worse off than available alternatives. Yet this all-or-nothing approach is too simplistic, Cordelli goes on to argue, and runs the risk of "presenting the problem simply as a question about the desirability or permissibility of transferring discrete state functions to private actors" which would in turn suggest that "government is ultimately reducible to a provider of particular goods and services" (6). Instead, progressive privatization should be seen as a fun-

[1] I would like to thank Joseph Heath and Elena Icardi for helpful comments on an earlier draft of this essay.

damental transformation "of the mode of governing and of the identity of government" thus calling into question one of the, if not the, main normative properties(y) of any political order, namely, its legitimacy. According to Cordelli:

> The ultimate wrong of privatization…consist in the creation of an institutional arrangement – the privatized state – that denies, to those subject to it, equal freedom, understood not as mere noninterference but rather as a relationship of reciprocal independence. It does so by making the definition and enforcement of individuals' rights and duties, as well as the determination of their respective spheres of freedom, systematically dependent on the merely unilateral will of private actors… (9).

Though the overall argument is complex, its core is relatively simple to grasp. The problem with privatizing an increasingly large part of state functions is that citizens interact with one another, and thus affect one another's rights and prerogatives, merely as private individuals; this is, in the end, what happens when important aspects of someone's life (e.g. access to medical care) are delegated to private providers of goods and services. The distinction between public offices and private roles is progressively eroded; our daily lives include a growing number of instances in which our independence is made precarious by the intervention of agents that lack appropriate standing. To avoid the normative pitfalls of the privatized state Cordelli proposes two distinct solutions. The first involves setting ex-ante constitutional limits on the outsourcing of state functions to private agents. The second consists in developing a democratic theory of public administration. This second aspect is crucial to understand that a more idealized version of public governance is possible and to be preferred to either privatization or to the acceptance of a dysfunctional and largely unresponsive state bureaucracy.

I have started my engagement with Cordelli's work by offering praise. And the praise is well deserved. However, in what follows, I shall highlight several points I found less intuitively appealing. I use the word 'appealing' advisedly, for I cannot hope to offer, given the space I have available, a detailed analytical appraisal of those points. Rather, I hope that by discussing them, the contours of an alternative picture might come to life, and thus that the nature of my perplexities can come to

be seen for what they are, namely, the result of a different overall philosophical orientation. To be clear, offering an alternative philosophical orientation does not prove Cordelli wrong. After all, to simply *assert* that the premises to an argument are incorrect does not, usually, invalidate its conclusions. However, offering such an alternative may provide some context to the discussion and explain the genesis of one's more specific perplexities about the argument under scrutiny.

To begin with, I should note that the book has a clear (and well defended) set of normative foundations. It is, more specifically, heavily indebted to a Kantian approach to political philosophy. Now, this is, to be fully clear, not a problem per se. And yet one is bound to balk at the idea that

> only in the presence of appropriately constituted democratic institutions can rights and duties be defined, adjudicated, and enforced in a way that is fully consistent with a norm of mutual respect both for the equal normative authority of all and for individuals' rational independence (47).

This kind of argument suggests a very specific normative framework. One where we have on hand: a) a well-defined conception of the free person; b) a clear picture of what kind of problem political institutions are meant to be a solution to; c) an uncontroversial account of what grounds the authority of democracy; and d) of the bases of the legitimacy of state action more broadly. The fact that political philosophers have spent considerable energy debating different views concerning a)-d) does not imply, to repeat, that Cordelli is wrong, yet, at times, one might feel that going along her criticism of the privatized state involves accepting a fair amount of 'philosophical baggage'. This is, to be fair, a feature rather than a bug of her work, and it is also part of what gives it depth, philosophically speaking.

I am not, however, particularly attracted to the overall Kantian picture that seems to emerge. My philosophical sympathies lie closer to the 'liberal' in 'liberal democracy', my understanding of the function of political institutions leans more heavily on their unique ability in solving coordination problems (though of course I am not equally attracted to all kinds of solutions!), the conception of the person I have in mind is rather more minimal and rather non-committal when it comes to the role of

rational independence, my enthusiasm for the authority of democracy is mild, and I am relatively happy to accept that the legitimacy of state institutions is affected by their outputs, not simply their inputs, over and above the realization of basic justice or guaranteeing the substantive conditions for a functioning democratic order.

This last point is, I believe, worth belaboring. Cordelli is not committed to the implausible view that Kantian input legitimacy is all that matters (and there are output elements in the Kantian account, as Cordelli correctly reminds us of), and she is also ready to concede that when state institutions are corrupted or exceedingly prone to malfunctioning there might be a case for delegating certain responsibilities to the private sector (12). Things must get done after all. However, one might feel that efficiency considerations do not exactly take pride of place in the overall structure of her argument. The relative unimportance of efficiency can be gleaned both at more abstract and more concrete levels of analysis. At the highest level of abstraction, efficiency is always presented by Cordelli as providing normative reasons that seem to be of lesser importance. I suspect that the explanation for this situation is closely related to what I have labelled, above, 'philosophical orientation'. In a Kantian approach political societies are not, or not primarily, cooperative ventures for the pursuit of mutual advantage in the context of relatively radical forms of pluralism. Rather, they are more akin to the creation of a normative order to preserve individuals' freedom when the latter is made precarious by the absence of public adjudication and enforcement of rights. While both approaches will certainly be hospitable to considerations pertaining to the fair division of the burdens and benefits of social cooperation, the place of efficiency is, however, bound to differ. For only in the first kind of approach does it even make sense to entertain the idea that efficiency can be considered central to the very point and purpose of political association. How so? One attractive option is, following Joseph Heath (2020, 142-146), to see the commitment to efficiency as one way in which public institutions respect liberal neutrality among conceptions of the good while at the same time registering the fact that persons cooperate, at a fundamental level, to improve their lives.

One, this time more applied, instance of the secondary importance assigned to efficiency is clearly visible in Cordelli's discussion of how to legitimize bureaucratic discretion. Cordelli is frankly admirable in the sub-

stantial amounts of reasonableness she injects in her Kantian democratic account when she suggests what she calls an integrative model (97 ff.). Nonetheless, the insistence on top-down and bottom-up forms of democratic control over public administrators' discretion have not, alas, managed to warm this reader's heart. Cordelli readily accepts that democratic control "should be limited by a requirement of fidelity to other aspects of the constitutional democratic state" (99). Yet, in my view, this is too loose a requirement. There are plenty of ways to waste public money, or simply to employ it in ways that are damaging for the ordinary lives of citizens, that pose no threat to the constitutional democratic state. The fact that such outcomes could be the result of robust democratic control over public administration would not, in my view, contribute to salvage them.

In the context of what we might reasonably see as a qualified defense of a fiduciary approach to the legitimation of bureaucratic discretion, Cordelli writes that "citizens are not children, and therefore they may, within certain boundaries, legitimately expect public administrators to carry out their own judgment and interpretation of what counts as a public purpose" (102). Hoping not to come across as exceedingly cynical or elitist, I would want to highlight that citizens not being children does not provide the sort of reassurance that would allow me to feel confident that *their* judgment and purposes are such that my life will not be made considerably worse because of *their* oversight over *our* bureaucracy. More to the point, it is at best unclear to me that the comparative evaluation of the risks involved in a despotic and unresponsive professional bureaucracy on the one hand, and of poor-quality inputs from democratic forms of oversight on the other, ought to be settled by assigning greater urgency to the former.

I suspect that my reaction is in part dictated by the kind of political context in which I spend most of my time. Southern Italy, and especially Napoli, are not exactly under threat from massive waves of privatization of core state functions. In addition, given the world as it is, the idea that the fundamental concern for public bureaucracies is to constraint professional discretion in light of democratic inputs from elected officials and ordinary citizens is bound to strike most people who live south of Rome as at best creative. I think that Cordelli would probably recognize that these contextual elements ought to matter to some extent. But I also suspect that some residual forms of disagreement would still stand.

One way to formalize this concern would be to say that one ought to discuss at greater length at what level of idealization we are required to operate for top-down and bottom-up democratic control to prove desirable. And I suspect that it would have to be considerable. Put differently, to the extent one assigns greater weight to efficiency considerations than Cordelli does, and to the extent that one sees the legitimacy of state action more strongly connected to its outputs, it seems reasonable to imagine that democratic control over state bureaucracies would have to be wielded by persons that are significantly different than the ordinary citizens of existing liberal democracies.

The relationship between efficiency and institutional design is also relevant in Cordelli's treatment of the market. The core of my concerns is related to what kind of picture of the market we are likely to gain by reading T*he* P*rivatized* S*tate*. A short detour is in order here. The premise I would like to begin with is that there is no such thing as 'the market', there are, instead, markets. As Debra Satz elegantly put it, "the view of the market as a homogeneous mechanism operating across different types of exchanges is distinctly modern" (2010, 39). Markets are socially embedded, and this implies that we need to look at how they are set up to understand who is likely to exercise more or less power within them. This last point is particularly salient in the context of the privatization of state functions. For it is precisely when we mix public goals and purposes with some form of price or incentive mechanism that we are likely to explore the regulatory complexities of different kinds of market structures (here I follow Claassen 2022). Concretely, this suggests that the privatization of utilities, rail transportation, health care, education etc. is unlikely to lead to market structures that resemble, say, the market for shoes.

So what? Much of life is about trade-offs. An interesting question, the question that I, for one, would be interested in getting an answer to, is what is gained and what is lost when a given market structure is introduced for the funding and/or production and/or allocation of a public service. We might lose some measure of public control, but, for example, gain some measure of efficiency, and the latter might come from empowering those who we might intuitively think are the 'right agents'. In Jane Gingrich's apt words, we can say that markets in public services "vary in how they place costs on users and in how they distribute power among (a) the state, (b) users of services, and (c) new

producers of services" (2011, 7). To illustrate, if a government decides to fund access to a service through a voucher citizens can spend by selecting a private provider instead of producing the service in question (think of schools), it is not obvious that competition between providers would not empower users (here, parents) as opposed to the providers themselves. Much will depend on how many providers there are, what standards the government sets to enter the market, whether families can realistically choose between different providers and are aware of what those choices involve etc.

Similar considerations, I believe, apply to some of the examples that Cordelli often reaches for to illustrate her concerns (154). The problem with, for example, contracting a specific firm for assessing a person's eligibility for a given benefit might not necessarily be that the firm's decision is illegitimate, but that, in the absence of competition, the firm might be tempted to exercise its (market) power to serve its purposes at the expense of applicants. If we could imagine a scenario where assessing benefit eligibility was contracted out to, say, twenty firms that applicants can realistically choose from, it is not at all obvious that benefit seekers would not gain substantially more 'power' than in a putative alternative where their eligibility was assessed by the government. Looking at things from the standpoint of efficiency, one might be tempted to say that replacing government monopolies with private ones is seldom a good idea if there are plausibly feasible alternatives, and that, if there aren't, then, the resulting market ought to be highly regulated precisely to avoid undesirable outcomes such as profit maximization attitudes without market discipline. Putting things in a slightly different way, we might, arguendo, concede that the only truly legitimate exercises of quasi-legislative power are public ones. What is less obvious is what follows from this. For, we might discover that some market structures, while permitting some exercises of power by private agents, would also allow us to minimize the latter while at the same time offering some form of improvement to citizens' quality of life. And, if this is the picture we face, it is unclear, at least to me, that privatization would be morally inappropriate. Benefit seekers are, after all, deeply interested in seeing their case assessed quickly, and fairly, not in the nature of the stamps that cover their applications.

To be fair, no one in their right mind should claim that it is easy to create market structures that combine effective public regulation engen-

dering efficiency gains and greater power for individual participants (especially when those individual participants come from disadvantaged groups in society). But thinking of privatization as 'the state vs. the market' suggests a different kind of all-or-nothing picture compared to the one Cordelli so insightfully warns us against. All forms of privatization are not created equal, and this is because market structures vary significantly, and their variations matter immensely. That many forms of privatization we are familiar with end up empowering private providers rather than users is not the result of destiny or nature, but of (poor) design (or lack thereof).

Whether or not one agrees with Cordelli's overall argument, her concern for the legitimacy of the privatized state is a healthy reminder of the fact that the political economy of very unequal democracies can often lead to undesirable outcomes. That the reminder comes from a well written and philosophically sophisticated book is a much-appreciated bonus.

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Critical Exchange

Reply to Elena Icardi and Pietro Maffettone

The Privatized State: A Reply to My Critics

Chiara Cordelli

I am very grateful to Elena Icardi and Pietro Maffettone for their generous and thoughtful comments on T*he* P*rivatized* S*tate*. It is a privilege to be given the opportunity to respond to their critical observations. Given the wide range of issues both contributors raise, I will not be able to provide a comprehensive response to all of them. I will rather concentrate my reply on five central topics, which can be broadly summarized as follows: 1) the relation between Kantian republicanism and neo-republicanism; 2) the over-demandingness of an internalist conception of legitimacy; 3) the relation between ideal and non-ideal theory; 4) the place of efficiency in evaluating the state involvement in the economy; and 5) the relation between bureaucracy and democracy. These are all important themes in the book, and I am glad to have the chance to further clarify, and expand on them.

Beginning with the first theme, Icardi wonders why I do not ground my critique of privatization on a neo-republican approach, and what the real difference between neo-republicanism and the Kantian account of freedom and democratic legitimacy I endorse is, given their many apparent similarities. I believe there are three main differences that motivate my choice of theoretical framework.

The first difference, which Icardi herself notes, has to do with their respective conceptions of the state, and of its relation to justice. For neo-republicans like Philip Pettit the state is "an unintended precipitate of human history", and living under a state is "a historical necessity on

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a par with living under the laws of physics".[1] This is what ultimately explains why the mere fact of having to live under a state is not itself a form of domination. From a Kantian perspective, things are very different. The state is a normative demand, not a historical fact. The existence of the state is necessitated not by history, but rather by freedom. More precisely, given the fact of physical proximity and thus of potential interference with each other purposiveness, freedom requires rights – secure spaces for self-determined action. Such rights, in turn, can only become conclusive within a state – a system of rules expressive of an omnilateral, that is to say, reciprocal, public and appropriately representative will.[2] True, for Pettit, the state is not *just* an historical necessity. Political institutions are also valuable means of nondomination – they serve the normative goal of minimizing domination between private parties (justice) and, when appropriately constituted, they also minimize the domination of private parties by the state itself (legitimacy). Yet, their value ultimately remains instrumental. The distinctiveness of Kantian republicanism, by contrast, consists in viewing political institutions and, I would add, democratic ones, as having a justice-constituting role. Without such institutions, justice would be conceptually impossible, as rights would remain merely provisional. For reasons I extensively examine in Chapter 2 of *The Privatized State*, I believe this account of the normative foundations of the state is both philosophically appealing and necessary to reject what I call the "interchangeability assumption" – the idea that, at a fundamental level, public and private forms of action are just interchangeable means for the achievement of independently defined ends. My normative critique of privatization as a return to the state of nature develops from such rejection.

A further difference with neo-republicanism relates to the very definition of freedom. For Pettit, non-domination is the absence of arbitrary power of interference, where "interference" is defined in terms of reduction of options for choice.[3] My own interpretation of Kantian freedom as independence makes no reference to the reduction of options

[1] Pettit 2012, 161.

[2] See also Ripstein 2009.

[3] Pettit 2012, 152.

for choice. Rather, the focus is on not having one's ability to form and pursue ends subject to, and dependent on, the merely unilateral will of another, whether one's options for choice are reduced or not. This distinction is important. To see why, consider the case of private philanthropy (a central theme of Chapter 7). Dependence on philanthropy is often thought to be incompatible with neo-republican freedom. But in what sense, exactly, does the philanthropist have the power to interfere? After all, the philanthropist, by making donations, only has the power to add options for choice to the beneficiary's pre-existing set. The reason why a person's dependence on philanthropy is incompatible with her freedom is not that the philanthropist has the power to reduce the beneficiary's options for choice but rather that the beneficiary's ability to form and pursue ends depends on the exercise of someone else's merely unilateral, because private, discretional, and non-accountable will. The Kantian account of freedom better captures this point.

The third difference is that neo-republicanism cannot, I think, suffice to ground a case for the authority of democracy, understood as collective rule. This is because a system of impersonal ruling, e.g. a system where a robot or computer makes the rules, would seem to be compatible with non-domination (assuming the robot is not an agent). If so, "rule of all", that is to say democracy, is not required by non-domination. It is also because, even if non-domination were to succeed in grounding a case for democracy at the level of sovereignty – the authorization of fundamental laws or constitutional essentials – it is unclear whether it would suffice to ground a secure case for democracy at the lower level of government. Suppose, for example, that a people democratically vote on a constitution that allows for certain forms of dictatorships, at least for certain periods of time, and that people retain the power to periodically revise the constitution. Why would subjection to the dictator's rule be incompatible with neo-republican freedom? The Kantian account of freedom as independence may have more resources to obviate this problem, insofar as freedom as independence includes, as a corollary, what Kant calls a requirement of "rightful honor". A political system can then be regarded as meeting such requirement only if it empowers citizens to resist becoming mere means for the pursuits of others' ends, and to *assert* their own worth in their relation to others, including those in power. These desiderata would be jeopardized by forms of government that reduce

citizens to passive subjects of a dictator, and deprive them of the ability to play an active part in actively shaping or influencing the content of the laws. If rightful honor constrains what a people can validly authorize through constitutional reforms, then, a people could not be understood as collectively authorizing an autocratic master to rule them.[4] Kantian freedom thus extends, more securely than neo-republicanism, the presumption in favor of democracy from sovereignty to government.

Turning now to the second theme, Icardi worries that my conception of legitimacy is overdemanding and that the non-dominating character of law-making, and of administration, does not hinge upon office holders' internal dispositions, rather it is enough that the process through which such powers are exercised meet "creteria of generality and reciprocity." In response, I would say, first, that it is not obvious what it means for a *process* to meet criteria of generality and reciprocity, e.g. is this a function of participants in the process acting according to the letter, or to the spirit, of rules or mandates? Is it also a function of the quality of reasons provided in support of so acting? Etc. Second, generality and reciprocity are, in my view, not enough for democratic legitimacy, if legitimacy is understood to be grounded on a commitment to republican values. This is because the process of law-making, and its implementation, must also be *representative* of an omnilateral will, understood as the collective, public will of the citizenry. More precisely, law-making must "carry out" such will so that no citizen is subject to the imposition of a will that represents a merely private form of judgment. My contention is that citizens' (i) shared control over the terms of democratic authorization, (ii) office holders' compliance with the letter of mandates, and (iii) ex post contestation, albeit essential, are not sufficient to secure that the process of law-making and implementation qualifies as appropriately representative. To see why, consider the following case:

> *Corruption*. Lawmakers are under a mandate to "pass a law that will result in 1000 new job placements." Some wealthy donors promise the lawmakers future benefits in exchange for passing a law the content of which happens to be identical to the one demanded by the people's original mandate. In response to the donors' request, the

[4] See also Hanisch 2016, 67-88 and 84.

lawmakers pass the law, which they would not have otherwise passed. The law successfully results in 1000 new job placements. After the law is passed, the donors change their mind and the lawmakers receive no extra benefit for passing the law.[5]

In the example, the officials make laws that they are authorized to make by all citizens equally sharing in the authorization process and the content of their decisions reflects the will of the people, such that citizens may see themselves as having no reasons to contest the law ex post. Further, no formal corruption takes place in the end. Nevertheless, there is still an important sense in which the will the officials carry out through the process of law-making is the donors' will, not the citizens' will. This is a function of the internal reasoning of the law-makers – the fact that they do what they do on the basis of considerations (the donors' preferences) that have a non-public nature. Now, one could respond, following Icardi, that the problem in this case rests with a feature of the external process (the fact that by promising benefits the donors violate the rules of the game, so to say), not with the internal reasoning of the lawmakers. I would disagree, however, and so for two reasons. First, the reason why the law cannot be regarded as carrying out a public will is not the existence of the donors' promise *per se*, but how the lawmakers treat such promise as a reason for action. Second, and relatedly, even in the absence of an actual promise, and thus of a violation of the external process, the *act* of law-making would still express a private, rather than public, form of judgment, thereby failing to carry out an omnilateral will, if it was based on non-public considerations.

One could object that, as a matter of practicality, it can be problematic to make the legitimacy of a norm dependent on the internal reasoning through which it is arrived at. But this is, in my view, not a reason to opt for a purely externalist conception of legitimacy, but rather to adopt institutional proxies as measurable standards of internalist requirements. For instance, insofar as the legal structure of public offices, with their duty of loyalty and tenure protections, as well as limits on campaign finance and lobbying, are arguably necessary to support the ability of

[5] I use this example in Chapter 5 of *The Privatized State*, where I discuss the normative conditions of representation.

public office holders to silence nonpublic reasons in decisional processes that are meant to be representative of a public will, such institutions can be used as proxies for office holders' quality of reasoning.

I shall now move on to the third theme – ideal versus non-ideal theory. Icardi spots an apparent contradiction in the way ideal and non-ideal considerations interact in my account of the duties of private actors within an already privatized state. As she puts it "It is one thing to acknowledge that the privatized state is unlikely to cease to exist in the near future, and that we need to adapt accordingly. But it is quite another to propose enhancing the legitimacy of privatization, even if only provisionally, in the non-ideal scenario. How can private associations act "as if they were legitimate"…if they cannot be legitimate by definition? Saying that seems to contradict the main argument." The contradiction, however, vanishes once we unpack the concept of provisionality. In my account, the legitimacy of private actors is merely provisional, in a way similar to the way in which private parties, in the Kantian pre-civil state, have a provisional, permissive authorization to claim rights and to use coercive force. Acting on such authorization, in the state of nature, is only transitionally and conditionally permissible, insofar as it is done compatibly with the final, obligatory end of bringing about a rightful condition, after which that authorization will disappear (being substituted by an omnilateral form of authorization). Similarly, private actors in the privatized state have only a provisional and transitional kind of permission to act, which does not amount to full legitimacy, and which is itself conditional on them being committed to exit the privatized state.

I should turn next to the place of efficiency in evaluating the state involvement in the economy. As Maffettone points out, I hold the view that the efficient achievement of certain justice-based outcomes is itself a demand (the substantive component) of legitimacy. But, as Maffettone also rightly notices, with a hint of disapproval, "efficiency considerations do not exactly take pride of place" in my argument. Should efficiency play a more central role in a theory of privatization, then? He seems to think so. Maffettone also suggests that we should adopt a more "case by case" approach to privatization, especially in analyzing "what is gained and what is lost when a given market structure is introduced for the funding and/or production and/or allocation of a public service." Some cases of privatization may empower beneficiaries, while others may not. In his ex-

ample, "If we could imagine a scenario where assessing benefit eligibility was contracted out to, say, twenty firms that applicants can realistically choose from, it is not at all obvious that benefit seekers would not gain substantially more 'power' than in a putative alternative where their eligibility was assessed by the government." In order to fully respond to these important criticisms, I would need more space.[6] Here I will limit myself to a few general considerations.

First, and in relation to the above scenario, I should make clear that, from a republican perspective, the relevant 'power', or form of empowerment, is not just a function of the number of options for choice beneficiaries have, and not even of the number of opportunities for exit. To go back to the philanthropy example, whether I am dependent on one benefactor or ten may make a difference in terms of my 'power' (actual capacity) to escape certain abuses, but it does not make a categorical difference in terms of my 'power' to be free – not to be dependent on a merely private and unilateral will. If the argument I make in the book – that private service providers who determine eligibility criteria necessarily lack the capacity to make such determinations in a public way – is valid, then, the problem of subjection to a merely unilateral, private will cannot be simply solved by multiplying the number of private organizations.

Second, my aversion for efficiency-based approaches to privatization, which Maffettone astutely grasps, is mostly targeted to those accounts, of which Joseph Heath's is an exemplar, which take each case of privatization as assessable on its own merits (the case-by-case approach), and which understand such merits in line with mainstream economic theory: "the state involvement in the economy should be guided primarily by the norm of efficiency, which is to say, the objective of correcting market failure."[7] When the market fails on both the demand and the supply side – the argument goes – then the state must act as both a purchaser and as a provider. When, instead, market failure occurs on one side only, it is on that side only that state intervention is required. The problem with this analysis, as I see it, is that it neglects and obscures the aggregative, structural and dy-

[6] Beyond the book, I expand on these points in a more recent piece (Cordelli 2024, 66-84).

[7] Heath 2023.

namic effects of privatization, especially on (i) the overall balance of power between the public and the private, states and private corporations; and (ii) the relationship between citizens and their state. It also unjustifiably subordinates such concerns to efficiency considerations.

With regards to (i), it is obvious that the more a government privatizes, the more it becomes dependent on the private sector for the performance of essential tasks. In turn, the higher its dependence on the private sector, the more the state will be vulnerable to, and powerless in front of, pressures from such sector – a sector populated by actors with a vast amount of economic resources and, in a context of international competition, with the power to threaten to bring their resources elsewhere.[8] Such dependency is further worsened by the likelihood of a "brain drain" from government to the private sector, which can generally afford to pay higher salaries. Call this *the problem of dependency*.

Further, the state's effective capacity to keep private actors under appropriate control and accountability standards is itself compromised by its level of dependence on the private sector.[9] This is not only because such sector can use its resources to impede needed regulations, but also because the more government outsources, the less capacity it is likely to retain to gather basic information about performance, costs, and outcomes, and thus to choose competent contractors, as well as to enforce contractual terms. Call this *the problem of control*.

With regards to (ii), since citizens' attachment to, and care for, their institutions mostly develop through their daily interactions with such institutions, in contexts where "the face" of government is largely privatized, citizens' interest in politics, and their motivation to act vigilantly, tend to diminish (as the empirical literature on the submerged state confirms), and civic apathy to grow.[10] Privatization thus generates *a problem of civic vigilance*, beyond those of dependency and control.

The important point for our purpose is that, insofar as all the above problems are a matter of scale, not of any single instance of privatization taken in isolation, a "case-by-case" analysis of privatization, especially if primarily

[8] Farrell 2019.

[9] Freeman, Minow 2009; Michaels 2017; Verkuil 2007; 2008.

[10] Mettler 2011.

focused on economic efficiency, will necessarily miss them. Yet, from a Kantian-republican perspective (a perspective that, of course, I cannot defend here but which I do my best to defend in Chapter 2), these problems are crucial, for they undermine the very point and purpose of the democratic state. On the one hand, the problem of dependency and civic vigilance lead to *the domination of the state by private actors*. Once the democratic process is dominated by private interests it can no longer carry out an omnilateral will. On the other hand, the problem of control leads to the *domination of citizens by a privatized state*. Contract incompleteness often leaves private contractors with wide degrees of discretion. The less the state retains the effective capacity to exercise appropriate forms of control over private contractors, the more citizens will unavoidably become subject to unaccountable, and thus unilateral, exercises of discretionary power. Both problems are entirely independent of whether private actors exercise their discretion in ways that benefit or rather undermine overall efficiency. And, both issues reproduce within the state the same problem of domination, the solution to which was meant to justify the existence of the state itself. Insofar as, in the account I defend, the state is first and foremost the constituent of a rightful condition, and not a solver of collective action problems, it cannot appeal to considerations of efficiency alone to justify the undoing of that very rightful condition.

I want to conclude with a brief discussion of my proposal to partially democratize public administration, in order to avoid the problem of bureaucratic domination. Maffettone is skeptical of this proposal mostly, it seems to me, on elitist grounds, and on the basis of considerations concerning the trade-off between legitimacy and other values. He argues

> citizens not being children [which, in turn, entitles them to not be put under fiduciary guardianship by experts] does not provide the sort of reassurance that would allow me to feel confident that *their* judgment and purposes are such that my life will not be made considerably worse because of *their* oversight of *our* bureaucracy.

He continues:

> More to the point, it is at best unclear to me that the comparative evaluation of the risks involved in a despotic and unresponsive professional bureaucracy, on the one hand, and of poor-quality inputs from democratic forms of oversight, on the other, ought to be settled by assigning greater urgency to the former.

In response, I would first resist the logic of simple trade-offs. The value of not being ruled by an alien will, whether a guardian or a dictator, is not something we can just balance against some improvement in terms of outcomes. I take it, for example, that even if an enlightened dictator could make better decisions than a democratic government, we would still opt for the latter. I hope that Maffettone would agree with me on this point. Now, if this is true of a democratic government when law-making is at stake, why shouldn't it be also true of a system of administration, when the implementation of those laws is at stake? In other words, if we give much importance to not being subject to an alien will in the making of laws, why should we be content with being subject to any such will when their application to particulars is concerned, given the fact that this application is what ultimately matters for our lives? The traditional answer, of course, is that the system of administration is already democratically legitimized because bureaucrats respond to the executive, which in turn implements the legislature's will, ect. However, the entire problem of bureaucratic domination arises precisely because certain exercises of administrative discretion simply cannot be legitimized by appealing to higher rules, mandates and chains of delegation (see Chapter 4). The only means to legitimize residual discretion is thus to democratize it.

But, hopefully, I can say something more to alleviate Maffettone's concerns. What I propose is a theory of administrative co-determination, not one of full democratization of the bureaucracy. Co-determination, unlike full democratization, does not give citizens full oversight over bureaucratic decisions. Meritocratically selected public administrators would still retain the responsibility to develop and propose rules, according to their technical expertise, and in light of information obtained during public hearings. Randomly selected citizen juries would only be given the power to veto rules that fail to take appropriate considerations into account – considerations that would have emerged during the relevant public hearings. Such role would not require in-depth technical expertise, which citizens may reasonably lack. It would certainly require certain competences and critical skills, but these would be the competences and skills that most citizens should be expected to have in a democracy, since it is hard to see how a democracy can be called such if citizens lack the capacity to understand and critically assess the laws and regulations that they are supposed to co-author, and to which they

are subject. I would add that there is no reason to suppose that citizens' bodies necessarily lack epistemic virtues, as the, by now extensive, work on mini publics and collective intelligence confirms.[11]

I hope I have gone at least some way in providing a preliminary answer to the many provocative and insightful questions posed by Icardi and Maffettone. I want to take the opportunity to thank them, once again, for engaging with my work in such a thorough way.

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[11] See, e.g., Landemore 2012.

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